IN THE UPPER TRIBUNAL **Case No.** CTC/1879/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 18 June 2014 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.

Directions: HMRC must make a further submission to the First-tier Tribunal within one month of the date on which this decision is sent to them. The submission must –

(a) respond to the claimant's appeal insofar as it relates to the decision of 26 August 2013 to amend the award of child tax credit to the claimant in respect of the year 2013-14;
(b) address the further evidence submitted by the claimant to the First-tier Tribunal and the Upper Tribunal since 18 June 2014 and also the points raised in paragraph 7 below;
(c) have attached to it any material documents submitted by the claimant to the Respondent that have not already been provided to the First-tier Tribunal and a transcript of any information provided by the claimant in her telephone calls to the Respondent other than that recorded in the evidence already disclosed.

The First-tier Tribunal may amend or set aside these Directions, either on a party's application or on its own initiative.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 18 June 2014 whereby it dismissed the claimant's appeal against a decision of the Respondent dated 26 August 2013 to the effect that she was not entitled to child tax credit for the year 2012-2013. The Respondent's decision notice in fact said that she was entitled to one day's child tax credit at the rate at which it had previously been awarded, because HMRC's computer does not permit the complete removal of an award. The First-tier Tribunal's decision notice erroneously referred to 2013 as the year from which the decision was effective, rather than 2012, but that was obviously a slip, although, as the Respondent now concedes, the claimant's appeal had clearly also been directed at the Respondent's decision that she was also not entitled to child tax credit in respect of the year 2013-14 and the response to the appeal should have addressed that decision as well.

2. The claimant's claim for child tax credit had been made on the basis that she was a single woman and the award had been made on that basis. The decision under appeal had been made on the basis that a man whom I shall call "Mr D" and she had been living together as husband and wife. That decision had been made substantially on the strength of Mr D's "financial footprint" as revealed in reports from a credit reference agency, Equifax, together with HMRC's own records. Having received the Equifax reports, HMRC had sent the claimant a letter (which amounted to a notice under section 18(10) of the Tax Credits Act 2002) on 5 July 2013,

requesting that she contact them to discuss the membership of her household, which she did on 22 July 2013. According to HMRC, she stated that Mr D did not live at her address but had used it for correspondence. The telephone record disclosed to the First-tier Tribunal does not reveal any detailed interview in which the claimant had been asked to give a detailed account of her dealings with Mr D or been given an opportunity to comment on the evidence that HMRC considered threw doubt on her entitlement to child tax credit. On 26 August 2013, the decisions mentioned above were made and payments of tax credit were terminated. On 13 September 2013, the claimant telephoned again to enquire why the payments had ended. According to HMRC, she said that she did not know Mr D at all and, when it was pointed out that that was not what she had said previously, she said that the previous call had been wrongly recorded. The claimant then appealed. HMRC wrote to her again, saying that they were not able to change their decision on the basis of the information provided with the appeal but inviting the claimant to provide various documents, including all those she had sent before. She sent some of the documents requested, with a covering letter explaining why she could not provide the others, and said she wished her appeal to continue. HMRC duly provided a response to the appeal and the case came before the First-tier Tribunal on 18 June 2014.

3. Unfortunately, the claimant was late for the hearing. It is not entirely clear whether the judge had already signed the decision notice before he was aware of her arrival. Nor is it entirely clear whether he allowed her to address him at all after she had arrived, although she says that she "asked to be allowed to give evidence but was refused" and it is clear that she did not give evidence as such. In any event, the judge recorded on the record of proceedings –

> "Appeal had been listed at 10 am.
> No appearance by 10.35 am.
> Question of whether to adjourn appeal considered applying all circumstances, rules and regulations. Nothing heard from the appellant. Facts quite 'old' although decision August 2013.
> On balance no adjournment.
> Appeal dismissed.
>
> [Appellant arrived 10.35].
> Too late as appeal listed for 11.30 am to change decision."

(The square brackets are in the original.)

4. A decision notice was issued, stating that the appeal had been refused. On the claimant's application, the First-tier Tribunal gave a brief statement of reasons. The material reasoning is compressed into three paragraphs –

> "4. The Appellant had made a claim as a single person but subsequent enquiries by the Respondent showed a paper trail linking [Mr D] to her address […] (see pages 22-26 in the bundle).
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> 5. The Tribunal also noted (submissions paragraph 22) that the Appellant had denied in a phone call on 13th September 2013 to the Respondent that she did not

> know [Mr D]. This contradicted her earlier telephone call that he used her address for correspondence only.
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> 6. The balance of the evidence, without oral input or documents from the appellant, showed an interdependence between her and [Mr D] and that, given the connection shown, he resided with her. The Tribunal considered the Appellant's letter of appeal dated 11th November 2013 which gave a different version of her connection with [Mr D] (submission bundle page 1). There was a letter purporting to be from [Mr D] (page 42) but which was written in a peculiar way and the signature undecipherable; it could have been from anyone. [Mr D] did not appear before the Tribunal."

