**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**Before Upper Tribunal Judge Brunner QC**

**This appeal has lapsed, and so there is no decision on this appeal.**

The decision of 3 March 2014 under s16 of the Tax Credits Act 2002 has lapsed, having been replaced by a decision under section 18 of the Tax Credits Act 2002, and so the appeal against the decision of 3 March 2014 to both the First-tier Tribunal and this tribunal has lapsed.

## REASONS

1. This is an appeal brought by the claimant against the decision of the First-tier tribunal ('FTT') given on 24 September 2015 relating to tax credits. HMRC notified a decision to the claimant on 3 March 2014, which was a decision under section 16(1) of the Tax Credits Act 2002 ('s16'). She appealed to the FTT which heard her case on 26 August 2015 and dismissed the appeal, finding that the claimant was not in genuine remunerative employment at the material time. The claimant appealed to the Upper Tribunal.

2. Leave to appeal was given by Judge Mitchell on 30 March 2016 on the sole ground that the FTT failed to take into account the absence of relevant evidence which should have been supplied to it by HMRC in making a finding as to the claimant's husband's credibility. Judge Mitchell was not made aware by HMRC that a decision under section 18 of the Tax Credits Act 2002 ('s18') had been made in January 2016 and so the jurisdiction issue which arises was not considered at the permission stage.

   Error of Law

3. The Commissioners of HMRC agree that the FTT erred in law.

4. The FTT found that the claimant's husband had either fabricated a letter which he said was dated 16$^{th}$ January 2014 or had not sent such a letter. The FTT made that finding based on an analysis of the evidence, including analysis of a telephone call on 24 January 2014, which the FTT found was inconsistent with the suggestion that a letter had been sent on 16$^{th}$ January 2014. However, the FTT did not have before it some significant documents, namely inquiry letters from 2013 , and records of what was received from the claimant's husband on 20$^{th}$ January 2014. The FTT should have been alive to the existence of both of those sets of documents from the material before it. The FTT should

have either asked for those documents, or taken account of the absence of those documents when drawing inferences from the evidence. The failure to do that was an error of law.

5. Despite that error, HMRC submits that this appeal can be dismissed as a subsequent decision by HMRC under s18 of the Tax Credits Act 2002 relating to the same period as the period under appeal. has made this case redundant.

6. The claimant seeks a decision and remission of the case to the FTT for redetermination of the appeal.

Chronology

7. The chronology of decisions, and their legal basis, is less than clear from HMRC's paperwork. It is of note that there is no clear summary of which statutory powers HMRC was relying on, nor what legal test was being applied, either in HMRC's submissions to the FTT (p556) or the FTT's Statement of Reasons (p594). I am not the first Upper Tribunal judge to comment that it is entirely unacceptable that HMRC failed to assist the FTT by clearly setting out the basic framework of their case.

8. A simplistic summary of the tax credit regime is as follows (all references are to the Tax Credits Act 2002): an initial award of tax credit is made under s14 . HMRC may then amend or terminate the initial award under s16 if they have reasonable grounds to believe that that tax credit has been awarded at the wrong rate or that there is no entitlement to tax credit. .A final decision as to entitlement to tax credit is made under s18 after the end of the tax year in question. The s18 has the effect of replacing both the initial decision made under s14 and any amendment to that initial decision made under s16.

9. Mr Eland's submissions to this tribunal are, in contrast to submissions made by HMRC to the FTT, a model of clarity. It appears that the chronology in this case was as follows.

    (1) HMRC made an initial decision under s14 and awarded tax credits for the 2013-14 year.
    (2) HMRC then amended that decision on 3 March 2014 under s16, having requested information in October 2013 and January 2014 (p622). That amended decision was to the effect that no tax credit was awarded (explained in a letter dated 30 June 2014 at p16).
    (3) On 26 August 2015 the FTT upheld the s16 decision
    (4) On 27 January 2016 HMRC made a decision under s18 of the Tax Credits Act 2002 for the same period.

