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 Birmingham First-tier Tribunal dated 1 May 2015 under file reference SC024/14/02943 involves an error on a point of law. The First-tier Tribunal's decision 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 HMRC's decision dated 3 April 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 (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge who was previously involved in considering this appeal on 1 May 2015.

(3) If the Appellant or the Second Respondent has any further written evidence to put before the new tribunal this should be sent to the regional tribunal office in Birmingham within one month of the issue of this decision.

(4) The new tribunal should have before it a copy of the submission to the Upper Tribunal made by Mrs E Collins on behalf of Her Majesty's Revenue and Customs (HMRC) (pp.122-129 of the Upper Tribunal bundle).

(5) The First-tier Tribunal office should arrange for a typed copy of the record of proceedings for the previous hearing on 1 May 2015 to be made available for the next hearing.

(6) The new First-tier Tribunal 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 reach the same or a different outcome to 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

A cautionary note

1. This appeal by the Appellant (from now on, the mother) to the Upper Tribunal succeeds. This is because the decision by the First-tier Tribunal (FTT) involved an error of law. There will need to be a fresh hearing before a new FTT, i.e. before a different Judge. Although this appeal to the Upper Tribunal has succeeded on a point of law, that should not be taken as any indication, let alone any guarantee, that the mother's appeal before the new FTT will succeed on the facts.

2. In other words, the previous FTT may have come to the right decision on the facts, even if it went wrong in law on the way to reaching that conclusion. Or the previous FTT may have come to the wrong conclusion on the facts. For the present we cannot say. Only time will tell.

The legal issue on this appeal

3. This appeal concerns the rules governing entitlement to child benefit. In particular, the appeal concerns the basis on which child benefit can be paid and what happens when there are competing claims. In the present case the competing claims are from the mother and the father (the Second Respondent). However, as a matter of principle the same problem could arise where either claimant is (or both claimants are) not a parent but simply a carer of the child in question.

The background to this appeal

4. The parents have been separated for some years. They have a daughter A, who was born in 1996. There have been proceedings in the family court. The father was the child benefit claimant as from a date in 2011. There also appears to have been a long-running dispute between the parents over child maintenance which may well have affected the parents' conduct in relation to their child benefit claims.

5. The father's position was quite clear. He said that A had been living with him and his new partner continuously from September 2011: "she hasn't moved out, nor has she left and come back" (letter dated 24 December 2013, p.8).

6. The mother's position was equally clear. Her case, however, was not that A was living with her. She accepted that was not the situation. Her argument was that A went to live with her then boyfriend and his family at some point in July 2013, and only moved back to live with her father in April 2014 (letter dated 30 April 2014, p.1). She further argued that she was supporting A financially (including, but not limited to, by way of a bank standing order (S.O.)) but A's father was not doing so.

The mother's child benefit claim and the HMRC decision

7. On 12 December 2013 (so about six months, according to the mother, after A had gone to live with her boyfriend's family) the mother made a claim for child benefit in respect of A.

8. On 3 April 2014 HMRC made a decision refusing the mother's child benefit claim in respect of A. The decision was made in three stages relating to successive periods of time.

9. First, HMRC decided that the mother was not entitled to child benefit for A *before 9 December 2013* as child benefit had already been paid to another person (i.e. the father) for her for that period. That decision was based on section 13(2) of the Social Security Administration Act 1992, which provides as follows:

> "(2) Except where regulations otherwise provide, no person shall be entitled to child benefit for any week on a claim made by him after that week if child benefit in respect of the same child or qualifying young person has already been paid for that week to another person, whether or not that other person was entitled to it."

10. Second, HMRC decided that the mother was not entitled to child benefit for A *from 9 December 2013 to 5 January 2014* as father had priority for the first three weeks after the mother's competing claim (see Social Security Contributions and Benefits Act 1992, section 144(3) and Schedule 10, paragraph 1).

