[2018] AACR 2

(LS and RS v Commissioners for Her Majesty's Revenue and Customs [2017] UKUT 257 (AAC))

Judge Jacobs **CTC/3228/2015**
Judge Markus QC **CTC/1938/2016**
Judge Perez
15 June 2017

Tax credits and family credit – a section 16 appeal to a First-tier Tribunal lapses when a section 18 decision has been made

Tribunal procedure and practice – proper course for First-tier Tribunal to strike out the proceedings under rule 8

Both cases involved the Commissioners for Her Majesty's Revenue and Customs (HMRC) making an initial decision under section 16 of the Tax Credits Act 2002, an appeal by the claimant against that decision and a further HMRC decision under section 18. In the first case HMRC terminated the claimant's tax credits for the 2013-2014 tax year under section 16 and her appeal against that decision was dismissed by the First-tier Tribunal (F-tT) on 28 August 2015. However, by then HMRC had made a further decision on 2 March 2015 under section 18. The claimant says HMRC failed to notify her of the section 18 decision. The F-tT also appears to have been unaware of it. The second claimant received child tax credit and working tax credit for the tax year 2014-2015 and both awards were terminated by HMRC under section 16. Following the claimant's request for a mandatory reconsideration HMRC reinstated the award of child tax credit and the claimant appealed to the F-tT. The tribunal confirmed HMRC's decision as originally made and the HMRC then made a decision under section 18 for the same tax year. Both claimants appealed to the Upper Tribunal (UT) and a three-judge panel was appointed to hear the appeals as two recent UT decisions had been taken which not only conflicted which with each other but also with the UT's general approach in such cases: *RF v Her Majesty's Revenues and Customs (HMRC)* [2016] UKUT 399 (AAC) and *JY v Her Majesty's Revenues and Customs (HMRC)* [2016] UKUT 407(AAC). Included among the issues before the Panel were whether a section 16 decision ceased to have effect after a section 18 decision was made for the same tax year, what effect that had on an appeal against the section 16 decision and what a F-tT should do about it.

Held, dismissing both appeals, that:

1. a section 16 appeal to the F-tT lapses when a section 18 decision has been made (paragraphs 24 to 25);

2. the proper course is for that tribunal to strike out the proceedings under rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules (paragraphs 52);

3. there is no scope for that tribunal to deal with the appeal as an academic issue, but the position is different in the UT (paragraphs 33).

In both cases the Panel refused to set aside either decision of the F-tT even though they may have involved an error on a point of law.

DECISIONS OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

CTC/3228/2015

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

Even if the decision of the First-tier Tribunal under reference SC024/14/03767, made on 28 August 2015 at Birmingham, involved the making of an error on a point of law, it is NOT SET ASIDE.

CTC/1938/2016

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

Although the decision of the First-tier Tribunal under reference SC024/15/02828, made on 21 January 2016 at Wolverhampton, involved the making of an error on a point of law, it is NOT SET ASIDE.

We direct that a copy of our decision be sent to Mr Hignett, the representative for the Commissioners in the early stages of this appeal, so that he may ensure that the claimant's application to set aside the First-tier Tribunal's decision is treated as an application for review under section 21A of the Tax Credits Act 2002.

REASONS FOR DECISION

A. What we have decided

1. As soon as the Commissioners for Her Majesty's Revenue and Customs have made a decision under section 18 of the Tax Credits Act 2002 for a tax year, any decision made under section 16 for that tax year ceases retrospectively to have any operative effect, any appeal that has been brought against that section 16 decision therefore lapses, the First-tier Tribunal ceases to have jurisdiction in relation to that appeal and that tribunal must strike out the proceedings.

B. Abbreviations and materials

2. We use "HMRC" to refer to the Commissioners for Her Majesty's Revenue and Customs. All statutory references are to the Tax Credits Act 2002 unless otherwise stated.

3. The relevant statutory material is in Appendix A and extracts from relevant cases are in Appendix B.

C. Why a three-judge panel was set up

4. The general understanding used to be that, when a decision was made under section 18, it replaced any previous decisions in respect of the same tax year, with the effect that an appeal against any of those decisions lapsed. Then, last year, two judges of this Chamber gave decisions that disagreed with that general understanding and with each other: *RF v Commissioners for Her Majesty's Revenue and Customs* (TC) [2016] UKUT 399 (AAC) and *JY v Commissioners for Her Majesty's Revenue and Customs* (TC) [2016] UKUT 407 (AAC), both in Appendix B. In view of the different approaches, Charles J appointed a three-judge panel to decide "the effect on appeal proceedings of decisions made under section 18".

D. The issues

5. Three issues arise:

- Does a section 16 decision cease to have operative effect when a section 18 decision is made for the same tax year?
- What effect does that have on an appeal against the section 16 decision?
- What should the tribunals do about it?

We gave detailed directions on the questions relevant to these issues.

E. The oral hearing

6. We held an oral hearing of the appeal on 20 April 2017. Tom Royston of counsel appeared for the claimants through the good offices of the Child Poverty Action Group. Galena Ward of counsel appeared for HMRC. We are grateful to both of them for their written and oral arguments.

F. The cases

LS - CTC/3228/2015

7. In this case, the section 18 decision was made before the First-tier Tribunal made its decision on the claimant's section 16 appeal, although she says that she was not aware of it. It only came to light when submissions were made on the appeal to the Upper Tribunal.

8. We take the history of this case from HMRC's submission to the Upper Tribunal written by John Best. On 2 October 2013, the claimant's award of tax credits for the tax year 2013-2014 was terminated under section 16. The claimant exercised her right of appeal to the First-tier Tribunal, which dismissed the appeal on 28 August 2015. By that time, there had been a decision under section 18, which was made on 2 March 2015. The claimant says that she was not notified of that decision; the First-tier Tribunal was unaware of it.

RS - CTC/1938/2016

9. In this case, the section 18 decision was made after the proceedings before the First-tier Tribunal were concluded. The decision under appeal to that tribunal purported to have been made under section 16.

10. We take the history of this case from HMRC's submission to the Upper Tribunal written by Mr A Hignett. On 13 April 2015, the claimant's award of child tax credit and working tax credit for the tax year 2014-2015 was terminated on the ground that she did not meet the conditions of entitlement to either credit. That decision was said to be made under section 16. On the claimant's request for a mandatory reconsideration, this was changed to reinstate the award of child tax credit. On appeal, the First-tier Tribunal confirmed HMRC's decision as originally made. Its decision was made on 21 January 2016. On 25 April 2016, HMRC made a decision under section 18 in respect of the tax year 2014-2015.

11. Mr Hignett submitted that the appropriate course is for the claimant to challenge the section 18 decision. He said that the claimant's application to set aside the First-tier Tribunal's decision "can, and will, be treated as" a request for a mandatory reconsideration.

G. The arguments

For the claimants

12. This is a summary of Mr Royston's arguments from the skeleton provided before the hearing. A section 18 decision does not deprive the First-tier Tribunal of jurisdiction on an appeal against a section 16 decision. There is a right of appeal against a section 16 decision even if a section 18 decision is subsequently made. The section 18 decision may render the section 16 decision of no further effect, but it does not excise it from history. It does not imply that the section 16 decision was wrong. There is no limit on the right of appeal. A decision is still a decision. The law on tax credit is different from that on social security. Section 9(6) of the Social Security Act 1998 is a statutory derogation from the right of appeal. It is impossible to treat an appeal against a section 16 decision as an appeal against a section 18 decision, but there are practical steps that can be taken to facilitate an appeal against the section 18 decision, such as inviting the parties to expedite the mandatory reconsideration of that decision and then inviting the claimant to withdraw the section 16 appeal. In any event, an appeal against a section 16 decision does not become academic and its outcome may even oblige HMRC to act under section 19.

13. At the hearing, Mr Royston began by setting out his arguments in this way. First, as HMRC's policy (as stated by Ms Ward) was to avoid making a section 18 decision when an appeal against a section 16 decision was pending, the issue of jurisdiction and lapsing only arose when that policy had failed. The claimant should not be prejudiced and lose the right to appeal. Second, a section 18 decision was of a kind of its own. Social security law on lapsing could not translate to it:

- The social security structure of decision-revision-supersession did not work under the Tax Credits Act. The section 18 decision did not involve deciding that the section 16 decision had been wrong. The claimant could rely on the section 16 decision so long as there was no factual change.
- Section 38 conferred a right of appeal against a section 16 decision even after the section 18 decision had been made.
- In rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules (SI 2008/2685), jurisdiction meant "what right or power Parliament conferred to bring or hear an appeal". There was no scope for exercising a discretion.
- The lapsing approach could lead to decisions being made without jurisdiction if the tribunal was not aware that a section 18 decision had been made.

Third, a case management approach was preferable. It allows a tribunal to hear an appeal if is capable of affecting subsequent potential decisions.

14. In view of the way in which Mr Royston's argument developed in the course of discussion with the panel, we allowed him time to set out in writing a statement of this final position on how a First-tier Tribunal should dispose of an appeal if there would be no purpose in deciding it. His preferred position was that, unless the claimant withdrew the appeal, the tribunal should decide it on its merits. This is likely to be rare, given HMRC's policy of not making a section 18 decision when an appeal is pending. In the alternative, the First-tier Tribunal's duty under rule 8 should be treated as extending to an academic appeal that it would not be proper to determine. This would be a strained construction, given the language of the rule.

