DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Brighton First-tier Tribunal dated 11 February 2016 under file reference SC301/15/00040 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> ***"The Appellant's appeal is allowed.***
>
> ***HMRC's decision of 25 August 2014 is revised. The Appellant's tax credit claim should not have been terminated with effect from 6 April 2013. The reason for this is that the Appellant was not 'living together as husband and wife' with her former partner, even though they shared the same address. She was accordingly correctly claiming tax credits as a single person and was not required to make a joint claim with her former partner."***

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

REASONS FOR DECISION

Drilling down: the moral of this case

1. The moral of this case is that in cases in which it is alleged that a man and a woman have been living together as husband and wife it may be necessary to "drill down" into the facts to arrive at a decision that can be properly sustained on all the evidence. It is not necessarily enough to ask: *<u>are</u> they living together*? In order to decide whether they are living together *as husband and wife*, one must also ask: *if they are living together, <u>why</u> are they living together*?

2. This is a case in which the claimant had lived at two separate addresses with the same man. They had had a child together. There was evidence from credit reference companies that their financial affairs were to some extent intertwined. All this might well suggest at first sight that this was an 'open and shut' case of 'living together as husband and wife' (or 'LTAHAW').

3. The claimant did not dispute that she had previously been living with the man in question in a way that could be characterised as LTAHAW. There was, however, another explanation for the current state of the relationship. The alternative explanation, in short, was that the couple had separated but had subsequently resumed living in the same property for reasons which were not consistent with LTAHAW. She was, therefore, on that basis a single person at the material time.

4. In this case the First-tier Tribunal failed properly to explore that alternative explanation and in doing so failed to make appropriate findings of fact or give adequate reasons for its decision.

The Upper Tribunal's decision in summary

5. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the Brighton First-tier Tribunal ("the Tribunal"), dated 11 February 2016, which dismissed her tax credits appeal involves an error of law and is set aside. The Tribunal's decision is of no effect.

6. The usual outcome for successful appeals before the Upper Tribunal is that the claimant's original appeal needs to be re-heard by a new First-tier Tribunal. But for reasons that I explain later a Tribunal re-hearing is not necessary in the circumstances of this case.

7. Cutting to the chase, I therefore both (a) allow the Appellant's tax credits appeal to the Upper Tribunal; and (b) re-make the decision that the First-tier Tribunal should have made and in the terms as set out above at the head of these reasons.

The legal framework

8. The relevant law is not in dispute. Section 3(3) of the Tax Credits Act 2002 provides that couples must make a claim for tax credits together and single claimants must claim alone:

> "(3) A claim for a tax credit may be made—
> (a) jointly by the members of a couple both of whom are aged at least sixteen and are in the United Kingdom, or
> (b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another)."

9. Section 3(4) then provides for the logical consequence of this rule:

> "(4) Entitlement to a tax credit pursuant to a claim ceases—
> (a) in the case of a joint claim, if the persons by whom it was made could no longer jointly make a joint claim, and
> (b) in the case of a single claim, if the person by whom it was made could no longer make a single claim."

10. Finally, section 3(5A)(a) and (b) define a "couple" (for heterosexual purposes) as being:

> "(a) a man and woman who are married to each other and are neither—
> (i) separated under a court order, nor
> (ii) separated in circumstances in which the separation is likely to be permanent,
> (b) a man and woman who are not married to each other but are living together as husband and wife".

The (bare) background facts

11. The Appellant and her alleged partner (who I shall refer to as Mr A to preserve the parties' anonymity) had lived together for several years in a property which I shall call "The House", subject to a joint mortgage. The House had four bedrooms, two bathrooms and two large living rooms. They had a joint bank account. They had a child together in 1998. During 2014 they both moved to a new address ("The Cottage"); the Appellant was the sole tenant of that property. The Cottage had two twin bedrooms and was more compact accommodation generally.

The HMRC decision under appeal to the First-tier Tribunal

12. The Appellant had been in receipt of tax credits for several years. Originally, she had been receiving tax credits as a joint claimant with Mr A. In around 2010 the joint claim was terminated and she started getting tax credits as a single person. In the course of 2013/14 Her Majesty's Revenue and Customs (HMRC) started inquiries into her tax credits award. This was because various databases, both internal to HMRC and external, showed that Mr A had financial links to the Appellant's address.

