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Case No: CO/2410/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th July 2021

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE QUEEN
On the application of

DK — **Claimant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Defendant**

- and -

SECRETARY OF STATE FOR WORK AND PENSIONS — **Interested Party**

- -
- -

Simon Cox and Michael Spencer (instructed by **Child Poverty Action Group**) for the **Claimant**
Galina Ward (instructed by **Government Legal Department**) for the **Defendant and the Interested Party**

Hearing date: Wednesday 16th June 2021

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Approved Judgment

The Hon. Mr Justice Bourne :

Introduction

1. The Claimant challenges the Defendant's decision to reject his backdated claim for child tax credit made following the success of his asylum claim. The issue is whether, as the Defendant contends, the claim is lawfully barred by Article 7 of the Welfare Reform Act 2012 (Commencement No. 23 and Transitional and Transitory Provisions) Order 2015 (SI 2015/634) ("Order 23").

2. The Claimant's case is that (1) Article 7, properly construed, does not bar a claim of this kind in respect of a period of entitlement occurring before an applicant could apply for Universal Credit, or (2) applying Article 7 so as to bar the claim would be incompatible with the Claimant's rights under Article 14 of the European Convention on Human Rights read in conjunction with Article 8 and/or Article 1 of Protocol 1, or (3) in making Article 7, the Interested Party failed to comply with her duty under section 149 of the Equality Act 2010 ("the PSED").

3. The first of those three points was in issue in a Scottish judicial review claim, *Adnan and Adnan v HMRC* [2021] CSOH 63, in which judgment was given by the Outer House of the Court of Session on 15 June 2021, the day before the hearing of this claim. I shall return to that decision below. The Claimant made an application to me on the day of the hearing, inviting me to stay these proceedings pending determination of any appeal in *Adnan*. I declined that invitation, ruling that it was in the interests of justice to proceed with the substantive hearing for which all parties had fully prepared, not least because the Claimant in this case relies on two grounds in the alternative to the first construction ground, which were not the subject of the decision in *Adnan*.

Statutory background

4. The Tax Credits Act 2002 made provision for child tax credit ("CTC") and working tax credit, repealing earlier provisions relating to tax credits. Tax credits could be claimed by people who are aged at least 16, and CTC could be claimed by such people who were responsible for a child or "qualifying young person".

5. Section 3(1) provided:

> "Entitlement to a tax credit for the whole or part of a tax year is dependent on the making of a claim for it."

6. Entitlement to tax credits therefore depended on the making of a claim for them, and it was necessary to make a new application for tax credits for each tax year.

7. Section 4(1) empowered the making of regulations requiring applications to be made in a particular way and at a particular time and providing for a claim made in specified circumstances to be deemed to have been made on a specified date, earlier or later than the actual date of the claim.

8. Section 42 permitted the entitlement to tax credits of persons subject to immigration control, including asylum seekers, to be excluded or modified.

9. Pursuant to section 42, the Tax Credit (Immigration) Regulations 2003 ("the 2003 Regulations") were made. Regulation 3 of the 2003 Regulations excluded such entitlement in paragraph (1), but provided exceptions including the following in relation to asylum seekers:

> "(4) Where a person has submitted a claim for asylum as a refugee and in consequence is a person subject to immigration control, in the first instance he is not entitled to tax credits, subject to paragraphs (5) to (9).
>
> (5) If that person—
>
> (a) is notified that he has been recorded by the Secretary of State as a refugee or has been granted section 67 leave, and
>
> (b) claims tax credit within one month of receiving that notification,
>
> paragraphs (6) to (9) and regulation 4 shall apply to him.
>
> (6) He shall be treated as having claimed tax credits—
>
> (a) on the date when he submitted his claim for asylum, and
>
> (b)on every 6th April (if any) intervening between the date in sub-paragraph (a) and the date of the claim referred to in paragraph (5)(b),
>
> rather than on the date on which he makes the claim referred to in paragraph (5)(b).
>
> (7) Regulations 7, 7A and 8 of the Tax Credits (Claims and Notifications) Regulations 2002 shall not apply to claims treated as made by virtue of paragraph (6).
>
> (8) He shall have his claims for tax credits determined as if he had been recorded as a refugee on the date when he submitted his claim for asylum."[1]

10. In short, a former asylum seeker could claim tax credits within one month of being granted refugee status, in which case he would be treated as if he (1) had made the claim on the date when he claimed asylum, (2) had been a refugee from that date and (3) had made such an application for each tax year since his asylum application.

11. By virtue of reg 3(5)(b), this entitlement to be awarded any applicable tax credit for that period depended upon the making of a claim for the tax credit within the time limit.

