IN THE UPPER TRIBUNAL **Appeal No. CSTC/466/2019 (V)**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

PA

Appellant

- v –

HM Revenue and Customs

Respondent

The Lord Advocate also making representations

Before: Upper Tribunal Judge Markus QC

Hearing date: 18 September 2020
Decision date: 18 November 2020

Representation:
Appellant: Did not appear (written representations in person)
Respondent: Mr R. MacLeod (Advocate)
Lord Advocate: Ms L. Irvine (Advocate)

DECISION

I refuse permission to appeal

REASONS FOR DECISION

1. The Appellant applied to the Upper Tribunal ('UT') for permission to appeal against a decision of the First-tier Tribunal ('FTT') relating to his entitlement to working tax credits. The Respondent is Her Majesty's Revenue and Customs ('HMRC').

2. On 6 January 1995 an order had been made against the Appellant by the Court of Session (Lord Ross) under section 1 of the Vexatious Actions (Scotland) Act 1898, and published in the Edinburgh Gazette of 13 January 1995, as follows:

> "no legal proceedings shall be instituted by the Respondent, Mr [*'PA'*], who resides at [*address*] in the Court of Session, Sheriff Court, or any other Inferior Court unless he obtains leave of a Judge sitting in the Outer House of the Court of Session…."

3. The Appellant remains subject to the order. He did not obtain the leave of a Court of Session Judge to bring the appeal in the FTT or in the UT. The question arises whether the UT has jurisdiction to deal with this appeal in these circumstances. I directed the parties to address this as a preliminary issue, in written submissions. I observed that, if the UT does not have jurisdiction, the application must be struck out under rule 8(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Lord Advocate had the statutory responsibility for making applications for orders under section 1 of the 1898 Act and I invited him to make written submissions on the preliminary issue as well as HMRC and I invited the Appellant to provide written representations including in relation to the proposed striking out (rule 8(4)).

4. Following the receipt of written submissions, I directed an oral hearing to consider the preliminary issue. In the light of the difficulties in holding a face-to-face hearing due to the impact of the Coronavirus pandemic, I sought the parties' views on the mode of hearing. The Appellant notified the UT that he would not be attending the hearing, whether it took place face-to-face or by telephone or video. Although the Respondent and the Lord Advocate were willing to attend a face-to-face hearing, the weight of their views favoured a video hearing. I decided that the submissions could properly be made and the issues determined by way of a video hearing and, in the light of the potential difficulties and risks associated with a face-to-face hearing, I directed accordingly. The code 'V' appearing next to the case number indicates the mode of hearing. The hearing was published in the cause list with contact details for use by any person who wished to observe the hearing and so was a public hearing.

5. Prior to the hearing Ms L. Irvine for the Lord Advocate and Mr R. MacLeod for HMRC had each provided written submissions, which they supplemented orally at the hearing. I gave them leave to send further written submissions after the hearing, addressing issues that had arisen during the course of the hearing. I am grateful to both advocates for their helpful submissions.

The legislation

6. Section 1 of the Vexatious Actions (Scotland) Act 1898 provides:

> "It shall be lawful for the Lord Advocate to apply to either Division of the Inner House of the Court of Session for an order under this Act, and if he satisfies the Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the Court of Session or in any inferior court, and whether against the same person or against different persons, the court may order that no legal proceedings shall be instituted by that person in the Court of Session or any other court, unless he obtains the leave of

> the Lord Ordinary on the Bills in the Court of Session, having satisfied the Lord Ordinary that such legal proceeding is not vexatious, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the Edinburgh Gazette."

7. By virtue of article 4 of the Courts Reform (Scotland) Act 2014 (Commencement No. 7, Transitional and Saving Provisions) Order 2016, despite the repeal of the 1898 Act by paragraph 27 of schedule 5 of the Courts Reform (Scotland) Act 2014 (which makes provision for vexatious litigant orders from 28 November 2016), an order under the 1898 Act continues to have effect. I am told that there are now only eleven individuals subject to orders under the 1898 Act. The provisions of the 2014 Act are substantially different from those of the 1898 Act. This decision is not concerned with the provisions of the later Act.