For HMRC

15. This is a summary of Ms Ward's arguments from the skeleton provided before the hearing and at the hearing itself. Ms Ward argued for a pragmatic approach that allowed the real issues to be determined compatibly with the structure of the Tax Credits Act. There was no issue of jurisdiction. A section 18 decision given after an appeal had been lodged against a section 16 decision raised issues of case management. The appeal should be treated as academic in all but exceptional cases, such as where an issue of principle was involved. A section 18 decision had a different function from a section 16 decision and did not replace it. Section 16 essentially was prospective and section 18 was retrospective. A new decision had to be made for each tax year, albeit that payment could continue under section 24(4).

H. Jurisdiction, lapsing and appeals in principle

16. Both Mr Royston and Ms Ward sought to avoid issues of jurisdiction in order to classify the issue as one of case management under which it was possible for tribunals to produce a pragmatic outcome. We do not accept that argument. As we are differing from the joint approach of counsel, we need to explain in detail why their approach is not permissible.

Jurisdiction

17. It is a common law rule that a statutory tribunal must not act outside its jurisdiction: *Evans v Bartlam* [1937] AC 473 at 480. This is a constitutional principle that represents the proper distribution of the judicial power of the State under the ultimate authority of Parliament. Despite counsel's argument, there is no scope for a pragmatic approach to what is, and is not, within a tribunal's jurisdiction. A tribunal either has jurisdiction or it doesn't. It cannot claim jurisdiction over an issue on the basis that it is dealing with it as an academic one. Nor can its jurisdiction depend on what would, or would not, be convenient in the circumstances of a particular case or class of cases. As Black LJ said in *In re X (Court of Protection: Deprivation of Liberty) (Nos 1 and 2)* [2016] 1 WLR 227:

> "47. … I note the authorities, therefore, as a useful reminder that a pragmatic approach to litigation may sometimes be appropriate, particularly in the light of the overriding objective set out in today's procedural rules, but they do not, to my mind, constitute a licence to ignore jurisdictional and procedural rules completely nor do they permit the courts to be used to determine issues just because it would be useful to have an authoritative answer."

This does not mean that pragmatic considerations may not be relevant to interpreting the legislation that confers the jurisdiction on the tribunal. They may also be relevant in the exercise of the tribunal's case management powers. But those powers can only be exercised within the tribunal's jurisdiction; they cannot be applied as a way to bring within the scope of the tribunal's jurisdiction something that is not authorised by statute.

18. A tribunal has jurisdiction to decide whether a case falls within its jurisdiction: *R v Fulham, Hammersmith and Kensington Rent Tribunal ex parte Zerek* [1951] 2 KB 1. The classic analysis of jurisdiction is that of Diplock LJ in *Garthwaite v Garthwaite* [1964] P 356 , [1964] 2 All ER 233 at 387:

> "In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons

> seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors."

The "subject-matter" of an appeal

19. What constitutes the "subject-matter of the issue" is determined, and only determined, by the terms of the legislation governing the tribunal and the scope of its authority. In the case of tax credits, the jurisdictions of both the First-tier Tribunal and the Upper Tribunal are appellate, but their subject matters differ. That difference is important for the purposes of the tribunals' jurisdiction.

20. It is the nature of an appeal that it must be against something. According to the Appendix to the Tribunal of Commissioners' decision in R(IS) 2/97:

> "9. **Appeal** is the process by which the decision of an administrative adjudicating authority is reconsidered and if necessary set aside or altered by a higher determining authority. …"

The Tribunal of Commissioners was referring to an appeal to what is now the First-tier Tribunal. Hence the reference to an administrative adjudicating authority. More generally, an appeal is a challenge to a decision on the ground that it is wrong, either in fact or law. This appears from the analysis in *Furtado v City of London Brewery Company* [1914] 1 KB 709. The issue there was whether an application under the Income Tax Act 1842 was an appeal. In argument, counsel said (page 710):

> "To constitute an appeal there must be something which he [the taxpayer] says is wrong and desires to have put right."

The Court of Appeal accepted this argument, saying (page 714):

> "There is not anything from which the applicant is appealing."

Without a decision, an appeal has no meaning or substance. It has no subject matter. This is a consequence of the combined effect of the nature of an appeal and the need for a decision as the subject matter of that appeal.

21. In the case of the First-tier Tribunal, a tax credit appeal is governed by section 38, which provides for an appeal to be brought against a decision under section 16(1). That decision is the subject matter of the appeal. If there is no section 16 decision, there is no subject matter for an appeal and, therefore, the tribunal can have no jurisdiction in relation to it.

22. This reasoning does not apply to all cases before the First-tier Tribunal, as not all cases come before that tribunal on appeal. The First-tier Tribunal's mental health jurisdiction illustrates the point. The cases come before the tribunal not on appeal, but on application or by referral. When a patient's status changes from being detained for assessment to being detained for treatment or from being detained in hospital to being discharged on a community treatment order, the tribunal retains jurisdiction: *AA v Cheshire and Wirral Partnership NHS Foundation Trust*: [2009] UKUT 195 (AAC); [2011] AACR 37; *KF v Birmingham and Solihull Mental Health Foundation Trust*: [2010] UKUT 185 (AAC); [2011] AACR 3. The significant factor underlying these cases is that the First-tier Tribunal's jurisdiction is not appellate. The tribunal's jurisdiction is governed by the Mental Health Act 1983, which

requires the tribunal to decide whether the conditions for the patient's detention are satisfied at the time of the hearing. The change in the patient's status has no effect on "the subject-matter of the issue" as set out in the 1983 Act, and so does not affect the tribunal's jurisdiction.

23. In the case of the Upper Tribunal, an appeal is governed by section 11(1) of the Tribunals, Courts and Enforcement Act 2007, which provides for the right of appeal on any point of law arising from a decision made by the First-tier Tribunal. That decision is valid for the purposes of an appeal regardless of whether or not it was made within the tribunal's jurisdiction, whether or not it was validly made, and whether or not it involved the making of an error of law. If it were otherwise, the right of appeal would be ineffective, as the Privy Council recognised in *Calvin v Carr* [1980] AC 574 at 590:

> "… where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal."

The underlying principle was stated by the Court of Appeal in *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255 at [20]:

> "Formal decisions of a tribunal are valid and of binding effect unless and until set aside by some order of the tribunal itself (e.g. if it comes to appreciate that it mistakenly acted without jurisdiction) or of a superior tribunal or court or on judicial review."

The operative effect of a decision

24. We have said that if there is no decision there can be no appeal to the First-tier Tribunal. What happens if a decision is changed after an appeal has been lodged against it? The Social Security Commissioners used lapsing to work out the answer. They decided that if the effect of the later decision was "to annul" the earlier decision that was under appeal, the appeal lapsed: R(SB) 1/82. As analysed by the Court of Appeal in *Chief Adjudication Officer v Eggleton R(IS) 23/95*, it depends on the earlier decision ceasing, retrospectively, to be of operative effect for any period:

> "In my judgment, whether or not an original decision lapses or is superseded when it is reviewed, depends on the nature and extent of the review. If the whole of the original decision from the date on which it is made is revised or varied, there is nothing left of it and it cannot therefore be appealed. But if it is only varied as to part, or from a particular date or because revision is precluded after a certain date, in the absence of any express provision to the contrary, I can see no logical reason why the original decision should not subsist, save in so far as it has been affected by the review."

It is this loss of all operative effect, and this alone, that generates the lapsing effect. There is no indication in *Eggleton*, or in any of the cases before *RF* and *JY* for that matter, that there was any element of discretion. Nor is there is any indication that an appeal might continue in existence for some practical or potential benefit that this might have.

25. The reason why the appeal lapses is that there is no longer any decision against which an appeal can be brought and, as a result, the tribunal has no jurisdiction in relation to any appeal that has been lodged. It makes no difference in principle to the reasoning whether the earlier decision ceased to have operative effect before or after the claimant lodged the appeal.

26. Our analysis of lapsing is consistent with section 99(2) of the Nationality, Immigration and Asylum Act 2002. This provides that an appeal lapses if the Secretary of State certifies that the decision was taken on grounds of national security or in the interests of international relations. This shows that lapsing is not limited to circumstances in which a decision ceases to exist. More importantly for present purposes, it shows that lapsing is a jurisdictional concept. The decision still exists under section 99; it is just no longer an appealable decision. The lapsing effect enforces the jurisdictional purpose of the provision, which is to remove the case from the First-tier Tribunal's jurisdiction.

27. Mr Royston argued that lapsing is now an exclusively statutory concept and is limited to those cases to which it is expressly applied by statute. We reject this argument. The concept was used by the Social Security Commissioners in the early days of the modern social security system. It was accepted and supported by the Departmental practice described in R(SB) 1/82 in [12]. The decision-makers avoided an appeal lapsing by postponing the making a decision that might have that effect until the appeal was decided. [Ms Ward told us that that is the practice adopted by HMRC.] From 1990, legislation provided for the decision-maker to review a decision under appeal, but that appeal would lapse only if the new decision gave the claimant all that was being sought on the appeal. This was subsequently modified under the Social Security Act 1998. Under section 9(6), an appeal lapses if the decision under appeal is revised. The effect of a revision is to correct the decision retrospectively. This is subject to prescribed circumstances. Those circumstances are prescribed by regulation 30(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This provides that the appeal does not lapse if the decision as revised was not more advantageous to the claimant than the original decision. Instead, the appeal continues as against the decision as revised (regulation 30(3)). The effect is not to alter the concept of lapsing, but to provide a short circuit to avoid the need to start new proceedings. None of these legislative provisions has affected the basic concept of lapsing. It has not been abolished. It is not, and never has been, the subject of a complete statutory code. It has been recognised by the legislation, but it has never been brought wholly within the legislation or replaced by it. It is not, therefore, possible to argue, as Mr Royston did, that the absence of any reference to lapsing in the tax credit legislation means that it does not apply.

