IN THE UPPER TRIBUNAL **Appeal No: CTC/1544/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant but only to the extent of setting aside the decision of the First-tier Tribunal sitting at Kidderminster on 14 November 2014 under reference SC014/11/00974 on the basis that it had no jurisdiction as no appealable decision had been appealed to it.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given, namely that the decision under appeal was not one in law against which an appeal could be made.

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. This is yet another case in which the putative appellant and the First-tier Tribunal was misled by HMRC and its defective procedures into thinking that HMRC had made a decision against which an appeal could lawfully be made to the First-tier Tribunal under section 38 of the Tax Credits Act 2002. It is frankly disgraceful that it took until the proceedings reached the Upper Tribunal before the careful industry of Ms Collins of HMRC revealed that the "decision" of 12 April 2012, which had been appealed, dealt with as an appealable decision by HMRC in its appeal response to the First-tier Tribunal and (understandably) addressed as such by the First-tier Tribunal in its decision of 14 November 2014, was not an appealable decision.

2. This unedifying process is not helped, indeed it is positively contributed to, by HMRC's continuing (and, in my view, wholly unjustifiable[1]) inability to even produce a copy of the decision said to be under appeal. A combination of Kafka and Captain Mainwaring might be thought unlikely to come up with such a sorry state of affairs.

3. Fortunately, for the reasons given below, in this case the fact that the 12 April 2012 "decision" has not been shown to be anything which could in law be appealed until Ms Collins's submission of 5 September 2015 has not led to any substantive injustice for either the appellant (the father) or the second respondent (the mother), in what in essence is a dispute about who out of them had the "main responsibility" for their daughter for child tax credit purposes for the latter part of the tax credit year 2011 to 2012.

4. It seems obvious that other claimants might not be so fortunate. The maximum time limit for appealing a tax credit decision which is appealable is 13 months. If a tax credit claimant for very good reason thinks they have appealed a decision which is appealable (when in fact it is not), they may not see any need, and so take no steps, to appeal the later decision which is as a matter of law appealable, and the true state of affairs might not be revealed until more than 13 months have elapsed since the appealable decision was made.

5. Neither the father nor the mother have contested Ms Collins's researches showing that the 12 April 2012 "decision" was not an appealable decision. I accept the submission and evidence of Ms Collins on this point. I take account of her evidence even though I am exercising an error of law jurisdiction because it is evidence which goes to the precedent fact issue necessary to decide whether the First-tier Tribunal had jurisdiction on an appeal.

[1] I say unjustifiable because this is a large Governmental organisation charged by statute with deciding financial entitlements of citizens to important levels of statutorily fixed levels of financial support, where such decisions are meant to be open to independent legal scrutiny by the First-tier Tribunal.

6. Awards of tax credits are made for a year (or the remaining part of the year if the claim is made part way through the year). The 'year' in question is aligned with the tax year (see section 5(1) of the Tax Credits Act 2002) and so falls between 6 April in the first calendar year and 5 April of the next calendar year. A claim for tax credits is required for each tax credit year: section 3(1) Tax Credits Act 2002.

7. As Ms Collins explains, the appellant already had an award of tax credits in the tax credit year from April 2011 to April 2012. That award, on the face of it, must have arisen under a claim made by the appellant for that year, upon which – per section 14(1)(a) of the Tax Credits Act 2002 – the Board of HMRC had made an *Initial decision* to "award" child tax credit for that year.

8. In September 2011 (so in the middle of his tax credit award for that year), the appellant applied to HMRC to have his daughter included in his child tax credit award with effect from 30 August 2011 on the basis that he had main responsibility for her from that date[2]. This on the face of it was a notification by the appellant (the father) of a change of circumstances pursuant to section 6(1) and (2)(c) of the Tax Credits Act 2002 and the Tax Credits (Claims and Notifications) Regulations 2002. The former provide that:

> "**6 Notifications of changes of circumstances**
>
> (1)Regulations may provide that any change of circumstances of a prescribed description which may increase the maximum rate at which a person or persons may be entitled to a tax credit is to do so only if notification of it has been given.
>
> (2)Regulations under subsection (1) may.....
> (c)provide that, in prescribed circumstances, an amendment of an award of a tax credit in consequence of a notification of a change of circumstances may be made subject to the condition that the requirements for entitlement to the amended amount of the tax credit

[2] This appeal need not delve into the 'main responsibility' rules, but for reference the statutory footing for them is in section 8(1) and (2) of the Tax Credits Act 2002 and regulation 3 of the Child Tax Credit Regulations 2002. The decision in *PG –v- HMRC and NG* [2016] UKUT 216 (AAC) carries out a useful and clear review of how the 'main responsibility' test should operate where there are competing claims for child tax credit in respect of a child or children

are satisfied at a prescribed time." (my underlining added for emphasis)

9. (A general conceptual problem with the Tax Credits Act 2002 is that "entitlement" to either working or child tax credits is not something that arises until the end of the tax year for which any award had been made: see sections 17 and 18 of the Tax Credits Act 2002. What is legally in place during the course of the tax year is simply an "award" of tax credit: per section 14 of the same Act. It may therefore be thought to be problematic that the general deeming power in section 6(1) only applies in respect of what a person may be 'entitled' to, which under the Act can only come about after the end of the tax credit year, yet section 6(2)(c) proceeds on the basis that a species of this general deeming allows the award to be changed (for change of circumstances) in the course of the year. An answer to this, and it does not have any real material bearing on this appeal, may be that section 6(1) is setting out a forward looking exercise, what a person "may be entitled" to in tax credits at the end of that tax credit year when the end of year notice under section 17 has been served and the section 18 entitlement decision made, and so section 6(1) is not inconsistent with awards of tax credits being changed in the course of the year as section 6(2)(c) provides for. This perspective may be said to be supported by the terms of section 15 of the Tax Credits Act 2002, which speaks in terms (see further below) of "a change of circumstances increasing the maximum rate at which a person…may be entitled to a tax credit…".)

