DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow both the appeals by the Appellant (the father). The decisions of the Doncaster First-tier Tribunal on 10 October 2016 under file reference SC287/16/00137 (CF/1265/2018) and of the Hull First-tier Tribunal on 3 February 2017 under file reference SC287/16/00910 (CF/1363/2017) each involves an error on a point of law.

In CF/1265/2018 the decision of the Doncaster First-tier Tribunal on 10 October 2016 under file reference SC287/16/00137 is set aside for breach of natural justice. The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Second Respondent (the mother)'s original appeal against the HMRC decision dated 29 April 2016, awarding child benefit to the father, is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

In CF/1363/2017 the decision of the Hull First-tier Tribunal on 3 February 2017 under file reference SC287/16/00910 is set aside for want of jurisdiction. The First-tier Tribunal had no jurisdiction to hear the purported appeal as the HMRC "decision" of 17 October 2016 was not itself an appealable decision. Technically it follows that I must dismiss the father's original appeal against that First-tier Tribunal "decision". Accordingly, this particular appeal does not need to be re-heard. However, the father has the right to make his case for entitlement to child benefit under the other appeal.

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

DIRECTIONS

The following directions apply to the re-hearing of the appeal under file reference SC287/16/00137 (CF/1265/2018):

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

(2) Both parents are parties to this appeal, as well as HMRC.

(3) The new tribunal should not involve the tribunal judges who sat on the previous tribunals that considered these appeals at the hearings on 10 October 2016 and 3 February 2017.

(3) The new tribunal should have before it the papers from both appeals (SC287/16/00137 and SC287/16/00910).

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

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

Introduction

1. This case is an object lesson in what can go wrong procedurally in appeals where there is a dispute between separated parents as to who should receive child benefit.

The background to the appeals to the First-tier Tribunal

2. Mr and Mrs C have a son, Bradley, who was born in 2003. Mrs C received child benefit for him from birth. The couple separated in or around 2010, when Bradley was aged about 7. Solicitors' letters from January and February 2011 show that it was agreed then that Bradley should live with his mother but have regular contact with his father, including staying over contact at the weekends. In March 2011 a county court consent order recorded that Mr C would pay Mrs C £30 a week in child maintenance until Bradley reached the age of 18 or finished full-time secondary education (whichever was the later). Mrs C continued to receive child benefit for Bradley.

3. However, Mr C successfully applied to Her Majesty's Revenue and Customs (HMRC) for child benefit in respect of Bradley in 2015. The subsequent decision-making process by HMRC and then on appeal by the First-tier Tribunal contained a catalogue of procedural errors. Suffice to say for the present that two hearings before the First-tier Tribunal (FTT) followed. At the first FTT hearing (FTT1), Mrs C won her appeal. Mr C was not a party to the appeal before FTT1. At the second FTT hearing (FTT2), Mr C lost his appeal. Mrs C was not a party to the appeal before FTT2.

4. The FTT's procedural handling of these appeals has been shambolic. It has also resulted in a prolonged and unacceptable delay in sorting out the real issue, which is who should get child benefit for Bradley (who is now aged 15). Regrettably that delay will continue for a while until a new hearing can be arranged before the First-tier Tribunal.

A summary of Upper Tribunal's decision

5. I am allowing Mr C's appeals to the Upper Tribunal against the decisions of both FTT1 and FTT2. The Tribunals' decisions both involve an error on a point of law, as HMRC rightly accepts. Those decisions are accordingly both set aside. The case needs to be reheard together by a new Tribunal at the earliest possible opportunity. The fact that these appeals to the Upper Tribunal have succeeded *on a point of law* is no guarantee that Mr C will succeed *on the facts* at the re-hearing of the appeal before the new FTT. The new Tribunal may reach the same, or a different, decision to that of both previous Tribunals. It all depends on the findings of fact that the new FTT makes.

The sequence of events: competing claims and alternating decisions

6. On 19 August 2015 Mr C made a claim to HMRC for child benefit, stating on the form that Bradley had come to live with him on 23 July 2015 (when he would have been 12). HMRC sent each parent the standard questionnaire it uses when assessing 'rival claims' for child benefit (Forms CH15RCE and CH15REC).