[1] Paragraph (9) provided for the amount of any asylum support payment to be deducted from any award of tax credits under paragraphs (6) and (8).

12. This challenge arises from the transition from tax credits to the new system of Universal Credit ("UC").

13. UC was introduced by the Welfare Reform Act 2012 ("the 2012 Act"). It replaced other benefits, including tax credits, which have been referred to as "legacy benefits" and which were prospectively abolished by section 33 of the 2012 Act.

14. However, UC (together with the abolition of legacy benefits) was subject to a phased introduction. Under section 150 of the 2012 Act, most of the relevant provisions were to be brought into force by statutory instruments. Such statutory instruments, from 2015 onwards, specified dates upon which UC would be introduced in different postcodes. From those dates, most applicants living in those postcodes could claim UC, and making such a claim would cause the relevant legislation, including the repeal of provisions for legacy benefits, to come into force in relation to each individual claimant[2]. Such areas, once this had happened, have been referred to as "full service areas".

15. Order 23 was one of the statutory instruments which contained commencement and transitional provisions. The key provision for the present case is Article 7 of Order 23. Article 7(1) provides:

> "Except as provided by paragraphs (2) to (6), a person may not make a claim for housing benefit, income support or a tax credit (in the latter case, whether or not as part of a Tax Credits Act couple) on any date where, if that person made a claim for universal credit on that date (in the capacity, whether as a single person or as part of a couple, in which he or she is permitted to claim universal credit under the Universal Credit Regulations 2013), the provisions of the Act listed in Schedule 2 to the No. 9 Order would come into force under article 3(1) and (2)(a) to (c) of this Order in relation to that claim for universal credit."

16. The effect of Article 7(1) is that in an area which becomes a full service area, only claims to UC can be made. In such an area, where a UC claim by a person would bring the provisions of the 2012 Act into force in relation to them, that person cannot make a new claim for a legacy benefit such as CTC.

17. However, the provisions for legacy benefits including tax credits have remained in force and have continued to apply to individuals who have not made, or have not needed to make, an application for UC.

18. UC, like the legacy benefits which it replaced, generally cannot be claimed by those subject to immigration control[3].

19. A significant feature of the UC system, which differentiates it from the legacy benefit systems, is that claims for UC cannot be backdated. So those who are recognised as

[2] See Article 3 of Order 23.
[3] See section 115 of the Immigration and Asylum Act 1999 as amended by the 2012 Act s 31 and paragraphs 52 and 54 of sch 2.

refugees cannot make backdated claims for UC in respect of the period while they were asylum seekers.

The facts

20. The Claimant arrived in the UK from Sri Lanka on 21 December 2009 with his wife and son (then aged 11). He made a number of unsuccessful claims for asylum, the first of which was on 22 December 2009. However, his last claim, made on 5 April 2016, was successful, resulting in a grant of refugee status with effect from 19 December 2019. The decision letter dated 31 December 2019 was received on 3 January 2020.

21. As a person subject to immigration control, the Claimant could not claim legacy benefits including CTC at any time before he received his refugee decision. If he had previously been a recognised refugee (or a British citizen), he could have claimed CTC in respect of his son.

22. The Claimant's son left full-time education aged 18 on 2 July 2016. Any entitlement to CTC would end on that date.

23. The Claimant's area became a full service area on 25 October 2017.

24. On 21 January 2020, after his refugee status was recognised, the Claimant claimed UC. As I have said, that claim could not contain any backdated element. His son having left full-time education, the Claimant could not claim the child element of UC in respect of him.

25. On 28 January 2020 (and again on 4 March and 8 April 2020) the Claimant also submitted written claims for CTC pursuant to the 2003 Regulations for the period between 22 December 2009 (his original asylum application) and 2 July 2016 (his son leaving full-time education).

26. The Defendant replied on 17 February 2020 and 8 April 2020, stating that CTC could not be awarded because the Claimant did not fall within any exception to Article 7(1) of Order 23 which would permit a new tax credit claim.

Ground 1: interpretation of Article 7 of Order 23

27. As I have said, the general rule under Article 7(1) is that a claim for a legacy benefit such as a tax credit cannot be made in a full service area. But a backdated award of a tax credit to a refugee, for the period going back to his or her asylum claim, depends on the making of a claim for the tax credit (see paragraphs 9-10 above). Article 7(1), read by itself, appears to prevent such a claim from being made in a full service area, with the effect that a newly recognised refugee living in such an area cannot obtain the backdated tax credit.

28. As Article 7(1) says, exceptions are provided by paragraphs (2)-(6). However, it is common ground that none of these applies to the present case.

