DECISION ON THE APPEAL 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 Harlow First-tier Tribunal dated 14 July 2015 under file reference SC133/14/00342 involves an error on a point of law. The Tribunal's decision is therefore set aside.

The Upper Tribunal is in a position to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows. The Upper Tribunal re-makes the decision accordingly:

> ***"The Appellant's appeal is allowed.***
>
> ***The Appellant was entitled to claim tax credits as a single person at all material times. Accordingly HMRC's decision to the contrary in relation to the 2012/13 tax year, dated 25 October 2013, is set aside."***

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

REASONS FOR DECISION

Introduction

1. The Appellant was born in Hungary in 1985. He probably cannot remember life there before the collapse of the former Communist regime in 1989. He has, however, doubtless heard tales from his parents and grandparents about the faceless and stifling government bureaucracy operating in Hungary before the restoration of democracy. He arrived in the UK in 2012 to work. He probably thought he had left those family memories well behind. Little did he know; his problems with Kafkaesque officialdom had only just begun.

The background to the tax credits claim

2. The Appellant lived in a shared house in Chelmsford with four other Hungarian nationals. He started work on a self-employed basis and began claiming working tax credits in the Spring of 2012. In March 2013 the Appellant advised Her Majesty's Revenue and Customs (HMRC) he was no longer self-employed but had started work for a company as an employee.

3. At some point in the 2012/13 tax year HMRC also appear to have formed the view that the Appellant and one of the Hungarian women living at the same address were living together as husband and wife. The basis for this hunch/view/decision is still even today wholly unclear (other than that the Appellant and his alleged partner shared the same address – but then so did their housemates). HMRC never provided the First-tier Tribunal (the Tribunal) with any evidence whatsoever to support its decision (if that is what it was).

The HMRC letters

4. On 13 September 2013 HMRC sent the Appellant a letter headed **Tax credits from 06/04/2013 to 05/04/2014** (emphasis as in original). It stated "Thank you for telling us about your recent change in circumstances. As a result of this change, you are no longer entitled to tax credits. We will now stop paying you tax credits." It stated

he had been overpaid £189.71 in working tax credit in the (then current) 2013/14 tax year. The letter carried the HMRC from reference TC607, otherwise known as a Statement of Account (or SOA), which is issued when provisional payments of tax credits in the current tax year are stopped. This TC607 letter said nothing about any appeal rights.

5. On 23 October 2013 HMRC sent the Appellant a further letter (with HMRC form reference TC610), described as a "NOTICE TO PAY under section 29(3) of the Tax Credits Act 2002", again stating he had to repay £189.71 in tax credits in relation to 2013/14. The Appellant repaid the sum in question as he did not wish to get into trouble.

6. On 25 October 2013 HMRC sent the Appellant yet another letter (with HMRC form reference TC602(J), this time described as a "**Provisional tax credits statement for 06/04/2012 to 05/04/2013**" (emphasis again as in original). The letter started off as follows:

> "**Summary**
>
> This is not a decision about your entitlement to tax credits.
> The amounts shown on this form are provisional."

7. The letter then went on to state that he had to repay £2,150.16 in tax credits for the (previous) 2012/13 tax year. Although the letter ran to 3 pages of text it did not explain why there was an overpayment or how it had been calculated. It did say that he had claimed as an individual and *if* he got married or lived together then he would have to advise the HMRC office. It gave no inkling whatsoever that HMRC thought he was actually in a relationship.

8. I interpose here the observation that the Tribunal bundle, comprising the HMRC submission and various further documents, and assembled in an apparently random fashion without the intervention of any human agency, included only the first page of the letter of 23 October 2013 and no copy at all of the letter of 25 October 2013. This is despite the fact that the Appellant had clearly sent the Tribunal office complete copies of both letters, as they were annotated in his handwriting (which originals I located on the Tribunal office's administrative file).