10. HMRC included the appellant's daughter in his award of tax credits, with effect from 30 August 2011, by amending the awarding decision under section 15 of the Tax Credits Act 2002 in a decision dated 17 October 2011[3]. Section 15 provides as follows:

"**15 Revised decisions after notifications**

[3] For reasons which remain unclear, but again no longer matter on this case, it seems that HMRC issued enquires to both the father and the mother *after* this decision with a view to deciding who of them had the main responsibility for their daughter. Those enquires, apparently, did not lead anywhere.

> (1)Where notification of a change of circumstances increasing the maximum rate at which a person or persons may be entitled to a tax credit is given in accordance with regulations under section 6(1), the Board must decide whether (and, if so, how) to amend the award of the tax credit made to him or them.
>
> (2)Before making their decision the Board may by notice—
>
> (a)require the person by whom the notification is given to provide any information or evidence which the Board consider they may need for making their decision, or
>
> (b)require any person of a prescribed description to provide any information or evidence of a prescribed description which the Board consider they may need for that purpose,
>
> by the date specified in the notice."

11. The other way in which awards of tax credits can be changed in-year is under section 16 of the Tax Credits Act 2002. For completeness it provides as follows:

> "**16 Other revised decisions**
>
> (1)Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board have reasonable grounds for believing—
>
> (a)that the rate at which the tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the tax credit for the period, or
>
> (b)that he has, or they have, ceased to be, or never been, entitled to the tax credit for the period,
>
> the Board may decide to amend or terminate the award.
>
> (2)Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board believe—
>
> (a)that the rate at which a tax credit has been awarded to him or them for the period may differ from the rate at which he is, or they are, entitled to it for the period, or
>
> (b)that he or they may have ceased to be, or never been, entitled to the tax credit for the period,
>
> the Board may give a notice under subsection (3).
>
> (3)A notice under this subsection may—

> (a)require the person, or either or both of the persons, to whom the tax credit was awarded to provide any information or evidence which the Board consider they may need for considering whether to amend or terminate the award under subsection (1), or
>
> (b)require any person of a prescribed description to provide any information or evidence of a prescribed description which the Board consider they may need for that purpose,
>
> by the date specified in the notice."

12. Reverting to the narrative, enquiries were then issued by HMRC to both the father and the mother after the mother had made a fresh claim for child tax credit on 10 February 2012 in which she sought to include her daughter in her claim under the "main responsibility" test. These enquiries were made to establish who had the main responsibility for the daughter for child tax credit purposes from 9 November 2011 (at the time, this date corresponded with the maximum 3 month period the mother's 10 February 2012 claim could be backdated for). Based on the replies it received from the father and the mother, HMRC, to use a neutral phrase, was of the 'view' that the mother had the main responsibility for the daughter from 9 November 2011, and so the father's award of child tax credits for the daughter only covered the period from 30 August 2011 to 8 November 2011.

13. It is at this stage that the "decision" problem arises. By the time HMRC had formed the view set out in the immediately preceding paragraph, the tax credit year 2011 to 2012 had ended or was about to end. On the face of the statutory provisions governing changes that can be made in-year to awards of tax credits, neither section 15 nor section 16 of the Tax Credits Act 2002 applied. The former did not apply because it only covers an increase in the maximum rate of tax credit, and here the effect of the successful claim made by the mother was to *decrease* the amount of child tax credit payable under the award to the father for 2011/2012. The latter also did not apply, or at least could only have applied if the decision under section 16(1) and any the notice under section 16(2) could have been made and served before 5 April 2012, as

section 16 in general only applies "at any time during the period for which an award of tax credit is made" (that is, it can only apply in-year).

14. HMRC could instead have sought to effect the change in the period the father had main responsibility for his daughter in the 2011/2012 tax credit year by using the end of year notice provisions under section 17 of the Tax Credit Act 2002 and then the end of year entitlement decision under section 18 of that Act. Indeed, it seems that it was as part of this process, but not the final section 18 decision making part of it, that led to the 12 April 2012 "decision" being issued, which told the father that the child tax credit award/entitlement for his daughter for the 2011 /2012 year ended with effect from 8 November 2011. It was against that "decision", and only against that "decision", that the father appealed, and which led to the decision of the First-tier Tribunal with which this appeal is concerned.