29. Instead, the Claimant relies on Article 7(8)-(10), which provide:

> "(8) Subject to paragraph (9), for the purposes of this article –

> a) a claim for housing benefit, income support or a tax credit is made by a person on the date on which he or she takes any action which results in a decision on a claim being required under the relevant Regulations; and
>
> b) it is irrelevant that the effect of any provision of the relevant Regulations is that, for the purpose of those Regulations, the claim is made or treated as made on a date that is earlier than the date on which that action is taken.
>
> (9) Where under the provisions referred to in paragraph (10), a claim for housing benefit or income support is treated as made at a date that is earlier than the date on which the action referred to in paragraph (8)(a) is taken, the claim is treated as made on that earlier date.
>
> (10) The provisions referred to are –
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> a) in the case of a claim for housing benefit, regulation 83(4E), (4F), (5)(d) or (8) of the 2006 Regulations or, as the case may be, regulation 64(5F), (5G), (6)(d) or (9) of the 2006 (SPC) Regulations; or
>
> b) in the case of a claim for income support, regulation 6(1A)(b) or 6A of the Claims and Payments Regulations 1987."

30. Mr Cox, representing the Claimant, invites me to focus on paragraph (8)(b) and to note that, for the purposes of applying the general rule in Article 7(1), the effect of Article 7(9)-(10) is that the date of a claim in some cases will be the date on which it is actually made but in other cases will be an earlier date on which it is deemed to have been made. Paragraph (8)(b) states that if an earlier date is deemed to apply by virtue of "any provision of the relevant Regulations", that deeming provision will be disregarded when Article 7 is applied. But, Mr Cox argues, if such deeming provisions are found anywhere other than "the relevant Regulations", they will therefore not be disregarded.

31. So, submits Mr Cox, paragraph (8), which ties the making of a claim to the taking of a specific type of action, applies only to claims which are governed by "the relevant Regulations" and not to other kinds of claim.

32. Article 7(11)(g) defines "the relevant Regulations", in a tax credit case, as the Tax Credits (Claims and Notifications) Regulations 2002. They therefore do not include the 2003 Regulations, and in the present case it is regulation 3(6) of the 2003 Regulations which deems the Claimant's tax credit claim to have been made on the earlier date when he submitted his claim for asylum.

33. So, Mr Cox argues, the deeming provision in the 2003 Regulations effectively overrides the effect of Article 7(8)(a), so that the Claimant's tax credit claim is treated as having been made on the date of his asylum application. Because that date was before his area became a full service area, Article 7 does not bar the tax credit claim.

34. This, says Mr Cox, is consistent with the legislative aim of a clean handover from legacy benefits to UC. If an applicant claimed asylum on a date after the UC provisions had come into force, then Article 7 would prevent any CTC claim being deemed to have been made on that date. However, he submits, the legislative intention cannot have been to remove the right to backdated CTC for any period for which no UC claim could be made. He argues that Article 7 is intended to resolve cases in which UC and legacy benefits otherwise might both be claimed, identifying which type of benefit takes precedence in each type of case. He therefore contends that Article 7 has no impact on this case, where the Claimant could not on any view have claimed UC for the backdated period.

35. Mr Cox also makes the more general point that it would be surprising if the right to claim backdated tax credits were abolished, without being replaced by any entitlement to UC, by a mere transitional provision which does not expressly refer to that previous right.

36. Ms Ward, on behalf of the Defendant and the Interested Party, invites me to focus instead on paragraph (8)(a) and to note that for Article 7 purposes, a tax credit claim is "made" on the date when the applicant "takes any action which results in a decision on a claim being required under the relevant Regulations".

37. That phrase is puzzling, because decisions on tax credit claims are "required" under sections 14-20 of the 2002 Act rather than under any of "the relevant Regulations" (in this case, the Tax Credits (Claims and Notifications) Regulations 2002). It may be that paragraph (8)(a) should be read as if commas were placed around the words "which results in a decision on a claim being required", so that the phrase "under the relevant Regulations" governs the words "takes any action" rather than the words "being required".

38. Be that as it may, Ms Ward submits, the fact that some deeming provisions, not relevant to this case, are disregarded under paragraph (8)(b) does not change the effect of Article 7(1), namely that the key date is the date when the tax credit application was actually made. Since that was a date when the UC provisions were in force in this case, Article 7 barred the claim.

39. Ms Ward also submits that this is consistent with Parliament's intention of introducing UC as a self-contained scheme in which there is no simultaneous entitlement to claim legacy benefits. If the Claimant's child had been younger, then the consequence of his argument would be that after the introduction of UC, he could claim both UC (which includes a child element) and CTC, which would be absurd. This, however, appears to be a bad point. As Mr Cox points out, regulation 8 of the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014/1230) would cause any award of CTC to terminate on the day before UC became payable, and therefore there could be no simultaneous entitlement to UC and legacy benefits in any event.

