

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. CF/3107/2016

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (3 May 2016, Romford, file reference SC 320/15/01255) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is **REMITTED** to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

REASONS FOR DECISION

Summary

1. This is another decision about the nature of a public authority respondent's duty to provide the First-tier Tribunal with "relevant" documents. H.M. Revenue & Customs (HMRC) argue their failure to provide documents was not a breach of their duty because the documents did not 'conclusively evidence' that a claimant was self-employed. I decide that HMRC's argument fails to recognise the constitutional role of the First-tier Tribunal. It is for the tribunal, not a public authority, to make findings of fact on the evidence.

Background

HMRC's decision-making and the First-tier Tribunal proceedings

2. HMRC refused Miss I's child benefit claim because they determined that she did not have the right to reside in the UK.
3. HMRC's written response to Miss I's appeal to the First-tier Tribunal stated that departmental records showed that Miss I "has a period of incapacity recorded from 7-12-14 to 9-8-15". Subsequently, the response stated "this period will be a period of maternity leave".
4. Miss I's notice of appeal to the First-tier Tribunal, dated 8 December 2015, stated:

"I am send my documents 3 times with passports and all proof of my self employed my Maternity Allowance documents...they send me one time that they lose my documents after that they find and say I am not entitled. Please check my appeal and if you need more information do not hesitate to contact me".

5. On 30 November 2015, HMRC informed Miss I that they refused to alter their decision. Their letter added: “this decision was given as you failed to provide sufficient evidence or information to confirm that your self-employment is genuine and effective”.
6. The First-tier Tribunal’s appeal bundle included copies of HMRC letters to Miss I which asked her to supply evidence of her self-employment. The papers contain no replies to these letters.
7. The First-tier Tribunal dismissed Miss I’s appeal. The tribunal’s statement of reasons noted Miss I’s assertion that she had supplied HMRC with proof of her Maternity Allowance but made no finding as to whether she had in fact been in receipt of that benefit. I also note the statement refers to that part of HMRC’s submission which referred to Miss I’s period of incapacity but not that part which described this period as ‘maternity leave’.

The issues

8. The issues arising on this appeal are described in my determination granting Miss I permission to appeal to the Upper Tribunal:

“In her application to the Upper Tribunal Miss [I] wrote she could not understand why her child benefit claim was refused when she had previously been awarded Maternity Allowance...and she had supplied on many occasions her income tax self-assessments and invoices.

H.M.R.C, as a party to the First-tier Tribunal proceedings, were required to supply the Tribunal with “copies of all documents relevant to the case” in their possession (rule 24(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008).

H.M.R.C’s written submission to the First-tier Tribunal referred to a check having been made of “departmental systems” which identified a “period of incapacity” between December 2014 and August 2015 (which I note might have been maternity-related and thus supportive of Miss [I’s] claim that she was awarded a Maternity Allowance) and receipt of an income tax self-assessment for 2014/15. The records on which those statements were based were not supplied to the First-tier Tribunal.

I grant Miss [I] permission to appeal to the Upper Tribunal because the First-tier Tribunal arguably erred in law by failing to address HMRC’s apparent failure to comply with rule 24(4).”

Legislation

9. Rule 24(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 provides:

“(4) The decision maker must provide with the response-
... (b) copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise...”.

10. Maternity Allowance is a benefit awarded by the Secretary of State for Work & Pensions. The eligibility conditions in section 35(1) of the Social Security Contributions and Benefits Act 1992 include:

“... (b) she has been engaged in employment as [a]... self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the expected week of confinement; and

(c) her average weekly earnings... are not less than the maternity allowance threshold for the tax year in which the beginning of the period of 66 weeks mentioned in paragraph (b) above falls”.

11. If Ms I was awarded Maternity Allowance, the Secretary of State must have decided that she was a self-employed earner (she has never claimed to have been an employed earner).

The arguments

12. HMRC do not support this appeal. Their written response to Miss I's appeal argues:

(a) “In its submission to the [First-tier Tribunal], HMRC set out that departmental records showed the claimant had registered for and paid class 2 N.I. contributions, submitted a self-assessment tax return for the tax year 2014/15, and had a period of inactivity recorded from December 2014 to August 2015. HMRC's position to the FtT was this information did not conclusively evidence the claimant was a self-employed person – for the purposes of having a right to reside in the UK – and it was upon the claimant to provide further evidence which would, on the balance of probabilities, show she was indeed a self-employed person. These departmental records were not included in the bundle to the FtT”;

(b) HMRC state their records “indicate the claimant may be self-employed but do not on the balance of probabilities show that she is” and “HMRC's view was the departmental records held fell short of what was needed to determine the claimant was a self-employed person” and do not “conclusively evidence the claimant is self-employed”;

(c) HMRC's involvement in the First-tier Tribunal proceedings complied with the decision of the House of Lords in *Kerr v Department for Social Development* [2004] UKHL 23:

“What emerges...is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced”;

(d) HMRC submit that Ms I was asked by them to supply details of her self-employment, on 26 January 2015 and 16 October 2015, but she did not. They also note that Ms I declined the opportunity of a hearing before the First-tier Tribunal;

(e) It is for the First-tier Tribunal to “call on whatever evidence it considers relevant to properly determine the issues arising in the appeal...It is for the FtT to determine what evidence is relevant to the issue in the appeal and whether that evidence should be called for”;

(f) The situation before the First-tier Tribunal was essentially the same as that addressed by a three-judge panel of the Upper Tribunal in *FN v Secretary of State for Work & Pensions* [2016] AACR 24; [2015] UKUT 670 (AAC). *FN* supports the tribunal’s approach;

(g) Miss I had the opportunity to supply evidence to demonstrate self-employment but did not take it. In those circumstances, there was no material unfairness in the proceedings nor did the First-tier Tribunal err in law by failing to inquire into whether HMRC had disclosed all relevant documentary evidence.