15. It is convenient at this point to set out the decisions against which there is a right of appeal under the Tax Credits Act 2002. This is dealt with in section 38 of that Act, which so far as is relevant for present purposes provides as follows:

> "**38 Appeals**
>
> (1)An appeal may be brought against—
>
> (a)a decision under section 14(1), 15(1), 16(1), 19(3) or 20(1) or (4) or regulations under section 21,
>
> (b)the relevant section 18 decision in relation to a person or persons and a tax credit for a tax year and any revision of that decision under that section,...
>
> (2)"The relevant section 18 decision" means—
>
> (a)in a case in which a decision must be made under subsection (6) of section 18 in relation to the person or persons and the tax credit for the tax year, that decision, and
>
> (b)in any other case, the decision under subsection (1) of that section in relation to the person or persons and the tax credit for the tax year."

16. As I have noted above, the view HMRC came to on or about 12 April 2012 could not have been a decision under either sections 15 or 16.

Likewise, in terms of the 2011/2012 tax credit year with which we are concerned, it was not a section 14 decision either because that decision had already been made much earlier in the year (on 25 May 2011) and the terms of section 14 do not permit another decision to be made under section 14 for the same year. Sections 19, 20 and 21 are irrelevant on this case. That then leaves the entitlement decision under section 18 of the Tax Credits Act 2002, but as its terms show it is parasitic on a section 17 notice having been issued after the end of the tax credit year and that did not occur in the appellant's case until 29 May 2012.

17. It is perhaps convenient to here set out the terms of sections 17 and 18 of the Tax Credits Act 2002.

> "**17 Final notice**
>
> (1)Where a tax credit has been awarded for the whole or part of a tax year—
>
> (a)for awards made on single claims, the Board must give a notice relating to the tax year to the person to whom the tax credit was awarded, and
>
> (b)for awards made on joint claims, the Board must give such a notice to the persons to whom the tax credit was awarded (with separate copies of the notice for each of them if the Board consider appropriate).
>
> (2)The notice must either—
>
> (a)require that the person or persons must, by the date specified for the purposes of this subsection, declare that the relevant circumstances were as specified or state any respects in which they were not, or
>
> (b)inform the person or persons that he or they will be treated as having declared in response to the notice that the relevant circumstances were as specified unless, by that date, he states or they state any respects in which they were not.
>
> (3)"Relevant circumstances" means circumstances (other than income) affecting—
>
> (a)the entitlement of the person, or joint entitlement of the persons, to the tax credit, or

(b)the amount of the tax credit to which he was entitled, or they were jointly entitled,

for the tax year.

(4)The notice must either—

(a)require that the person or persons must, by the date specified for the purposes of this subsection, declare that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified or comply with subsection (5), or

(b)inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified unless, by that date, he complies or they comply with subsection (5).

(5)To comply with this subsection the person or persons must either—

(a)state the current year income or his or their estimate of the current year income (making clear which), or

(b)declare that, throughout the period to which the award related, subsection (1) of section 7 did not apply to him or them by virtue of subsection (2) of that section.

(6)The notice may—

(a)require that the person or persons must, by the date specified for the purposes of subsection (4), declare that the amount of the previous year income was the amount, or fell within the range, specified or comply with subsection (7), or

(b)inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the previous year income was the amount, or fell within the range, specified unless, by that date, he complies or they comply with subsection (7).

(7)To comply with this subsection the person or persons must either—

(a)state the previous year income, or

(b)make the declaration specified in subsection (5)(b).

(8)The notice must inform the person or persons that if he or they—

(a)makes or make a declaration under paragraph (a) of subsection (4), or is or are treated as making a declaration under paragraph (b) of that subsection, in relation to estimated current year income (or the range within which estimated current year income fell), or

(b)states or state under subsection (5)(a) his or their estimate of the current year income,

he or they will be treated as having declared in response to the notice that the amount of the (actual) current year income was as estimated unless, by the date specified for the purposes of this subsection, he states or they state the current year income.

(9)"Specified", in relation to a notice, means specified in the notice.

(10)Regulations may—

(a)provide that, in prescribed circumstances, one person may act for another in response to a notice under this section, and

(b)provide that, in prescribed circumstances, anything done by one member of a married couple or an unmarried couple in response to a notice given under this section is to be treated as also done by the other member of the married couple or unmarried couple."

"**18 Decisions after final notice**

(1)After giving a notice under section 17 the Board must decide—

(a)whether the person was entitled, or the persons were jointly entitled, to the tax credit, and

(b)if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,

for the tax year.

(2)But, subject to subsection (3), that decision must not be made before a declaration or statement has been made in response to the relevant provisions of the notice.

(3)If a declaration or statement has not been made in response to the relevant provisions of the notice on or before the date specified for the purposes of section 17(4), that decision may be made after that date.

(4)In subsections (2) and (3) "the relevant provisions of the notice" means—

(a)the provision included in the notice by virtue of subsection (2) of section 17,

(b)the provision included in the notice by virtue of subsection (4) of that section, and

(c)any provision included in the notice by virtue of subsection (6) of that section.