The parties' submissions

8. The Appellant submitted that on "HMRC had already accepted [the] matter was not vexatious at first passing to upper tier and can not now do so as res judicata and should be dismissed." He also provided a copy of a notification from HMRC of receipt of a payment and said that there was "no evidence of vexatious". Finally, he submitted that Lord Ross cannot have anticipated the UT, his order having been made many years before its establishment.

9. In response to the Appellant's submission, Mr MacLeod's position on behalf of HMRC was that HMRC made no concession, that the preliminary issue had not previously been canvassed, that there could be no plea of *res judicata* and that this tribunal must determine a question of jurisdiction once it has arisen. As to the preliminary issue, Mr MacLeod's position was in summary, as follows. The UT is a "court" and, insofar as Lord Ross intended anything different by specifying "inferior court", the UT is also an "inferior court" for the purpose of that order. The appeal to the UT amounts to "the institution of legal proceedings" within section 1. If the appeal to the UT was not the institution of legal proceedings, the appeal to the FTT was and the FTT was a court within section 1. On either basis, the UT should strike out the application under rule 8(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

10. On behalf of the Lord Advocate, Ms Irvine submitted that the order of 6 January 1995 did not apply to an application for permission to appeal or an appeal to the UT. By seeking permission to appeal and (if permission were granted) bringing an appeal, the Appellant would not be "instituting legal proceedings" for the purpose of section 1 of the 1898 Act and so the order did not apply in this case. Accordingly, it was not necessary to decide whether the UT was a "court" for the purpose of section 1. As to whether the order applied to the FTT proceedings, her position was that the FTT was probably a "court" for the purpose of section 1 (the Lord Advocate did not have a definitive position on this), but that an appeal to the FTT was not the institution of legal proceedings. Ms Irvine made clear that the Lord Advocate's position was specific to the particular context in which the issue arose in this case and in particular, was not a concession that sections 100-102 of the Courts Reform (Scotland) Act 2014 could not apply to any proceeding in either the FTT or the UT.

Res judicata

11. The FTT decision against which the Appellant now appeals was not the first in the history of this case. The Appellant had originally appealed against the decision of HMRC in 2017. The appeal was refused by the FTT on 16 June 2018. The UT gave the Appellant permission to appeal and in due course allowed the appeal and remitted it to a different FTT. It is the decision made by the FTT on remittal that is the subject of the application now before the UT. The Appellant's submission set out at paragraph 8 above appears to be an assertion that HMRC had accepted that the previous proceedings did not contravene the order. I reject this. Neither HMRC, the FTT nor the UT was aware of the order at the time of those earlier decisions. Furthermore the payment confirmation from HMRC was not concerned with any matter as to the Appellant's entitlement to bring the appeal and is irrelevant to the preliminary issue

12. Nor does *res judicata* apply here. There was no previous determination by the FTT or the UT regarding the order or its effects. The preliminary issue with which I am concerned has not previously been canvassed.

The First-tier Tribunal is a "court" for the purpose of section 1 of the 1898 Act.

13. There is no Scottish authority as to whether a tribunal is a "court" for the purpose of the 1898 Act or the Courts Reform (Scotland) Act 2014. There are several authorities considering the question in respect of the Senior Courts Act 1981 which applies in England and Wales. It was common ground that these authorities are relevant to the question as it arises under the 1898 Act, and I am satisfied that they are. Those authorities grapple with the fundamental nature of a "court", the principles as to which are no different in either jurisdiction.

14. In *Attorney-General v BBC* [1981] AC 303, in deciding whether the local valuation court was an "inferior court" for the purpose of the contempt of court jurisdiction in RSC Order 52, the House of Lords distinguished between "courts which discharge judicial functions and those which discharge administrative ones, between courts of law which form part of the judicial system of the country on the one hand and courts which are constituted to resolve problems which arise in the course of administration of the government of this country" (Viscount Dilhorne at page 339H). However, as Lord Edmund-Davies said, there is "no unmistakable hall-mark by which a 'court' or 'inferior court' may unerringly be identified. It is largely a matter of impression" (page 351F).