13. Quite properly, HMRC also inform the Upper Tribunal that, on 16 January 2017, the First-tier Tribunal allowed Miss I’s appeal against a decision of H.M.R.C. to refuse a subsequent child benefit claim. That tribunal’s decision notice stated:

(a) “She has been self-employed as a cleaner since arriving in the UK in 2013, interrupted only during her maternity period that finished in August 2015”;

(b) “She has today produced monthly invoices for her cleaning work covering the period September 2015 to December 2016 inclusive, she is registered with HMRC and has paid Class 2 N.I. contributions”.

14. Miss I’s written reply to HMRC’s response merely states:

“I am single parent. I am now working as a self-employed person and I need to receive child benefit to collect my daughter from school with school bus”.

15. Neither party requests a hearing of this appeal. In my view, a hearing is unnecessary.

Conclusions

16. Miss I could have done more to improve her prospects of success before the First-tier Tribunal. She could, for example, have supplied the self-employment evidence that she supplied to a subsequent tribunal. Despite that, I decide that the First-tier Tribunal's decision involved an error on a point of law and allow her appeal.

17. In my determination, HMRC's submissions on this appeal confuse its responsibilities as a party to proceedings with those of the First-tier Tribunal. It is not for the public authority respondent to an appeal to determine whether a document proves a particular fact (in HMRC's words, 'conclusively evidences' a fact). That is the function of the First-tier Tribunal. The approach advocated by HMRC would involve it usurping the constitutional role that Parliament has entrusted to the First-tier Tribunal.

18. Rule 24 of the First-tier Tribunal's rules required HMRC to supply all "relevant" documents. The evaluation of a document's relevance must be carried out in a manner that respects the constitutional role of the First-tier Tribunal. On an appeal, the tribunal is the (judicial) body charged with determining whether a piece of evidence proves any fact on a balance of probabilities. A document should be considered relevant, and hence disclosed, if the Tribunal could (not would) rely on it to make any relevant finding of fact. Applying that test, on the description of the evidence given by HMRC in these proceedings they were required to supply the documentation to the First-tier Tribunal.

19. The decision in *FN* does not save the First-tier Tribunal's decision. Nothing in *FN* supports HMRC's argument that the analysis of a document's relevance for the purposes of rule 24 involves a public authority respondent standing in the shoes of the tribunal and asking whether a document proves a particular fact. It is true that *FN* holds that a respondent's breach of its rule 24 duties does not inevitably result in a material error on a point of law in a decision of the First-tier Tribunal. However, *FN* also emphasises that it is for the First-tier Tribunal to address whether it has sufficient relevant evidence before it to determine the issues arising on an appeal. In Miss I's case, the First-tier Tribunal made no finding that the evidence before it was sufficient so that there was no need to inquire into the nature of the undisclosed documentation held by HMRC. Since the existence of the documentation was apparent from HMRC's response to Miss I's appeal to the First-tier Tribunal, that was an error on a point of law.

20. As I mentioned above, Miss I did not help herself before the First-tier Tribunal. It must be reasonably likely that she held copies of at least some of the documents related to her self-employment or could at least have reconstructed them. Yet Miss I did not supply them to the Tribunal. Does this mean I should decline to set aside the First-tier Tribunal's decision? I decide not. I am not satisfied that it was clearly explained to Miss I that the documentation she had supplied to HMRC was absent from the evidence disclosed to the tribunal. I am also concerned that the Tribunal might have overlooked that HMRC's appeal response described a

period of recorded ‘inactivity’ as maternity leave. While this was not a ground on which permission to appeal was granted, I take it into account in determining that the fair and just disposal of this appeal is to set aside the First-tier Tribunal’s decision and remit Miss I’s appeal against HMRC’s decision to that Tribunal for re-determination.

Directions

I direct as follows:

- (1) Miss I’s appeal against HMRC’s decision of 14 August 2015 is remitted to the First-tier Tribunal for re-determination.
- (2) If Miss I wants the First-tier Tribunal to hold a hearing before re-determining her appeal she must make a written request, to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued.
- (3) The tribunal that re-determines Miss I’s appeal must not include the judge whose decision I have set aside.
- (4) Within **one month** of the date on which this decision is issued, the First-tier Tribunal must receive from HMRC all documents in their possession which could show that Miss I was self-employed at the relevant time.
- (5) Within **one month** of the date on which this decision is issued, the First-tier Tribunal must receive from Miss I all documents in her possession which could show that she was self-employed at the relevant time.

Apart from directions (1) and (3), the above directions are subject to any case management directions of the First-tier Tribunal.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
2 June 2018