The Appellant's appeal(s)

9. On 8 November 2013 the Appellant telephoned HMRC for an explanation for the alleged £2,150.16 overpayment. He was told – according to his own letter to HMRC dated 22 November 2013 – that "you think that I am in a relationship and I do not have enough proof that I am single." The Appellant stated he was single, although living in the same house as four other Hungarians, and that he "came to the UK to work, not looking for a relationship". He sent in an appeal form dated 22 November 2013 (a copy of which is only on the Tribunal office's administrative file).

10. On 22 January 2014 HMRC received another appeal notice from the Appellant, in which he stated – unsurprisingly – that he was appealing against the decision dated 25 October 2013.

11. On 12 February 2014 HMRC acknowledged the Appellant's appeal. HMRC's letter stated "*Your appeal was against the decision dated 12 December 2014*". This was, in one sense, nonsense. The Appellant had not appealed in advance against a future decision (as his own puzzled annotation noted: "???? The date is not here

yet"). His second notice of appeal had made it clear he was appealing against the decision dated 25 October 2013. The HMRC letter also asked for further information about his circumstances, which the Appellant duly supplied.

12. I interpose here that thanks to the valiant efforts of Mr John Best of HMRC, who has unravelled at least some of this mess, it appears that HMRC did in fact "manually" issue a decision on 12 December 2013. I say "appears" advisedly, as of course there is no trace of any such decision in either the hearing bundle or on the Tribunal office's administrative file (by now the reader will have gathered that to expect otherwise, notwithstanding the requirements of rule 24(4)(b) of the Tribunal procedure (First-tier Tribunal) Rules 2008 (SI 2008/2685), is wholly unrealistic in this Kafkaesque world).

13. Mr Best advises that this HMRC decision of 12 December 2013 was in the same terms as the notices dated 13 September 2013 and 25 October 2013 and was a decision under section 18 of the Tax Credits Act 2002 (the 2002 Act). It (apparently) asserted that the Appellant was not entitled to claim working tax credit as a single person in the 2012/13 tax year as he was living together as husband and wife with one of his Hungarian housemates. I have to say I have some doubts as to whether, assuming for the moment it was sent, the Appellant ever received the decision letter of 13 December 2013 – he has been quite meticulous in his account of events and has at various stages appended copies of all other HMRC letters, but he makes no mention of any HMRC letter of this date. For present purposes, however, I disregard this complication.

The HMRC submissions to the Tribunal

14. On 2 July 2014 HMRC sent the Tribunal office a submission (a submission which, naturally, did not find its way into the hearing bundle). The submission stated that the Appellant had been sent a decision notice on 13 September 2013 stating that he was not entitled to tax credits for the 2012/13 tax year as he was living together with his partner and he had incorrectly claimed as a single person. The letter of 13 September 2013 itself, of course, was not produced. However, a screenshot of the HMRC tax credit computer records system apparently supported the assertion made in the submission. However, the details on that screenshot bear no relation whatsoever to the copy of the TC607 letter of 13 September 2013 which is elsewhere on file. The HMRC submission further asserted that the appeal of 21 November 2013 (presumably 22 November 2013) was more than 30 days outside the 30 day time limit for appealing the decision of 13 September 2013. HMRC added that it was not accepting the late appeal and referred the matter to the Tribunal for consideration.

15. I also note that as the HMRC submission was not added to the appeal bundle, the screenshot of the HMRC tax credit computer records system was not in the hearing case papers for the Tribunal (although it was buried on the Tribunal office's administrative file). It also seems highly likely that the Appellant was never sent a copy of this "evidence". Be that as it may, on 2 July 2014 HMRC also wrote the Appellant a letter advising him of the referral to the Tribunal. The Appellant annotated a copy of this letter and sent it to the Tribunal office (a copy which, yet again, inevitably did not get into the appeal bundle) pointedly noting that "after more than 7 months you sent me a letter that you got it [i.e. my appeal], what previously said you did not, but Royal Mail confirmed".

16. On 18 July 2014 Judge Guest – understandably, on the basis of the law as it was then understood – issued a directions notice warning that the Tribunal was

minded to strike out the appeal as out of time. She invited the Appellant's representations. Yet again, no copy of this notice appeared in the hearing bundle.