11. Third, HMRC decided that the mother was not entitled to child benefit for A *from 6 January 2014 onwards* because A was living with another person (her father) and he was entitled to child benefit for her (see Social Security Contributions and Benefits Act 1992, section 143(1) and Schedule 10, paragraph 2).

12. On 30 April 2014 the mother appealed against HMRC's decision. She appended the detailed 10 page diary of phone contacts with her daughter over the relevant period which she argued supported her case that A was not actually living with her father at all. The father also provided documentary evidence to back up his case.

The First-tier Tribunal's decision

13. The mother attended the FTT hearing on 1 May 2015 and gave evidence (pp.71-74). The father did not attend. The FTT dismissed the mother's appeal. The tribunal's decision notice simply recorded that (i) A had not lived with her mother since the end of August 2011; (ii) A had moved to live with her father who had claimed and was still receiving child benefit (p.75). It will be apparent from the summary above that the mother accepted point (i) and did not dispute point (ii), although her argument was that this did not paint the full picture of A's residency since 2013. The FTT subsequently issued a full statement of reasons (pp.77-79).

The appeal to the Upper Tribunal

14. The mother made a lengthy application for permission to appeal to the Upper Tribunal. Not all of the matters which she raised were strictly relevant to the matter in hand. However, I gave her permission to appeal for the following two main reasons:

> "First, did the FTT need to resolve the issue as to whether [A] was actually living with [her father] at the material time? If it did have to resolve that, did it do enough to find the necessary facts and explain why it reached the conclusion it did?
>
> The second point relates to the FTT's finding that [the mother] was not contributing to the costs of providing for her daughter at a weekly rate not less than the rate of child benefit then payable. This was based simply on the S.O. for £10 a week – see para. 13 of the reasons. However, it is arguable the FTT failed to find sufficient facts or give adequate reasons on this point. This is because the reasons are silent on [the mother's] evidence that she was providing cash support in other ways as well – see her e-mail submission of 19 April 2015."

15. Mrs Elisa Collins, HMRC's representative in the present proceedings, supports the mother's appeal. She has provided a detailed and helpful written submission.

16. The father, who replied to HMRC at the outset but otherwise did not really engage with the proceedings before the FTT, other than providing a letter with some documents showing A was using his address at certain dates, has also made a detailed submission (pp.131-135). Understandably the father does not address the legal issues raised by Mrs Collins. Indeed, he does not even mention the FTT's decision. Rather, the father focuses on the facts as he sees them to be. He reiterates that A was living with him throughout, albeit spending some time at her boyfriend's house. He makes the point very forcefully that during the period in question A was playing off one parent against the other when it came to issues such as financial support. That is an argument that any parent who has or has had teenage children can empathise with. However, it goes to the facts and not to the law. The new FTT will have to consider the father's arguments on the facts. His arguments may be more compelling if he attends the new hearing to give his side of the case.

17. The mother has also replied to the father's arguments in some detail (pp.136-139). Again, insofar as these issues are relevant, they are factual matters for the new FTT.

Did the First-tier Tribunal go wrong in law?

18. The short answer is yes, and for two reasons.

Section 13(2) of the Social Security Administration Act 1992 is not an absolute rule

19. First, the FTT appears to have assumed that as the father had already been paid child benefit (i.e. as regards the first time period of the threefold decision) it necessarily followed that the mother could not also qualify for child benefit for that same period. As the FTT put it, "Child Benefit cannot be paid before the week a claim is received when Child Benefit has already been paid to another person" (statement of reasons, paragraph [14]). That is certainly true as a general principle. It is indeed the default position, as provided for by section 13(2) of the Social Security Administration Act 1992 (see paragraph 9 above). But general principles tend to have exceptions, especially in the world of social security legislation. The clue is in the opening words to section 13(2), which are "*Except where regulations otherwise provide*…". And regulations do otherwise provide. In particular, regulation 38 of the Child Benefit (General) Regulations 2006 (SI 2006/223) provides an exception to the general principle as follows:

> "**Exception to rules preventing duplicate payment**
>
> 38.—(1) A person is not disentitled to child benefit in respect of a child or qualifying young person by virtue of section 13(2) of the Social Security Administration Act 1992 and section 11(2) of the Social Security Administration (Northern Ireland) Act 1992 (persons not entitled to benefit for any week if benefit already paid for that week to another person, whether or not that other person was entitled to it) if in respect of that week—
>
> (a) the determining authority has decided that the Commissioners are entitled to recover the child benefit paid in respect of that child or qualifying young person from a person in consequence of his misrepresentation of, or his failure to disclose, any material fact and, where that determining authority is one from whose decision an appeal lies, the time limit for appealing has expired and no appeal has been made; or
>
> (b) the child benefit paid to the other person has been voluntarily repaid to, or recovered by, the Commissioners in a case where the determining authority

> has decided under section 9 or 10 of the Social Security Act 1998(1) or under Article 10 or 11 of the Social Security (Northern Ireland) Order 1998(2) either—
>
> > (i) that, while there was no entitlement to benefit, it is not recoverable, or
> > (ii) that there was no entitlement to benefit but has made no decision as to its recoverability."

20. As Mr Commissioner Williams (as he then was) said in Social Security Commissioner's decision CF/1771/2003, "There are only two limited exceptions [to the general rule in section 13(2)]. The first is that it has been decided that the child benefit was overpaid to that person and is recoverable from that person and that decision is final. The second is that the other person has voluntarily repaid the child benefit or it has been recovered from the other person." Thus the "determining authority" in regulation 38(1) is defined as including the FTT or the Upper Tribunal (see regulation 38(2)(d) and (e), as amended by the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (SI 2008/2683) article 6(1) and Schedule 1 paragraph 308). However, the regulation 38 possibility is necessarily subject to an important jurisdictional qualification (see paragraphs 31 and 32 below).

21. So it may well be relatively rarely that regulation 38 can be successfully invoked. However, if (and it may be a big 'if') the father was not properly entitled to child benefit for A for the relevant period, then statutory provision *does* exist for another person (here the mother) to be entitled to child benefit for the same weeks. The FTT's treatment of section 13(2) as an absolute rule rather than a general rule amounts to an error of law, especially when taken together with the second point on which the FTT erred.

Entitlement to child benefit is not exclusively a matter of residency

22. The second error of law is as follows. The FTT's statement of reasons included the following assertion:

> "[7] The appellant said that A had not lived with her at any time after August 2011. That is the one single fact that principally prevents the appellant from entitlement to child benefit throughout the relevant period."

23. So the FTT plainly proceeded on the assumption that co-residency (of parent and child) is essential to a successful child benefit claim. That is equally plainly wrong as a matter of law.

24. Section 141 of the Social Security Contributions and Benefits Act 1992 (as amended) provides as follows:

> "A person who is responsible for one or more children or qualifying young persons in any week shall be entitled, subject to the provisions of this Part of the Act, to a benefit (to be known as 'child benefit') for that week in respect of the child or qualifying young person, or each of the children or qualifying young persons for whom he is responsible."

25. So entitlement to child benefit depends on *responsibility* for the child in question. That concept is defined in turn by section 143(1) of the same Act (again, as amended):

> "(1) For the purposes of this Part of this Act a person shall be treated as responsible for a child in any week if–
> (a) he has the child or qualifying young person living with him in that week; or
> (b) he is contributing to the cost of providing for the child or qualifying young person at a weekly rate which is not less than the weekly rate of child benefit payable in respect of the child or qualifying young person for that week."

26. So there are two contrasting routes to entitlement – "living with" the child (section 143(1)(a)) and alternatively contributing to the cost of providing for the child at the relevant rate (being at least the level of child benefit) (section 143(1)(b)). Where one parent qualifies under the former route and one under the latter route, the former takes priority as the child benefit claimant (Social Security Contributions and Benefits Act 1992, Schedule 10, paragraph 2).