40. As I have said, the same issue has just been decided in Scotland by Lord Tyre, sitting in the Outer House, Court of Session in *Adnan and Adnan v HMRC* [2021] CSOH 63. There the Petitioners were notified that they had been granted refugee status on 17 and 18 December 2019. They lived in a full service area and, on 23 December 2019, made a successful UC claim. On 14 January 2020 they also claimed CTC backdated to the

date of their asylum application in 2013. Lord Tyre considered the same legislation as is referred to above, and heard arguments very similar if not identical to those summarised above.

41. Lord Tyre preferred the petitioners' argument, and held:

i) Article 7(1) and (8) do not expressly exclude the possibility of a claim being made by a newly recognised refugee under regulation 3(5) of the 2003 Regulations, with the consequences specified in regulation 3(6).

ii) The Government's case depends upon a distinction being drawn between entitlement to tax credit on the one hand and the possibility of "making a claim" for tax credit on the other, with the latter having been cut off by the prohibition in the opening words of article 7(1) read together with article 7(8)(a).

iii) Contrary to the Government's contention that regulation 3(5) constitutes a barrier which must be overcome before the deeming provision in reg 3(6) is reached, regulation 3(5) does no more than state that if particular conditions are met (the claim being made within one month of the notification of refugee status), the deeming provision in regulation 3(6) takes effect.

iv) That deeming provision was not overridden by Article 7. The CTC claims, being treated as made on the date of the asylum application and on 6 April in every intervening year, therefore fell outside the prohibition in Article 7(1).

v) That interpretation is confirmed by the wording of regulation 3(6) which states that an applicant is treated as having claimed on the earlier date "rather than on the date on which he makes the claim". That sentence echoes the words "make a claim" in Article 7(1), and is also consistent with regulation 3(8).

vi) In Article 7(8)(b), the omission of any reference to regulation 3(6) cannot be a "mere lacuna", but instead indicates that Parliament (or the Government) did not intend to amend the special rules relating to claims for tax credits by asylum seekers, and in particular has not sought to interfere with the scheme in the 2003 Regulations for backdated claims by them.

42. The decision of the Outer House is not binding on this Court but obviously commands considerable respect. Indeed, in areas such as revenue and taxation, the English courts "endeavour to keep in line with the courts of Scotland": *Secretary of State for Employment and Productivity v Clarke Chapman & Co* [1971] 1 WLR 1094 at 1102 per Widgery L.J.

43. Mr Cox also drew my attention to the judgment of Ward LJ in *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699 at [26], quoting the earlier case of *Abbott v Philbin*:

> "I am satisfied that we are not obliged to follow decisions of the Northern Ireland Court of Appeal, but we must accord them the greatest respect. Where the decision relates to a statutory requirement which applies or which is the same as that which applies in England and Wales, then we ought to follow that Court

> in order to prevent the wholly undesirable situation arising of identically worded legislation on the other side of the Irish Sea (or the other side of the Tweed) being applied in inconsistent ways. The same approach as we adopt for cases of the Court of Session in Scotland should be followed in the case of Northern Ireland. In *Abbott v Philbin (Inspector of Taxes)* [1959] 1 Ch. 27 Lord Evershed M.R. said at p. 49:
>
> > 'I ask myself, therefore, having expressed such doubts as I have with all respect to the learned judges in Scotland, ought this court now to answer those two questions in a precisely opposite sense? We in this court are not bound to follow the decisions of the Court of Session, but the Income Tax Act and the relevant Finance Act applying differently both north and south of the border, and, if we were to decide those questions in a sense diametrically opposite to the sense which appeal to the Scottish judges, we should lay down a law for England in respect of this not unimportant matter which was completely opposite to the law which was being applied on exactly the same statutory provisions north of the border. I cannot think that that is right. In a case of a revenue statute of this kind, I think it is the duty of this court, unless there are compelling reasons to the contrary, and while expressing such doubts as we feel we ought to, to say that we follow the Scottish decision.'
>
> In the House of Lords, as reported at [1961] AC 352, Lord Reid observed at 373:
>
> > 'In the present case the Court of Appeal, though not bound to do so, very properly followed the decision of the Court of Session … I say very properly because it is undesirable that there should be conflicting decisions on Revenue matters in Scotland and England.'"

44. As the *Deane* case shows, the same approach should be taken in a case concerning welfare benefits as is taken in a "Revenue matter".