13. On 25 August 2014 HMRC notified a final decision to the Appellant (under section 18 of the Tax Credits Act 2002) on her tax credits award for 2013/14. The decision was to the effect that she had no entitlement to tax credits for that tax year (save for the customary one day's entitlement, which the HMRC computer system cannot cope with). The justification given was that the Appellant "failed to provide the necessary documents to support your entitlement to Tax Credits as a single person".

14. Following further correspondence, HMRC issued the Appellant with a mandatory reconsideration notice on 11 January 2015. That HMRC notice confirmed the original decision. It summarised its conclusions as follows:

> "*Based on the evidence listed above you and Mr A are residing in the same household. You have not taken steps to show you are separated on a permanent basis and have stated that your living arrangement is one of convenience. You appear to be living as a family unit. You have stated that you are financially jointly running the household with Mr A and it would appear you are dependant upon Mr A's financial contribution to remain in the property. The balance of probability indicates that you should have submitted a joint claim for the tax year 6 April 2013 to 5 April 2014*."

15. The Appellant lodged an appeal. She explained that due to her mental health problems she did not feel able to cope with an oral hearing and would not be attending. The Tribunal adjourned on two occasions for further evidence and submissions to be provided.

The First-tier Tribunal's decision under appeal to the Upper Tribunal

16. The Tribunal dealt with the appeal on the papers on 11 February 2016. The Tribunal's decision notice confirmed the HMRC decision of 25 August 2014 and so dismissed the Appellant's appeal. The decision notice included the following summary of the Tribunal's reasoning:

> *"The Tribunal decided that the Appellant and Mr A were living together as husband and wife and should have made a joint claim for Tax Credits. The Appellant and Mr A are living together and moved to The Cottage together and they have a child born in December 1998 and there is considerable trust and stability in the relationship and sharing of finances. The Appellant and Mr A are not separated on a permanent basis. The Tribunal accepts that the living arrangement is convenient, as confirmed by Mr A, but it appears to be similar to*

> *a family unit and the household is run with joint finances with the Appellant being dependant upon Mr A's financial contribution to remain in the property. The balance of probability shows that a joint claim should have been made for the tax year 2013-2014."*

17. The Tribunal also subsequently issued a detailed 6-page statement of reasons.

The proceedings before the Upper Tribunal

18. Some 18 months later (a delay for reasons that will become apparent), I gave the Appellant permission to appeal, explaining that I had two main doubts about the Tribunal's approach to the LTAHAW issue:

> "First, while it may be that the FTT's statement of reasons sets out the relevant legal test correctly, I am troubled somewhat by the decision notice. This records the finding that the living arrangement 'appears to be similar to a family unit'. The true question, of course, is whether the Appellant and Mr A were 'living together as husband and wife', which may not be quite the same thing as being similar to a family unit, whatever that is.
>
> Second, there appears to have been some evidence that the Appellant had spent some time separated from Mr A (and was living and working?) in Norfolk. It is not clear whether the FTT took this into account. It is also questionable how far the FTT considered the issue of the parties' intentions at the relevant time(s)."

19. Mrs M. Spalding, who now acts for HMRC in these proceedings before the Upper Tribunal, supports this appeal in her detailed and helpful submission. So far as the legal issues are concerned, she makes two main points.

20. First, and very fairly, Mrs Spalding refers to the HMRC's characterisation of the relevant legal test, as set out in its mandatory reconsideration notice (see paragraph 14 above), as being "somewhat confounding". She is right to make that observation. The HMRC notice was confusingly treating part of the test that applied to *married* couples (see section 3(5A)(a)(ii) of the Tax Credits Act 2002) as relevant to the test for *unmarried* couples who were LTAHAW. As Mrs Spalding notes, this conflation of legal tests may possibly have misled the Tribunal. Likewise, HMRC's reference to the mysterious notion of a "family unit" served to muddy the waters still further.

21. Secondly, Mrs Spalding argues that the Tribunal's decision involves an error of law in that it gives an inadequate explanation for reaching its decision on the facts. The main reasons given by the Tribunal for its decision – both in the decision notice and the statement of reasons – were that the Appellant and Mr A had been living in the same household for a number of years, they had a child, they had joint finances and there was stability and permanence in the relationship. In short, Mrs Spalding contends that the Tribunal failed to make findings of fact or give sufficient reasons in respect of the arguments the Appellant had advanced as to how the nature of her relationship with Mr A had changed over time.