Disposal

28. Before 2008, tribunals disposed of cases that were outside their jurisdiction in a variety of ways. They might (i) refuse to admit the appeal, (ii) strike it out for having no prospect of success, (iii) declare that it was out of jurisdiction, or (iv) dismiss the appeal. There was no specific provision in any rules of procedure of which we are aware. In particular, we have not found any provision for striking out an appeal in any rules of procedure before regulation 7 of the Social Security (Adjudication) Regulations 1986, which introduced a *power* to strike out for want of prosecution. This did not cover cases that were outside the tribunal's jurisdiction. The power to strike out was extended by the 1999 Regulations. Regulation 46 gave the tribunal *power* to strike out an "out of jurisdiction appeal", as defined by regulation 1(3). This was supplemented by a *power* to strike out "a misconceived appeal", which included other cases of lack of jurisdiction.

29. When the First-tier Tribunal and Upper Tribunal came into operation on 3 November 2008, the position changed. The rules of procedure under the Tribunals, Courts and Enforcement Act 2007 introduced a specific provision dealing with lack of jurisdiction. Rule

8(2)(a) introduced a *duty* to strike out all or part of proceedings if the tribunal did not have jurisdiction in relation to them. It is impossible to interpret rule 8 as admitting any discretionary element. The terms of rule 8(2) could not be clearer: the tribunal *must* strike out the proceedings. That is the unmistakeable language of a duty. It is in contrast to rule 8(3), which merely authorises the tribunal to strike out proceedings by providing that it *may* do so.

30. The duty imposed by rule 8(2) reflects the tribunal's duty not to act outside its jurisdiction and the requirement that it decide whether it has jurisdiction. Its introduction may have been prompted by the arrangements for lodging an appeal. In some cases, the appeal is lodged with the decision-maker. Once such an appeal has been lodged, it is impossible for the tribunal simply to refuse to admit it and important to ensure that it is the tribunal, rather than the decision-maker, that exercises the gatekeeper control over which appeals are and are not within its jurisdiction.

31. The introduction of rule 8(2)(a) makes it important to understand the principles upon which lapsing operates. If (as we have decided) it operates by depriving a tribunal of jurisdiction, it imposes a duty on tribunals to dispose of cases by way of strike out rather than by one of the other methods that were previously used. And the strike out procedure contains an important and obligatory step by which the tribunal must allow the claimant a chance to make representations. This allows the claimant to argue that no later decision has been made or, if one was made, it has not been issued. This chance is all the more important because, unlike other strike out provisions, there is no power to reinstate proceedings once they have been struck out under rule 8(2).

32. When a section 16 appeal lapsed by virtue of a section 18 decision, it used to be possible for a tribunal to avoid any issue of jurisdiction and, therefore, the need for a claimant to lodge a new appeal against the section 18 decision. All the tribunal had to do was to treat the appeal as continuing against the section 18 decision. That is no longer possible; since the introduction of mandatory reconsideration in April 2014, before an appeal can be brought against a decision, the claimant must first apply for a review of the decision under section 21A. Only when that has been carried out and HMRC have issued a formal notice is it possible to appeal (section 38(1A)). This procedure is designed to avoid the need for an appeal if HMRC identify an error in a decision. Its effect, though, is to make it impossible for tribunals to short-circuit the appeal process in the way that was possible previously. It may be that this was a factor that prompted the judge in *RF* to try to find a way to avoid the need for a claimant to go through the mandatory reconsideration procedure and then lodge another appeal.

33. The Upper Tribunal is subject to the same duty to strike out proceedings that are outside its jurisdiction as the First-tier Tribunal. It operates differently, though, because its jurisdiction is differently defined, as we have shown in paragraph 23 above. The Upper Tribunal is not under a duty to strike out an appeal just because the First-tier Tribunal had no jurisdiction to entertain the proceedings; its decision has not ceased to exist. And, as the Upper Tribunal has jurisdiction, it has power to deal with an issue that might be considered academic in view of the First-tier Tribunal's lack of jurisdiction. It is at this stage that there is scope within its jurisdiction for discretion in the exercise of the Upper Tribunal's power to hear and decide an academic issue.

Other Chambers

34. In *VK v Commissioners for Her Majesty's Revenue and Customs (TC)* [2016] UKUT 331 (AAC) [2017] AACR 3, a different three-judge panel at [4] encouraged representatives to identify relevant caselaw on the rules of procedure for other Chambers than those involved in an appeal and to consider how any interpretation of the rules might operate in other jurisdictions. In keeping with that approach, Ms Ward drew our attention to the decision of the Immigration and Asylum Chamber of the Upper Tribunal in *SM (withdrawal of appealed decision: effect) Pakistan* [2014] UKUT 64 (IAC). The case involved the withdrawal by the Secretary of State of the decision that was the subject of the appeal to the First-tier Tribunal. Its significance is that the Immigration and Asylum Chamber of the First-tier Tribunal is not subject to a duty to strike out proceedings for which it has no jurisdiction, except in cases of failure to pay fees. We are grateful to Ms Ward for bringing this to our attention, but we do not consider that it affects our analysis. As Upper Tribunal Judge Peter Lane explained at [70], the analysis in that case depended on the decision-making structure in the Nationality, Immigration and Asylum Act 2002. In particular, section 82 of that Act did not list the withdrawal of the decision under appeal as a way in which the appeal would cease to be pending. This conclusion is consistent with our approach that a tribunal's jurisdiction depends on the interpretation of the legislation governing an appeal.

35. More generally, the decision-making structure in immigration and asylum is significantly different from that for social security and tax credits, making it impossible to apply the reasoning from that jurisdiction to other contexts.

I. Applying the principles to tax credit cases before the First-tier Tribunal

36. The scheme for tax credit decision-making is different in a number of ways from that for social security.

37. In social security, a decision is made on a claim (section 8(1)(a) of the Social Security Act 1998) by reference to the conditions of entitlement for the particular benefit. This decision may be altered in order to correct mistakes (of fact or law) as at the time the decision was made or to take account of subsequent developments (of fact or law). The three processes are revision (section 9), supersession (section 10) and appeal (section 12). All alterations, whether under section 9, 10 or 12, are made by reference to the conditions of entitlement.

38. In tax credits, it is usual to distinguish decisions made on a claim (section 14) or later during the tax year (sections 15 and 16) from those made after the end of the tax credit year (section 18). The former, it is said, relate to payment on an award; the latter, it is said, relate to entitlement. That may be a convenient way to explain the way those sections work, but it does not provide a sound basis for analysis of the issue we have to decide. Sections 17 and 18 ensure that entitlement for the whole of the tax year in question is investigated and made the subject of a conclusive decision. Sections 14, 15 and 16 may differ in that they operate essentially prospectively, but they nonetheless deal with entitlement. The only sensible view is that they provide for payment *calculated by reference to the conditions of entitlement* as shown by the evidence available at the time. This may be implicit in section 14, but it is explicit in sections 15 and 16, which refer repeatedly to the claimant's entitlement. What makes section 18 different is that it is conclusive on entitlement for the tax year (section 18(11)). This reasoning makes the same point as made in paragraph 32 of CTC/2662/2005 and CTC/3981/2005.

39. We have shown that the structure of the tax credit decision-making scheme differs from that of the social security scheme. The way that it operates also differs. The social security scheme is designed as a "right first time" system, although there is power to make changes if a decision is later shown to be wrong in fact or law. The way that the tax credit scheme operates makes it much more likely that the decision will be taken on a provisional view of the facts and less likely that the decision will be "right first time". Hence the compulsory investigation and decision-making once the tax year has ended. This would not need to be compulsory if the scheme was designed to ensure, as far as possible, that the decisions made in the course of the tax year were correct.

40. But these differences in the schemes and their operations are not ones of substance. In both schemes, decisions are made by reference to the conditions of entitlement on the basis of the evidence available to the decision-maker at the time and are subject to change as further evidence requires. As Ms Ward said at the hearing in relation to section 14: "HMRC would not make an award if the conditions of entitlement were not satisfied." The difference in the design and operation of decision-making regimes for social security and tax credits does not affect the essential similarity. It seems to us that the differences are required by the nature of tax credit as an annual entitlement calculated in a way that is more akin to a tax than a benefit, but paid in a way that is more akin to a benefit. If anything, the tax credit scheme makes it clearer that the effect of a section 18 decision is to deprive the decisions under sections 14, 15 and 16 of any operative effect, even within the tax year to which they related, since their inherently provisional nature makes it more likely than in the social security scheme that they will only be of temporary effect. That is put beyond doubt by the mandatory nature of the procedure under sections 17 and 18, and underlined by the provision in section 18(11) that the decision under that section is conclusive on entitlement for the tax year in question. That is the position whether or not the First-tier Tribunal knows of the section 18 decision when it considers the section 16 appeal.