27. In the present appeal the mother had never claimed she qualified under section 143(1)(a)). Her case all along had been that she was entitled by virtue of section 143(1)(b). Furthermore, she argued that the father was not entitled because he was neither living with A (under section 143(1)(a)) – because, so she said, A was living with her boyfriend's family – nor financially supporting her to the requisite extent (section 143(1)(b)).

28. The FTT, however, never properly addressed that argument. The FTT mentioned the father's documentary evidence in passing. The FTT also referred to the mother's claims about where A was living at particular times. But the FTT never properly interrogated the evidence to make appropriate findings of fact about where A was living at material dates. The point was simply left hanging as though it did not really matter. Yet it clearly did matter. If the FTT found as a fact that A was not living with her father at the relevant time, the FTT would then have had to ascertain the true level of support provided by the mother to see if she qualified for child benefit for A on that alternative basis.

29. For these reasons the FTT's decision involves an error of law in two respects and the mother's appeal at the Upper Tribunal succeeds. I also set aside the FTT's decision as of no effect.

What happens next at the new First-tier Tribunal?

Introduction

30. As I have allowed the mother's appeal and set aside the FTT's decision, there will need to be a fresh hearing of the appeal before a new tribunal. Although I am setting aside the previous tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the mother is entitled to child benefit for A for the material period. That is all 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. The following paragraphs include some guidance for the new FTT on both jurisdictional and evidential matters.

Guidance on jurisdictional matters

31. It will be recalled that the mother's case is that A was not living with her father between July 2013 and April 2014. She made her own claim for child benefit part way through that period in December 2013. The new FTT should have regard to the guidance by Mr Commissioner Turnbull (as he then was) in decision CF/2826/2007 at paragraphs 23-29. The effect of that guidance is that as a matter of law the new FTT has no jurisdiction to decide whether A was living with her father in the period

before the date of claim, i.e. whether the father satisfied the basic condition of entitlement to child benefit *for that period*. The FTT cannot make a decision superseding the existing award of child benefit to the father for that past period. This is because it is difficult to see how HMRC's decision to refuse the mother's claim can also be treated as a separate refusal to supersede the father's award. Furthermore, there is no appeal against any such separate decision before the tribunal (see especially Mr Commissioner Turnbull's helpful analysis at paragraph 26 of CF/2826/2007).

32. Given also the impact of the priority rules on new conflicting claims, it follows that the focus of the FTT's enquiry should be on the third part of the HMRC's decision (see paragraph 11 above). This is not to say that A's residence before January 2014 is irrelevant. It may well assist in establishing where she was living after January 2014. But in terms of deciding any entitlement questions it is difficult to see how the father's own award can be reopened by the FTT for the period before the date of the mother's claim. Mr Commissioner Turnbull's summary of his guidance (at paragraph 39(i) of CF/2826/2007 can be usefully adapted for present purposes as follows:

> *As regards any period prior to the date of the mother's claim in respect of which benefit has at the date of claim already been paid to the father: unless, by the date of the decision refusing the mother's claim, either (i) HMRC has made a decision that the benefit paid to the father is recoverable or (ii) the father has voluntarily repaid the benefit, the First-tier Tribunal deciding the mother's appeal does not err in law in failing to make findings (and indeed has no jurisdiction to make findings) as to whether the father was entitled to the benefit for that past period. The reasons are simply that (a) the Tribunal has no jurisdiction to revise or supersede the father's award and (b) it would have no jurisdiction to award benefit to the mother in respect of that past period.*

Guidance on evidential matters

33. The new FTT has a considerable body of documentary evidence already provided by both parents which it will need to evaluate in reaching its decision.

34. As indicated above, it is probably in the father's own interests if he attends the next hearing of the appeal so the FTT can hear from him first-hand.