The Upper Tribunal's analysis

The appeal to the Upper Tribunal against the decision of the First-tier Tribunal

22. I agree in part with Mrs Spalding's first point. The HMRC officer who drafted the mandatory reconsideration notice was plainly confused as to the relevant law. That confusion meant the HMRC notice was unhelpful to the Appellant in terms of enabling her to understand the case that she had to meet. However, despite the Tribunal's reference to there being "no legal separation in place" (statement of reasons at paragraph 43) and the relationship being "similar to a family unit"

(decision notice), I am not persuaded that this Tribunal was necessarily led into error as to the true nature of the LTAHAW test. I say that as the Tribunal correctly identified a series of decisions of the Social Security Commissioners as relevant to the test it had to apply. These authorities included Commissioner's decision *R(SB) 17/81*, with its discussion of the so-called "signposts" under the general rubric of the LTAHAW test, i.e. membership of the same household, stability, financial support, sexual relationship, children and public acknowledgement. The Tribunal's findings showed it clearly had that test and those signposts in mind.

23. However, I also agree with Mrs Spalding's second point. The Tribunal failed properly to engage with the arguments that the Appellant had advanced as to why she and Mr A were no longer LTAHAW by the time of the 2013/14 tax year, despite living at the same address. There was a passing reference to the fact that Mr A "has health difficulties and his health may have been one of the reasons why [he] continues to reside with [her]" (statement of reasons at paragraph 43). The Tribunal accepted "it is also convenient that they are living together" (statement of reasons at paragraph 44). It was additionally stated that the Appellant was providing support and care to Mr A "which is a normal part of living as husband and wife" (statement of reasons at paragraph 45). But the Appellant's contentions as to how the relationship had changed over time were not adequately addressed.

24. I therefore accept Mrs Spalding's submission that the Tribunal went wrong in law and so I should allow the appeal and set aside the Tribunal's decision. I accordingly do just that.

25. So far as further disposal is concerned, Mrs Spalding proposes that I send the case back to a differently constituted First-tier Tribunal for further fact-finding and determination. However, I consider that it is right for me to re-make the decision under appeal, rather than send it back for a new hearing before a fresh Tribunal. I say that for two main reasons.

26. First, the Appellant has already indicated that she is unlikely to be well enough to attend a hearing. That being the case, a new Tribunal is very unlikely to be any better placed than me in making the decision. It is unlikely to have the benefit of oral evidence. There is, in any event, ample evidence on file to reach a fair and just outcome.

27. Second, a remittal to a new Tribunal will also add unnecessarily to delay (and so to the Appellant's stress) in resolving this appeal. In that context I take into account that the Appellant originally applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal by letter dated 21 June 2016, within a month of having received the Tribunal's full statement of reasons. That request appears to have gone into a black hole at the Birmingham Appeals Service Centre; certainly, there is no indication of any judicial or clerical action being taken on the case between 11 July 2016 (when the file was supposedly sent to Ashford) and 27 July 2017 (when a 'dummy file' was re-sent to Ashford). The Appellant is in no way responsible for that prolonged delay. I should also put on record my appreciation to Mrs Spalding and her colleagues in HMRC for producing a full copy of the original appeal bundle, which has made this decision possible.

28. I therefore propose to re-make the Tribunal's decision under appeal.

Re-making the decision of the First-tier Tribunal

Finding the facts

29. Based on the extensive evidence on file, I make the following findings of fact.

30. The Appellant and Mr A were originally a couple who were undoubtedly LTAHAW. They had a daughter born in 1998, which seems to have been the start of the relationship. They lived in the same household at, and had a joint mortgage of, The House. The ownership of the equity in the house is unclear. However, credit reference checks place Mr A at that address only as far back as 1998, whereas the Appellant herself is associated with that address at least as far back as 1994. The Appellant and Mr A also had a joint bank account. They were claiming tax credits as a couple. Their relationship as a couple LTAHAW broke down in 2009. The couple separated and the Appellant and her daughter left The House and moved to live in Norfolk, where they lived for approximately 18 months. During this period the joint tax credits claim was terminated and the Appellant claimed as a single person (at least from February 2010). During the period when they were living in Norfolk, Mr A's health deteriorated and he had a serious operation, requiring a long period of convalescence.

31. The Appellant's business venture in Norfolk did not succeed as she had hoped and in or about November 2010 she and her daughter returned to live at The House. They moved back for financial reasons rather than because the couple were resuming their relationship as LTAHAW. The plan was to sell the house, their joint asset, but this took longer than was anticipated. In January 2012 the Appellant had a telephone conversation with an HMRC Claimant Compliance Officer (CCO) in which she explained that she and Mr A were no longer in a relationship and they had separate rooms and separate finances. The CCO's record of that call stated "looking for somewhere else to live; after further questioning I accepted her explanation for now but advised her that the issue could happen again if she did not live elsewhere, set up a formal rental agreement, etc." During this period Mr A took responsibility for paying the mortgage, council tax and utility bills for The House and the Appellant paid him £350 a month in cash as her contribution to the household expenses. They kept the joint account as it was in overdraft and the bank would not allow the Appellant to be taken off the account. The Appellant had her own separate bank account as well.