J. Applying the principles to tax credit cases before the Upper Tribunal

41. We have explained why the subject matter of an appeal differs in proceedings before the First-tier Tribunal and the Upper Tribunal. Both tribunals are under a duty to strike out proceedings in relation to which they have no jurisdiction. What makes the proceedings different in the Upper Tribunal from the First-tier Tribunal is that the decision under appeal is different. The decision under appeal to the Upper Tribunal is not a decision under the Tax Credits Act, but the decision of the First-tier Tribunal. That decision has sufficient existence to form the subject matter of appeal, so the duty to strike out is not triggered.

42. It follows that, in proceedings before the Upper Tribunal, it does not matter *for the purposes of the Upper Tribunal's jurisdiction* whether the section 18 decision was given:

- before the claimant made an appeal to the First-tier Tribunal;
- during the course of the proceedings before that tribunal;
- after the First-tier Tribunal made its decision; or
- during the course of the proceedings before the Upper Tribunal.

In all these case, the Upper Tribunal had and retains jurisdiction to hear the case.

43. As the Upper Tribunal has jurisdiction, it also has power to decide an issue that is, as a result of the section 18 decision, academic between the parties. It is the existence of a decision that allows scope for the Upper Tribunal to exercise its power to hear such issues in

accordance with the principles established by *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450. It is this that distinguishes the *Salem* line of authorities from the principle set out in *In re X*, part of which we have already cited. This is the full passage from Black LJ's judgment:

> "47. I do not think that the jurisprudence goes so far as to establish that this court should entertain an appeal in a case in which the lower court was itself only ever engaged upon a determination of hypothetical or academic issues. In each of the cases to which I refer in the preceding paragraph, the matter began as a real dispute between parties to conventional litigation of one sort or another, before a court which undoubtedly had jurisdiction to rule upon the dispute, but the issue had been settled or otherwise resolved before the case reached the appeal court. I note the authorities, therefore, as a useful reminder that a pragmatic approach to litigation may sometimes be appropriate, particularly in the light of the overriding objective set out in today's procedural rules, but they do not, to my mind, constitute a licence to ignore jurisdictional and procedural rules completely nor do they permit the courts to be used to determine issues just because it would be useful to have an authoritative answer."

As soon as the appeal lapses before the First-tier Tribunal, that tribunal ceases to have jurisdiction and from then on, in Black LJ's words, "was itself only ever engaged upon a determination of hypothetical or academic issues". There is no longer any issue in dispute between the parties in relation to the section 16 decision and it is not permissible to resurrect under the guise of an academic issue any dispute that did at one time exist against a decision that no longer exists.

44. If the Upper Tribunal does not decide an issue as an academic one, its powers are set out in section 12(2) of the Tribunals, Courts and Enforcement Act 2007. Depending on the circumstances of the case, the Upper Tribunal might consider it appropriate (i) not to set aside a decision of the First-tier Tribunal despite an error of law or (ii) re-make the decision, perhaps by substituting a decision striking out the proceedings on the appeal to the First-tier Tribunal for lack of jurisdiction.

K. The decisions in RF and JY

RF

45. It follows from our analysis that we do not agree with the judge's analysis in *RF*. Where a section 18 decision has been made, there is no scope for a discretion to continue with the section 16 appeal and, therefore, the practical considerations that she mentioned do not arise. We deal with them for completeness and because Mr Royston relied on one of them.

46. The judge referred to the possibility of a decision under section 16 being a defence to a money claim to recover overpayment of a tax credit. Even if that is theoretically possible despite the detailed (and apparently comprehensive) legislative provisions for making and correcting a conclusive decision, it is more likely that a debt will be recovered from future tax credit payments rather than by legal action.

47. The judge mentioned the difficulties facing unrepresented claimants in finding their way around the complicated decisions, mandatory reconsiderations and appeals in the tax credit scheme. Mr Royston made the same point. We agree with them that claimants do face difficulties. These are, however, essentially matters for HMRC to ensure that decisions are

made timeously and proper notice is given of appeal rights. As Black LJ said in *In re X*, practical considerations cannot override jurisdictional boundaries.

48. The judge referred to Mitting J's judgment in *Vasile Anghel*. We have set out that judgment in Appendix B. The reasoning in his judgment is compatible with the analysis of lapsing as a matter of jurisdiction in the First-tier Tribunal. The challenge before him was to an extradition order. That order continued to exist despite the fact that Mr Anghel had been extradited under it. The execution of an order does not deprive it of its existence, just as the performance of a contract does not mean that the contract no longer exists. To use Diplock LJ's words, the extradition order was "the subject-matter of the issue" and it continued to exist.

JY

49. It follows from our analysis that we do not agree with the way in which the judge equated the position of proceedings before the First-tier Tribunal and the Upper Tribunal. The latter require a different analysis, as we have shown. Her case concerned the latter and her reasoning on academic issues is relevant there, but it is not relevant to the First-tier Tribunal. In the First-tier Tribunal, the appeals lie against the section 16 decision and are subject to the duty to strike out proceedings that are outside that tribunal's jurisdiction. In the Upper Tribunal, in contrast, the appeals are against the decision of the First-tier Tribunal to which the strike out duty has no relevance.

50. Despite the judge's statement at [16], neither Ms Ward nor Mr Royston was able to identify any part of *In re X* that was relevant to lapsing. Neither could we. Nor do we agree with the judge that there is any scope for a discretionary element in lapsing. There is no hint of this in the social security caselaw. In particular, we can find no justification for the judge at [36] relegating the analysis in *Eggleton* to merely "the starting point".

51. Finally, the Upper Tribunal's jurisdiction is limited by the scope of the decision under appeal. Subject to anything that Upper Tribunal Judge Wright may decide in CTC/0865/2016, there is no power to give directions to a decision-maker in respect of another decision or in respect of a future appeal against another decision. The judge had no power to give the directions she did in [44] to [45].

L. Matters of practice

The First-tier Tribunal

52. If the First-tier Tribunal lacks jurisdiction to hear an appeal, the proper disposal before that tribunal is to strike out the proceedings. It is unlikely that the Upper Tribunal would give permission to appeal if the tribunal took a different course, such as refusing to admit the appeal, dismissing it or recording that it has lapsed. But the strike out procedure contains an important safeguard in that the claimant has a chance to make representations, which the duty of fairness would require the tribunal to respect if it did take another course. That is not a mere formality; it may save a tribunal from using its powers inappropriately or without first ensuring that the conditions for a strike out are met.

HMRC's practice of deferring a section 18 decision while an appeal is pending

53. Ms Ward told us that this was HMRC's practice. It is not for us to tell HMRC how to organise the management of tax credits. It is, though, our view, for what it is worth, that it would be preferable for HMRC to make a decision under section 18 as soon as possible after the end of the tax year. That is consistent with good administrative practice by ensuring efficiency of decision-making and certainty for the claimant. It would also have the beneficial effect that any appeal could focus on the important issues of the claimant's entitlement.

M. How our decision applies to appeals against decisions made under section 14 or section 15

54. Both appeals before us concerned decisions that were made, or purportedly made, under section 16. We have not had to consider appeals against decisions that were made under either section 14 or section 15. However, we can see no difference in principle why our reasoning should not apply to appeals against decisions under those sections, as it does to appeals against decisions under section 16.

N. Disposal

LS

55. In this case, the decision that was the subject matter of the appeal to the First-tier Tribunal was made on 2 October 2013. By the time the tribunal made its decision, HMRC had made a decision under section 18. There is an issue whether the section 18 decision had been issued to the claimant prior to the tribunal's decision. It is not necessary for us to resolve this issue. If the decision had been issued, the First-tier Tribunal had no jurisdiction and it was under a duty to strike out the appeal. The proper disposal before the Upper Tribunal would be to re-make the First-tier Tribunal's decision to that effect. Even if the decision had not been issued, the claimant is now aware of it and, in view of our reasoning, there would be nothing to gain from further proceedings in respect of the section 16 decision. Either way, the outcome is the same for the claimant. We have compromised by giving a decision that even if the First-tier Tribunal made an error of law, it is not appropriate to set its decision aside.

RS

56. In this case, the decision that was the subject matter of the appeal to the First-tier Tribunal was made on 13 April 2015. It purported to be made under section 16 and in respect of the 2014-2015 tax year. That tax year had ended when the decision was made. A decision under section 16 may only be made during the period for which an award of tax credit has been made. As the decision was made after that period had ended for the 2014-2015 tax year, HMRC had no power to make the decision. Accordingly, the decision was not validly made. However, applying the principle that a decision once made is effective unless and until it is changed or set aside (*Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255 at [20]), and subject to anything that Judge Wright may decide in CTC/0865/2016[1], it was effective until it was replaced by the decision under section 18. That decision was not made until after the proceedings before the First-tier Tribunal were

[1] Judge Wright's decision is now available: *HO v Her Majesty's Revenues and Customs (TC)* [2018] UKUT 105 (AAC)

concluded. So, the decision under section 16 was still in existence when the tribunal made its decision. The proper course was to decide that the decision had not been validly made and so was of no force or effect. Now that a decision has been made under section 18, it is no longer appropriate to give that decision. We have, therefore, found that the tribunal made an error of law but that it is not appropriate to set aside its decision.