35. The mother at various stages has asked for other individuals to give evidence. In particular, she has referred to evidence that her daughter's then boyfriend's mother (Claire) can give about A's living arrangements during the 2013/14 period. The position is this. On the appeal before the new FTT it is for each parent to provide the evidence they think supports their case. It is unreasonable and disproportionate to expect HMRC to carry out a further investigation at this stage. In addition, HMCTS is not an inquiry agency. If the mother wants Claire to give evidence at the new hearing, then she should arrange for that herself. If Claire declines to assist, then the mother can ask the Tribunal to issue a witness summons under rule 16 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685).

36. Rule 16 is only occasionally used in social security appeals. There is no formal official guidance from the Chamber President in the Social Entitlement Chamber. However, the practice is more common in the Tax Chamber in the First-tier Tribunal, which has issued a Practice Statement entitled *Witness summonses and orders to produce documents* (24 February 2015). This Practice Statement is not binding on

the FTT in the present appeal but provides some helpful guidance, not least in stressing the desirability of making a prior request for a witness to attend before applying to the tribunal for a summons. Based on that guidance any application for a witness summons by the mother would need to include:

> (i) the name and address of the proposed witness;
> (ii) the nature and relevance of the evidence which the proposed witness is expected to be able to give;
> (iii) the reasons why the Tribunal should consider that there is a real likelihood that the evidence will materially assist the Tribunal in its determination of an issue or issues in the proceedings;
> (iv) either evidence of a prior request to the witness to attend voluntarily and of the reason why the applicant considers the witness will not attend voluntarily or, exceptionally, the reason why no prior request has been made;
> (v) if it is not intended to serve the application on the proposed witness, the reasons for not doing so;
> (vi) a statement setting out why the applicant considers the issue of a summons would not cause unfair prejudice to any other party, and why it would be in the interests of justice for the Tribunal to issue the summons.

37. If such an application is made, the FTT would of course apply the overriding objective under rule 2 in deciding whether or not to grant such a request. That would include, for example, consideration of whether such an approach is proportionate to the issues to be determined.

38. In addition, the mother has complained about the legibility of the record of proceedings from the previous tribunal hearing. In fact the record is legible in parts and not so clear in others. The FTT office should arrange for a typed copy of that record to be available for the next hearing. Although the FTT's decision has been set aside, the evidence at the previous hearing is still relevant and should be available to the new FTT (see the Tribunal of Commissioners' decision in R(U) 3/88).

39. Finally, in preparing their respective cases for the new FTT hearing, both parents should understand that the FTT will want to focus on the key issues and to hear direct evidence on those points. The parents will accordingly need to focus their evidence on the points that the FTT wishes to examine. One example will suffice of what this should *not* involve.

40. The father in his response to the appeal makes the point that A had a part-time job with a fast food chain and "wasted a lot of money on buying hamster cages, hamsters and things for them to eat and play with. She kept these animals at [the boyfriend's] house as my partner wouldn't have them in our house". The mother's reply was that the father and his partner "live in a five-bedroomed house, have dog(s) and cat(s), yet claim they couldn't accommodate hamsters too. The MATERIAL FACT is that the hamsters were kept at [the boyfriend's] house as that's where A was living for the period in question."

41. The father did not make the claim attributed to him. What he said was that his partner "wouldn't have them in our house", not that they did not have space for them. His partner might have been allergic to hamsters. She might not like the smell. She might be worried the cat would have them for breakfast. We do not know why she would not have the hamsters in the house and frankly it does not matter. Simply because the hamsters resided at the boyfriend's house does not prove that A lived

there too. That *might* be an inference but there may well be an explanation which rebuts that conclusion. So the hamsters are probably not relevant. Nor is A's part-time job nor her alleged profligacy relevant to where she was living. The parents will accordingly need to consider carefully *which evidence best supports their argument that A was living at this address or that address*. The FTT will then form a view on the balance of probabilities.

Conclusion

42. I conclude that the decision of the First-tier Tribunal involves an error of law. I therefore allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be sent back for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 09 November 2016

Nicholas Wikeley
Judge of the Upper Tribunal