5. The claimant wrote a further letter to the First-tier Tribunal, setting out her case in more detail. This was treated as an application for permission to appeal but permission to appeal was refused. The claimant applied to the Upper Tribunal for permission to appeal, primarily on the ground that it had erred in law in refusing to take evidence from her when she had appeared late for the hearing. I granted permission to appeal on the ground that it was arguable that the First-tier Tribunal had not given adequate reasons for its decision, given the limited evidence provided to the First-tier Tribunal by the Respondent. In a very detailed and helpful submission to the Upper Tribunal the Respondent supports the appeal both on the ground on which I granted permission and on the ground raised by the claimant.

6. There is no doubt that the evidence obtained by HMRC raised a number of questions for the claimant to answer, both as to whether Mr D lived at her address and, if so, the nature of their relationship. If not, she needed to offer some explanation for the information relied upon by HMRC. However, what is striking about this case is the complete failure of HMRC to ask the necessary questions before making its decision. Realistically, that probably required HMRC to interview the claimant and put to her the inferences it drew from the Equifax reports, rather than ask questions in writing, but it scarcely attempted even the latter, seemingly expecting all the material answers to emerge from documentary evidence. As is now conceded, HMRC had an obligation to ask the material questions. This is clear from what Baroness Hale of Richmond, with whom the other members of the House of Lords agreed, said in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372, also reported as an appendix to R1/04(SF), at [61] and [62]. The questions that need to be asked are sometimes ones that give guidance as to the evidence that is required – "he may need to be guided if the information which he gives falls short of what is needed" (per Lord Hope of Craighead at [12]).

7. It is not as though the evidence produced by HMRC amounted to a watertight case. When I granted permission to appeal, I raised the following questions –

> "3. First, there is a question as to the scope of the claimant's appeal. The Respondent's submission covered only the decision in respect of the tax year 2012-13. However, was the claimant's letter of appeal not also challenging the decision to stop paying tax credits in respect of the subsequent year?
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> 4. Secondly, I note that doc 4 appears to show [Mr D] living at the claimant's address in 1997, with six, presumably more recent, addresses redacted. Docs 7

and 9 also appear to show him living somewhere else at various times. Was the redacted information not significant?

5. Thirdly, The Equifax Report at docs 22 to 26 purports to show [Mr D] as having two "active accounts" at the claimant's address. It is not clear to me what activity between 6 April 2012 and 5 April 2013 is disclosed and why any activity shows that [Mr D] was living at that address between those dates.

6. Fourthly, HMRC commented at paragraph 19 of Section 6 of its submission to the First-tier Tribunal that the claimant had not provided details of all her accounts but neither it nor the First-tier Tribunal followed that up by making a specific request for details of the other two accounts it was said that she had. Moreover, does the Equifax Report disclose activity on all three bank accounts?

7. Fifthly, HMRC commented at paragraph 20 of Section 6 of its submission to the First-tier Tribunal that the claimant's bank statements did not reveal any payments for utilities but did not mention her evidence (doc 40) that she had pre-payment meters for gas and electricity and paid for water through her rent.

8. Sixthly, HMRC commented at paragraph 21 of Section 6 of its submission to the First-tier Tribunal that the claimant had provided a council tax bill and a rental agreement that are outside the period of enquiry. However, it has not provided any evidence from the local authority that [Mr D] was liable for council tax in the relevant year or that there was any more recent tenancy agreement that the claimant could have produced and that showed [Mr D] to be a tenant.

9. Seventhly, HMRC commented at paragraph 22 of Section 6 of its submission to the First-tier Tribunal that the claimant had not provided evidence of an arrangement for the payment of maintenance for her children. Apart from the fact that the claimant appears never to have been asked to provide such evidence and my doubt as to the realism of HMRC's assumption that a person "would" seek maintenance – I would have thought it might depend on the circumstances, including such basic facts as whether the father is alive and in the jurisdiction and has an income that might make an application for child support maintenance worthwhile – I fail to see what relevance that has to the present case. There does not appear to be any evidence that [Mr D] is the father of any of the claimant's children and living with him would not have removed any other father's liability for child support maintenance.