APPENDIX A

THE LEGISLATION

Some of the legislation cited below refers to "the Board". By virtue of the Commissioners for Revenue and Customs Act 2005, the functions of the Board are now exercised by HMRC.

Social Security Act 1975

"**104 Review of decisions**

…

(3B) Where a claimant has appealed against a decision of an adjudication officer and the decision is reviewed under this section by an adjudication officer, then-

(a) if the adjudication officer considers that the decision which he has made on review is the same as the decision that would have been made on the appeal had every ground of the claimant's appeal succeeded, then the appeal shall lapse; but

(b) in any other case, the review shall be of no effect and the appeal shall proceed accordingly."

This became section 29 of the Social Security Administration Act 1992 on consolidation.

Social Security (Adjudication) Regulations 1986 (SI 1995/2218)

"**7 Striking-out of proceedings for want of prosecution**

(1) The chairman of an appeal tribunal or a medical appeal tribunal may …, on the application of any party or of his own motion, strike out any application, appeal or referral for want of prosecution."

Social Security Act 1998

"**9 Revision of decisions**

…

(6) Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under this section before the appeal is determined."

Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/ 991)

1 "**Citation, commencement and interpretation**

…

(3) In these Regulations, unless the context otherwise requires-

'misconceived appeal' means an appeal which is-

(a) frivolous or vexatious; or

(b) obviously unsustainable and has no prospect of success,

other than an out of jurisdiction appeal; …"

'out of jurisdiction appeal' means an appeal brought against a decision specified in Schedule 2 to the Act [the Social Security Act 1998] or a decision prescribed in regulation 27 (appeals against which no appeal lies); …

"**30 Appeal against a decision that has been revised**

(1) An appeal against a decision of the Secretary of State or the Board or an officer of the Board shall not lapse where—

(a) the decision is revised under section 9 before the appeal is determined; and

(b) the decision as revised is not more advantageous to the appellant than the decision before it was revised.

…

(3) Where a decision as revised under section 9 is not more advantageous to the appellant than the decision before it was revised, the appeal shall be treated as though it had been brought against the decision as revised."

"**46 Appeals which may be struck out**

(1) … an appeal may be struck out by the clerk to the appeal tribunal-

(a) where it is an out of jurisdiction appeal …

(4) … a misconceived appeal may be struck out by a legally qualified panel member …"

Nationality, Immigration and Asylum Act 2002

"**99 Section 97: appeal in progress**

(1) This section applies where a certificate is issued under section 97 [nationality security, etc] in respect of a pending appeal.

(2) The appeal shall lapse."

Tax Credits Act 2002

"**14 Initial decisions**

(1) On a claim for a tax credit the Board must decide—

(a) whether to make an award of the tax credit, and

(b) if so, the rate at which to award it.

(2) Before making their decision the Board may by notice—

(a) require the person, or either or both of the persons, by whom the claim is made 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.

(3) The Board's power to decide the rate at which to award a tax credit includes power to decide to award it at a nil rate."

"**15 Revised decisions after notifications**

(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."

"**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.

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 the 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 couple in response to a notice given under this section is to be treated as also done by the other member of the 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, 20, 21A and 21B 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.

19 Power to enquire

(1) The Board may enquire into—

(a) the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year, and

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

if they give notice to the person, or each of the persons, during the period allowed for the initiation of an enquiry.

(2) As part of the enquiry the Board may by notice—

(a) require the person, or either or both of the persons, to provide any information or evidence which the Board consider they may need for the purposes of the enquiry, 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 those purposes,

by the date specified in the notice.

(3) On an enquiry 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.

(4) The period allowed for the initiation of an enquiry is the period beginning immediately after the relevant section 18 decision and ending—

(a) if the person, or either of the persons, to whom the enquiry relates is required by section 8 of the Taxes Management Act 1970 to make a return, with the day on which the return becomes final (or, if both of the persons are so required and their returns become final on different days, with the later of those days), or

(b) in any other case, one year after the beginning of the relevant section 17 date.

(5) '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 year to which the enquiry relates, that decision, and

(b) in any other case, the decision under subsection (1) of that section in relation to the person or persons and that tax year.

(6) 'The relevant section 17 date' means—

(a) in a case in which a statement may be made by the person or persons in response to provision included by virtue of subsection (8) of section 17 in the notice given to him or them under that section in relation to the tax year, the date specified in the notice for the purposes of that subsection, and

(b) in any other case, the date specified for the purposes of subsection (4) of that section in the notice given to him or them under that section in relation to the tax year.

(7) A return becomes final—

(a) if it is enquired into under section 9A of the Taxes Management Act 1970, when the enquiries are completed (within the meaning of section 28A of that Act), or

(b) otherwise, at the end of the period specified in subsection (2) of that section in relation to the return.

(8) An enquiry is completed at the time when the Board give notice to the person or persons of their decision under subsection (3); but if the Board give notice to the persons at different times the enquiry is completed at the later of those times.

(9) The person, or either of the persons, to whom the enquiry relates may at any time before such notice is given apply for a direction that the Board must give such a notice.

(10) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act), and the tribunal must give the direction applied for unless satisfied that the Board have reasonable grounds for not making the decision or giving the notice.

(11) Where the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year has been enquired into under this section, it is not to be the subject of a further notice under subsection (1).

(12) Subject to sections 20 , 21A and 21B and regulations under section 21 (and to any appeal), a decision under subsection (3) 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.

21 Decisions subject to official error

Regulations may make provision for a decision under section 14(1) , 15(1) , 16(1) , 18(1) , (5), (6) or (9) , 19(3) or 20(1) or (4) to be revised in favour of the person or persons to whom it relates if it is incorrect by reason of official error (as defined by the regulations).

38 Appeals

(1) An appeal may … be brought against-

(a) a decision under section 14(1), … 16(1) …,

(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, …

(1A) An appeal may not be brought by virtue of subsection (1) against a decision unless a review of that decision has been carried out under section 21A and notice of the conclusion on that review has been given under section 21A(3).”

Tax Credits (Official Error) Regulations 2003 (SI 2003/692)

“2.—

(1) In these Regulations—

‘the Commissioners means the Commissioners of Inland Revenue;

'official error' means an error relating to a tax credit made by—

(a) an officer of the Commissioners,

(b) an officer of the Department for Work and Pensions,

(c) an officer of the Department for Social Development in Northern Ireland, or

(d) a person providing services to the Commissioners or to an authority mentioned in paragraph (b) or (c) of this definition, in connection with a tax credit or credits,

to which the claimant, or any of the claimants, or any person acting for him, or any of them, did not materially contribute, excluding any error of law which is shown to have been an error by virtue of a subsequent decision by a Social Security Commissioner or by a court;

'Social Security Commissioner' has the meaning given by section 63(13);

(2) In these Regulations references to a section are to that section of the Tax Credits Act 2002.

3.—

(1) A decision under section 14(1) , 15(1) , 16(1) , 18(1) , (5), (6) or (9) , 19(3) or 20(1) or (4) may be revised in favour of the person or persons to whom it relates if it is incorrect by reason of official error, subject to the following paragraphs.

(2) In revising a decision, the officer or person in question need not consider any issue that is not raised by the application for revision by the claimant or claimants or, as the case may be, did not cause him to act on his own initiative.

(3) A decision mentioned in paragraph (1) may be revised at any time not later than five years after the date of the decision."

It seems that regulation 2(1) has not been amended to take account of the amendments to section 63(13) made by paragraph 191(8) of Schedule 3 to the Transfer of Tribunal Functions Order 2008 (SI No 2833). The Upper Tribunal took over the functions of the Social Security Commissioners and is a court by virtue of section 3(5) of the 2007 Act.

Tribunals, Courts and Enforcement Act 2007

"**11 Right of appeal to Upper Tribunal**

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

12 Proceedings on appeal to Upper Tribunal

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision."

Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685)

"**7 Failure to comply with rules etc.**

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement; …

8 Striking out a party's case

…

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

…

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) … without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

There are equivalent provisions in the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698).

APPENDIX B

THE SOCIAL SECURITY CASES

The concept of lapsing in social security dates back to the early days of the modern social security system. It began with the Social Security Commissioners deciding that an appeal lapsed when the decision under appeal was replaced. In order to avoid the consequences for the claimant, the Department (with the approval of the Social Security Commissioners) adopted a practice of delaying any revision until the appeal was concluded. Mr Commissioner Monroe explained this in R(SB) 1/82:

> "12. … In the National Insurance field it was decided in Decision CU 42/54 (not reported) that the effect of reviewing a decision (meaning I think revising it on review) was to annul the decision so that any pending appeal from it lapsed. This decision was followed in the case on Commissioner's file CI 202/77 where it was stated that after the earlier decision a practice had grown up, which had the approval of the Commissioners, of not reviewing (or perhaps of not revising on review) decisions from which there was a pending appeal unless the revised decision would give the claimant all that he could get on the appeal. I would commend this practice for application in supplementary benefit cases. …"

The fullest, and most authoritative, analysis of the circumstances in which lapsing occurred is the decision of the Court of Appeal in *Chief Adjudication Officer v Eggleton*, reported as R(IS) 23/95. The Court decided that an appeal lapsed when the decision under appeal had been replaced for the entire period to which it related. Stuart-Smith LJ said:

> "In my judgment, whether or not an original decision lapses or is superseded when it is reviewed, depends on the nature and extent of the review. If the whole of the original decision from the date on which it is made is revised or varied, there is nothing left of it and it cannot therefore be appealed. But if it is only varied as to part, or from a particular date or because revision is precluded after a certain date, in the absence of any express provision to the contrary, I can see no logical reason why the original decision should not subsist, save in so far as it has been affected by the review. A simple example in my view shows that [t]his must be so. Suppose that a decision made on 1 January is revised from 1 February on the grounds that there has been a change of circumstances (s. 25(1)(b) [of the Social Security Administration Act 1992]), I can see no reason why an appeal against his original decision cannot be brought as of right if made within three months, otherwise with leave. The original decision stood for the period 1 January to 1 February. Equally, the original decision, subject to the limitation imposed by s. 69, can be reviewed under s. 25(2) for this period."

