IN THE UPPER TRIBUNAL **Appeal No: CF/575/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Manchester on 17 November 2015 under reference SC944/15/02635 involved an error on a material point of law and is set aside.

The Upper Tribunal remakes the decision. The Upper Tribunal's decision is that the appellant is entitled to child benefit from 15 December 2014.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. In the light of both parties agreeing that HMRC in its decision of the 11 May 2015 and the First-tier Tribunal in upholding that decision were wrong in holding that the appellant did not have right to reside in UK at the time of her claim for child benefit because she was not temporarily unable to work, and my agreeing with that result, I can give my reasons for allowing this appeal very shortly.

2. I can best describe why the First-tier Tribunal erred materially in law in its decision of 17 November 2015 by repeating what I said when I gave directions on the appeal on 6 June 2016.

> "The decision of HMRC under appeal concerns a refusal of child benefit to [the appellant] in respect of a claim for that benefit which she had made in respect of her grandson on 10 March 2015. It appears

> from page 45 that [the appellant] had been awarded child benefit previously up until 2014, and child tax credit until July 2015, in respect of the same child. Unfortunately HMRC's appeal response to the First-tier Tribunal does not grapple with this important background (which it must have been aware of, if what is said on page 45 is accurate). Nor does the appeal response (or the reasoning of the tribunal) grapple with the award of ESA as evidencing an acceptance by the DWP that [the appellant] had a right to reside in 2015.
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> It does not appear to be disputed that [the appellant] worked in the UK from December 2009 to April 2004.
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> The appeal was dismissed by the First-tier Tribunal on the ground that [the appellant] could not be treated as retaining her 'worker' status when she claimed JSA in February 2014 because she had no prospect of returning to any form of work due to her health and therefore, it would appear, was permanently incapable of work.
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> If this is the correct characterisation of the tribunal's reasoning (and it may have erred in law simply by not explaining in an adequate manner the basis for its decision), there seems to me to be merit in the CAB's criticism of the decision. In a context where permanent incapacity for work means not temporary (see paragraph 31 of *Samin* [2012] EWCA Civ 1468), it was arguably incumbent on the First-tier Tribunal to explain *why* it considered that there was no realistic prospect of [the appellant] returning to any work (per paragraph 30 of *Samin*), especially in a context of her ongoing medical treatment.
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> In the alternative, if the First-tier Tribunal was correct in its analysis, very arguably [the appellant] ought to have had a permanent right to reside in the UK in March 2015 based on article 17(1)(b) of Directive 2004/38/EC and regulations 5(3)(b)(i) and 15(1)(c) of the Immigration (EEA) Regulations 2006."

3. I then directed HMRC to file submissions on the appeal addressing in particular:

> "If it is accepted that [the appellant] was permanently incapacitated for work when she ceased working in February 2014, the submission should say whether it is accepted that she had a right to reside under article 17(1)(b) of Directive 2004/38/EC and regulations 5(3)(b)(i) and 15(1)(c) of the Immigration (EEA) Regulations 2006, and if not why not. In the alternative, if it is accepted that [the appellant] was temporarily incapable of work either on ceasing that work or when she stopped claiming JSA, the submission should say whether it is accepted that had a right to reside under article 7(3)(a) of Directive 2004/38/EC and regulation 6(2)(a) of the Immigration (EEA) Regulations 2006, and if not why not. The submission should also, if necessary, address the basis in right to reside terms of the prior award of child benefit, and child tax credit, and why the prior award of child benefit was apparently removed."

4. Mr Best on behalf of HMRC has filed, a helpful submission in response in which he supports the appeal and does not dispute, on behalf of HMRC, that the appellant was a 'worker' in EU law terms before she became unable to work due to ill-health. Mr Best further argues, rightly in my view, that the First-tier Tribunal erred in law in not focusing sufficiently on whether the inability to work was temporary (and not whether the illness is temporary or permanent). Following *SSHD –v- FB* [2010] UKUT 00447 (IAC), if the inability to work due to illness was not permanent then it was temporary. In this case the First-tier Tribunal had not found, or had not found adequately, that the appellant's inability to work due to her ill-health was permanent and therefore on the evidence HMRC's argues that the "only conclusion was the [appellant's] inability to work was temporary".

