IN THE UPPER TRIBUNAL **Case No. CTC/1039/2012**
ADMINISTRATIVE APPEALS CHAMBER

Before Judge Mark

Decision: The appeal is allowed. I set aside the decision of the tribunal and I remit the matter to be reheard by a new tribunal in accordance with the directions given below.

A District Tribunal Judge may wish to consider expediting the rehearing in view of the fact that the decision under appeal was made nearly 4 years ago and the sums involved are significant for the claimant and his wife.

The principal issues which would appear to require to be dealt with at the rehearing are (1) whether the claimant's wife was subject to immigration control within the meaning set out in section 115(9)(a) of the Immigration and Asylum Act 1999, and (2) if not, whether the claimant and his wife had a reasonable excuse for making a claim which did not comply with the requirements of paragraph 5(4) of the Tax Credits (Claims and Notifications) Regulations 2002.

REASONS FOR DECISION

1. This is an appeal with the permission of a District Tribunal Judge from a decision of the First-tier Tribunal issued on 27 October 2011 upholding the decision of "the Secretary of State" issued on 15 July 2010.

2. On 5 March 2010 the claimant and his wife made a joint claim for tax credits. The claimant has indicated that he only wanted to make a claim for himself alone and only included his wife's name because the form required it. However, the effect of section 3(3) of the Tax Credits Act 2002 is that members of a couple can only claim tax credits jointly and not alone.

3. There was no copy of the claim form before the First-tier Tribunal but a copy has now been provided by HMRC and includes the claimant's name, address and National Insurance number (NINO) and his wife's name and what the claimant described on the form as her NINO, a number commencing "TN" and continuing with the claimant's date of birth. "TN" stands for temporary number, its use had ceased by 2010 and it was rightly not regarded by HMRC as a sufficient NINO for tax credit purposes.

4. Under regulation 5(3) and (4) of the Tax Credits (Claims and Notifications) Regulations 2002 (the 2002 Regulations), a claim for a tax credit must contain the information requested on the form (or such of that information as HMRC may accept as sufficient) and in particular must include in respect of every person by whom the claim is made a NINO or information or evidence enabling the NINO to be ascertained or an application for a NINO to be allocated accompanied by information or evidence enabling such a number to be allocated.

5. Regulation 5(5) defines "National insurance number" as the national insurance number allocated within the meaning of regulation 9 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001. That regulation provides for the allocation of a NINO to everybody over 16 who satisfies certain conditions as to domicile, residence or presence in Great Britain.

6. Regulation 5(6) of the 2002 Regulations provides that paragraph 5(4) does not apply if HMRC are satisfied that the person or persons by whom the claim is made had a reasonable excuse for making a claim which did not comply with the requirements of that paragraph. Regulation 5(8) provides that paragraph 5(4) does not apply to any person who is subject to an immigration control within the meaning set out in section 115(9)(a) of the Immigration and Asylum Act 1999 and to whom a NINO has not been allocated.

7. Because HMRC did not regard the TN number as a NINO, on 15 July 2010 it rejected the claim. The only evidence of the rejection is a print out of a computer screen reading "IS13 CLM REJTD FAILED TO ATTEND EOI INTERVIEW X2 07-06-10 & 05-07-10". This refers to the claimant's wife's failure to attend two interviews at the DWP to obtain a NINO. I also note that at the tribunal hearing the tribunal accepted that there was good reason for her not to do so because she did not receive notice of the two appointments until after the time for them had passed.

8. The claimant appealed the rejection of his claim, giving three reasons why he did not agree with the decision: (1) his wife had attended an earlier interview at the DWP, (2) the late receipt of notice of the appointments, and (3) that he had requested "for the application to be applicable to me only and based on me, if my wife's status would pose an issue. I obviously mentioned that I am married but I feel that I'm being penalised due to my wife's status."

9. HMRC referred the appeal to the tribunal but contended that the tribunal had no jurisdiction to hear it because the decision had been to reject the claim under regulations 3 and 4 of the 2002 Regulations and there was no provision for an appeal to lie from such a rejection. An appeal would only lie, it was contended, from a decision under section 14 of the Tax Credits Act 2002 to award or not to award tax credits based on a claim which had been accepted as validly made.