15. In *Peach Grey and Co v Sommers* [1995] ICR 549, which was relied on by the Employment Tribunal in *Vidler v UNISON* [1999] ICR 746 in deciding that the employment tribunal was a "court" for the purposes of the 1981 Act, the Divisional Court held that an employment tribunal (then called an 'industrial tribunal') was an "inferior court" for the purpose of RSC Order 52. At page 557E-H Rose LJ said:

> "It is true that it is not a court of record and its monetary awards have to be enforced and taxation of its costs carried out by the county court; that, although in practice it observes the rules of evidence, it is not strictly bound to do so; that there are conciliation proceedings available involving the Advisory Conciliation and Arbitration Service; and that rights of audience that are not

> limited to lawyers. But it was established by Parliament, it has a legally qualified chairman appointed by the Lord Chancellor, and, like the Employment Appeal Tribunal which is a court of record, other members representing employers and employees drawn from panels compiled by the Secretary of State for Employment. It sits in public to decide cases which affect the rights of subjects and it has power to compel the attendance of witnesses, administer oaths, control the parties' pleadings by striking out and amendment and order discovery; the parties before it can have legal representation; it has rules of procedure relating to the calling and questioning of witnesses and addresses on behalf of the parties; it can award costs; it must give reasons for its decisions which, on a point of law, can be appealed to the Employment Appeal Tribunal and Court of Appeal. In all, it appears to me to exercise judicial functions."

16. The statutory provisions for restrictions of vexatious legal proceedings in England and Wales are found in section 42 of the Senior Courts Act 1981. There are many differences between those provisions and section 1 of the 1898 Act but one significant similarity is that the court may make an order restricting a person's ability to bring civil proceedings "in any court". In *Re Terence Patrick Ewing* [2002] EWHC 3169 (QB) Davis J considered *BBC* and *Peach Grey* in concluding that the Information Tribunal was a "court" for the purpose of section 42 of the 1981 Act. His reasons were set out at paragraph 40, and were in summary as follows: a) The Tribunal is established by Parliament and requires a chairman appointed by the Lord Chancellor and members who are legally qualified; b) The statutory function of the Tribunal is analogous to the Administrative Court's judicial review function; c) The Tribunal has a list of powers including as to amendment, disclosure of documents, summoning of witnesses, conduct of proceedings and of hearings, and costs, which are typical of judicial powers; d) Concluding that the Tribunal was a court was not inconsistent with the observations of Viscount Dilhorne in the *BBC* case and, as a matter of impression, the Tribunal was a court.

17. In *IB v Information Commissioner* [2011] UKUT 370 (AAC), [2012] AACR 26, Upper Tribunal Judge Jacobs decided that both the FTT and the UT in their information rights jurisdictions were courts within the 1981 Act, applying the principles set out in *BBC* and in *Ewing*. He said that it was clear that the FTT in its information rights jurisdiction was performing a judicial rather than an administrative function, in the light of the statutory task of the FTT to decide if the decision of the Information Commissioner was in accordance with the law. He also observed, without deciding the point, that the overwhelming majority of the jurisdictions of the FTT and UT were judicial (paragraph 22).

18. Judge Jacobs then went on to address the considerations set out in *Ewing:*

a. The establishment and constitution of the FTT is prescribed by Parliament under the Tribunals, Courts and Enforcement Act 2007 and the Practice Statements of the Senior President of Tribunals. The FTT will be composed of a single judge or a judge sitting with specialist members. Davis J did not regard an exclusively legal composition as essential and the employment tribunal, which is recognised as a court for these purposes, may be composed of a judge and members.

b. Judge Jacobs considered the judicial review and appellate functions of the UT. I do not set it out as this reasoning does not apply to the FTT.

c. At paragraph 30 he described the rules of procedure of the UT and the FTT as follows:

> "30. The First-tier Tribunal operates under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) and the Administrative Appeals Chamber of the Upper Tribunal operates under the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). These are essentially similar in content and structure to the rules of procedure that apply to all chambers of both the First-tier Tribunal and the Upper Tribunal. They consist of a common core of rules that govern: the overriding objective and the duty to co-operate; alternative dispute resolution; delegation to staff; case management powers; powers to give directions; failure to comply with rules and directions; striking out and barring participation; identification of parties; costs; representatives; calculating time; sending and delivery of documents; use of documents and information; controlling evidence and submissions; summoning witnesses and production of documents; withdrawal; lead cases; and staying decisions. Of these, only the rules about costs vary significantly from jurisdiction to jurisdiction. There then follow rules governing hearings and the giving of decisions and reasons. These vary considerably between chambers in order to make appropriate provision for particular jurisdictions. The rules end with common provisions governing: correction of slips, setting aside for procedural error; review; and permission to appeal. All of those rules find equivalents in the rules that apply in the High Court and County Court. In terms of characteristics, the tribunal rules of procedure contain what is to be expected of the rules governing the proceedings before a judicial body."

d. Taking account of the wide range of cases that come before the FTT and the UT across both their chambers and specifically in their information rights jurisdiction, Judge Jacobs' overall impression was that the tribunal were courts. They were

> "generally although not exclusively, bodies that have to interpret and apply the law to the cases before them, for the purposes of which they have procedural powers that are similar to those possessed by the ordinary courts, albeit adjusted to the particular needs of tribunals." (paragraph 34)

19. One of the issues in *AO and BO v Shepway DC* [2013] UKUT 009 (AAC) was whether the FTT or UT had jurisdiction to hear an appeal in a housing benefit case. Upper Tribunal Judge Wikeley noted that there were several reasons to suggest that *IB* applied to the FTT and the UT exercising their social entitlement jurisdictions. First, one of the prime purposes of the Tribunals, Courts and Enforcement Act 2007 was to establish a coherent integrated tribunal system and so, if the FTT and UT are "courts" in one jurisdiction, then they should be in others. Second, as Judge Jacobs said at paragraph 34 of *IB*, the FTT and the UT have to interpret and apply the law to

the cases before them and have procedural powers similar to those possessed by the ordinary courts. Finally, Judge Wikeley referred to recent authority deciding that the Leasehold Valuation Tribunal was a court for the purposes of section 42.

20. Despite those considerations, Judge Wikeley held that the FTT exercising its social entitlement jurisdiction was not a "court" for section 42 purposes, although the UT was. His decision regarding the FTT was based on four considerations which were not referred to in *IB*. With the greatest respect to Judge Wikeley, I do not agree that these considerations mean that the FTT exercising its social entitlement jurisdiction is not a court for the purpose of section 42.

21. The first matter relied on by Judge Wikeley was that the question of access to means tested benefits is a qualitatively different issue to the question of access to information under FOIA. That is true, but the distinctions drawn by Judge Wikeley (that welfare benefits are benefits of last resort, and that rights under FOIA are generally qualified) do not seem to me to have a bearing on the nature of the tribunal for these purposes.

22. Secondly, Judge Wikeley said that the mischief to which section 42 is directed does not arise in the same way in the context of appeals to the FTT (SEC). He said: "The vexatious litigant cannot bring repeated cases before the Social Entitlement Chamber, in the same way as he or she can bombard the court with applications, as the right of appeal depends on a Government agency or local authority making a decision on his or her benefit claim" (paragraph 24). That is also true, as far as it goes, but there is nothing to stop a vexatious litigant making unmeritorious applications for benefits so as to generate decisions which trigger a right of appeal.

23. The third factor was that the FTT has ample case management powers to deal with hopeless cases. But that is also true of the GRC, as Judge Wikeley acknowledged, and is also true of the ordinary courts. The point of the vexatious litigant jurisdiction is that it is precautionary rather than having to wait until an abuse actually occurs in proceedings which are pending before the court: see Lord Reed in *Lord Advocate v McNamara* [2009] CSIH 45, 2009 SC 598 at paragraph 8.

24. Finally, Judge Wikeley noted the difficulty in administering the effect of section 42 orders if they applied to appeals before the Social Entitlement Chamber. I do not have information about what if any administrative procedures are available in courts or tribunals for checking for vexatious litigants. However, to the extent that it presents a difficulty, it is one that arises in all tribunals and in the ordinary courts and this does not of itself provide a basis for excluding the FTT from the scope of the provisions.

