

SA v COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
[2017] UKUT 90 (AAC)
UPPER TRIBUNAL CASE NO: CTC/3207/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 27 June 2016 at Nottingham under reference SC319/15/01976) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: at no time during the tax year 2014-2015 was the claimant a member of a couple. She was entitled to claim tax credit as a single person.

REASONS FOR DECISION

A. The issue

1. Section 3 of the Tax Credits Act 2002 provides that a claim for an award must be made jointly by a couple or, if and only if the person is not a member of a couple, by an individual. The issue in this case is whether the claimant and her husband were a couple as defined by section 3(5A). Specifically, the issue is whether they were 'separated in circumstances in which the separation is likely to be permanent' for the purposes of section 5(5A)(a)(ii). The issue arises because the claimant was awarded tax credits on a claim as a single person for the 2014-2015 tax year. The Commissioners decided that she was a member of a couple and so not entitled. The First-tier Tribunal dismissed her appeal. I gave her permission to appeal and the representative for the Commissioners has submitted that the tribunal's decision was made in error of law. She has invited me to remit the case to the First-tier Tribunal for rehearing. The claimant's representative has invited me to re-make the decision.

B. The facts

2. I take the facts from the findings made by the First-tier Tribunal. They are not in dispute. What matters is their analysis and whether they show that the couple's separation is likely to be permanent.

3. The claimant and her husband married in 1993. They have two children: their son was born in 1994 – he has autism, lives at home and does not leave the house; their daughter was born in 1998. They separated in 2010, but there has been no divorce or separation order. The tribunal found that the couple had separated but that it was not likely to be permanent. It came to that conclusion for these reasons.

4. First, the couple maintained a joint account into which the claimant's benefits and her husband's earnings were paid. The tribunal found that this was

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because the husband had poor budgeting skills and the claimant helped him manage his finances. Despite making the finding, the judge remarked that he would have expected the husband to have his own accounts by 2015. The claimant also said that the account was necessary as they had a joint mortgage; neither could afford to buy out the other. The judge remarked that he had 'not been told of any significant efforts on the part of either of them to have the property transferred into one of their names.' Overall, the judge remarked that the joint financial arrangement 'shows a high degree of trust.'

5. Second, the claimant had considerable health problems and her husband helped her if required. He occasionally slept on the claimant's sofa. The judge described this as showing that 'there is still a degree of interaction between them.'

6. Third, although the husband had had his own address at times, he had not found permanent accommodation and used the claimant's address for receiving his post. As he had had periods of employment, the judge remarked that he 'should have been in a position to get a settled address.'

7. Fourth, there had been no matrimonial proceedings.

8. In conclusion, the judge said that despite the length of their separation, 'when all of these factors were considered together, they indicated that the separation was not permanent.'

C. Analysis

9. The tribunal found that the couple had separated and remained separated. This is not a case in which the couple's arrangements were not sufficient to show that they were separated at the relevant time. The only issue was the likely permanence of their separation.

10. Section 3(5A)(a) applies to couples who are married but separated. It has to be interpreted and applied in the context that there is a continuing marriage. It is inherent in such a situation that the couple may continue to have some involvement with each other, over family and financial matters if nothing else.

11. The length of the separation may be relevant, but its significance may be difficult to assess. Separation followed by divorce is the usual sequence of events, so the lack of divorce proceedings may indicate that the parties have not yet decided their future marital status. On the other hand, the longer the separation continues, the stronger the indication that the parties may be content with the status quo. The legislation envisages that a couple may remain married but separated. It would be wrong to reason that because they remain married, their separation cannot be permanent. There may, after all, be good reasons – reasons that make sense to the parties – not to divorce. It may be that they cannot afford it. It might, realistically, make no practical difference to their situation. They may be happy as they are and not wish relations to be soured by legal proceedings. They may just find the idea of legal proceedings intimidating. My

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point is that the length of the separation must be considered in the context of all the circumstances – as the judge said.

12. It is important not to confuse the existence of the separation and its permanence. The degree to which the parties continue to be involved with each other and in each other's lives may indicate that they have not truly separated. But if that is not the case, as the judge found in this case, it is wrong to assess the evidence on the basis that continuing involvement is necessarily an indication that the separation is not likely to be permanent. As I have said, continued involvement may be inherent in the situation. There is also this point. Even divorced couples may continue to be involved in each other's lives. This may be because it is forced upon them by their responsibility for their children or by the financial dependence of one on the other. But it may also be because they continue to share interests and wish to provide mutual support. The model of a divorced couple as warring combatants is not universal. If continuing friendship and support is possible for a divorced couple, it follows that those features must not be taken as necessarily indicating that the separation is likely not be permanent.

13. Although the judge was right that permanence has to be assessed on the circumstances of the case as a whole, I consider that a number of his comments indicate that he must have misdirected himself on their significance in the overall context. To take just one example, the claimant has health issues and their son does not leave the house. It is natural that the husband would wish to visit his son and perhaps even sleep over on occasions. It is reasonable for separated couples to maintain a degree of mutual trust and support, to the extent that the husband would continue to help his wife when her health required it. To take these signs of interaction as indicative that the couple might come back together overlooked the fact that they had still not done so at the relevant time, several years after their separation.

14. I accept the argument by the claimant's representative that it is possible for the Upper Tribunal to re-make the decision in the claimant's favour. The parties had been separated for between four and five years at the relevant time. They continued to interact and have a degree of mutual trust. There is no reason to doubt their explanation for why they have arranged their lives as they have. That arrangement is not inconsistent with separation or with the separation remaining permanent. The duration of the separation indicates that they have settled into an arrangement that suits both of them. There are only three options. One is to continue as they are, which they seem content to do. The second is to come back together, but there is no evidence to suggest that this is something that they are considering. That is a possibility, but I do not consider that the circumstances show that it is likely. The third option is to divorce. For their own reasons, they have not done so. Even if they did, there is nothing to suggest that their overall position or their attitude towards each other would change.

Signed on original

Edward Jacobs

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on 27 February 2017

Upper Tribunal Judge