7. On 9 October 2015 Mr C returned his questionnaire. On the form he explained as follows:

> "After a breakdown in Bradley's relationship with his mother on the 23.1.15 Bradley came to live with me, we agreed to give this 6 months to make sure it

> was what Bradley wanted and he has lived here ever since. This is why I would like to make the claim from 23.7.15 for Child Benefit."

8. On 14 October 2015 Mrs C returned her questionnaire. She included copies of the solicitors' correspondence from 2011. She explained that Bradley lived with her in accordance with the 2011 agreement, apart from a fortnight's summer holidays spent with his father.

9. Clearly one parent was not telling the truth, the whole truth and nothing but the truth. But which parent? HMRC's evidence gathering and decision-making processes may not be best placed to resolve these issues, as the competing claims degenerated into a version of adjudicatory ping-pong. As soon as one officer decided the case one way, another officer decided it the other way.

10. On 29 October 2015 an HMRC officer decided that Mr C was entitled to child benefit for Bradley as from 14 September 2015. On 7 November 2015 Mrs C disputed that decision. HMRC accordingly wrote to both parents seeking further information. Mrs C responded enclosing further documentation including a letter from a doctor which stated: "This letter is to confirm I am the usual GP for Bradley C and he lives at the following address: [mother's address inserted]."

11. Meanwhile HMRC had also written to Mr C. He replied on 4 January 2016, stating "you have requested to see any court orders/social services/legal documents as this was a decision made by Bradley to live with me his father I do not have the relevant paper work you have required."

12. On 1 February 2016 another HMRC officer revised the previous decision of 29 October 2015. The revised decision was that Mr C was not entitled to child benefit as Bradley was found to have been living with Mrs C as from 14 September 2015. On the same date Mrs C was sent a mandatory reconsideration notice. This stated that as regards the HMRC decision of 29 October 2015, this was "made at the discretion of the Commissioners for Her Majesty's Revenue & Customs and there is no statutory right of appeal against it". However, the mandatory reconsideration notice went on to say the evidence had been reconsidered and the decision changed, so that she was now entitled to child benefit from 14 September 2015. The notice further stated that she had the right of appeal to a tribunal against this new decision.

13. Mr C in turn disputed the revised decision, repeating his claim that Bradley had been living with him since January 2015, save for the occasional night. Mr C also produced a letter from the College Academy that Bradley attended, confirming that he lived at Mr C's address.

14. On 29 April 2016 an HMRC officer reconsidered the case and revised the decision of 1 February 2016, concluding that Mr C was indeed entitled to child benefit as from 14 September 2015. In effect the decision of 29 October 2015 was reinstated. On 6 May 2016 Mrs C again disputed the decision, applying for a mandatory reconsideration. HMRC wrote to Mrs C on 26 May 2016, stating that she had already had a mandatory reconsideration notice (MRN) on 1 February 2016 and could not now have another one. She was advised to appeal to the FTT if she still thought the decision was wrong.

15. On 23 June 2016 Mrs C lodged an appeal with the FTT, enclosing further paperwork and asking for the appeal to be dealt with on the papers. A FTT registrar issued a ruling waiving the requirement that Mrs C produce a MRN, given the terms of the HMRC letter dated 26 May 2016.

16. HMRC filed a response to Mrs C's appeal. HMRC's submission resisted the appeal. It noted that both parents had argued that Bradley resided with them on a permanent basis and had produced documentary evidence. However, the submission argued that much of Mrs C's evidence was neither conclusive nor particularly helpful (e.g. copies of passports and utility bills). It also contended that a school was likely to have "personal knowledge" of where a child actually resided, and so the letter produced by Mr C from the College Academy should carry some weight. HMRC asked the Tribunal to dismiss Mrs C's appeal.