This decision and analysis is compatible with the approach that had been taken by the Department and the Social Security Commissioners.

THE TAX CREDIT CASES

CTC/2662/ and /3981/2005

In these cases, Mr Commissioner Jacobs analysed what was then the relatively new and still unfamiliar adjudication and appeal procedures under the Tax Credits Act. One question he

asked was: What happens to an appeal once a decision is given under section 18? His answer was:

> "42. If a claimant's appeal against a section 16 decision has not been decided before a decision is given under section 18, the former is redundant and of no possible benefit to the claimant. The sensible thing to do is to withdraw the appeal, but claimants may not understand this. Ideally, the legislation would provide for the appeal to lapse in these circumstances, but it does not do so. On general principle, a decision lapses if the decision ceases to be of any force or effect in respect of any period. See the analysis of Stuart-Smith LJ in *Chief Adjudication Officer v Eggleton*, reported as R(IS) 23/95. And if the decision has lapsed, there can be no appeal against it and any appeal that has been made must lapse also. The Tax Credits Act 2002 makes no provision for the effect of a section 16 decision after a section 18 decision has been made. However, section 18(11) provides that the decision under that section is conclusive, which carries with it the implication that the section 16 decision is no longer of any force or effect. That is lapsing in all but name. The disadvantage of this approach is that it is automatic. In most cases that would not matter, but there may be cases in which it would be appropriate to proceed with the appeal despite the fact that it had been overtaken by the section 18 decision.
>
> 43. Another analysis is that the tribunal should treat the appeal as raising only hypothetical issues. Courts decline to deal with such issues in public law cases. The appeal tribunal could do the same, simply declaring that the only issues raised are hypothetical and declining to decide them. The advantage of this approach over the lapsing of a decision or an appeal is that it gives the tribunal a discretion. The courts are prepared to decide hypothetical issues in public law cases if 'there is a good reason in the public interest for doing so', as Lord Slynn explained in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 A.C. 450 at 457. This would allow a tribunal to proceed with an appeal against a decision under section 16 (or for that matter under section 14 or 15) if, for example, it raised an issue of general importance, such as the scope of an appeal under that section."

This analysis did not refer to the appeal tribunal's strike out power that applied at the time.

CTC/2103/2006

In this case, Mr deputy Commissioner White adopted the lapsing analysis:

> "17. The final decision in relation to the tax year 2004-05 was not made until 15 March 2006. … The effect of the finalisation decision of 15 March 2006 is to lapse the earlier section 16 decision. The detailed reasons for such an effect are set out in joined cases CTC/2662/2005 and CTC/3981/2005. I agree with the analysis of the Commissioner in those cases. …
>
> 18. So the only decision which will be before the new tribunal is that of 13 January 2005 relating to the tax year 2003-04. This is the finalisation decision for the specified year. I direct the new tribunal to proceed on that basis."

The decision does not disclose when the proceedings before the First-tier Tribunal in relation to the tax credits decisions began. It seems that the tribunal had an appeal against (i) the section 18 decision of January 2005 for 2003-2004 and (ii) a section 16 decision for 2004-2005, which had been replaced by a section 18 decision for that year in March 2006. The

Commissioner decided that (ii) had lapsed. Strictly, it was not correct to say that the section 16 decision lapsed; it was the appeal that lapsed. Although he adopted the lapsing approach, he did not explain why.

CSTC/840/2014

In this case, Upper Tribunal Judge May also adopted the lapsing approach. The claimant had appealed to the First-tier Tribunal against a section 16 decision, but this had been replaced by a section 18 decision. Given the dates of the section 18 decision and the date of the tribunal's decision, the decision must have been made after the proceedings before the First-tier Tribunal had begun. The judge explained his decision:

> "5. The issue in relation to what happens when a decision is given under section 18 is, as can be seen, explored by the Commissioner in the case referred to above. He indicates that the effect of section 18(11) is that the decision under that section is conclusive with the implication that the section 16 decision is no longer of any force or effect. I accept his view on that. The Commissioner permits himself the observation that there may be many cases in which it would be appropriate to proceed with the appeal despite the fact that it had been overtaken by the section 18 decision. He does not explain why this is the case and I do not know what he has in mind. Thus I do not accept that proposition. He then proceeds in paragraph 43 of his decision to pose an alternative analysis which is that the tribunal should treat the appeal as raising only hypothetical issues. He is correct when he says that courts decline to deal with such issues in public law cases, though he does note that by virtue of *R v Secretary of State for the Home Department ex p Salem* there are circumstances which would allow a tribunal to proceed with an appeal against a decision the result of which would be hypothetical if for example it raised an issue with general importance. It is not argued by the claimant that her case involves an issue of general importance. The issue focused in the claimant's case before the tribunal was whether the claimant's self-employment supported "meaningful, effective and realistic expectation of remuneration". That was a simple question of fact which the tribunal determined in a matter which was adverse to the claimant and which she has sought to dispute in this appeal. In these circumstances I accept the respondent's submission in the supplementary submission at paragraph 10 that the decision of 18 August 2014 was conclusive. The tribunal did not deal with this issue, though in fairness to it, it was not one which was presented before it. The consequence of this is that the tribunal erred in law in a fundamental respect. In these circumstances I set their decision aside.
>
> 6. In disposing of this appeal I consider that having accepted that the decision of 18 August is conclusive for the reasons set out by Mr Commissioner Jacobs, I should make my own decision to the effect that the decision appealed against to the tribunal is no longer of any force and effect and that accordingly the appeal to the First-tier Tribunal is dismissed. It is quite clear from paragraph 11 of the respondent's submission that neither the First-tier Tribunal, if I was disposed to remit the case to them, nor myself could give any effective remedy to the claimant if her position on the merits was accepted. As a matter of principle the Upper Tribunal should not be inclined as a general rule, which I consider applies in this case, to make a hypothetical decision in an appeal before it. It is apparent from the speech of Lord Slynn of Hadley in *R v Secretary of State for the Home Department ex p Salem* that the discretion to do so should be

> exercised with caution and in very limited circumstances. It is not a discretion I would choose to exercise here. In these circumstances I have determined the appeal in the manner I have. I should perhaps add that had I considered that the exceptional circumstances applied to enable me to exercise the discretion to make a hypothetical decision I would have been inclined to accept the respondent's submission in paragraph 5 of the supplementary submission and I would not have been disposed to have interfered with the first tier's conclusion on the merits. I consider the reasoning of the tribunal is supportable."

The judge did not refer to what by this time was the First-tier Tribunal's duty to strike out appeals for which it lacked jurisdiction. If that had been drawn to his attention, he would no doubt have substituted a decision striking out the proceedings in the First-tier Tribunal rather than one dismissing the appeal.

NA v Commissioners for Her Majesty's Revenue and Customs (TC) [2016] UKUT 404 (AAC)

In this case, Upper Tribunal Judge Rowland followed Judge May:

> "10. … the primary ground on which the Respondent supports this appeal is entirely different from the grounds upon which I granted permission to appeal. It is pointed out that the decision under appeal to the First-Tier Tribunal was made under section 16 of the Tax Credits Act 2002 but that, unknown to the First-tier Tribunal, a further decision under was made on 17 June 2013 in respect of the claimant's entitlement to tax credits in the tax year from 6 April 2012. That decision was made under section 18 and, relying on the decision of Mr Commissioner Jacobs in CTC/3981/2005 and the more recent decision of Upper Tribunal Judge May QC on file CSTC/840/2014, it is submitted that its effect was to cause the appeal to the First-tier Tribunal to lapse. That submission is not opposed by the claimant and I accept that it is correct, although this system of adjudication seems bizarre. … It is further submitted by the Respondent that the appeal against the First-tier Tribunal's decision should be dismissed on the basis that the decision is of no effect, but I prefer to follow Judge May's example and give the decision set out above."

So, the judge substituted a decision that the appeal to the First-tier Tribunal had lapsed. Like Judge May, he did not refer to that tribunal's duty to strike out the proceedings.

RF v Commissioners for Her Majesty's Revenue and Customs (TC) [2016] UKUT 399 (AAC)

In this case, Upper Tribunal Judge Gray took a different approach. There had been a section 16 decision in September 2012 and a section 18 decision in May 2014. The First-tier Tribunal was not aware of the section 18 decision. It is not clear whether the claimant sent notice of appeal to the First-tier Tribunal before or after the section 18 decision had been made. It is clear that it had been made before the Commissioners sent the First-tier Tribunal their response to the appeal. This was the judge's reasoning:

> "**The interaction between sections 16 and 18 here**
>
> 33. The decision under appeal to the F-tT in this case is a section 16 decision which was made in September 2012. A matter unknown to the F-tT, but which I have been

told, is that in May 2014 a conclusive decision as to entitlement during that same tax year was made under section 18.