> (5)Where the Board make a decision under subsection (1) on or before the date referred to in subsection (3), they may revise it if a new declaration or statement is made on or before that date.
>
> (6)If the person or persons to whom a notice under section 17 is given is or are within paragraph (a) or (b) of subsection (8) of that section, the Board must decide again—
>
> (a)whether the person was entitled, or the persons were jointly entitled, to the tax credit, and
>
> (b)if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,
>
> for the tax year.
>
> (7)But, subject to subsection (8), that decision must not be made before a statement has been made in response to the provision included in the notice by virtue of subsection (8) of section 17.
>
> (8)If a statement has not been made in response to the provision included in the notice by virtue of that subsection on or before the date specified for the purposes of that subsection, that decision may be made after that date.
>
> (9)Where the Board make a decision under subsection (6) on or before the date referred to in subsection (8), they may revise it if a new statement is made on or before that date.
>
> (10)Before exercising a function imposed or conferred on them by subsection (1), (5), (6) or (9), the Board may by notice require the person, or either or both of the persons, to whom the notice under section 17 was given to provide any further information or evidence which the Board consider they may need for exercising the function by the date specified in the notice.
>
> (11)Subject to sections 19 and 20 and regulations under section 21 (and to any revision under subsection (5) or (9) and any appeal)—
>
> (a)in a case in which a decision is made under subsection (6) in relation to a person or persons and a tax credit for a tax year, that decision, and
>
> (b)in any other case, the decision under subsection (1) in relation to a person or persons and a tax credit for a tax year,
>
> is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year."

18. So the "decision" of 12 April 2102 could not have been a decision under section 18 (as the section 17 notice it is dependent on was not issued

until 29 May 2012). If not a section 18 decision, what then was the "decision" of 12 April 2012?

19. Ms Collins provides the acronymic answer. It was a "SLAN". This means "Statement Like an Award Notice. I will set out Ms Collins's context and explanation for it ("TCA" means the Tax Credits Act 2002).

> "Section 17 of the TCA is not a decision making provision. After the end of each tax year, HMRC is required to issue a notice to every claimant detailing the circumstances on which the award for the previous year was made. In the majority of cases, the claimant is required to make a return by a specified date. Certain claimants are not required to make a return but are deemed to have done so by a specified date. The information on the declaration or deemed declaration serves two distinct and separate purposes.
>
> It forms the basis for a s18 TCA decision by which entitlement for the tax year just ended will be determined. It also is accepted as a claim for the new year, resulting in a s14(1) decision in respect of that year [per regulations 11 and 12 of the Tax Credits (Claims and Notifications) Regulations 2002].
>
> A s18 decision is conclusive as to the claimant's tax credit entitlement in the year to which the s18 decision relates, save for prescribed circumstances.
>
> Section 24(4) TCA allows HMRC the discretion to, in prescribed circumstances, continue to make payments for any period, after the tax year, when the claimant is entitled to make a claim for tax credit for the next tax year [s.24(4) TCA and regulation 7 of the Tax Credits (Payment by Commissioners) Regulations 2002]. In effect s24(4) allows for HMRC to choose to continue to make payments during a period where entitlement for the previous tax year has not yet been decided (a s18 decision has not been taken) and where a decision to make an award for the current tax year has not yet been decided (a s14 decision has not been taken). These are colloquially known as provisional payments.
>
> Where an amendment is made during the provisional period a Statement Like an Award Notice (SLAN) is issued.
>
> A SLAN is not a notice against which an appealable decision is made; it is a notice to tell the claimant that we have amended their provisional payments. There is no obligation for HMRC to issue these notices, under s.23 TCA, but they allow the claimant to be kept up to date with what circumstances HMRC have based their provisional payments upon."

20. To complete the legislative jigsaw, section 24(4) of the Tax Credits Act 2002 provides that:

> "(4)Where an award of a tax credit has been made to a person or persons for the whole or part of a tax year, payments may, in prescribed circumstances, continue to be made for any period, after the tax year, within which he is or they are entitled to make a claim for the tax credit for the next tax year.";

and section 23 of the same Act provides as follows:

> "**23 Notice of decisions**
>
> (1)When a decision is made under section 14(1), 15(1), 16(1), 18(1), (5), (6) or (9), 19(3) or 20(1) or (4) or regulations under section 21, the Board must give notice of the decision to the person, or each of the persons, to whom it relates.
>
> (2)Notice of a decision must state the date on which it is given and include details of any right to appeal against the decision under section 38.
>
> (3)Notice need not be given of a decision made under section 14(1) or 18(1) or (6) on the basis of declarations made or treated as made by the person or persons in response to the notice given to him or them under section 17 if—
>
> (a)that notice, or
>
> (b)in the case of a decision under subsection (6) of section 18, that notice or the notice of the decision under subsection (1) of that section,
>
> stated what the decision would be and the date on which it would be made."

21. The SLAN therefore seems to cover the period after one tax credit year has ended but the s.18 entitlement for that year has not yet been decided nor has the s.14 award for the new tax credit year been decided, and so allows tax credit payments to continue in this interregnum. I have, I confess, some difficulty in understanding the basis on which section 24(4) did apply here so as allow payments to continue to be made to the father after 5 April 2012. I say this because the effect of the HMRC's finding (though not deciding) on 10 April 2012 (the notification in the SLAN was made two days later) would appear to have been to *reduce* the level of child tax credit due to the father for the 2011/2012 tax credit year given HMRC's finding that he only had the

main responsibility for his daughter from 30 August 2011 to 8 November 2011 and not (as had been decided under the section 15 decision of 17 October 2011) that he had main responsibility for his daughter from 30 August 2011 until the end of the year.