17. On 10 October 2016 the mother's appeal was considered on the papers by FTT1 at Doncaster. FTT1's decision notice simply stated that the appeal was allowed, the HMRC decision of 29 April 2016 was set aside and Mrs C was entitled to child benefit from the relevant date in 2015. HMRC did not ask for a statement of reasons. Mr C did not ask for a statement of reasons as he was not sent a copy of the Tribunal's decision notice. Astonishingly, nobody had thought to join him as a party to Mrs C's appeal.

18. On 17 October 2016 – a week after the FTT1 decision – HMRC purported to make a fresh "decision" (for reasons that will become apparent, I refer throughout to this determination as a "decision", using inverted commas). This was a "decision" to revise the decision dated 29 April 2016 and to find that Mr C was not entitled to child benefit. HMRC also wrote to Mr C on 18 October 2016 stating that "we have looked again at the decision we sent you on 26 April 2016. As a result we have changed that decision. We cannot award Child Benefit to you for Bradley." The letter went on to state that "There are no appeal rights against the decision from 14 September 2015. This is because it is a decision made at the discretion of the Commissioners for HM Revenue & Customs."

19. Undeterred, Mr C challenged the purported new "decision" by HMRC. He asked for a mandatory reconsideration. HMRC wrote to him on 16 November 2016 stating that (i) he could not have a MRN as had had already had a MRN on 29 April 2016 which he could have appealed (a decision which, of course, had been in his favour); and (ii) if he wished to appeal against the "decision" of 17 October 2016, he should write to HMCTS within one month. On 28 November he did just that, asking for his appeal to be dealt with on the papers.

20. HMRC prepared a response to Mr C's appeal. Unlike the submission to Mrs C's earlier appeal, this response did not argue that Mr C was the correct beneficiary of a child benefit award from September 2015. It included the following passage:

> "I respectfully submit that Mr and Ms C have stated that Bradley lives with them on a full time basis and each have provided supporting evidence to substantiate their claims. However, following an appeal put forward by Ms C, a legally qualified person with all the evidence before them has decided that Ms C is entitled to Child Benefit for him from 14-09-15."

21. There was no explanation in HMRC's submission as to what "all the evidence" meant. Despite its existence having been referred to, there was no copy of FTT1's decision notice on the appeal file for FTT2. FTT2 considered Mr C's appeal at Hull on 3 February 2017. FTT2 dismissed the appeal, confirmed HMRC's "decision" of 17 October 2016 and, like FTT1, ruled that Mr C was not entitled to child benefit as from 14 September 2015. FTT2's statement of reasons included the following passage:

> "The Tribunal also noted that another Tribunal considered Mrs C's appeal on 16.10.2016 and whilst this Tribunal does not know what evidence was before that Tribunal it is aware they were satisfied from the evidence produced by Mrs C that Bradley was living with his mother at the relevant time."

22. Mr C then applied for permission to appeal to the Upper Tribunal. I gave permission to appeal following an oral hearing in Leeds on 15 November 2017. Following submissions from the parties, I took several procedural steps to ensure I had all relevant matters before me. In summary, those steps were as follows:

(i) I joined Mr C as a party in the case of Mrs C's appeal before FTT1;
(ii) I waived the requirement that Mr C apply to the FTT for permission to appeal against the decision of FTT1;
(iii) I extended time to admit Mr C's late application for permission to appeal against the decision of FTT1 and gave him permission to appeal;
(iv) I joined Mrs C as a party to Mr C's appeal against the decision of FTT2.

23. As a result, there are two Upper Tribunal files in these proceedings. The first in time is CF/1363/2017, which is Mr C's appeal against the decision of FTT2. The second is CF/1265/2018, which is Mr C's late appeal against the decision of FTT1. Inevitably, the files contain a considerable body of duplicated evidence, both within each file and across the two appeal files.

Where did HMRC go wrong?

24. It is difficult to know where to start in answering this question. In one sense it matters not, as the issue for the Upper Tribunal is whether the First-tier Tribunal's decisions involve any error of law, and not whether HMRC went wrong. But errors in decision-making by the first-tier agency (here HMRC), in the absence of proper scrutiny, can infect appellate adjudication in the tribunal system. There were at least three obvious problems with HMRC's handling of these competing claims for child benefit.