25. Ms Irvine referred me to a number of other considerations which might indicate that the FTT is not a court for the purpose of section 1. The first of these was a decision of the New South Wales Supreme Court in *Attorney-General v Betts* [2004] NSWSC 901 which considered a statutory provision that was in almost identical terms to section 1 of the 1898 Act and, similarly to section 1, applied to instituting proceedings in the New South Wales Supreme Court or in "any inferior court" which, Hoeben J said, "of course excludes tribunals" (paragraph 3). Accordingly, he held that the numerous complaints by the defendant before the Anti-Discrimination Board "and other tribunals" (paragraph 5) could not be taken into account. There is no discussion of the nature of the Anti-Discrimination Board or the other tribunals referred to but for present purposes it is sufficient to note that the constitutional

position of tribunals in Australia is very different to that in Great Britain and this decision does not assist on the issue before me.

26. The second authority referred to by Ms Irvine in this regard was *Attorney-General v Jones* [1990] 1 WLR 859, in which Lord Donaldson of Lymington MR said that "civil proceedings", whether in the High Court or any inferior court in section 42 of the 1981 Act "was not intended to extend to proceedings initiated in those tribunals which were not properly characterised as courts" (page 863C). There was no issue as to tribunal proceedings in that appeal. In any event, it takes matters no further for present purposes because it does not resolve whether any particular tribunal can properly be characterised as a court.

27. Next, Ms Irvine suggested that it may be relevant that, in 1898, the legislature had afforded recognition to tribunals as distinct from courts. Her researches came up with two statutory tribunals which had been in existence in Scotland at that time and another body (the Crofters Commission) which had similar characteristics to statutory tribunals of the time. In addition she referred to two pieces of legislation predating the 1898 Act which used the term "tribunal" in contradistinction to "court": section 22 of the Sheriff Courts (Scotland) Act 1853 which provided for the exclusive and final jurisdiction of the Sheriff Court in causes not exceeding the value of £25 by prohibiting challenges to any such judgment in "any ….Court or Tribunal"; and section 1 of the Crown Suits Act 1855 which provided for the recovery of costs by the Attorney General or Lord Advocate in proceedings brought by or on behalf of the Crown in proceedings "instituted before any Court or Tribunal".

28. These examples show that at the time of the 1898 Act there was parliamentary and other recognition of the existence of "tribunals" which were not "courts". But it does not follow from this that Parliament intended to exclude from the scope of the 1898 Act bodies which, as a matter of substance, were "courts" whether or not described as such. Parliament did not then, nor has it since, made specific provision for such bodies. Yet, as the case law set out above shows, it is now clearly established that a number of tribunals fall within the scope of "courts" in comparable provisions: RSC Order 52 and section 42 of the Senior Courts Act 1981.

29. Ms Irvine submitted that, in enactments in existence at the time of passing of the 1898 Act, Parliament had used the term "inferior court" in a narrow sense encompassing "courts of law" as opposed to the broader sense which might encompass tribunals. As Ms Irvine correctly pointed out, the term "inferior court" in section 1 is used only as regards the matters to be taken into account in determining whether the order is to be granted, but the later provisions of that section apply the scope of an order to proceedings in the "Court of Session or any other court". However, for present purposes I assume that "other court" is intended to mirror "inferior court" earlier in the section.

30. The scope of the term "inferior court" in Scotland in the nineteenth century was different in different contexts. I have been referred to the provisions of the Court of Session Act 1868 for appeals from "inferior courts" to the Court of Session and which was understood to be limited to a few specific courts of law. The modern appeal provisions are contained in Chapter 40 of the Rules of the Court of Session, which similarly limits the meaning of "inferior court". Administrative tribunals were not included in the 1868 procedures because they had their own forms of procedure (*The*

Practice of the Court of Session, Maxwell, 1980, pg 578, n 9), and that of course remains the case now in respect of a wide range of tribunals including the modern unified tribunals under the Tribunals, Courts and Enforcement Act 2007. Other statutory provisions of the time (eg section 1 of the Procurators (Scotland) Act 1865) embraced a much wider range of bodies within the term "inferior court" including at least one body (the Dean of Guild Court) which had a regulatory role.