22. My difficulty as to the application of section 24(4) probably does not matter, however, because the SLAN is an entirely non-statutory notice (see section 23 above), and so did not need to be tied to any payments made under section 24(4). In effect it told the father that the part of his award of child tax credit covering his daughter for the tax credit year 2011 to 2012 was to change because HMRC had come to the view that he did not have the main responsibility for his daughter from 9 November 2011 to 5 April 2012.

23. Even Ms Collins, however, has been unable to put before me the SLAN issued to the appellant father on 12 April 2012, which simply reemphasises the criticism I have made of HMRC's working practices in paragraph 2 above. Her submission has either been based on: (a) a process of deduction, the results of which I accept, that given the date 12 April 2012 and the dates for the sections 14, 15 decisions given above and the date the section 17 notice was issued for the 2011/2012 tax credit year (all of which she presumably was able to check on some computer or other database), what was issued on 12 April 2012 could not have been an appealable decision and must instead have been a SLAN; or (b) positive information on the same database showing that a SLAN was in fact issued on 12 April 2012. Whichever applies, quite why the person who wrote the appeal response for the First-tier Tribunal was unable to do the same as Ms Collins has done and tell that tribunal it was not an appealable decision remains wholly unexplained. If that had occurred then it would have saved everyone a lot of time and energy.

24. Absent a copy of the actual notice of 12 April 2012, but accepting that it was a SLAN notice, I have to assume that it did tell the appellant that it **was** a decision he could appeal against to the First-tier Tribunal, or it

at least it gave him that impression: if it did not then he would not have appealed against it. I fail to understand, given that the SLAN is not a decision notice at all let alone a decision that is capable of being appealed and is instead a creature all of HMRC's own devising, why HMRC was not capable of highlighting on it in bold capitalised lettering, or by some other way, that it was not a decision and could not be appealed. Had it done so then the father was very unlikely to have appealed it, but had he done so and had the notice been included in the appeal bundle then the First-tier Tribunal in all likelihood would not have been misled into thinking it did have an appealable decision before it.

25. The failure by HMRC to produce the SLAN notice of 12 April 2012, or absent the SLAN being produced the failure of the HMRC appeal's writer to interrogate HMRC records so as to be able to at least submit to the First-tier Tribunal that it either was in fact, or could only have been, a SLAN, is I am afraid yet another example of HMRC's failure to accord the statutory appeals under section 38 of the Tax Credits Act 2002, and ancillary issues such as whether an appeal does arise, the proper and necessary respect those appeals must be given.

26. To take perhaps the most obvious example, rule 24(4)(a) and (b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the "TPR"), places HMRC under a legal duty (the word "must" is used) to provide to the First-tier Tribunal with its appeal response "a copy of any written record of the decision under challenge" if the appellant did not provide the same with his or her notice of appeal, and "copies of all documents relevant to the case in the decision maker's possession…". On an appeal where an appealable decision has been made, given the duty under section 23 of the Tax Credits Act 2002 it seems to me plain that HMRC are under a duty to provide the First-tier Tribunal with a copy of the decision under appeal. By not doing so, HMRC stands in breach of its legal duty under rule 24(4)(a) of the TPR. In my judgment it is no answer to this to say, as HMRC's appeal responses to the First-tier Tribunal habitually say, that the decision was

issued automatically by HMRC's computer to the claimant only and a copy of the decision cannot thereafter be obtained by HMRC. HMRC must be able to obtain it in order to meet its statutory duty of disclosure in any case where an appeal is made against the decision.

27. The same hold true in my judgment in a case like this one, where the appeal response ought to have said to the First-tier Tribunal that there was no appealable decision before it and it therefore had no jurisdiction to make any decision on the purported appeal beyond ruling that it had no jurisdiction (see *R(I) 17/94*). In such a case it seems to me that rule 24(4)(b) of the TPR required the SLAN to be put before First-tier Tribunal as a "document relevant to the case", and it *ought* to have been in HMRC's possession.

28. Had any of the above forensic steps been taken then this appeal ought never to have got off the ground, though an appeal could have been made against the later section 18 decision. As it is, everyone's valuable resources have been expended on an appeal that ought to never have been. I suspect Ms Collins was being deliberately understated when she said that HMRC's appeal response "did not assist the [First-tier Tribunal]".

29. If HMRC is to (wrongly) persist in not providing First-tier Tribunals with copies of the "decisions" under appeal (be they appealable decisions or SLANs), or in their absence any sensible and factually sound explanation in the appeal response about all the relevant decision-making history, then First-tier Tribunals should in my judgment be astute to checking on that history and, in particular, on periods when what may have been issued was a SLAN (the most obvious candidate being anything issued in the month of April). And HMRC can expect to be required to provide such information and clarifications, in appropriate cases, by way of directions issued by the First-tier Tribunal, directions which HMRC is <u>obliged</u> as a matter of law to follow (unless it can persuade the First-tier Tribunal to vary the directions).