At the time of the FTT hearing, therefore, the s16 decision was in force but there had been no final s18 determination.

Jurisdiction: general

10. The issue for this tribunal is whether the section 16 appeal (this appeal) has lapsed. It is worth re-visiting the central case law to see how the principle of lapsing operates.

11. The Court of Appeal addressed the issue of lapsing in the context of social security law in *Chief Adjudication Officer v Eggleton,* reported as *R(IS) 23/95.* That was an appeal against a series of decisions by a Social Security Commissioner that the several claimants' income support for the period 11 April 1988 to 8 October 1989 was to be calculated so as to include severe disability premium. The appellant sought an order that the case be remitted for decision on the basis that the calculation of income support should not include SDP for that period.

12. An issue arose as to whether the decisions under appeal, and the appeal itself, had lapsed. The Court of Appeal summarised that issue as follows:

*'The result of these appeals depends on whether the Commissioner erred in law in deciding that purported "review decisions" of the adjudication officer in the summer of 1990, in relation to income support, superseded, replaced and rendered of no effect decisions made by him in each case in 1988. Leave to appeal out of time had been granted in relation to the 1988 decisions but that leave cannot be exercised if the decisions to be appealed no longer exist. That being a legal point upon the construction of the legislation, it is not necessary to set out the facts in each case in detail.'*

13. Lord Justice Stuart-Smith expressed the jurisdiction issue for the court in this way:

*'Is the effect of a review of the original decision, whatever the outcome, such that the original decision ceases to have effect or lapses, with the result that it cannot be appealed out of time?'*

His answer, following a review of the provisions relevant to the appeal, was as follows:

*'In my judgment, whether or not an original decision lapses or is superseded when it is reviewed, depends on the nature and extent of the review. If the whole of the original decision from the date on which it is made is revised or varied, there is nothing left of it and it cannot therefore be appealed. But if it is only varied as to part, or from a particular date or because revision is precluded after a certain date, in*

*the absence of any express provision to the contrary, I can see no logical reason why the original decision should not subsist, save in so far as it has been affected by the review.'* [my emphasis]

14. It is of some note that in this analysis it is taken as axiomatic that an appeal cannot be heard in relation to a lapsed decision. For ease I will refer to the principle articulated in the underlined section above as 'the lapsing principle'.

15. There was no consideration of whether there are exceptions to the lapsing principle. However, given that the finding on the facts of that case was that the original decisions and therefore appeals were extant because they had not been entirely revised, there was no need for the Court of Appeal to consider the lapsing principle in further detail.

16. The lapsing principle has been articulated time and time again by the higher courts (a recent example being the Court of Appeal in *Re X (Court of Protection Practice) [2015] EWCA Civ 599).* It appears plain from authorities that the lapsing principle does not automatically apply: the courts retain some discretion as to whether to hear appeals relating to apparently lapsed decisions, at least in the arena of public law.

17. That discretion was considered by the House of Lords in *R v Secretary of State for the Home Department, ex p Salem [1999] 1 AC 450***.** The Court of Appeal had dismissed the appellant's application that his benefits should not have been stopped as he had not been informed that his application as an asylum seeker had been rejected. Following the Court of Appeal decision the appellant had been granted that status and accordingly would receive back-payment of benefits. There was no live issue to be determined by the House of Lords.

18. It was accepted that even where there was no longer a matter to be decided which would directly affect the rights and obligations of the parties that a discretion arose to hear an appeal '*in a cause where there is an issue involving a public authority as to a question of public law*'.