45. I will therefore follow the decision of the Outer House. It would be extremely undesirable for conflicting Court decisions to compel applications by refugees to be resolved in one way in Scotland and in another way in England and Wales. In my judgment there are no "compelling reasons to the contrary".

46. I do however think it appropriate to express some doubt, with great respect to Lord Tyre, about the conclusion reached in the Outer House.

47. Ms Ward rightly points out that, because of regulation 3(5) of the 2003 Regulations, a refugee cannot take advantage of regulation 3(6) unless he makes a claim for the tax credit. Article 7(1) states unambiguously that, unless specified (non-material) exceptions apply, a claim for tax credit cannot be made in a full service area. If it was

intended to make an exception to that rule for a refugee's tax credit claim, Article 7 could have said so.

48. Furthermore, sub-paragraph (a) of Article 7(8) states that a claim is made when the individual takes the necessary action i.e. submitting the claim by whatever mode the legislation permits. That is expressly subject to an exception specified in Article 7(9)-(10) which, again, is not material to the present case. Had a further exception for a refugee's tax credit claim been intended, it could have been identified in a further paragraph.

49. I therefore question whether sub-paragraph (b) of Article 7(8) provides the answer in the way suggested by Mr Cox. If indeed Article 7(8) applies only to some tax credit claims and not to others, it is odd that this is revealed only by the inclusion (at the end of the key sentence) of the words "the relevant Regulations".

50. Nevertheless, as counsel agreed, it is possible to read the legislation as having either of the meanings for which the parties contend. As Lord Tyre said, Order 23 does not state in terms that claims under reg 3(5) and (6) of the 2003 Regulations can no longer be made. And as Mr Cox submitted, the removal of the right to make such claims, in circumstances where UC provides no replacement at all, might have been expected to be announced more explicitly, rather than occurring as a side-effect of a transitional provision.

51. Notwithstanding the doubts expressed above, I therefore adopt the reasoning of the Outer House and find that Article 7(1) of Order 23 did not bar the Claimant from claiming CTC under reg 3(5)(b) of the 2003 Regulations, and that reg 3(6) therefore entitled him to be treated as having made valid claims on the date of his asylum claim and on the first day of each of the subsequent tax years while his son was in full-time education.

Ground 2: ECHR Article 14

52. In case I am wrong in that conclusion, it is necessary to consider Grounds 2 and 3 of this claim.

53. By Ground 2, the Claimant claims that Article 7, if given the meaning for which the Government contend, would infringe Article 14 of the ECHR in conjunction with Article 8 and/or Article 1 of Protocol 1 ("A1P1").

54. Those Articles provide:

> "Article 14
>
> > The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> Article 8

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protections of the rights and freedoms of others.
>
> Article 1 of Protocol 1
>
> 1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

55. The Claimant contends that to avoid such an infringement, Article 7 (if construed contrary to Ground 1) should be read down under section 3 of the Human Rights Act 1998[4]. Section 3 provides:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section –
>
> a) applies to primary legislation and subordinate legislation whenever enacted;
>
> b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

[4] The Claimant's pleaded case relied in the alternative on section 6 of the Human Rights Act 1998 which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, but that contention was not proceeded with at the hearing.

56. Mr Cox's argument can be summarised as follows:

i) Secondary legislation imposing a procedural bar on a claim to a backdated award of a social security benefit to which an applicant would otherwise be entitled is within the ambit of Article 8 and A1P1. Denial of such a benefit on an allegedly discriminatory ground was held to be within that ambit in *SC v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, [2019] 4 All ER 787, though judgment on an appeal in that case is awaited from the Supreme Court.

ii) It is common ground that refugee status constitutes an "other status" for the purposes of Article 14.

iii) Article 14 does not only require like cases to be treated the same. It also requires unlike cases to be treated differently so as to avoid unjustified discrimination based on "other status". See *Thlimmenos v Greece* (2000) 31 EHRR 411.

iv) The bar on new tax credit claims applied to all (or most) cases and did not make different provision for refugees, despite the difference in their situation caused by regulation 3 of the 2003 Regulations, i.e. their need to make backdated claims after being granted refugee status.

v) The application of these transitional provisions to refugees, barring them from making a claim in respect of an earlier period for which no UC could be claimed, is not justified.

vi) It is possible to read and give effect to Article 7 so that it does not have that effect, and this course should be taken under section 3 of the 1998 Act in order to avoid an infringement of Article 14.

57. In respect of justification, Mr Cox submits that the evidence filed on behalf of the Government places too much emphasis on a general policy of avoiding backdating in the UC system, and does not sufficiently engage with the special position of refugees who could not claim tax credits until their refugee status was recognised and who could not claim UC for the period before that recognition. In a system which does preserve backdated legacy benefit claims in some categories of case where UC cannot be claimed, this omission cannot be justified.