34. The submission of HMRC to the F-tT was dated 20 July 2014. It is indeed unfortunate that the writer of that submission did not check whether a section 18 decision had been made. The failure to do so was in fact a breach of rule 24 (4) (b) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008, under which it is the duty of the decision maker to provide with the response '*copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise'.*

35. Had that duty been complied with there might have been an opportunity for a F-tT judge in a case management role to establish the appellant's understanding of that decision and his right of appeal in respect of it, and if, as I suspect he would have done, he chose to appeal that decision both matters could have been linked to be dealt with together by the F-tT, which would have been in effect a supplanting of the appeal against the section 16 in year decision by the appeal against the section 18 decision. Instead the section 16 appeal stood alone.

36. The appellant did, however, respond to the notification of the section 18 decision. I am told that the letter was received by HMRC on 11 June 2014, but it is not in the papers before me. Whether or not HMRC is able to take action on the basis of that letter is a matter which I am specifically asked by HMRC to consider.

Does the section 18 decision lapse the section 16 appeal?

37. HMRC invites me to set aside the decision of the F-tT and give the decision that it ought to have made, namely that the appeal against the section 16 decision made on 7 March 2013 is lapsed, but I am not persuaded that the section 18 decision will automatically lapse the section 16 decision, leaving a tribunal seized simply of the section 16 appeal without jurisdiction. It is not axiomatic that an apparently purposeless appeal must lapse. In *Anghel Judicial Authority of France* [2015] EWHC 493 (Admin) Mitting J considered whether an extradition appeal would lapse where the individual had already been extradited. He said:

'*As a matter of principle the fact of his extradition does not mean that his appeal automatically lapses or is to be treated as having been withdrawn or abandoned'.*

38. For unrepresented appellants (the majority in this field) it may be that the need to pursue an appeal against a subsequent section 18 decision is not appreciated when there is already an appeal pending against the earlier decision in respect of apparently the same award; if the section 16 decision is made towards the end of the relevant tax year, and the section 18 decision promptly at the end of it, or if there is a delay in triggering the mandatory reconsideration process or some other procedural delay that cannot be laid at the door of the appellant, the situation could easily arise where the section 16 decision under appeal is apparently rendered nugatory but the section 18 appeal rights have been lost. That may lead to unfairness.

39. In other areas of law, and specifically in the area of social welfare law within which the Tax Credits legislation operates, there are statutory provisions for an appeal to lapse if it is overtaken by another decision against which there is a right of appeal. I note that under section 63(8) Tax Credits Act 2002 the Government had power to apply

those provisions of the social security legislation that authorise lapsing but has not done so; HMRC's submission to me is that there is no such provision in the tax credits legislation but that section 18(11), which provides that the decision under section 18 is conclusive, carries with it the implication that a prior section 16 decision is no longer of any effect. That is said to be lapsing in all but name.

The relationship between sections 16 and 18

40. The interplay between sections 16 and 18 has been considered by the Upper Tribunal in the two cases which have been referred to in the submission of HMRC before me.

41. Support for the current HMRC proposition is to be found in the decision of Upper Tribunal Judge May *CSTC/840/2014*, although I note that the HMRC position before Judge May was that there was value in the appeal continuing:

> "[11] HMRC consider that the best option in light of this would be to allow the current appeal to continue and whatever the outcome (albeit that it is hypothetical), HMRC will undertake to reflect that by, if necessary, making an amendment to 18 August 2014 decision. The basis that this would be that an official error had been made by HMRC in terms of the Tax Credit Decision, and under Section 21 of the 2002 Act and Regulation 3 of the Tax Credits Official Error Regulations 2003 (SI 2003/692), could be revised accordingly".

42. I examine the issue of potential value below.

CTC/2662/2005

43. Whether the First-tier Tribunal has power to proceed with a section 16 appeal in circumstances where a section 18 entitlement decision has been made was also an issue for Upper Tribunal Judge Jacobs in *CTC/2662/2005.*

44. That was a case in which he had both the section 16 and the section 18 decisions before him. He pointed out at [26] that any issues that were raised by the section 16 appeal were effectively redundant in the light of the end of that tax year and the section 18 decision. I do not disagree with that. I have already made the point here that had the two appeals been heard together the section 18 appeal would have effectively subsumed the section 16 appeal.

45. Judge Jacobs asked and answered the question:

"What happens to an appeal once a decision is given under section 18?

> "42… The Tax Credits Act 2002 makes no provision for the effect of a section 16 decision after a section 18 decision has been made. However, section 18(11) provides that the decision under that section is conclusive, which carries with it the implication that the section 16 decision is no longer of any force or effect. That is lapsing in all but name. The disadvantage of this approach is that it is automatic. In most cases that would not matter, but there may be cases in which it would be appropriate to proceed with the appeal despite the fact that it had been overtaken by the section 18 decision.
>
> 43. Another analysis is that the tribunal should treat the appeal as raising only hypothetical issues. Courts decline to deal with such issues in public law cases.

> The appeal tribunal could do the same, simply declaring that the only issues raised are hypothetical and declining to decide them. The advantage of this approach over the lapsing of a decision or an appeal is that it gives the tribunal a discretion. The courts are prepared to decide hypothetical issues in public law cases if 'there is a good reason in the public interest for doing so', as Lord Slynn explained in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 A.C. 450 at 457. This would allow a tribunal to proceed with an appeal against a decision under section 16 (or for that matter under section 14 or 15) if, for example, it raised an issue of general importance, such as the scope of an appeal under that section."

46. He left the two possible approaches as valid, not needing to rule on the issue in order to decide the appeal.

CSTC/840/2014

47. Judge May disagreed with Judge Jacobs's first approach that there may be cases in which it would be appropriate to proceed with a section 16 appeal that had been overtaken by a section 18 decision, saying that no example had been given, and he did not know what Judge Jacobs had had in mind. Judge May also referred at [6] to *R v Secretary of State for the Home Department, ex parte Salem* and dealing with a hypothetical issue, saying that the lesson from that case is that*" the discretion to do so should be exercised with caution and in very limited circumstances."*

An academic issue

48. Whilst a cautionary approach is no doubt appropriate, perhaps peculiarly in social welfare appeals cases not infrequently become academic prior to a decision, particularly an appellate decision on point of law, but are sometimes continued. In relation to the disputed factual issue in this case, whether the appellant could be said to been working in expectation of payment, *CAO-v-Ellis* was itself of a hypothetical nature by the time it reached the Court of Appeal. Nonetheless, the Court went on to consider it because it raised an important issue upon which the Chief Adjudication Officer wished to give guidance in pursuance of the proper administration of the benefits regime; it did not *"raise merely academic questions of private right, but questions of public law which need to be decided if the administration of the Social Security system can proceed in an orderly manner."*(Millett LJ)

49. But is a decision on the section 16 issue merely academic where the section 18 right of appeal is, or may be, lost?

Private right: an academic issue or of value to individual appellants

50. The conclusive nature of a section 18 decision does not mean that the section 16 decision raises merely academic questions. There will be circumstances in which such a decision can yet be of some effect.

51. Even though a tribunal decision on a section 16 appeal cannot be conclusive of entitlement, as a matter of practicality if a decision on the facts was made by a judicial body which was contrary to the facts found by the HRMC decision maker in the section 18 decision, the tribunal decision may provide grounds for HMRC to conduct a revision of the section 18 entitlement decision on the basis of official error. A major advantage

for an appellant is that the time limit for such an application is five years, as opposed to the 13 month limit for appealing the section 18 decision itself; regulation 3(3) of the Tax Credits (Official Error) Regulations 2003.

52. Even if an application to revise was not successful it may be that the FTT judgement could be used as a defence to a money claim by HMRC *(Manchester City Council v Pinnock [2010] UKSC 45; R (Beeson) v Dorset County Council [2002] EWCA Civ 1812).*

53. So there may be reasons to resolve a section 16 decision on appeal in cases where there is no extant section 18 appeal."

The judge then considered how this related to mandatory reconsideration under section 38(1A) before continuing:

"**My decision on the lapsing issue**

61. The preferred course is an appeal against the section 18 decision upon registration of which the section 16 appeal might be withdrawn, or if it was not could be deemed by a judge to be lapsed or otherwise supplanted by the section 18 appeal.

62. Where there is no section 18 appeal, and there may be a section 16 appeal outcome which, although it cannot immediately affect the section 18 decision has the potential to do so indirectly, the section 16 appeal should continue unless or until an effective appeal against the relevant section 18 decision is lodged.

63. Lodgement of an appeal against the section 18 decision may be a trigger for a case management decision to the effect that the section 16 appeal has lapsed, or that it should be struck out for lack of jurisdiction, but that step is premature without the subsuming section 18 appeal.

64. The procedural aspects relating to the difficulties of this particular legislation in concert with the complications of the appeal process in relation to time limits and mandatory reconsideration lend themselves to a situation such as has arisen here happening again. Without a statutory lapsing provision the proper protection for an individual is the continuation of rights in relation to an appeal currently in progress."