19. Lord Slynn clearly envisaged that the discretion to proceed with a case where the subject matter has expired should be exercised in very limited situations:

    *' The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and <u>appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so</u>, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.* [my emphasis]

*I do not consider that this is such a case. In the first place, although a question of statutory construction does arise, the facts are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case…In the second place,.. only in a few cases has this question arisen.'*

20. In *R v Canons Park Mental Health Review Tribunal ex p Andrews [1995] Q.B.60* the Court of Appeal heard an appeal against a Divisional Court's decision to quash the decision of a Mental Health Tribunal. The issues had, on their face, become academic: the patient had been returned to hospital on different grounds to those underpinning her original detention, and thus there was no effective order which the court could make. The issue was not referred to in terms of 'lapsing', but was identified as an issue of jurisdiction.

21. The reasons given by the Court of Appeal for hearing the case included potential future effects on the patient:

    *'It is true that if the Divisional Court's order quashing the Tribunal's decision was held to have been wrongly made, the decision could not now be revived as a basis for the applicant's detention. But other consequences might flow from the quashing of the decision and, if the correct view is that it ought to have stood, declaratory relief ought to be granted accordingly. Moreover, as Mr Richards pointed out, 'the applicant might again be re-classified during her present admission to hospital or, on an application to the tribunal, the tribunal might find that she was suffering from a psychopathic disorder. Thus there is a real possibility that the same issue could arise in respect to the applicant. In all the circumstances, the issues raised are neither hypothetical nor academic and there is no impediment in my judgment, to our hearing and disposing of the appeal.'*

22. The Court of Appeal proceeded to decide issues relating to treatability, and how to construe section 72(1) and (2) of the Mental Health Act 1983. The determination of those issues was plainly in the public interest: indeed, the case is often cited with a head note saying 'Guidelines on the treatability test'. Although the court placed weight on the possibility of the applicant benefitting from the continuance of the appeal, it is clear from the full judgement that the benefit envisaged was from a swift resolution of legal issues, which would then be applied by any future tribunal hearing the applicant's case. It is a moot point whether this case should be read as any authority for widening the discretion to hear an appeal about a non-effective decision beyond Lord Slynn's consideration of 'good reason in the public interest'.

<u>Jurisdiction: s16/18</u>

23. It is implicit in the wording of the Tax Credits Act that once a decision under section 18 has been given, HMRC's decision under section 16 is no longer of any effect: the section 18 decision entirely replaces the section 16 decision, dealing with the same entitlement for the same period of time.

24. In *CTC/3981/2005* Commissioner Jacobs (as he then was) analysed what happened to a s16 appeal once a decision is given under s18 in this way:

    *42.If a claimant's appeal against a section 16 decision has not been decided before a decision is given under section 18, the former is redundant and of no possible benefit to the claimant. The sensible thing to do is to withdraw the appeal, but claimants may not understand this. Ideally, the legislation would provide for the appeal to lapse in these circumstances, but it does not do so. On general principle, a decision lapses if the decision ceases to be of any force or effect in respect of any period. See the analysis of Stuart-Smith LJ in* Chief Adjudication Officer v Eggleton, reported as R(IS) 23/95. *And if the decision has lapsed, there can be no appeal against it and any appeal that has been made must lapse also. The Tax Credits Act 2002 makes no provision for the effect of a section 16 decision after a section 18 decision has been made. However, section 18(11) provides that the decision under that section is conclusive, which carries with it the implication that the section 16 decision is no longer of any force or effect. That is lapsing in all but name. The disadvantage of this approach is that it is automatic. In most cases that would not matter, but there may be cases in which it would be appropriate to proceed with the appeal despite the fact that it had been overtaken by the section 18 decision.*

    *43.Another analysis is that the tribunal should treat the appeal as raising only hypothetical issues. Courts decline to deal with such issues in public law cases. The appeal tribunal could do the same, simply declaring that the only issues raised are hypothetical and declining to decide them. The advantage of this approach over the lapsing of a decision or an appeal is that it gives the tribunal a discretion. The courts are prepared to decide hypothetical issues in public law cases if 'there is a good reason in the public interest for doing so', as Lord Slynn explained in* R v Secretary of State for the Home Department, ex parte Salem [1999] 1 A.C. 450 at 457*. This would allow a tribunal to proceed with an appeal against a decision under section 16 (or for that matter under section 14 or 15) if, for example, it raised an issue of general* importance, *such as the scope of an appeal under that section.*

25. Judge Jacobs therefore left two analyses on the table. Firstly, a finding that the s16 decision had lapsed and thus the appeal had automatically lapsed. Secondly, a finding that the tribunal had a discretion to hear the appeal.