17. On 31 July 2014 the Appellant replied to the Tribunal office. His letter did not distinguish between HMRC or the Tribunal. He wrote that "There is something wrong with your system, or you just do not care at all, and write everything without a check back, everything is correct or not…" He added "Also I do not understand that I had to prove I am in not relationship with anybody, but how you can prove if I am in it… You should prove that I am in a relationship and you have the right to ask the money back from me." He ended with the rather plaintive, if plainly unrealistic, question: "There is any office where I can go in and speak with somebody, because it could be much easier and faster?" Again, this letter failed to make its way to the appeal bundle.

18. On 27 August 2014 Judge Jerman instructed the Tribunal clerk to send the Appellant's letter of 31 July 2014 with enclosures to HMRC for its comments. There was no response from HMRC.

19. On 28 October 2014 Judge Macdonald, observing that the HMRC notice dated 13 September 2013 did not say anything about appeal rights, admitted the Appellant's appeal. Judge Macdonald also directed HMRC to file a full submission within 6 weeks. Again, nothing happened, so on 7 January 2015 Judge Clarke issued further directions for HMRC to file a full submission within a further 5 weeks. In fact by now HMRC had belatedly provided a submission, also dated 7 January 2015, which seems to have crossed in the post with Judge Clarke's directions.

20. However, HMRC's supplemental submission was not a full submission. In short it (again) dealt only with the issue of whether the appeal was late and ignored the wider merits of the case. It argued that Judge Macdonald had been wrong to admit the Appellant's appeal as (a) it was late and (b) HMRC had not treated it as made in time under section 39A of the 2002 Act. It also argued that the direction that HMRC should supply a full submission should itself be revoked. This supplemental submission again identified the decision under appeal as being that dated 13 September 2013, and included the following paragraph of bureaucratic gobbledegook, which ends with a conclusion that contradicts the submission being made by HMRC:

> "I would ask Tribunal to note that the decision of 13 September 2013, was notified to [the Appellant] on a 'Statement Like An Award Notice' (SLAN) which is not a decision carrying appeal rights. Instead it is a notice issued in the period after the tax credits year has ended and showing the change has been applied to the tax credits computer system pending the final decision for the year being made. However, as HMRC have previously accepted this date as the date of appeal, we cannot now say the appeal is not valid."

21. This passage makes little if any sense in English. I can only imagine what it sounds like when translated into Hungarian. It is probably no more coherent than "my hovercraft is full of eels".[1]

The Tribunal's final decision

22. On 14 July 2015 the matter came before a First-tier Tribunal. The District Tribunal Judge dismissed the appeal and confirmed the HMRC decision dated 13 September 2013. The Tribunal found that there was no evidence that any preceding

[1] Monty Python, *The Hungarian Phrasebook Sketch* (1970).

entitlement decisions had been appealed within the 30 day time limit. The Tribunal also found for good measure that Judge Macdonald did not have any power to admit the supposedly late appeal.

23. On 17 February 2016 the same District Tribunal Judge recognised there had been some procedural confusion in the matter, but refused to extend the time limit for appealing to the Upper Tribunal. That ruling was issued on 25 February 2016.

The proceedings before the Upper Tribunal

24. On 29 March 2016 the Appellant lodged his application for permission to appeal with the Upper Tribunal, four days late.

25. On 24 June 2016 Upper Tribunal Judge Mitchell gave the Appellant permission to appeal. In doing so he waived to the extent needed any requirement of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). In doing so Judge Mitchell by implication both granted a modest extension of time under rule 5 and in effect certified the requirements of rule 21(7) as being met, i.e. that the interests of justice meant the application should be admitted, notwithstanding that the application to the First-tier Tribunal had been out of time.