58. In response, Ms Ward relies on the decision of the Court of Appeal in *Blakesley v Secretary of State* [2015] EWCA Civ 141, [2015] 4 All ER 529. There a refugee challenged the effect of domestic legislation which excluded successful asylum seekers from claiming backdated Income Support, reversing the position as it had previously been. The Claimant argued that she was in a position analogous to that of a British national needing social assistance and was placed at an unjustified disadvantage compared to such a person, and that this treatment infringed Article 14.

59. Jackson LJ held at [64] that there was no significance in the fact that a previous entitlement to backdated benefits had been repealed. Such a change in the law was permissible and was bound to take effect from an arbitrary date which would disadvantage some individuals. Ms Ward argues, by analogy, that in the present case it was not unlawful to move to the new system of UC, removing an entitlement which the

Claimant would have enjoyed if his refugee status had been recognised at an earlier date.

60. Jackson LJ continued:

> "65. Secondly, there is no analogy between asylum seekers and British citizens in need of social assistance. In the case of asylum seekers it is not known whether they have any entitlement to be in this country. Therefore they all receive support under an asylum support scheme, which complies with the obligations imposed by the Geneva Convention and the Reception Directive. British citizens in need of social assistance are in a different position and they receive mainstream benefits."
>
> 66. Thirdly, in this case (as in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173) there is an objective justification for the different treatment of the two groups to which the appellant points. The two groups are asylum seekers and British citizens in need of social assistance. Asylum seekers are a large group of people, an unknown proportion of whom have no entitlement to be here. Their entitlement to welfare support derives from international instruments, which do not apply to British citizens. In this sphere it is for the legislature and the executive to determine how national resources should be allocated."

61. Ms Ward submits that the same considerations must apply to the present case, defeating the Article 14 claim. Even if the finding of justification in *Blakesley* is not conclusive for the present case, it is common ground that the bar for justification is low. As a majority of the Supreme Court decided in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 (per Lord Wilson at [65]):

> "… in relation to the government's need to justify what would otherwise by a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation."

62. In the present case Ms Ward submits that the change was justified as part of a consistent policy to introduce a self-contained UC system and to move away from a system involving backdated claims.

63. Justification is dealt with in the witness statement of Yasir Naim, a policy team leader with the Department for Work and Pensions. Mr Naim emphasizes the size and significance of the welfare reform which the introduction of UC involved, and the complexity of the phased transition from legacy benefits to UC from 2013 onwards. He also comments on the history of the provision of backdated benefits to newly recognised refugees. Until 2007, core means-tested benefits such as Jobseeker's Allowance, Income Support and Housing Benefit were not available to asylum seekers but, upon the recognition of refugee status, could be claimed on a backdated basis to cover a shortfall between asylum support payments and those benefits. That changed in 2007, when backdated claims of that kind ceased to be possible and were replaced by a

refugee integration loan scheme[5]. Meanwhile, tax credits were introduced in 2002 under separate legislation and were backdated for refugees as explained above. According to Mr Naim, until 2015 asylum support payments for those with children were broadly equivalent to CTC and therefore any backdated CTC claims would have been small. Asylum support payments were reduced in 2015 but by this time, work to phase out tax credits was in train. From its introduction, UC could not be claimed by asylum seekers. A claim could be made upon recognition of refugee status but could not be backdated. This, says Mr Naim, demonstrates a policy and a Parliamentary intention to move from the old system to the new system in which there would be no backdating. The change was not just procedural but changed individuals' entitlement. There was no entitlement to claim CTC before refugee status was recognised. After recognition, there was an entitlement to make a backdated claim but the new legislation removed it. This reflected the policy move away from provision of backdated benefits from 2007 onwards and the policy of ending all legacy benefits at the point of introduction of UC. Mr Naim concludes at paragraph 57:

> "There is no obligation in international law to make provision for backdated benefit payments, to children or adults, and it would be unfair and inconsistent for some refugees (those with children) to be entitled to a backdated payment of an arbitrary amount, depending on how long their asylum claim took to process. The system of loans introduced in 2007 is the way the Government has chosen to support refugees at that point."

64. In response to the submission of Ms Ward, Mr Cox seeks to distinguish *Blakesley*. In the present case, he says, the complaint is not that refugees are treated less favourably than British citizens. Instead it is that, among all those who are unable to make backdated claims under the new system, provision was wrongfully not made for the special situation of refugees. In addition, he submits, the change being challenged in *Blakesley* was the removal of a substantive entitlement whereas in the present case, it was a procedural change making it impossible to claim a benefit which (for some claimants) still existed. The discrimination operated adversely to refugees, when compared with British citizens who could make backdated claims for some benefits by virtue of Article 7(9) of Order 23.