10. Eighthly, HMRC commented at paragraph 26 of Section 6 of its submission to the First-tier Tribunal that [Mr D] should have been required to prove that he lived at the claimant's address when he opened his accounts. Given that the accounts were opened in 2003 and 2011, is there any evidence that the claimant's address was given when the accounts were opened and, even if there is such evidence, does that prove that he was living at that address from 6 April 2012 to 5 April 2013?

11. Ninthly, HMRC has commented at paragraph 40 of Section 6 of its submission to the First-tier Tribunal that that [Mr D]'s bank statements would have been delivered to the claimant's address and argues that that shows a close personal relationship. On-line banking does not require much in the way of paper correspondence from a bank. Is there any evidence that any paper bank statements (apart, perhaps, from an annual summary) would have been delivered to the claimant's address? I would also comment that even husbands and wives do not necessarily open each other's post.

> 12. Tenthly, HMRC has commented at paragraph 43 of Section 6 of its submission to the First-tier Tribunal that the claimant has not provided evidence that [Mr D] lived elsewhere. If she is telling the truth, she can only provide documents provided to her by [Mr D]. Doc 43 appears to be one such document upon which the First-tier Tribunal did not comment."

Doc 43, was a letter, apparently from his bank, addressed to Mr D at the address given as his in the letter purporting to be from him that the First-tier Tribunal said could have been written by anyone. (It is fair to record that both documents post-dated HMRC's decisions and HMRC had commented that Mr D did not appear to have any active bank accounts at that address and so did not have a financial footprint there, which it suggested was surprising if he was living there.)

8. Moreover, as the Respondent now submits, it appears that HMRC did not provide to the First-tier Tribunal the information and documents provided by the claimant following its first request. At first sight this is a breach of rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), requiring a decision maker to provide with a response "copies of all documents relevant to the case in the decision maker's possession". However, it is possible that the explanation is that the evidence had been returned to the claimant without copies having been taken but, in any event, the submission to the First-tier Tribunal failed to explain what the documents were or why they were considered to be inadequate, perhaps because records had not been kept. One way or another, the position is highly unsatisfactory. I do not consider that it was good enough simply to ask the claimant to provide the information again when she appealed. The First-tier Tribunal had no way of knowing whether the evidence she later provided did include all the evidence that she had provided earlier or whether the Respondent had in fact seen some further evidence.

9. Had there been a hearing before the First-tier Tribunal at which the claimant had been present, the defects in HMRC's approach could probably have been cured, although that is not a justification for the approach. When, having asked for a hearing, the claimant did not appear, it might also have been permissible for the First-tier Tribunal to consider drawing adverse inferences and to proceed in the claimant's absence notwithstanding HMRC's inadequate investigation, but any ground for drawing adverse inferences fell away once the claimant arrived.

10. When granting permission to appeal, I overlooked the fact that the claimant's attendance at the hearing venue, albeit late, was confirmed in the record of proceedings. I am grateful to the Respondent for pointing that out. The Respondent suggests that the First-tier Tribunal erred in law in not either hearing evidence from her or adjourning and reference is made to the overriding objective in rule 2 of the 2008 Rules, which provides –

> "**2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

11. As I have said above, the sequence of events on the day of the hearing is not entirely clear but nothing ultimately turns on it. As I have also indicated above, the First-tier Tribunal was not necessarily prohibited from proceeding in the claimant's absence and deciding the case promptly before she arrived. However, once she appeared, everything changed. It could no longer be presumed that the claimant was not interested in pursuing her appeal or wished to avoid confronting the evidence produced by HMRC. Plainly she did wish to contest the appeal and give evidence.

12. It is clear from the record of proceedings (and is confirmed by the First-tier Tribunal's file), that the claimant's appeal had been listed for hearing in a 90 minute "slot" at 10 am, with the next case listed at 11.30 am. Thus, when the claimant appeared, over half of that slot remained. It appears that the First-tier Tribunal took the view that it did not have time to hear the claimant's case. It may well have been entitled to take that view. There may have been good reasons for it expecting the 11.30 am case to be effective and to take its allotted time and I note from the First-tier Tribunal's file that the claimant had asked for an interpreter (in French) so that it could reasonably have been expected that her case might take some time too.