26. The "interests of justice" precondition was plainly met; as Judge Mitchell noted, HMRC appeared to have disputed the Appellant's appeal, "arguing there was no evidence that he had appealed in time while, at the same time, informing the Tribunal that the apparent decision was not a decision at all." Judge Mitchell expressed concern that the Appellant may "feel the 'system' to date has been playing games with him' and thus asking him "to chase shadows".

The HMRC response to the appeal before the Upper Tribunal

27. I am greatly indebted to Mr Best, the HMRC's representative in these Upper Tribunal proceedings, who supports the Appellant's appeal to the Upper Tribunal, for his submission and his sterling work in untangling this unholy mess.

28. Mr Best helpfully starts by conceding, by way of a masterly understatement, that in this case "HMRC's decision making is somewhat unclear". Mr Best also makes it clear that there was simply no evidence that the Appellant and his alleged partner were a couple – "they had an address in common, the house in multiple occupation, but, on the evidence, they did not share an emotional life". He accordingly fully supports the Appellant's appeal to the Upper Tribunal.

29. Mr Best then poses the question "What species of decision did HMRC make?" and spends the next three pages answering that conundrum. His submission is that HMRC had been trying to make an end-of-year final decision under section 18 of the 2002 Act to the effect that the Appellant was not entitled to tax credits for the 2012/13 tax year (because of his alleged relationship status). Mr Best also surmises that (unspecified) problems with the tax credits computer system meant that a section 18 notice could not be issued at the time. A section 18 decision, of course, must be notified along with its appeal rights (sections 23 and 38(1)(b) of the 2002 Act).

30. Instead, Mr Best suggests, the computer issued not a section 18 notice but what is known in the HMRC's lexicon as a "Statement Like an Award Notice" (or SLAN) on two occasions (13 September and 25 October 2013). The effect of these SLANs was to record that the Appellant was not entitled to tax credits in the 2012/13 tax year as he should not have claimed as a single person. A SLAN, Mr Best advises, is "not a notice required to be issued under section 23. It is as its name says, a statement like

an award notice. It is not a section 23 TCA award or preferably decision notice. As such it is not required to inform the claimant of their appeals rights and generally will not do so." A SLAN carries the HMRC form reference TC602(J).

31. Mr Best's contention is that the SLANs on which the Appellant launched his appeal had been erroneously issued in place of a formal section 18 decision. Mr Best further and rightly concedes that the Appellant will have understood them as decision notices – as he says, "I cannot criticise [the Appellant] for that. After all, a statement like an award notice does look like, well, an award notice, or decision notice as I would refer to it."

32. As noted above, Mr Best also reports that HMRC manually issued a 'proper' section 18 decision notice for the 2012/13 tax year on 12 December 2013 in the same terms as the previous SLANs. He further submits that the Appellant's appeal should be treated as an appeal against that section 18 decision, irrespective of whether it may have begun life as an attempted appeal against a SLAN.

33. In conclusion, Mr Best argues that the Tribunal's decision of 14 July 2015 was in error of law for the reasons given by Judge Mitchell when giving permission to appeal. Mr Best advocates allowing the appeal, setting aside both the Tribunal's decision and HMRC's decision and making a fresh decision on the underlying appeal to the effect that the Appellant was entitled to the working tax credit award made to him for the 2012/13 year.

The Upper Tribunal's analysis

34. Although I am indebted to Mr Best for his painstaking efforts, my own analysis is not quite the same.

The "decision" of 13 September 2013: the computer says No

35. I start with the "decision" of 13 September 2013. Mr Best surmises that was a SLAN communicating in effect a decision that the Appellant was not entitled to tax credits for the 2012/13 tax year (because of his relationship status). The screenshot of the HMRC action dated 13 September 2013 (not carried forward to the main appeal file) certainly supports that assumption. The screen shot refers to a SLAN for the 2012/13 tax year, with the award status described as "Finalised EOY" [end of year] and the final comment "YOU DO NOT QUALIFY FOR THIS BENEFIT" (emphasis in original).