5. I accept Mr Best's arguments, which are not disputed by those acting for the appellant, and so allow the appeal on the basis that at the time of her claim for child benefit the appellant had a right to reside under article 7(3)(a) of Directive 2004/38/EC and regulation 6(2)(a) of the Immigration (EEA) Regulations 2006.

6. I should not leave this decision however without one highlighting one other matter. This concerns the misuse, or at least the less than helpful use, by the District Tribunal Judge of the First-tier Tribunal of that tribunal's power to refer appeals to the Upper Tribunal. I highlight it because it is an area where mistakes continue to be made.

7. I set out what I said about this issue in giving directions on the appeal.

> "I treat this as an appeal by [the appellant] from a decision of the First-tier Tribunal dated 17 November 2015. By that decision the First-tier Tribunal refused the appeal and upheld HMRC's decision of 11 May 2015 that [the appellant] was not entitled to child benefit on her claim for that benefit of 10 March 2015 because she did to have a right to reside in the UK.
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> I say 'treat' this as an appeal because the wording of the 29 January 2016 decision [notice] is unclear. [The District Tribunal Judge] in that

> notice said nothing about whether the grounds of appeal were arguable or not but did say that the "**[t]he matter shall be referred to the Upper Tribunal in accordance with section 9(5)(b) of the Act**". This wording may in other circumstances have led to confusion on the claimant's part as to whether she had to take any further action. An unrepresented claimant in particular may have thought there was nothing further for her to do when in fact she still had to lodge the appeal with the Upper Tribunal.
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> More importantly, however, the power of referral under section 9(5)(b) in "the Act" (which regrettably was not defined by [the District Tribunal Judge] but must mean the Tribunals, Courts and Enforcement Act 2007) has a special meaning and requires certain preconditions to have been met before it can be exercised. Under section 9 of the Act and the First-tier Tribunal's review powers in rule 40 of its Procedure Rules (which must first be considered once an application for permission to appeal has been received – see rule 39(1) of the Procedure Rules), a referral can *only* arise if the First-tier Tribunal has reviewed the decision and set it aside for error of law (see section 9(4)(c) and (5) of the 2007 Act). In this context "error of law" means a plain or clear error of law – see *R(SB) –v- FtT (Review)* [2010] UKUT 160 (AAC); [2010] AACR 41 – and not just grounds which are "arguable". Then, and only then, can the District Tribunal Judge of the First-tier Tribunal "refer" the *original* appeal to the Upper Tribunal for it to decide that appeal on the facts. However there is nothing in the 29 January 2016 decision of [the District Tribunal Judge] [which sets] aside the tribunal's decision of 17 November 2015.
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> It is for this reason that I construe [the] DTJ as (only) having given [the appellant] permission to appeal in his decision of 29 January 2016. That perspective is supported by the First-tier Tribunal's letter of 4 February 2016 which accompanied [the] decision of 29 January 2016, as that letter refers to the District [Tribunal] Judge having decided to grant permission to appeal. (If I am wrong in the above, the ground of appeal submitted by the CAB on behalf of [the appellant] plainly merits the Upper Tribunal giving permission to appeal.)

8. I consider the above adequately explains my concern and where the DTJ went wrong. I would simply emphasise that any decision of the First-tier Tribunal on an application for permission to appeal must make clear whether permission has been granted or refused **and** whether any review of the decision has been made under rules 39(1) and 40 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber Rules) 2008 and section 9(4)(a) and (5) of the Tribunals, Courts and Enforcement Act 2007, and the steps taken on, and results of, any review. The Upper Tribunal's decision in *JS –v-*

SSWP [2013] UKUT 100 (AAC); [2013] AACR 30, provides a helpful explanation of the steps needed to be taken in order for a District Tribunal Judge to properly review a First-tier Tribunal's decision, steps which are needed in order to properly "refer" an appeal to the Upper Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 26th August 2016