Vasile Anghel v Judicial Authority of France [2015] EWHC 493 (Admin).

Judge Gray referred to this case. For convenience, this is the whole of Mitting J's judgment:

"1. This appeal raises a relatively unusual question, namely what can happen when an appellant who wishes to challenge an extradition order made at first instance is extradited before his appeal is heard.

2. As a matter of principle the fact of his extradition does not mean that his appeal automatically lapses or is to be treated as having been withdrawn or abandoned. The court must look into the matter, or at least give the parties the opportunity of looking into the matter, a little further than that. In Ratajczak v Judicial Authority of Poland [2013] EWHC 2588 (Admin) the Divisional Court treated an appeal in circumstances similar to those that I have described as abandoned or not live where the appellant by his own conduct in declining to get in touch with his solicitors despite their efforts to get in touch with him demonstrated that there was no wish on his behalf to have the appeal determined.

3. That is the situation here. The appellant was extradited on 5 March 2014 despite the fact that he had put in a notice of appeal. The reason why he was extradited was because he put in a notice of appeal in one of the two names by which he is known, up to that point having been dealt with entirely in the other name. It is therefore his own fault that he came to be extradited despite having put in an appeal.

4. The fact is that he has not attempted to contact his solicitors despite being sent a letter by them on 27 August 2014. Accordingly, as in Ratajczak, I am satisfied that he no longer wishes to have his appeal heard. In any event, there were no grounds upon which it could properly have been allowed. I therefore dismiss this appeal."

JY v Commissioners for Her Majesty's Revenue and Customs (TC) [2016] UKUT 407 (AAC)

In this case, the First-tier Tribunal had heard an appeal against a section 16 decision. A section 18 decision was then given. So the issue for Judge Brunner was the significance of this subsequent event. This is the only case we know of in which the section 18 decision was made after the First-tier Tribunal's proceedings ended. The judge first referred to *Eggleton* and said:

"14. It is of some note that in this analysis it is taken as axiomatic that an appeal cannot be heard in relation to a lapsed decision. For ease I will refer to the principle articulated in the underlined section above as 'the lapsing principle'.

15. There was no consideration of whether there are exceptions to the lapsing principle. However, given that the finding on the facts of that case was that the original decisions and therefore appeals were extant because they had not been entirely revised, there was no need for the Court of Appeal to consider the lapsing principle in further detail.

16. The lapsing principle has been articulated time and time again by the higher courts (a recent example being the Court of Appeal in *Re X (Court of Protection Practice) [2015] EWCA Civ 599).* It appears plain from authorities that the lapsing principle does not automatically apply: the courts retain some discretion as to whether to hear appeals relating to apparently lapsed decisions, at least in the arena of public law.

17. That discretion was considered by the House of Lords in *R v Secretary of State for the Home Department, ex p Salem [1999] 1 AC 450***.** The Court of Appeal had dismissed the appellant's application that his benefits should not have been stopped as he had not been informed that his application as an asylum seeker had been rejected. Following the Court of Appeal decision the appellant had been granted that status and accordingly would receive back-payment of benefits. There was no live issue to be determined by the House of Lords.

18. It was accepted that even where there was no longer a matter to be decided which would directly affect the rights and obligations of the parties that a discretion arose to hear an appeal 'in a cause where there is an issue involving a public authority as to a question of public law'.

19. Lord Slynn clearly envisaged that the discretion to proceed with a case where the subject matter has expired should be exercised in very limited situations:

> ‘The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future. [my emphasis]
>
> I do not consider that this is such a case. In the first place, although a question of statutory construction does arise, the facts are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case… In the second place, … only in a few cases has this question arisen.’

20. In *R v Canons Park Mental Health Review Tribunal ex p Andrews [1995] Q.B.60* the Court of Appeal heard an appeal against a Divisional Court’s decision to quash the decision of a Mental Health Tribunal. The issues had, on their face, become academic: the patient had been returned to hospital on different grounds to those underpinning her original detention, and thus there was no effective order which the court could make. The issue was not referred to in terms of ‘lapsing’, but was identified as an issue of jurisdiction.

21. The reasons given by the Court of Appeal for hearing the case included potential future effects on the patient:

> ‘It is true that if the Divisional Court's order quashing the Tribunal's decision was held to have been wrongly made, the decision could not now be revived as a basis for the applicant's detention. But other consequences might flow from the quashing of the decision and, if the correct view is that it ought to have stood, declaratory relief ought to be granted accordingly. Moreover, as Mr Richards pointed out,
>
> “the applicant might again be re-classified during her present admission to hospital or, on an application to the tribunal, the tribunal might find that she was suffering from a psychopathic disorder. Thus there is a real possibility that the same issue could arise in respect to the applicant. In all the circumstances, the issues raised are neither hypothetical nor academic and there is no impediment in my judgment, to our hearing and disposing of the appeal.”’

22. The Court of Appeal proceeded to decide issues relating to treatability, and how to construe section 72(1) and (2) of the Mental Health Act 1983. The determination of those issues was plainly in the public interest: indeed, the case is often cited with a head note saying ‘Guidelines on the treatability test’. Although the court placed weight on the possibility of the applicant benefitting from the continuance of the appeal, it is clear from the full judgement that the benefit envisaged was from a swift resolution of legal issues, which would then be applied by any future tribunal hearing the applicant’s case. It is a moot point whether this case should be read as any authority for widening the discretion to hear an appeal about a non-effective decision beyond Lord Slynn’s consideration of ‘good reason in the public interest’.”

The judge then reviewed the cases before continuing:

"35. The case of *Anghel v Judicial Authority of France [2015] EWHC 493 (Admin)* to which Judge Gray referred is one of a line of extradition cases, beginning with *Pilecki v Poland [2008] UKHL 7* in which an extradition appeal was heard despite the claimant having been extradited, because it raised a matter of public importance. I do not read the case of *Anghel* as contrary to the principle of lapsing. The court dealt with the question of whether the appellant wanted the appeal to continue as a preliminary issue and, having answered that in the negative, did not need to articulate any further the test which it would have applied if he had wished to proceed.

Decision and Directions

36. A section 18 decision entirely replaces a section 16 decision, such that there is no operative part left of the section 16 decision. Where a section 18 decision has been made, the section 16 decision falls into the category of decisions identified in *Chief Adjudication Officer v Eggleton*, reported as *R(IS) 23/95* where the starting point is: 'there is nothing left of it and it cannot therefore be appealed'.

37. The absence of a statutory lapsing provision in the Tax Credits Act does not, in my view, displace the lapsing principle, which is not a creature of statute. It is a principle which, on the analysis of case law above, binds the higher courts hearing appeals from tribunals. In my view, it binds tribunals as well.

38. Although the lapsing principle is the starting point, it is not necessarily the end point. I agree with Judge Gray in CTC/1343/2015 that a section 18 decision does not automatically lapse the section 16 appeal. So far as CTC/2103/2006 and CSTC/840/2014 asserted that lapsing was automatic, I disagree with that analysis.

39. There remains discretion to hear an appeal against a lapsed decision, but that is a discretion which should only, in my view, be exercised in very limited circumstances. Those limited circumstances include good reason in the public interest to hear the appeal as stated in *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450. It is doubtful, in my view, whether those limited circumstances can ever extend beyond the test of 'good reason in the public interest'. Whatever the precise boundaries of the discretion, it should be a very rare event for either the F-tT or this tribunal to hear an appeal against a section 16 decision when a section 18 decision has been made.

40. I am doubtful whether the sort of reasons which Judge Gray relied on in CTC/1343/2015 to remit the case could ever be circumstances which allow an otherwise lapsed appeal to continue. Such reasons do not in my view make the section 16 appeal anything other than academic, and do not disclose any public interest in continuance. It seems to me that the potential disadvantages to a claimant caused by lapsing an appeal can be dealt with by observations from a tribunal, such as those I have made in this case. Remitting cases to the F-tT on the basis of speculative future advantage to a claimant will not, to my mind, usually meet the requirements of the overriding objective to deal with cases in ways which are proportionate to the complexity of the issues, the anticipated costs and the resources of the parties.

41. In this case, my findings are as follows: the section 16 decision has been lapsed by the section 18 decision. This appeal is academic, there is no public interest here in the s16 appeal continuing, and this appeal has thus also lapsed.

42. As the appeal has lapsed this tribunal has no jurisdiction and I make no decision and do not remit (following the approach taken in *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 (AAC). I make observations about the findings of the FTT as set out at paragraphs 3,4,5 above.

43. I understand that the claimant has asked for mandatory reconsideration of the s18 decision (if she has not, and if she disagrees with the decision then she should do so, and HMRC have indicated that they will treat a late request for reconsideration as if it was made in time). The claimant should understand that if she disagrees with the result of the mandatory reconsideration of the section 18 decision she must appeal that decision to the First-tier Tribunal.

44. There should be no reliance by HMRC or any future tribunal on the adverse findings of the F-tT on 26 August 2015. This decision, and HMRC's submissions to this tribunal, should be considered by the HMRC decision maker(s) considering the s18 mandatory reconsideration and any response to a section 18 appeal.

45. Any F-tT which hears the section 18 appeal or any future appeal brought by this claimant or her husband should be a differently constituted panel to the panel which sat on 26 August 2015."