25. First, HMRC decision makers were utterly confused as to the scope of their own powers in determining competing child benefit claims. Schedule 10 to the Social Security Contributions and Benefits Act 1992 provides for "Priority between persons entitled to child benefit". The priority order, in summary, comprises (1) a person with a prior award; (2) the person having the child living with them; (3) a wife; (4) a parent (paragraphs 1-4). If nobody making competing claims qualifies under any of those categories, then the person entitled to child benefit is "such one of them … as they may jointly elect or, in default of election, as the Secretary of State may in his discretion determine" (paragraph 5). This was a case in which HMRC, and on appeal the Tribunal, had to decide which parent Bradley was living with. It was thus a Schedule 10 paragraph 2 case that carried a right of appeal. It was not the sort of shared care case in which HMRC has a non-appealable discretion to exercise within Schedule 10 paragraph 5.

26. Second, HMRC decision makers were hopelessly confused about the effect of a decision by the First-tier Tribunal. This is why I refer to the "decision" (in inverted commas) of HMRC dated 17 October 2016. FTT1 on 10 October 2016 had in effect made a decision on Mr C's (lack of) entitlement to child benefit as from 14 September 2015. HMRC might well communicate FTT1's decision to Mr C. It might make what is sometimes called an implementing decision, phrasing the Tribunal's decision in its own language but not changing its effect. But HMRC had no need to, nor any power, to make its purported "decision" of 17 October 2016. If Mr C wished to challenge the decision by FTT1, he needed to apply for that decision to be set aside or for

permission to appeal to the Upper Tribunal. To do that, he needed to be joined as a party to that appeal. This necessary procedural step has only belatedly been achieved in these Upper Tribunal proceedings. More worrying, from the wider point of view, is that there appears to be a systemic ignorance within HMRC of the basic architecture of decision-making under the Social Security Act 1998. This is, after all, not the first time the Upper Tribunal has been faced with a phantom "decision", dealt with as an appealable decision by HMRC in its appeal response to the First-tier Tribunal and (perhaps understandably) also addressed as such by the First-tier Tribunal (see the 'SLAN' "decision" unpicked by Upper Tribunal Judge Wright in *DG v HMRC and EG (TC)* [2016] UKUT 505 (AAC)).

27. Third, this double confusion was reflected in the various letters and notices that both parents received. For example, Mrs C was told in the same letter both that she had no right of appeal and that she had a right of appeal (HMRC letter dated 1 February 2016). Mr C was advised that he had already had a mandatory reconsideration notice which he should have appealed at the time – even though the notice in question was in his favour (HMRC letter dated 16 November 2016). I also recognise that the rampant confusion within HMRC ranks additionally resulted in unhelpful written responses in the appeal bundles for the two cases. This did not make the First-tier Tribunal's task any easier. Even so, where did FTT1 and FTT2 go wrong in law?

Where did the Doncaster First-tier Tribunal (FTT1) go wrong in law?

28. In the absence of a statement of reasons it is usually difficult to show an error of law by the tribunal concerned. This case is the exception that proves the rule. The absence of a statement of reasons usually means that we have no idea why FTT1 reached the decision it did, namely to allow Mrs C's appeal against the HMRC decision dated 29 April 2016 awarding Mr C child benefit. There was, however, a fundamental flaw in the proceedings before FTT1. Mr C was not a party to that appeal. He was obviously interested in the outcome of Mrs C's appeal. He had made representations to HMRC about where Bradley was living which were included in the HMRC appeal bundle for FTT1. But he never saw the HMRC response on the appeal or the other documentation in the case. He was not invited to join the appeal or to express a view on whether or he wanted an oral hearing. That was a clear breach of any notion of natural justice. It remains a puzzle why the Judge hearing FTT1 decided she could go ahead and deal with Mrs C's appeal without giving Mr C the opportunity to be joined. Whatever the reason, the outcome was a clear breach of fair procedure. Having joined him to the proceedings, I allow Mr C's appeal against the decision of FTT1 and set aside that Tribunal's decision.