26. In two cases which followed, the first of the approaches suggested by Judge Jacobs, that a s18 decision means that a s16 decision automatically lapses and therefore cannot be the subject of appeal, was adopted.

27. In *CTC/2103/2006* appeals against both a s16 and a s18 decision were purportedly before the Upper Tribunal. Commisioner White said '*the effect of the finalisation decision of 15 March 2006 is to lapse the earlier section 16 decision..so the only decision which will be before the new tribunal is [the section 18 decision*]'. In that case the Commissioner made no decision about the appeal against the s16 award, and only dealt with the s18 award.

28. In *CSTC/840/2014*, Judge May QC also adopted the approach that a s16 appeal lapses when a s18 decision is made. Judge May said this about Judge Jacob's conclusion: '*He indicates that the effect of section 18(11) is that the decision under that section is conclusive with the implication that the section 16 decision is no longer of any force or effect. I accept his view on that. The Commissioner permits himself the observation that there may be many* [sic] *cases in which it would be appropriate to proceed with the appeal despite the fact that it had been overtaken by the section 18 decision..I do not accept that proposition… It is quite clear..that neither the FTT, if I was disposed to remit the case to them, nor myself could give any effective remedy to the claimant if her position on the merits was accepted'*.

29. In that case the s18 decision had been taken before the FTT purported to make a decision as to the s16 award. Judge May QC proceeded to decide the appeal at the Upper Tribunal, allowing the appeal on the basis that the FTT erred in law, as the appeal against the s16 decision had lapsed before the FTT heard the case. Judge May QC then re-made the FTT decision in these terms : '*the appeal against [the s16 award] has lapsed'*.

30. In both of the above cases the Upper Tribunal applied the lapsing principle automatically. Neither case allows for any exception to the lapsing principle, although it is plain from both of those cases that there was no argued or arguable public interest in the appeal continuing.

31. A different approach was taken in the very recent case *CTC/1343/2015* where Upper Tribunal Gray addressed the relationship between s16 and s18. In that case, and in contrast to the two cases above, the only existing appeal was against the s16 decision: there was no appeal against the section 18 decision. Judge Gray said:

    *'I am not persuaded that the section 18 decision will automatically lapse the section 16 decision, leaving a tribunal seized simply of the section 16 appeal without jurisdiction. It is not axiomatic that an apparently purposeless appeal must lapse. In* Anghel Judicial Authority of France [2015] EWHC 493 (Admin) *Mitting J considered whether an*

*extradition appeal would lapse where the individual had already been extradited. He said : 'as a matter or principle the fact of his extradition does not mean that his appeal automatically lapses or is to be treated as having been withdrawn or abandoned'.*

32. At paragraph 50 Judge Gray opines that:

*'the conclusive nature of a section 18 decision does not mean that the section 16 decision raises merely academic questions. There will be circumstances in which such a decision can yet be of some effect'.*

33. The potential effects of a continuing section 16 appeal were said to include the revision of a section 18 decision on the basis of official error, or the use of the FTT judgment as a defence to a money claim by HMRC.