32. Eventually, in March 2014, The House was sold. The Appellant took an assured shorthold tenancy of The Cottage in her sole name with effect from 3 March 2014. The utility bills for the new property were also in her sole name. The intention was that The Cottage should provide a home for the Appellant and her daughter, and not for Mr A. In the event, however, Mr A's continued ill-health was such that he was unable to find suitable accommodation for himself. A combination of the Appellant's problems with her business and the seriousness of Mr A's condition was such that the parties reached what the Appellant describes as "a delicate compromise and workable way ahead". This was that Mr A moved into The Cottage to be looked after by the Appellant (who was at some later date awarded carer's allowance). Mrs Spalding records her understanding, which is supported by information on one of the credit reference checks on file, that Mr A moved to The Cottage sometime around July 2014 (i.e. not at the very outset of the assured shorthold tenancy). The Appellant and her daughter slept in the larger of the two bedrooms at The Cottage, Mr A in the smaller of the two.

Pulling the threads together

33. The nature of the parties' relationship must initially be assessed as at April 2013, the beginning of the year in question for entitlement to tax credits. It is also relevant to consider events in the 2013/14 tax year. The HMRC decision refusing entitlement as a single claimant was not taken until 25 August 2014. The starting point in that assessment is to consider the so-called signposts approved in case law such as *R(SB) 17/81*.

34. *Members of the same household*. The Appellant has not sought to argue that she maintained a separate household while they lived under the same roof at The House. However, she does argue that given the size of that property "we were able to live our lives virtually apart with as little immediate disruption to our daughter until the property could be sold". The size and nature of the accommodation at The Cottage inevitably made that more difficult.

35. *Stability*. As has been remarked elsewhere, this 'signpost' rather begs the question. The parties' relationship was stable in that they have known each other since at least 1998 and have lived at the same address for many years. Stability only becomes of any real relevance if the relationship is found to be one that is like husband and wife. In that context it is important to bear in mind that such stability as there was suffered a major rupture in 2009 when the Appellant moved some distance away to Norfolk and stayed there for some 18 months before financial pressures necessitated her return to live at The House.

36. *Financial support*. Given that the parties were undeniably a couple at one stage, it is unsurprising that their financial affairs are to some extent intertwined. The joint mortgage and the problems and delays in selling The House likewise means that their finances were connected. However, it is noteworthy that by the time in question the Appellant was not operating the joint bank account and had made efforts, albeit unsuccessful efforts, to be released from that arrangement.

37. *Sexual relationship*. There was indubitably a sexual relationship in 1998 and for some unknown time thereafter. Any such relationship had ceased at the very latest by the time the couple separated in 2009 and the Appellant moved away to Norfolk. There is no evidence of and indeed no suggestion of any sexual relationship after 2009 or in 2013.

38. *Children*. It is not in dispute that the Appellant and Mr A are the parents of a child born in 1998. But equally the Appellant does not dispute that she was a member of a couple LTAHAW in 1998. The fact that the couple have a child in common has limited significance when looking at the position 15 years later in 2013. There is no evidence as to shared care at the material time. There is no evidence as to joint holidays. The Appellant's evidence is that she alone provided financially for her daughter when they were living at The House. When the Appellant and Mr A separated in 2009, the child – by then aged about 10 or 11 – went with her mother to live in Norfolk.

39. *Public acknowledgement*. There is precious little evidence as to public acknowledgement either way. The only clear indicator on the file is that in 2012 the HMRC CCO, following questioning, was satisfied that the Appellant and Mr A were not a couple although they were living under the same roof.

40. So what conclusion do the signposts point towards? They clearly support a finding that the couple were LTAHAW in 1998. They are much less clear as regards the position in April 2013 and thereafter.

41. The case law shows that it is important to have regard to the parties' intentions when evaluating the factual matrix – see the decisions of the Divisional Court in *Crake v Supplementary Benefits Commission; Butterworth v Supplementary Benefits Commission* [1982] 1 All ER 498 and *Robson v Secretary of State for Social Services* (1982) 3 FLR 232.