65. In my judgment, although this human rights claim is put in a different way from *Blakesley*, it must fail for the same reasons.

66. The first two points made by Jackson LJ are directly applicable. In other words, human rights law does not preclude a change in entitlement with the effect that a claim made after a date set by legislation must fail where a claim before that date would have succeeded. In my judgment the change in this case was a change of entitlement and was not merely procedural. And in any event, the situations of a person not subject to immigration control and of an asylum seeker are not analogous, and Article 14 therefore cannot prevent them from being made subject to different benefits regimes.

67. Even if the differential treatment required to be justified, Mr Cox cannot surmount the "manifestly without reasonable foundation" test. Mr Naim's evidence shows that there

[5] This was effected by the Asylum and Immigration (Treatment of Claimants etc) Act 2004, which repealed section 123 of the Immigration and Asylum Act 1999.

were policy reasons for the Government's decisions on how to allocate resources. It was open to Government to discontinue the provision of backdated CTC for refugees, just as it had been to discontinue other backdated benefits for refugees in *Blakesley*. The aims of introducing a new and streamlined system of UC, for it to be comprehensive once introduced and for a continued and consistent move away from the provision of backdated benefits cannot be said to be manifestly without reasonable foundation.

68. Therefore Ground 2 cannot succeed, even if Ground 1 were to fail.

Ground 3: the Public Sector Equality Duty

69. The PSED is set out in section 149 of the Equality Act 2010 whose provisions include the following:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of the persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation of such persons is disproportionately low.

…

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are –

Age;

Disability;

Gender reassignment;

Pregnancy and maternity;

Race;

Religion or belief;

Sex;

Sexual orientation."

70. The Claimant contends that, because of the close connection between refugee status and the protected ground of race, the PSED required the Interested Party, when enacting Article 7 of Order 23, to consider its impact on refugees. It appears that no equality impact assessment was carried out when Order 23 was introduced. The Claimant submits that Article 7 was therefore unlawful and should be quashed or disapplied.

71. The Defendant responds that consideration was given to the impact of implementing the 2012 Act generally and that there was no requirement for separate assessment of every aspect of the policy. Meanwhile the removal of backdating provisions in respect of legacy benefits generally had already been considered and implemented in 2007, and the latest change was similar in kind.

72. Moreover, argues Ms Ward, it is now far too late to impugn Order 23, which came into force on 10 March 2015 and has therefore been applied to large numbers of Claimants for over six years.

73. Furthermore, Ms Ward contends that any such challenge should have been directed at the Interested Party, not the Defendant, because the legislation was introduced by the Secretary of State and not by HMRC.

74. And even if there was a breach of the PSED, Ms Ward submits, this does not necessarily mean that Article 7 should be disapplied. For the reasons given by Mr Naim in relation to justification, an assessment would have led to the conclusion that the impact of the measure was justified. A detailed equality impact assessment was conducted in 2020 in response to this claim, and is referred to in Mr Naim's statement.

75. Mr Cox accepts that if the 2020 assessment demonstrates belated compliance with the PSED, then this Court will not grant any relief. However, he submits that that assessment was defective because (1) it wrongly assumed that Article 7 must be interpreted and applied as barring new backdated claims and (2) it did not recognise and assess the scale of the problem, i.e. the number of refugees who might have such a claim and the value of such claims.

76. The lack of a focused assessment of impact on protected groups (in this case, non-British nationals and children) does not necessarily lead to the conclusion of a breach of the PSED. The PSED is not a duty to carry out an equality impact assessment, though that is a method often used for complying with it. It is instead a duty to have regard to the need to (inter alia) eliminate unlawful discrimination and to advance equality of opportunity between protected groups and others.

77. It is clear that the implementation of UC involved an intense exploration, over a period of years, of the question of what benefits the State should provide to what individuals and in what circumstances. This included an equality impact assessment relating to UC as a whole, dated November 2011. It also included equality assessments in relation to Order 23 and to the later order which abolished new tax credit claims[6], though these did not address the specific issue which arises in this case of backdated tax credit claims by newly recognised refugees. That exploration as a whole has not been reviewed in this litigation. Taken as a whole, it may in fact have satisfied the requirements of section 149, although it would no doubt have been preferable for the detailed impact of Article 7 of Order 23 to be identified and analysed separately.