34. Judge Gray's conclusion ( at paragraph 64) was that:

*'without a statutory lapsing provision the proper protection for an individual is the continuation of rights in relation to an appeal currently in progress'.*

35. The case of *Anghel v Judicial Authority of France [2015] EWHC 493 (Admin)* to which Judge Gray referred is one of a line of extradition cases, beginning with *Pilecki v Poland [2008] UKHL 7* in which an extradition appeal was heard despite the claimant having been extradited, because it raised a matter of public importance. I do not read the case of *Anghel* as contrary to the principle of lapsing. The court dealt with the question of whether the appellant wanted the appeal to continue as a preliminary issue and, having answered that in the negative, did not need to articulate any further the test which it would have applied if he had wished to proceed.

Decision and Directions

36. A section 18 decision entirely replaces a section 16 decision, such that there is no operative part left of the section 16 decision. Where a section 18 decision has been made, the section 16 decision falls into the category of decisions identified in *Chief Adjudication Officer v Eggleton,* reported as *R(IS) 23/95* where the starting point is: 'there is nothing left of it and it cannot therefore be appealed'.

37. The absence of a statutory lapsing provision in the Tax Credits Act does not, in my view, displace the lapsing principle, which is not a creature of statute. It is a principle which, on the analysis of case law above, binds the higher courts hearing appeals from tribunals. In my view, it binds tribunals as well.

38. Although the lapsing principle is the starting point, it is not necessarily the end point. I agree with Judge Gray in *CTC/1343/2015* that a section 18 decision does not automatically lapse the section 16 appeal. So far as *CTC/2103/2006* and *CSTC/840/2014* asserted that lapsing was automatic, I disagree with that analysis.

39. There remains discretion to hear an appeal against a lapsed decision, but that is a discretion which should only, in my view, be exercised in very limited circumstances. Those limited circumstances include good reason in the public interest to hear the appeal as stated in *R v Secretary of State for the Home Department, ex p Salem [1999] 1 AC 450*. It is doubtful, in my view, whether those limited circumstances can ever extend beyond the test of 'good reason in the public interest'. Whatever the precise boundaries of the discretion, it should be a very rare event for either the FTT or this tribunal to hear an appeal against a s16 decision when a s18 decision has been made.

40. I am doubtful whether the sort of reasons which Judge Gray relied on in *CTC/1343/2015* to remit the case could ever be circumstances which allow an otherwise lapsed appeal to continue. Such reasons do not in my view make the s16 appeal anything other than academic, and do not disclose any public interest in continuance. It seems to me that the potential disadvantages to a claimant caused by lapsing an appeal can be dealt with by observations from a tribunal, such as those I have made in this case. Remitting cases to the FTT on the basis of speculative future advantage to a claimant will not, to my mind, usually meet the requirements of the overriding objective to deal with cases in ways which are proportionate to the complexity of the issues, the anticipated costs and the resources of the parties.

41. In this case, my findings are as follows: the s16 decision has been lapsed by the s18 decision. This appeal is academic, there is no public interest here in the s16 appeal continuing, and this appeal has thus also lapsed.

42. As the appeal has lapsed this tribunal has no jurisdiction and I make no decision and do not remit (following the approach taken in *Dorset Healthcare NHS Trust v MH [2009] UKUT 4 (AAC)*. I make observations about the findings of the FTT as set out at paragraphs 3,4,5 above.

43. I understand that the claimant has asked for mandatory reconsideration of the s18 decision (if she has not, and if she disagrees with the decision then she should do so, and HMRC have indicated that they will treat a late request for reconsideration as if it was made in time). The claimant should understand that if she disagrees with the result of the mandatory reconsideration of the s18 decision she must appeal that decision to the First-tier Tribunal.

44. There should be no reliance by HMRC or any future tribunal on the adverse findings of the FTT on 26 August 2015. This decision, and HMRC's submissions to this tribunal, should be considered by the HMRC decision maker(s) considering the s18 mandatory reconsideration and any response to a s18 appeal.

45. Any FTT which hears the s18 appeal or any future appeal brought by this claimant or her husband should be a differently constituted panel to the panel which sat on 26 August 2015.

**Upper Tribunal Judge Kate Brunner QC**

**Signed on the original on 9 September 2016**