42. In *Crake and Butterworth v SBC* Woolf J held as follows (at 502c-d):

> "… it is not sufficient, to establish that a man and woman are living together as husband and wife, to show that they are living in the same household. If there is the fact that they are living together in the same household, that may raise the question whether they are living together as man and wife, and, indeed, in many circumstances may be strong evidence to show that they are living together as man and wife; but in each case it is necessary to go on and ascertain, in so far as this is possible, the manner in which and why they are living together in the same household; and if there is an explanation which indicates that there not there because they are living together as man and wife, then they would not fall within [the relevant statutory definition]; they are not two persons living together as husband and wife."

43. Woolf J continued as follows (at 504d-e):

> "If the only reason that Mr Jones went to that house temporarily was to look after Mrs Butterworth in her state of illness and, albeit, while doing so, acted in the same way as an attentive husband would behave towards his wife who suffered an illness, this does not amount to living together as husband and wife because it was not the intention of the parties that there should be such a relationship. Looked at without knowing the reason for Mr Jones going to live there, it would appear that they were living together as husband and wife, but when the reason was known that would explain those circumstances, and once the explanation was accepted by the tribunal, as clearly as it was here, and it was a matter for them, they should have come to the conclusion that in this case [the statutory definition] did not apply."

44. Likewise, Webster J held as follows in *Robson* (at 236D):

> "usually the intention of the parties is either unascertainable, or, if ascertainable, is not to be regarded as reliable. But if it is established to the satisfaction of the tribunal that the two persons concerned did not intend to live together as husband and wife and still do not intend to do so, in my judgment it would be a very strong case indeed sufficient to justify a decision that they are, or ought to be treated as if they are, husband and wife."

Reasons

45. Looking at the evidence in the round, and bearing in mind the correct legal test, I am not satisfied that the Appellant and Mr A were a couple LTAHAW in April 2013. That relationship had ended in 2009 when the Appellant and her daughter moved away for a period of up to 18 months. It is true that the Appellant returned to The House towards the very end of 2010 and resumed living under the same roof as Mr A. However, this step was not taken in order to revive the previous relationship that they had enjoyed. The Appellant was driven back by financial pressures including the failure of her business venture in Norfolk and the need to sell The House. As the Appellant put it in her reply to Mrs Spalding's submissions on the appeal, "the fact we resided separately in the same residence was based solely on 'necessity' as opposed to 'convenience' and not based on any physical, sexual or emotional (other than for a fellow human being) relationship". As she had also put it in written evidence to the Tribunal, Mr A "is my daughter's father and, although I have no intention of a personal relationship with him, I am not prepared to leave him struggling to cope, and would consider it morally indefensible to do so." Rather as in *Butterworth*, this was a relationship which had the hallmark of one between a carer

and a disabled person being cared for, rather than one that was like husband and wife.

46. The move from The House to The Cottage came at the end of the tax year in question but before the HMRC decision under appeal. The Tribunal had found as a fact that the Appellant and Mr A "moved to [The Cottage] together (statement of reasons at paragraph 43). However, the evidence is ambiguous on this point – as noted above, there is some indication that while the Appellant moved in March 2014 Mr A may not have moved until July 2014. If they were truly living together as husband and wife, one would have expected them to have moved at the same time. More importantly, however, is the other evidence about this move. The tenancy and all utility bills were in the Appellant's sole name. If they had been representing themselves as husband and wife, or LTAHAW, then one would have expected the landlords' agent to have insisted on Mr A being a party to the tenancy as well. The decision to rent The Cottage is entirely consistent with the Appellant's intention to mark a clear separation, as she had previously been advised by the HMRC CCO. The fact that Mr A's health continued to deteriorate and she did not feel she could leave him to cope by himself is not in itself indicative of any intention to renew or revise a LTAHAW relationship.

47. It follows that the decision that the First-tier Tribunal should have made, and which I now make, is therefore as follows:

> ***The Appellant's appeal is allowed.***
>
> ***HMRC's decision of 25 August 2014 is revised. The Appellant's tax credit claim should not have been terminated with effect from 6 April 2013. The reason for this is that the Appellant was not "living together as husband and wife" with her former partner, even though they shared the same address. She was accordingly correctly claiming tax credits as a single person and was not required to make a joint claim with her former partner.***

Conclusion

48. The decision of the First-tier Tribunal involved an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also re-make the Tribunal's decision (section 12(2)(b)(ii)) in the terms set out above.

Signed on the original
on 2 July 2018

Nicholas Wikeley
Judge of the Upper Tribunal