30. Coming back then to the history of this case, the SLAN notice of 12 April 2012 was wrongly treated by all at the time as a decision that could be appealed. HMRC in its response to the First-tier Tribunal changed its position, on the basis of further evidence that had been submitted by the father, and argued that the father should be treated as having the main responsibility for his daughter until (and including) 23 January 2012. That in the result was what the First-tier Tribunal decided. Given there was no appealable decision before it under the Tax Credits Act 2002, it had no jurisdiction in my judgment to make such a decision. However, how, if at all, could this jurisdictional lacuna be rectified?

31. Ms Collins suggested that this could be done by the Upper Tribunal treating the "present case as being an appeal against the section 18(1) decision notified to the father on 7 February 2013". This was the end of year decision following the issue of the section 17 notice on 29 May 2012. An immediate difficulty with this suggestion was that on one analysis the only appeal the father had in fact submitted was one dated 27 April 2012, and that could not have been an appeal against a decision still some 9 months off being made. Further, the appeal had to be to the First-tier Tribunal. If no appeal had in fact ever been made, or could be treated as having been made, against the 7 February 2013 decision there would be no appeal. In addition, the mother could clearly have an interest in arguing whether the father had ever appealed the correct decision.

32. Both parents filed submissions in reply to those made by Ms Collins for HMRC. Neither, perhaps understandably, sought to grapple with the jurisdictional problems thrown up by the SLAN. I then issued further directions on the appeal, in part because of the matters referred to at the end of the immediately preceding paragraph. These directions are now really of historic interest only but I set out the salient parts of them in order to frame that which follows and because they may arise in other similar cases.

"First, if HMRC's submission is correct then it would seem that the "decision" of 12 April 2012 that [the father/appellant] purported to appeal was not a decision which could be appealed to the First-tier Tribunal under section 38(1) of the Tax Credits Act 2002. Neither [the father] nor [the mother] has addressed this issue. It is important, however, because if the First-tier Tribunal had no jurisdiction under the law to hear and decide the appeal then its decision would very arguably have to be set aside solely on that basis.

It is HMRC's view, from its submission to the Upper Tribunal, that the relevant decision which was appealable was one made on 7 February 2013. HMRC asserts that this was a decision made under section 18 of the Tax Credits Act 2002 ("TCA"). Beyond this assertion, I can find no evidence of this decision in the appeal bundle. A copy of this decision letter must be supplied by HMRC or the evidence from which it has concluded that a section 18 decision in the terms set out above was made on 7 February 2013. On the basis of what HMRC says in its submission to the Upper Tribunal that decision in effect decided that [the father] had main responsibility for [the daughter] from 30 August 2011 to 23 January 2012. (In other words, for exactly the same period the First-tier Tribunal found in **allowing** [the father's] appeal.)

If such a decision was made on 7 February 2013 then it may be possible to treat [the father's] seeking to re-open the appeal on 12 February 2013 (see page 61) as amounting to him appealing the 7 February 2013 decision. (This at least would allow the substantive issue of "main responsibility" for the period 24 January 2012 to 11 May 2012 to be addressed on an appeal made by [the father].) However no party to this appeal has had the opportunity to make representations on this issue. For example, page 61 is silent about how [the father] contacted HMRC on 12 February 2013. This may be important because it would appear that at the relevant time under regulation 2(2) of the Tax Credits (Notice of Appeal) Regulation 2002 (SI 2002/3036), the notice of appeal had to be in writing. If that contact was not in writing, on what other basis may [the father] be said to have appealed the 7 February 2013 decision? (I would note, however, that section 54(2) of the Taxes Management Act 1970 requires any notice from a party wishing to resile from settlement of his appeal to be in writing, which may indicate that the 'contact' on 12 February 2013 was written. No doubt HMRC and/or [the father] can evidence this if that is the case.)

Absent such evidence of a written appeal against HMRC's decision of 7 February 2013, I am unclear as to the basis for HMRC's submission in paragraph 44 on page 251 that I can "accept the present case" as being an appeal to the First-tier Tribunal against the 7 February 2013 decision.

The second issue concerns the decision of HMRC dated 31 July 2012 concerning [the mother] and the First-tier Tribunal's decision allowing [her] appeal against that decision. HMRC's submission to the Upper Tribunal does not address either of these decisions.

It may assist to understand (a) the background to and basis for the 31 July 2012 decision, and (b) what effect, if any, it had on the section 18 decision now said to have been made on 7 February 2013 in respect of

[the father's] entitlement to child tax credits for the 2011/2012 year; and HMRC's further submission should address both of these issues. Was, for example, either decision made with reference to the other? The First-tier Tribunal appeal papers for [the mother's] appeal against the 31 July 2012 decision describe it as the *final decision for the tax year 2011-2012*. That would suggest that it was a section 18 decision for the tax credit year that had ended on 5 April 2012. Is this correct? The reason for the child tax credit part of the entitlement decision was that [the mother] was only entitled to child tax credit up to 29 August 2011 because she did not have the 'main responsibility' for [the daughter] from 29 August 2011.

I note from page 55 of the appeal bundle that [the mother] was added as a party to [the father's] appeal. However, what effect, if any, does this have on her appeal? ([The father] appears as a party – the second respondent – on [the mother's] appeal, though so far I have been unable to identify any judicial direction making him a party.) If what is set out….below is correct then [the mother's] entitlement/main responsibility for 2011/2012 could not be decided on [the father's] appeal. On what basis does her having been made a 'party' to [the father's] appeal under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 alter this (if at all). (See, however, *CM –v- HMRC* (TC) [2014] UKUT 272 (AAC).)

