DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant. The decision of the London Fox Court First-tier Tribunal 01 April 2015 under file reference SC242/15/00652 involves an error on a point of law and is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the HMRC decision dated 19 October 2014 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the re-hearing:

(1) The re-hearing will be at an oral hearing.

(2) The new tribunal should not involve the tribunal judge who sat on the tribunal that considered this appeal at the hearing on 1 April 2015.

(3) The new tribunal should have before it copies of the submission to the Upper Tribunal by Mrs E Collins on behalf of HMRC (pp.157-172 of the Upper Tribunal bundle, with attachments).

(4) The Respondent should provide the FTT within one month of the date of issue of this decision with a transcript of the recordings of the telephone calls made by the Appellant to HMRC contact centres on 19 April 2013 at 14.57 and on 3 May at 18:55.

(5) The new tribunal must consider all the evidence afresh and is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may end up reaching the same or a different result to the outcome of the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Summary of Upper Tribunal's decision

1. The Appellant's case as put to the First-tier Tribunal (FTT) was, frankly, a confused mess.

2. The case advanced in reply by the Respondent (Her Majesty's Revenue and Customs or HMRC), although superficially persuasive, was not much better and omitted key evidence.

3. Regrettably, but sadly rather predictably, this poor preparation on both sides has resulted in the FTT's decision being less than satisfactory.

4. I now allow the Appellant's appeal to the Upper Tribunal. The FTT's decision involves an error on a point of law, as HMRC now rightly accepts. The FTT's decision is accordingly set aside. The case needs to be reheard by a new tribunal.

5. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new FTT will succeed *on the facts*. The new tribunal may reach the same, or a different, decision to that of the previous tribunal. It all depends on the findings of fact that the new tribunal makes.

The issue before the First-tier Tribunal

6. In summary, the Appellant and his wife had been in receipt of tax credits since the 2007/08 tax year. HMRC finalised the Appellant's tax credit award for the 2013/14 tax year. At the material time he had three children. In finalising this award, HMRC allowed him total childcare costs (CCC) of £100 p.w. for all three children together. The Appellant's argument, in outline, was that his CCC amounted to £100 *per child* and not in aggregate. He appealed. The FTT dismissed his appeal.

The proceedings before the Upper Tribunal

Introduction

7. I subsequently gave the Appellant permission to appeal to the Upper Tribunal. I did so for two reasons. First, I had doubts about the adequacy of the Tribunal's reasons. Second, I added that based on past experience "I am not at all confident that all relevant evidence was presented to the FTT by HMRC". Little did I know how true that was.

8. Mrs E Collins has now provided a comprehensive and helpful submission on behalf of HMRC. She supports the Appellant's appeal to the Upper Tribunal, adding a further ground to those I identified. However, I am giving detailed reasons both for the benefit of the new Tribunal and as a general reminder of the need to take an appropriately inquisitorial approach to appeals.

The Tribunal's decision to proceed to hear the appeal in the Appellant's absence

9. The Appellant is a member of the Orthodox Jewish community. The FTT office notified him on 11 February 2015 that the hearing of his appeal would take place on Wednesday 1 April 2015. That was not a date on which the Appellant had previously said he would be unavailable. Passover in 2015 started on the evening of Friday 3 April.

10. On Monday 30 March 2015 the Appellant telephoned the FTT office asking for a postponement, saying that his representative was not working due to Passover and he himself was unwilling to attend alone. The request was refused on the basis that it

was made at very short notice and Passover did not start until the Friday. The Appellant was advised to attend the hearing.

11. The FTT on 1 April 2015 reconsidered the matter. The Judge explained carefully on both the decision notice and the statement of reasons why she decided to proceed with the hearing in the Appellant's absence. When giving permission to appeal, I recognised "that the period in the run-up to Passover is exceptionally busy. However, the date of Passover is known well in advance. It is not reasonable to make such a request 48 hours before the scheduled hearing." I remain of the view that on the basis of the reasons given for the Appellant's non-attendance the Tribunal was entitled to proceed as it did.

12. That said, I think there is a very strong argument that the FTT should have adjourned for reasons other than to do with the non-availability of the representative owing to impending religious observance. This is because of gaps in the evidence that was put before the FTT, as will become apparent. However, I need not decide that point here.

The parties' preparation of the respective cases before the First-tier Tribunal

13. The Appellant finds it difficult to cope with bureaucracy. In an unsuccessful attempt to have the FTT's decision set aside, his representative explained that a previous representative had withdrawn as the Appellant had been unable to provide him with "any documentation or evidence". His new representative candidly added that the Appellant "is totally incapable of managing his affairs effectively and hence always misses deadlines".