Where did the Hull First-tier Tribunal (FTT2) go wrong in law?

29. FTT2 made exactly the same mistake as FTT1. The Tribunal proceeded to deal with Mr C's appeal without apparently giving any consideration to joining Mrs C as a party to the proceedings. In the event it is arguable Mrs C suffered no real prejudice on that score, as it so happened that FTT2 decided the appeal in her favour.

30. There are several difficulties with the reasoning of FTT2. One will suffice. As Mr Joe Gough (HMRC's representative in the current proceedings) notes, once FTT2 had identified that it did not know what evidence was before FTT1, then it should have adjourned to gather further details about the proceedings before FTT1. I would add that FTT2 was apparently prepared to take a great deal on trust – it did not even have a copy of the decision notice from FTT1. If it had, then it would presumably have spotted that Mr C had not been a party to those proceedings. So, taking such steps may have led to him being belatedly joined as a party to her earlier appeal.

This in turn may have helped in resolving at an earlier stage the factual conflict surrounding where and with whom Bradley lives.

31. However, perhaps the main problem with FTT2's decision is that it went ahead to hear a case over which it simply had no jurisdiction at all. For the reasons noted above, the HMRC's "decision" of 17 October 2016 was not a decision properly so-called which carried any appeal rights. If it had been an appealable decision, then the parties could have been on a never-ending carousel of perpetual appeals. I also allow Mr C's appeal against the decision of FTT2 and set aside that Tribunal's decision.

What happens next: the new First-tier Tribunal

32. I have therefore allowed Mr C's appeals against the decisions of both FTT1 and FTT2. The question then is what to do next.

33. In CF/1265/2018 I have given serious consideration to deciding the underlying issue of entitlement to child benefit myself. On balance, however, I do not consider that is appropriate. The parties have the right to have their cases put and tested before a fact-finding oral hearing at the First-tier Tribunal. This means there will need to be a hearing before a new First-tier Tribunal of the appeal by Mrs C against HMRC's decision of 29 April 2016. Mr C is now a party to that appeal. Although I am setting aside both the previous Tribunals' decisions, I should make it clear that I am making no finding, nor indeed expressing any view, on which parent is properly entitled to child benefit for Bradley. That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact. I hope that both parents appreciate that going to the new Tribunal and explaining their case in person is the best way forward. The documentary evidence only goes so far and the new Tribunal will wish to test that evidence.

34. In CF/1363/2017 the proceedings are effectively redundant. The dispute between the parents as to with whom Bradley lives can be sorted out in the appeal remitted for re-hearing in the previous paragraph. So far as CF/1363/2017 is concerned, HMRC did not have jurisdiction to make its "decision" of 17 October 2016 and so the First-tier Tribunal on 3 February 2017 did not have jurisdiction to hear Mr C's appeal. That FTT2 decision having already been set aside, it just leaves me technically to dismiss Mr C's appeal against the HMRC "decision" of 17 October 2016, as HMRC had no power to make that decision in the first place. There was, literally, nothing to appeal. This has no bearing on Mr C's right in the appeal remitted in CF/1265/2018 to argue that he was entitled to child benefit as from 14 September 2015.

Conclusion

35. The Appellant's appeals are both allowed. I conclude that the decisions of the First-tier Tribunal both involve an error of law. The decision of FTT1 involves a breach of natural justice. The decision of FTT2 was made without jurisdiction. I allow the appeals and set aside both decisions of the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The First-tier Tribunal decisions are now of no effect. The appeal in CF/1268/2018 – i.e. what was originally Mrs C's appeal against HMRC's decision of 29 April 2016 – must be remitted for re-hearing by a new Tribunal subject to the directions above (section 12(2)(b)(i)), enabling both parents to put their case. The underlying appeal in CF/1363/2017 is re-made and technically dismissed (section 12(2)(b)(ii)). My decisions are as set out above.

Signed on the original
on 5 July 2018

Nicholas Wikeley
Judge of the Upper Tribunal