Further, if [the father's] rights cannot be decided on [the mother's] appeal and vice versa, what binding role, if any, can the First-tier Tribunal's decision on [the mother's] appeal (which arguably remains in place as the final decision on [the mother's] entitlement to child tax credit for the 2011/2012 year) have on any decision on [the father's] appeal (if it was to be re-decided)? To unpack this further, if [the father's] appeal was to be re-decided on the facts and law as to his entitlement to child tax credit for 2011/2102, would it be open to [the mother] to now argue relying on the legal concepts of *issue estoppel* or *res judicata* that any tribunal considering [the father's] appeal would be bound to accept that she had main responsibility for [the daughter] from 24 January 2012 and [the father] did not: see, for example, *CH/704/2005*? The situation here may be different from that contemplated in *CM* (above) because here only one of the First-tier Tribunal's decisions has been appealed. Or is the answer simply that if [the father] was to succeed on any remitted appeal (if this was to be the result of this appeal to the Upper Tribunal) in establishing he had main responsibility for [the daughter] from 24 January 2012 to 11 May 2012 then both that decision and the (same) decision concerning [the mother] would have to stand and be honoured by HMRC?

A further, and perhaps related, issue might be what is the legal scope of any section 18 decision? On one analysis it may be said just to be whether there is entitlement for a tax credit year and if so the level of that entitlement for that year: per section 18(1)(a) and (b) of the TCA. That would suggest that the reasons for the decision – here *why* [the father] only had 'main responsibility' for [the daughter] for part of the tax credit year was not part of the decision. If that is so then it would seem even less likely that the person who did have the main responsibility for the child for the other part of that tax credit year could form any part of the section 18 decision on [the father's]

> entitlement. In other words, the section 18 decision of 7 February 2013 was not made up of "[The father is] entitled to child tax credit for [this part of the] tax credit year; [the mother is] entitled for the [the other part of the] tax credit year". That, arguably, would seem to flow from the terms of section 3(3) of the TCA governing claims: the person the section 18 decision relates to is the (single) person who made the claim and it that person's entitlement only which is decided under section 18. If that is so then on an appeal against the section 18 decision the only issue arguably is what that person's entitlement was for the tax credit year; that is, what periods that person had main responsibility for the child. It is not part of such an appeal, if this is correct, to decide (in any binding legal sense in terms of the other person) which other person (or persons) had main responsibility for the child. Put another way, is it the case that in giving its decision on [the father's] appeal the First-tier Tribunal could not give any binding decision on [the mother's] main responsibility/entitlement to child tax credit?"

33. The father's response to these directions argued, it seems to me entirely understandably, that he had at all times followed the guidance of HMRC on how to appeal and how to reinstate an appeal settled under section 54 of the Taxes Management Act 1970. Given the course this appeal to the Upper Tribunal has since taken, I do not need to address whether the father's letter of 13 February 2013 confirming his reinstatement of his previously settled ought to have been, or could still be, treated by the First-tier Tribunal as an appeal against the section 18 decision of 7 February 2013.

34. HMRC also filed a response to the directions. Again, its author was Ms Collins. These said that HMRC would have no objection to the father's 'reinstatement' letter of 13 February 2013 being treated as an appeal against HMRC's decision of 7 February 2013. Further, HMRC's answer was "Yes" to the question I had posed "is the answer simply that if [the father] was to succeed on any remitted appeal…in establishing he had main responsibility for [the daughter] from 24 January 2012 to 11 May 2012 then both that decision and the (same) decision concerning [the mother] would have to stand and be honoured by HMRC?".

35. The last part of HMRC's response, however, revealed the important information that the father had in fact been paid child tax credit as if he had had the main responsibility for his daughter from 30 August 2011

to the end of the tax credits year on 5 April 2012, and that HMRC had decided not to recover any of these sums of child tax credit from the father.

36. This new information led me to issue a final set of directions. These said as follows:

> "If I have understood HMRC's most recent response of 9 September 2016 correctly, it seem to me to raise two potentially important and relevant issues.
>
> The first is that that the HMRC 'decision' of 12 April 2012 appealed by [the father] to the First-tier Tribunal was not an appealable decision under section 38 the Tax Credits Act 2002. It was, if HMRC are correct, not even a decision at all, and was not therefore a decision under section 14, 15, 16 or 18 of that Act. In consequence, the First-tier Tribunal simply had no jurisdiction to entertain an appeal against that 'decision' and erred simply on that basis in even deciding the appeal. However, HMRC suggest that the First-tier Tribunal could treat [the father's] letter of 19 February 2013 as an appeal against its final decision of 5 February 2013 under section 18 of the Tax Credits Act 2002 in respect of his entitlement to tax credits for the tax credit year 6 April 2011 to 5 April 2012. Such a decision would have encompassed the issues concerning child tax credit entitlement for that year, and so would cover issues as to [the father's] main responsibility for [the daughter] for that year. If this is correct then it seems to me that the remedy on this appeal, **if it needs to continue** (as to which see the second issue below), would be to (a) set aside the decision of the First-tier Tribunal of 14 November 2014 simply on the basis that it had no jurisdiction as it had no appeal before it, and (b) ask the First-tier Tribunal to consider whether [the father's] letter of 19 February 2013 is a valid appeal against the section 18 decision of 5 February 2013. If it does then new appeal proceedings would begin against that decision.
>
> However, the second issue arising from HMRC's response suggests that there may well be no substantive issue left affecting any of the parties, and [the father] in particular, which would merit any further consideration of an appeal against the 5 February 2013 section 18 decision. The reason I say this is that, as I understand HMRC's response, [the father] has in fact been *paid* child tax credit on the basis of his having the main responsibility for [the daughter] for the period from 30 August 2011 to 5 April 2012, but HMRC have now said that even if any part of that payment was an overpayment it is not to be recovered from [the father]. If this correct then given that [the father] has in effect been treated in all practical respects (i.e. the payment of child tax credit) as if he had the main responsibility for [his daughter] for all periods of time that could be raised on any appeal against the 5 February 2013 section 18 decision, and that practical consequence is now not to be reversed, a serious question arguably arises as to what would be the point in him continuing with this appeal and/or seeking to appeal the 5 February 2013 decision. Put bluntly, even if he won