14. The Respondent is a government agency with all the power and the resources of the State behind it. It has much less excuse for providing the FTT with an inadequate submission on the appeal. Indeed, it is of course also subject to the duty under rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), which provides that "The decision maker must provide with the response…copies of *all documents relevant* to the case in the decision maker's possession, unless a practice direction or direction states otherwise" (emphasis added; see further *ST v Secretary of State for Work and Pensions (ESA)* [2012] UKUT 469 (AAC)). On the face of it, the HMRC submission on this appeal appeared to set out both the history of the case and the issues arising for decision. However, once one digs down a bit further, the gaps in that account become evident. As this decision will show, the HMRC submission lamentably failed to comply with rule 24(4)(b).

The chronology of the case

15. Stripped of unnecessary detail, the history of this case is as follows (and I am indebted to Mrs Collins of HMRC for bringing order to chaos in this regard).

16. In July 2013 HMRC made a decision for the 2013/14 tax year under section 14 of the Tax Credits Act 2002 awarding the Appellant and his wife tax credits with total CCC allowed of £100 a week.

17. In May 2014 HMRC issued the Appellant with a section 17 final end of year notice. On 23 May 2014 HMRC also wrote to the Appellant asking for various information to support the award for 2013/14, including details of his CCC incurred.

18. On 8 July 2014 the Appellant returned the relevant HMRC enquiry form, listing CCC of £100 a week for one named child, but adding the following further explanation:

> "I do have 2 more childcare providers, I have not paid them in a long while as I claimed CC costs of approx £270 per week and for some reason there was a mistake on my TC award letter; only £100 are included in childcare costs. I have written about this and received no response."

19. In February 2015, following an unsuccessful request for a mandatory reconsideration, the Appellant sent in his appeal notice. This stated (and, given both its clarity and its handwriting, I surmise this was written by his then representative):

> "When I originally requested the childcare element of tax credits an error was made on my award. Instead of childcare costs being paid based on £100 each for 3 children, I was awarded childcare based on £100 in total (instead of £300.00). Due to this I could not afford to pay the childcare. I wrote to tax credits countless times and was ignored. I am still liable for childcare costs and still owe the monies to the providers. Please reinstate the childcare element as I am entitled according to regulations."

20. The HMRC response on the appeal contains a considerable volume of documents relating to the period <u>from</u> May 2014 (i.e. just after the end of the 2013/14 tax year in question) but nothing before that time. The Appellant sent in a disorganised pile of further evidence, all again being documents dated after May 2014 (although some referred to the 2013/14 tax year).

21. What is singularly absent from the HMRC response to the FTT was any documentation generated in the course of the 2013/14 tax year. Yet in July 2014, referring presumably to his original award letter in 2013, the Appellant had stated "I have written about this and received no response." His subsequent appeal in February 2015 referred to having written to HMRC "countless times". This should have rung alarm bells for the FTT considering the appeal.

22. The bundle contains a further document which indicates those alarm bells should have rung even louder. There is an HMRC screen-print (at p.110) referring to a letter received from the Appellant on 28 March 2014 (i.e. in the relevant tax year). The letter is noted as being about CCC. The record adds "No action taken compliance referral". No copy of the letter received on 28 March 2014 was included in the FTT bundle.

23. Mrs Collins's inquiries have unearthed a letter from the Appellant dated 11 March 2014 which is date-stamped as received by HMRC on 26 March 2014. Given the coincidence of dates, it seems highly likely that this is the letter referred to in the screen-print. The letter states:

> "I started paying childcare costs and called tax credits to advise of this change. I informed the office on the telephone that I was [paying] childcare costs for 3 children of £100 each a total of £300 per week. I was receiving very little tax credits … This is an error on your part and I am requesting that this be amended from the date my child care started."

24. As Mrs Collins rightly acknowledges, this was plainly a relevant document that should have been before the FTT. Its non-appearance in the HMRC response was contrary to natural justice and amounted to a clear breach of rule 24(4)(b). That is reason enough to find that the FTT decision involves an error of law and should be set aside.

It gets worse

25. Mrs Collins's enquiries have also unearthed further information which was not put before the FTT. She has produced HMRC records showing that the Appellant telephoned an HMRC contact centre on both 19 April 2013 and 3 May 2013, presumably in relation to the original section 14 notice. The computer record for 19 April 2013 states "updated first claim to CCC from 19-03-2013, average weekly costs 100.00 per week." The note may be short but the call apparently lasted for about half an hour. The note for the much shorter call on 3 May 2013 states "customer rang back to check CCC have been actioned, asked him to confirm details and asked if they were on award notice he received? he confirmed correct however was unsure due to provisional notice, advised regarding this".

26. As Mrs Collins fairly observes, the fact that these telephone calls were made "lends some credibility to the claimant's view of events and I would have rather hoped that HMRC had investigated this further at the time." So would I.