13. However, even if that is so, I still find it extraordinary that the First-tier Tribunal neither heard evidence from the claimant nor arranged for her appeal to be heard on another occasion. The Respondent was not represented at the hearing, so presumably the judge had not announced his decision to anyone even if he had made it before he became aware that the claimant had arrived. If he had already made his decision on the appeal and had signed the decision notice, he still had the power to set his decision aside under rule 37 of the 2008 Rules and start again. Recusal is not generally necessary in such circumstances if there is the possibility of hearing the case immediately, because claimants – not to mention the fair-minded and informed observer – are well capable of understanding that the fact that a judge has decided a case one way without hearing oral evidence is no reason to suppose that he or she will be over-inclined to decide the case in the same way if the evidence is heard. The First-tier Tribunal also had the power to adjourn the hearing so that it could be considered on another day.

14. I accept that setting aside a decision or adjourning a hearing both require the exercise of a considerable element of discretion and that there is no express statutory duty to give reasons for not setting a decision aside or not adjourning. Often reasons are in any event obvious from the context. However, written reasons are to be expected if the decision would otherwise appear aberrant (*R (Birmingham City Council) v Birmingham Crown Court* [2009] EWHC 3329 (Admin), [2010] 1 WLR 1287) and this is such a case. Here only limited reasons have been given or can be inferred. It is clear that the judge considered that there was insufficient time to hear the claimant's appeal, that she was responsible for arriving late and thereby causing there to be insufficient time to hear her case and that the issues in the case related to a period beginning more than two years earlier. The third of those considerations was arguably irrelevant, because there is no evidence that the claimant had caused any earlier delay in the proceedings before the First-tier Tribunal, but the first two considerations were certainly material. Claimants ought to arrange their affairs so that they arrive in good time for hearings and so that valuable tribunal time is not wasted to the inconvenience of others. Rule 2(4) of the 2008 Rules lends support to that approach. However, proportionality also has a part to play. This is required expressly by rule 2(2)(a) although I am not sure that that adds a great deal to what would be required by simple notions of fairness. The First-tier Tribunal has given no indication that it has had regard to the balancing arguments in favour of hearing evidence from the claimant even if that meant an adjournment.

15. First, there is no indication that the judge ascertained the reasons for the delay, although he may have done so. The claimant, who lived in Stockwell, explained in her grounds of appeal to the Upper Tribunal that she was late because, having dropped a child at school for 9 am, she got a bus that was delayed in traffic. Travelling at that hour of the morning, it is perhaps not altogether surprising that she was late for a hearing in Holborn at 10 am but it nonetheless appears that at worst there was an error of judgement on her part. Secondly, the amount at stake was clearly a material consideration to which rule 2(2)(a) explicitly refers. The response to the appeal had revealed that the amount of child tax credit paid in respect of 2012-13 was £8,617.65, so presumably that was the amount that the claimant had been expected to repay in the light of the challenged decision (probably with about a third as much again in respect of the following year). That is a not insignificant sum. Thirdly, the claimant was not the only party at fault. It was highly relevant that one of the reasons why lengthy oral evidence from the claimant was particularly important in this case was that the Respondent was also at fault in not having properly investigated the case in the first place. Fourthly, it could not be said that the claimant had no prospects of success given that the Respondent's evidence was not conclusive and there was no indication as to what the claimant's detailed case would be.

16. Moreover, even if the First-tier Tribunal had been doubtful as to the justification for adjourning the case, there really seems to have been no reason not to have made use of the remaining half (or more) of her "slot" to hear from her and so form a better view as to the merits of her case.

17. In these circumstances, I am satisfied that the First-tier Tribunal's failure to consider, or reconsider, the claimant's case when she arrived does appear to be

aberrant in the absence of any fuller reasons than have been recorded in the record of proceedings. That renders the substantive decision erroneous in point of law.

18. In any event, the First-tier Tribunal's reasons for its decision on the substantive appeal are wholly inadequate. It has not addressed those points the claimant had made and it has also not addressed the weaknesses in the Respondent's case to which I have drawn attention above or given any consideration to the consequences of the Respondent having failed to ask the claimant material questions. Although I have indicated that it might have been justified in drawing adverse inferences if the decision was made before the claimant appeared, it has not done so and has therefore failed to justify deciding the case without adjourning to enable the claimant to put her case properly.

19. For all these reasons, I allow the claimant's appeal. I agree with the Respondent that it is necessary for there to be a further hearing. It is preferable that that be before the First-tier Tribunal rather than the Upper Tribunal. I issue some directions, set out above, which are partly based on suggestions made by the Respondent. Any request that they be set aside or varied should be made to the First-tier Tribunal. HMRC may also wish to consider whether they should interview the claimant before they make their further submission to the First-tier Tribunal.

Mark Rowland
19 February 2016