> that appeal on "main responsibility" no more money would fall to be paid to him in child tax credit for the year 2011/2012.
>
> I recognise that, as I understand it, [the father] may wish to argue that he had the 'main responsibility' for [his daughter] for a period *beyond* 5 April 2012 (up to, I think, 11 May 2012). However any such period would fall after the tax credit year 6 April 2011 to 5 April 2012 and could not therefore be an issue on any appeal against the 5 February 2013 section 18 decision. [The father's] remedy, if he wished to pursue the period after 5 April 2012, would be to appeal (or have appealed) decisions made by HMRC about the 6 April 2012 to 5 April 2013 tax credit year. HMRC might usefully be able to identify those decisions and whether any appeals have been made by [the father] against any of those decisions (and the result of any such appeals, if known).
>
> If the above is correct, and I stress "if", then an issue is likely to arise as to the appropriate remedy to afford [the father] on this appeal to the Upper Tribunal (if he does not now seek to withdraw this appeal on the basis that no issue of practical substance can now arise on the appeal or any appeal remitted to the First-tier Tribunal to decide about his entitlement to child tax credit for the tax credit year 6 April 2011 to 5 April 2012). One course may simply be to dismiss the appeal and take no further steps, section 12(2) of the Tribunals, Courts an Enforcement Act 2007 not requiring the Upper Tribunal to set aside a decision of the First-tier Tribunal even if it has erred in law. Another course would be for the Upper Tribunal to set aside the First-tier Tribunal's decision but remake its decision under section 12(2)(b)(ii) of the Tribunals, Courts an Enforcement Act 2007 simply to the effect that there is no jurisdiction to decide the appeal as the 'decision' of 12 April 2012 is not in law appealable. Either course would then require [the father] to ask the First-tier Tribunal to treat his letter of 19 February 2013 as being a valid appeal against the 5 February 2013 section 18 decision. Whether that appeal ought then to be accepted or proceed if accepted may be an issue [the father] may be called upon to address by the First-tier Tribunal if there would be no material benefit to [the father] even if he was to win that appeal.
>
> If it is to be disputed that [the father] has in fact been paid child tax credit covering [his daughter] from 30 August 2011 to 5 April 2012 then it would obviously be sensible for me to have in advance from [the father] and HMRC any and all such evidence as they have about payments of child tax credit made for that period."

37. Despite my having directed submissions in response to these directions from all parties, only HMRC and the mother have replied. Ms Collins for HMRC had made further researches. These showed that HMRC had delayed making its decision about who out of the father and the mother had had the main responsibility for the daughter in the 2012/2013 tax credit year. As the father had, apparently, incurred child care charges for his daughter for that year, Ms Collins had authorised an ex gratia

payment to be made to the father by HMRC as if he had had main responsibility for his daughter from 6 April 2012 to 12 May 2013. As for the tax credit year 6 April 2011 to 5 April 2012, Ms Collins confirmed that the 'overpayment' to the father for that year (i.e. made up of his being treated as having main responsibility for his daughter until 5 April 2012) had been written off and any monies already recovered were to be repaid to the father. Despite Ms Collins saying that the father was aware of these developments and had confirmed he would be writing to the Upper Tribunal, he has not done so.

38. The mother filed her submissions through her welfare rights representative. These said that she had no objections to whether there was an appealable decision and accepted what had been set out in the directions set out in paragraph 35 above. The submissions ended by asking HMRC to clarify with the mother whether she had been correctly paid child tax credit for her same daughter in the tax credit year 2011/2012. This is not a matter I can rule on on this appeal. A copy of the mother's submission of 27 October 2016 has already been issued to HMRC and hopefully Ms Collins will be able to provide the mother with the clarification she seeks.

39. It is perhaps not surprising that the father has made no response given that the result is that he has been treated in cash terms as if he had the main responsibility for his daughter from 30 August 2011 to 5 April 2012 (and throughout the whole of the following tax credit year as well). In the circumstances, I take the second option I suggested in the penultimate paragraph of the directions set out in paragraph 36 above and give the decision as set out above.

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

Dated 7th November 2016