10. At the hearing, as appears from the record of the proceedings, the claimant explained his wife's efforts to obtain a NINO in and before 2009 and referred more than once to problems with her visa and also to his having sought to make the claim as a single person because she had no NINO.

11. In dismissing the appeal the tribunal stated in the decision notice that at the time of the decision the claimant's wife had not provided sufficient information to satisfy the NINO requirements for a tax credit application. In the statement of reasons the tribunal also found that there was no right of appeal to the tribunal from the decision to reject the claim, accepting the submissions of HMRC in this respect.

12. The question when a right of appeal lies in this type of case was dealt with recently by Judge Ward in *ZM and AB v HMRC* [2013] UKUT 0547 (AAC). In that case also a claim by a couple had been rejected by HMRC on the ground that the wife had no NINO, but by the time the case came to be heard in the Upper Tribunal, it was accepted that the wife was a person subject to immigration control within section 115(9)(a) of the Immigration and Asylum Act 1999, as she was not a national of an EEA state and required leave which she did not have to enter or remain in the UK. Accordingly, she fell within regulation 5(8) of the 2002 Regulations and paragraph 5(4) did not apply to her.

13. Judge Ward considered whether a total absence of any right of appeal would be compliant with Article 6 of the ECHR. He drew a distinction, in paragraph 37 of his decision, between issues which were clearly a matter of discretion from those where there were specific questions of fact to be determined. Matters of discretion which he identified were such as whether something may be accepted as a claim when not made on the relevant form or whether HMRC was satisfied under regulation 5(6) that a claimant had a reasonable excuse for making a claim non-compliant with regulation 5(4). Matters of fact included whether the claimant or his wife fell within regulation 5(8), an issue which also raised questions of law. Both the questions of fact and of law were not matters in which HMRC could be presumed to have any special expertise and it had no discretion to exercise in answering them.

14. In paragraph 46 of his decision, he rejected the submission that judicial review would be article 6 compliant because it generally concerned itself with the decision-taking by the public body on the evidence that was before it at the time.

15. Judge Ward concluded in paragraph 64 of his decision that he was required by section 3(1) of the Human Rights Act to construe section 14 of the Tax Credits Act 2002 as if it said "On a claim for a tax credit or what would constitute such a claim but for the Board's [*i.e.* HMRC's] view that the person or one of the persons making the claim could not avail themselves of regulation 5(8) of the Tax Credits (Claims and Notification) Regulations 2002 where that provision is in issue)…"

16. He continued at paragraph 65 by stating that there may be other circumstances where the question is likewise one of fact rather than discretion which may require a similar approach to be adopted. He rejected a more general proposition that a decision under section 14(1) included a decision that there was no claim to determine under that section because that would have the effect of conferring a right of appeal in cases where the reason for the rejection of the purported claim was within the Board's discretion and so properly challengeable only by judicial review.

17. I agree with Judge Ward that the 2002 Regulations must be construed if at all possible to be Article 6 compliant. I also agree with him that in cases of this type judicial review is not a sufficient remedy for the reasons which he gave. However, it appears to me that his distinction between issues that require to be resolved by an appeal and those that cannot be the subject of an appeal, if correct, would cause considerable problems. On his analysis it would mean that a tribunal can determine whether a person is subject to immigration control but not whether that

person had a reasonable excuse for not complying with the requirements of regulation 5(4), so that where, as here, both issues arise, the dissatisfied claimant may need to bring both an appeal and an application for judicial review to get both points fully considered. Also, if the tribunal was to set aside a decision on an appealable ground, but there were discretionary factors to be considered as well, it would seem not to be able to substitute its own decision, as that would involve consideration of matters beyond its jurisdiction.

18. I am also satisfied that the distinction drawn by Judge Ward between the reasonable excuse point and the immigration control point is wrong. Whether an excuse for not doing something is reasonable is a question of fact, and indeed the same type of fact as was dealt with in *Tsfayo v United Kingdom* (2006) 48 EHRR 457, cited by Judge Ward himself. In that case the question whether a claimant had good cause for not claiming earlier was identified as a simple question of fact in the passage cited by him at paragraph 42 of his decision. It does not appear to me that a reasonable excuse for the purposes of regulation 5(6) is any less a question of fact.