27. Further, as Mrs Collins explains, if the Appellant did actually tell HMRC on 19 April 2013 that his CCC were £100 a week per child and that information was not recorded correctly, that could be found to be an official error (as defined by regulation 2(1) of the Tax Credits (Official Error) Regulations 2003 (SI 2003/692)). This could result in the revision of any decision made on the basis of official error, subject to a five year time bar (regulation 3 of the 2003 Regulations).

28. Furthermore, Mrs Collins helpfully adds that if official error is identified, but a proportion of child care costs could not be treated as "relevant" CCC because they were not actually paid, then "the case could be referred to HMRC's customer service group for their consideration having full regard to the scope of the official error. This could also effect the claimant's entitlement for the 2012-2013 tax year." As I noted when giving permission to appeal, the definition of CCC refers to CCC actually *paid*, not just a liability *incurred* (see regulation 14 of the WTC (Entitlement and Maximum Rate Regulations 2002 (SI 2002/2005); "the 2002 Regulations").

In conclusion

29. The failure of HMRC to provide the FTT with all relevant documents led the FTT into error, as it failed to have regard to relevant evidence and in particular failed to consider whether the HMRC decision was founded on official error. There were clues in the documentation that was provided to the FTT that there were other relevant documents. I therefore allow the appeal on the second ground that I identified and set aside the FTT's decision.

The adequacy of the First-tier Tribunal's reasons

30. I can deal with this ground shortly in the circumstances.

31. The FTT, having summarised some of the CCC invoices in the bundle, concluded its reasoning as follows:

> "In relation to the costs of [one of the childcare providers] it appears that this relates to costs for [one child] for whom the Foundation provided childcare facilities in their out of hours service. [The Appellant and his wife] do not make clear why they require after hours care [for their son] given their working hours, or why they would realistically commit to such high child care costs in the context of their other commitments and income. It also appears that they are charged for attendance at the school in the summer holidays when [the claimants], who are both employed at a school, may not in fact be at work and in need of child care. Furthermore I find it implausible that a school who in December 2015 was

allegedly owed £7900 would not take formal action in respect of those arrears, of which the Appellant has not provided any evidence. I also note that [the Appellant's] current unauthorised representative is also the administrator of the Foundation and I assume that such information would therefore have been available to both to submit as requested."

32. When giving permission to appeal, I commented as follows:

"The District Tribunal Judge who refused permission on behalf of the FTT described the statement as 'not … a fully polished decision'. This is, frankly, an under-statement. The FTT's analysis of the evidence is very cursory and does not appear to tie it into the tax year under consideration. Furthermore, it gives no explanation of why some CCC were accepted and others were not. In addition, at paragraph 15, in dealing with the CCC which were accepted by HMRC, the FTT drew no distinction between the two tax years which the payments cover. Finally, in paragraph 17 the FTT makes observations which appear to amount to an allegation of unspecified wrongdoing (suggesting some sort of contrivance) which does nothing to assist one's understanding of the central issue of why the Appellant did not have his CCC accepted as having been 'incurred'. It is therefore difficult to see how the claimant 'looking at the decision should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority' (see e.g. *Re Poyser and Mills Arbitration* [1964] 2 QB 467 and R(A) 1/72)."

33. Mrs Collins also supports the appeal on this ground, agreeing with my observations. She also very fairly notes that regulation 14 of the 2002 Regulations does not place any restriction on the number of hours a claimant can utilise the services of a childcare facility nor does it state that childcare costs must be proportionate to household income.

34. The appeal therefore also succeeds on this ground.

What happens next: the new First-tier Tribunal

35. This all means there will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the previous FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant was entitled to all the help with childcare costs claimed. That is a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact.

36. In doing so the new FTT should have available to it transcripts of the recordings of the telephone calls to HMRC contact centres on 19 April 2013 at 14.57 and on 3 May at 18:55. My understanding is that telephone calls to HMRC helplines are retained for at least 5 years (see the helpful analysis of both the law and HMRC practice in *AG v HMRC (TC)* [2013] UKUT 0530 (AAC)). I direct accordingly.

Conclusion

37. The Appellant's appeal is allowed. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The First-tier Tribunal decision is now of no effect. The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is as set out above.

Final comment

38. The Upper Tribunal has previously been assured that HMRC's former unsatisfactory approach to FTT submissions, which was not compliant with rule 24(4)(b), had been corrected with effect from May 2014 (see *ZB v HMRC* [2015] UKUT 198 (AAC) and *JW v HMRC (TC)* [2015] UKUT 369 (AAC)). The HMRC submission in the present appeal for the FTT was dated 3 March 2015. Plainly HMRC's best intentions have yet to be fully realised, but tax credit claimants and their advisers up and down the country probably do not need me to tell them that.

39. Of course, as the tribunal system moves towards the brave new world of 'digitization', this problem may become a problem of the past. But, then again, that all depends on which documents are digitized.

Signed on the original
on 6 October 2016

Nicholas Wikeley
Judge of the Upper Tribunal