36. There are certainly situations in which a computer log can lead a decision maker or tribunal to conclude that a certain type of letter has been sent (see by analogy *DW v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 0179 (AAC)). However, the circumstances of this case do not support any such inference. The only letter dated 13 September 2013 in the appeal files (whether the appeal bundle for the hearing or the office administrative file) is a statement of account TC607 letter relating to the 2013/14 tax year which says nothing about the preceding 2012/13 tax year. The Appellant has been meticulous in his production of relevant correspondence. The computer may have said "No" on 13 September 2013 in relation to the 2012/13 tax year but I find on the balance of probabilities that no such decision was ever communicated to the Appellant at that time. If there was no decision made and properly communicated, he could not have appealed. Time had not started running.

37. The decision that the Appellant had been overpaid £189.71 in the 2013/14 tax year was then repeated in the letter dated 23 October 2013. As noted above, the Appellant paid that sum.

The "decision" of 25 October 2013: the SLAN only looks like a decision – or is one?
38. That takes us to the HMRC TC602(J) letter dated 25 October 2013, otherwise known as the Statement Like an Award Notice (SLAN). I have to agree with Mr Best that the Appellant not unreasonably took this to be a decision. It is true it was headed "provisional tax credits statement" for 2012/13 and purported to be "not a decision about your entitlement to tax credits". On the other hand further on the letter stated in no uncertain terms "You are not entitled to Working tax Credit". It also asserted that the "amount due from you" – not the amount *provisionally* due from you – was £2,150.16.

39. If it looks like a duck, walks like a duck and quacks like a duck, then it probably is a duck. In the same way, if it looks like a decision, walks like a decision and quacks like a decision, then it probably is a decision.

40. Although the SLAN did not include the necessary section 23 details of his appeal rights, the Appellant certainly sent HMRC an appeal notice within 30 days of the date of the SLAN. I am tempted to say this form was not an appeal but an ALAN (an Application Like an Appeal Notice). If so, perhaps this Upper Tribunal ruling is a VLAD (a Verdict Like a Decision).

41. Whatever the terminology, it is important to focus here on substance over form. Whatever it purported to be, the 25 October 2013 SLAN notification was reasonably understood by the Appellant to be a notification of a decision that he was not entitled to any tax credits for the previous 2012/13 tax year (i.e. a section 18 end of year decision). He appealed in time against that decision, despite not being advised of his appeal rights.

42. Pausing there, I must ask myself whether a decision in the circumstances of the present case to treat the SLAN of 25 October 2013 as the communication of a substantive section 18 decision is (i) the only permissible way of resolving the problem that arises in this case and/or (ii) a construction which may lead to unintended consequences in other cases.

43. As to the former issue, there is another way. It would be possible simply to treat the SLAN as not a decision at all. To borrow the language of the Tribunal of Social Security Commissioners in R(IB) 2/04, the SLAN may arguably be one of those types of decisions "which have so little coherence or connection to legal powers that they do not amount to decisions ... at all" (at paragraph 72). There are three reasons why that approach is deeply unattractive. First, and as noted above, it prioritises form over substance (and over the understanding plainly communicated to the Appellant, even working in a second language). Second, the logical consequence may then be that the Tribunal has no jurisdiction at all, with the result that the Appellant is left without any independent judicial determination of his entitlement to tax credits for 2011/12. As Mr Best rightly recognises, that would not be a happy outcome ("to take that strict position would risk [the Appellant] being denied any effective judicial examination of his grievance") and so would only reinforce the Kafkaesque nature of this regime. Third, HMRC has rightly conceded in this appeal that it was trying – albeit in a cack-handed and less than transparent manner – to communicate a section 18 decision to the Appellant.