78. Meanwhile, the 2020 assessment did give belated consideration to the impact of the specific change. I reject Mr Cox's first complaint about this assessment, namely that it assumed that Article 7 has the meaning for which the Government contends. Had it not made that assumption, it would have disabled itself from assessing the impact of applying Article 7 as so interpreted. There is more substance in his second complaint, that there is a lack of statistical data about the numbers and amounts involved. Nevertheless, the assessment notes (at paragraphs 48 and 65) that no evidence has emerged since the introduction of UC of a disproportionate negative impact on those identified by age or by race (which includes nationality). That conclusion is bolstered by consideration of the other provision made by the State for asylum seekers and refugees, in particular asylum support payments and the integration loan scheme.

79. In my judgment, that assessment would have been sufficient to fulfil the PSED if carried out when Order 23 was introduced in 2015. Mr Cox realistically concedes that such a finding means that the Court will not order relief. Pursuant to section 31(2A) of the Senior Courts Act 1981, I would have withheld relief in respect of any breach of the PSED, because it appears to me to be highly likely that the outcome – the introduction of Article 7 of Order 23 – would not have been substantially different if such a breach had not occurred.

80. Even if I had found a breach of the PSED and that the 2020 assessment did not bring section 31(2A) into play, I would in any event have withheld relief on the ground of

[6] See Article 2 of the Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order 2019 (SI 2019/167).

delay. In *R (Moore) v Secretary of State for Work and Pensions* [2020] EWHC 2827 (Admin), [2021] PTSR 495, Swift J said at [50]:

> "As a matter of principle, I do not consider there is any reason why, so far as concerns the obligation to commence proceedings promptly and in any event within three months of the decision challenged, a claim asserting breach of section 149 of the Equality Act 2010 should be approached differently from any other public law challenge. The section 149 obligation is a process-type obligation, requiring prescribed considerations to be built-in to every decision-making process. The obligation will either have been discharged or breached by the time the relevant substantive decision has been taken. The time to commence proceedings alleging a breach of section 149 of the Equality Act 2010 starts from that time. If anything, the nature of the obligation under section 149, concerned with how a decision is taken, heightens the need for any challenge to be brought promptly because proceedings brought promptly increase the prospect that if the challenge succeeds, there would be no compelling practical objection to granting a remedy that requires the substantive decision to be reconsidered and taken again following the proper consideration of the matters prescribed by section 149 of the 2010 Act."

81. Mr Cox referred to *R (Badmus and others) v Secretary of State for the Home Department* [2020] EWCA Civ 657, [2020] 1 WLR 4609 for the proposition that a claim may be directed not only against the lawfulness of delegated legislation but also, or instead, against a decision applying that legislation.

82. That much is not in dispute. But *Badmus* was not a PSED challenge. In each case it is necessary to identify what type of claim is being made. In the present case it is necessary to recognise the difference between Ground 3 and Grounds 1 and 2. By the latter, the Claimant mounted an in-time challenge to the decision made in his individual case via the contention that Article 7, properly construed (by itself and/or applying the interpretative obligation under section 3 of the Human Rights Act 1998) does not have the meaning given to it by the decision maker. The former, however, is an allegation of a breach of what Swift J in *Moore* called a process-type obligation. Properly analysed, that is a complaint about the making of Order 23 in 2015, not a complaint about its application in 2020.

83. My use of the word "delay" is not a criticism of the Claimant for not attempting a challenge when Order 23 was made in 2015, long before his refugee status was recognised and Order 23 was applied to him. The point is that it is simply too late to invite the Court to quash that Order, six years after its introduction.

84. For completeness, I will add that in the circumstances of this case I would not have withheld relief under Ground 3 because the Secretary of State was a mere Interested Party and was not made a Defendant to the claim.

85. For the reasons set out above, Ground 3 therefore fails.

Conclusion

86. The claim succeeds in respect of Ground 1.

87. After the parties saw this judgment in draft, at my invitation they made further submissions on consequential matters.

88. I have made an order by agreement including a declaration as to the effect of Article 7 and a quashing order in respect of the Defendant's decision of 8 April 2020.

89. I have also ordered the Defendant to pay 80% of the Claimant's reasonable costs. It seems to me right to make some adjustment for the Defendant's success on grounds 2 and 3, as a departure from the default position that costs are awarded to the successful party, not least because the existence of grounds 2 and 3 was a material reason for proceeding with this hearing, as explained above. However, this is a lesser adjustment than was proposed by the Defendant, as the Claimant is plainly the successful party overall as matters stand.

90. The Defendant's application for permission to appeal is granted. The case for each side on ground 1 was arguable and there is a real prospect that the Court of Appeal could reach a different decision. It will be for the appellate Courts in this country and in Scotland to consider any application to stay an appeal in one place while an appeal proceeds in the other.