19. Further, it was held in R(IS) 6/04 that a purported exclusion by statutory instrument of a right of appeal against a decision of the Secretary of State for Work and Pensions that a properly completed claim form for income support had not been submitted contravened article 6, and did not prevent the tribunal from hearing an appeal on that issue. I am unable to draw any relevant distinction between the provisions relating to the Secretary of State's discretion in that case, and those relating to the proper completion of the claim form here. I am unable to follow why the distinction drawn by Judge Ward, in paragraphs 28 and 29 of his decision, between claims made for other social security benefits and tax credit claims should affect the application of Article 6 to the simple question whether a form has been correctly completed or not, and I note that that distinction is not drawn by him in the context of Article 6 but only in considering how the regulations should be construed independently of convention rights.

20. While no issue arises in this case as to the use of the correct form, even when it comes to HMRC considering whether to accept a claim not made on the proper form, and a possible appeal from any such decision, it would appear to me to be relevant to bear in mind the observations of the Court of Appeal in *Novitskaya v LB of Brent* [2010] AACR 6, where Arden LJ pointed out at paragraph 25 that the distribution of benefits is different from other areas of civil law and is "concerned not simply with recognising rights or enforcing liabilities but also with sustaining members of the community whom Parliament has decided should be sustained through the welfare state". In paragraph 28 she continued that she found it clear from the relevant regulation that "Parliament did not intend that the courts should approach the question of what is a claim in an over-technical way: that would defeat the object of the legislation."

21. Tax credits are benefits, like other social security benefits, which are provided to sustain members of the community through the welfare state and I should not approach the question of what is appealable in an over-technical way. I also note that regulation 5(3) provides that "A claim must contain the information requested on the form (or such of that information as the Board may accept as sufficient in

the circumstances of the particular case)." The form requests the wife's NINO. It necessarily follows from Judge Ward's decision that the question whether she is subject to immigration control is appealable that the exercise of the Board's discretion as to what to accept as sufficient in the circumstances must also be appealable at least in that respect. If a claimant is subject to relevant immigration controls, and therefore falls outside regulation 5(4), HMRC cannot reject a claim because no NINO is provided just because one is requested on the form it uses.

22. Section 14(1) of the Tax Credits Act 2002 provides that on a claim for a tax credit the Board must decide whether to make an award and if so, the rate of the award. In my judgment, a "claim" must make it clear that a claim is being made (*Novitskaya v LB of Brent* at paragraphs 27 and 28). If it is not made on the correct form or does not contain the required information, it is still a claim, but it may be rejected by HMRC. If it is rejected that is a decision on the claim which falls within section 14(1) and is therefore a decision which carries a right of appeal by virtue of section 38(1)(a) of that Act, although no doubt in many cases the defects may be such that an appeal would have no prospect of success and would be struck out.

23. This also appears to me to be a far more satisfactory construction of sections 14 and 38 of the Act than that proposed by Judge Ward (see para.15 above) which would have to be extended to cover all other appealable questions of fact as they were identified as contemplated by him in paragraph 65 of his decision.

24. In this case, the claimant's contentions that he was claiming for himself alone and that he had provided a NINO for his wife are both bound to fail, but they are nevertheless justiciable. The claim that he had a reasonable excuse for not providing a NINO is also justiciable, and given the finding of the tribunal under appeal that there was a reasonable excuse for not attending the two DWP interviews of which notice had not been received, and other matters to which the claimant has referred, it is possible that the claimant and his wife had a reasonable excuse for making a claim which did not comply with the requirements of paragraph 5(4). Most significantly, by the time the matter reached the tribunal, it should have been clear from the evidence before it as to the wife's visa problems, her use of the TN number and the fact that she had never been given a NINO despite having worked in England for some time, that there may well be a question whether she was subject to immigration control within regulation 5(8). The issue should therefore have been investigated and determined. The fact that she has even now only received an OO NINO also indicates that regulation 5(8) may well have applied in March 2010 when the claim was made.

25. The tribunal erred in law in finding that it had no jurisdiction to deal with these matters and in failing to consider the application of regulation 5(8). I therefore set aside its decision and remit the matter to be reconsidered by a new tribunal.

(signed) Michael Mark
Judge of the Upper Tribunal
4 April 2014