44. As to the latter point, is there a risk of unintended consequences that may disadvantage other claimants caught in this spider's web? There is, of course, an absolute time limit of 13 months for lodging tax credits appeals. What if a claimant fails to put in an appeal against a SLAN in good time and so is later left without any redress? That potential problem is much more apparent than real. The answer to that scenario is that a SLAN should only be treated as a 'real' decision (e.g. under section 18) if that reading is sustainable on the facts and assists the claimant in achieving a just resolution to the appeal, as here. In any event if the claimant does not appeal the SLAN in time, then time cannot start to run as the SLAN will not comply with the legal requirement to give notice of appeal rights (see section 23(2) of the 2002 Act). So more often than not a SLAN will not amount to a lawful decision as it omits that statutory notification. However, *this* Appellant should not be disadvantaged simply because he took the decision letter at face value and immediately lodged an appeal.

The "decision" on 13 December 2013: the SLAN perfected?

45. Mr Best's submission is that a manual section 18 decision was in any event issued on 13 December 2013. There is no trace of a letter of that date but I am content to accept Mr Best's submission, and it explains the otherwise mysterious reference in the letter of 12 February 2014 (see paragraph 11 above) to a decision dated 13 December 2014. As I have already indicated, I rather doubt that decision ever found its way to the Appellant. Be that as it may, the substance of that decision had already been communicated to the Appellant and he had already appealed in time. For good measure the Appellant sent in a further appeal notice on 22 January 2014, which was only just outside the 30 days required under section 39(1) of the 2002 Act at the time. Furthermore, as Mr Best submits, issues of lateness have now fallen away with the grant of permission and the admission of the appeal by Judge Mitchell.

The First-tier Tribunal's final decision on 14 July 2015

46. Where does this leave the Tribunal decision of 14 July 2015? My conclusion is that the Tribunal erred in law. It wrongly assumed that the Appellant was appealing against a decision dated 13 September 2013 when in fact he was appealing against the decision dated 25 October 2013. The Tribunal also wrongly assumed the appeal was out of time when in fact it was in time even on the basis of the law as it then was, before *VK v HMRC (TC)* [2016] UKUT 0331 (AAC). I therefore allow the appeal to the Upper Tribunal and set aside the Tribunal's decision.

47. I also re-make the underlying decision under appeal. The Appellant was entitled to working tax credit for the 2012/13 tax year; HMRC's decision that he was not so entitled because of his relationship status is set aside and revised. At all material times he was entitled to claim as a single person.

48. There may well be a "knock on" consequence for the 2013/14 tax year entitlement to tax credits. The matter is therefore remitted to Mr Best of HMRC for implementation and any necessary consequential decisions.

Summary of Upper Tribunal's decision

49. I therefore allow the Appellant's appeal. The Tribunal's decision involves an error on a point of law. That Tribunal's decision is set aside. Fortunately I can make the decision that the Tribunal should have made and do so.

Other matters

50. I recognise that the District Tribunal Judge in this case was in no way assisted in determining this appeal by the shambolic way in which the appeal papers had

been thrown together. It may well be that there is a particular difficulty with case managing appeals which start life as an interlocutory referral or as an application for a strike out as a late appeal. However, the combination of HMRC's disregard of its obligations under rule 24(4)(b) to produce "copies of all documents relevant to the case in the decision maker's possession" and HMCTS's failure to manage its own file properly put the District Tribunal Judge in a near impossible position.

51. The Appellant also asks me to make an order requiring HMRC to compensate him financially for what he describes as "this ordeal that I have been going through for the past three years". The Upper Tribunal's powers are limited by statute and they do not include making financial compensation orders against HMRC. It may be that Mr Best or indeed an independent advice agency such as a CAB or law centre can signpost the Appellant in the right direction e.g. if he wishes to make a complaint of maladministration.

52. In that context it is only right to record that, entirely independently of the current proceedings, the Appellant received a series of demands for payment of taxes from HMRC and its debt recovery agencies. These related to sums of income tax owed by another taxpayer with the same surname but a different first name. That again falls outside my jurisdiction.

Conclusion

53. The Appellant's appeal to the Upper Tribunal 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 that Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The Tribunal's decision is now of no effect. I re-make the Tribunal's decision in the terms as set out above (section 12(2)(b)(ii)).

Signed on the original
on 09 November 2016

Nicholas Wikeley
Judge of the Upper Tribunal