31. The term "inferior court" was understood differently, and more broadly, in late 19th and early 20th century textbooks. For example, in *Court of Session Practice* (Maclaren, 1916, at pages 1008 and 1017-18), the term was said to include decisions by the General or Special Commissioners under the Income Tax Acts and decisions of the Insurance Commissioners under the National Insurance Act 1911. Maclaren also discussed the supervisory jurisdiction of the Court of Session over inferior courts as encompassing courts and also administrative or executive bodies which do not exercise a judicial function (pg 117).

32. This brief review shows that there was a variety of meanings given to or understandings of the term "inferior court" at the relevant time, dependent on the context. Moreover, the term was capable of embracing bodies exercising a range of functions beyond those of the traditional courts. It is presumed that Parliament intends an Act to be construed in a way that allows for changes that have occurred since the Act was initially framed, for instance to include the creation of new bodies (*Bennion on Statutory Interpretation*, 7th ed, 14.1). Although the modern tribunals as now established under the 2007 Act could not have been in the legislature's mind in 1898, they are not conceptually different from the types of bodies which were understood at that time to be "inferior courts" in the broad sense of that term.

33. Finally, Ms Irvine pointed out that the FTT has jurisdiction throughout Great Britain but the effect of an order of the Court of Session under section 1 is limited to the territory of Scotland and so, if a section 1 order applies to the FTT, then there is the potential for inconsistency. She noted that in *HM Advocate v Frost* [2006] CSIH 56, 2007 SC 215 the Extra Division at paragraph 32 considered that the 1898 Act would apply only to proceedings within Scotland. Ms Irvine did not elaborate further on this submission and, as it stands, it does not take matters further. At paragraph 32 of *Frost* the Court was addressing proceedings issued in the High Court of England and Wales. In contrast, the appeal in this case was issued in Scotland. I note that the point about potential for inconsistency could equally be made of those tribunals with a GB-wide jurisdiction to which section 42 of the Senior Courts Act 1981 applies, but this has not been an obstacle to their being within the scope of that provision.

34. I return, then, to the reasoning of Judge Jacobs in *IB* which I have summarised at paragraphs 17 and 18a, c and d above (paragraph b not applying to the FTT). I agree with and adopt that reasoning. It is also supported by the factors identified by Judge Wikeley (summarised at paragraph 19 above). In addition I note that, at paragraph 22 of *IB* Judge Jacobs said that the FTT in its information rights jurisdiction was clearly on the judicial side of the line because its task under section 58(1) of the Freedom of Information Act 2000 was to decide if the decision of the Information Commissioner was in accordance with the law. He said that the same was true of the "overwhelming majority" of the FTT's jurisdictions. I agree. The nature of an appeal in the social entitlement jurisdiction is essentially the same as in information rights cases. The right of appeal to the FTT in tax credits cases is in

section 38(1) of the Tax Credits Act 2002, and in social security and child support cases the right of appeal is in section 12(1) of the Social Security Act 1998. It is established in case law that both provisions create a full right of appeal, involving a rehearing: *MD v HMRC (TC)* [2017] UKUT 106 (AAC) and *R (IB) 2/04*. This is the same as the role of the FTT in the information rights jurisdiction: see *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC), [2018] AACR 29 at paragraph 90. The FTT in these jurisdictions is performing the same role as in the information rights jurisdiction.

35. In conclusion, in the social entitlement jurisdiction the FTT is a court. It is, in the words of Lord Scarman at page 359G-H of *A-G v BBC*, "a body established by law to exercise…the judicial power of the state" in contrast with "legislative and executive (i.e. administrative) power".

The appeal to the FTT was the "institution" of "legal proceedings".

36. Ms Irvine submitted that the initiation by the Appellant of the appeal to the FTT was not the "institution" of "legal proceedings" within section 1. Although a challenge to a decision by HMRC could be characterised as starting a "proceeding" which, as an appeal, was "legal" in nature, she submitted that other considerations would justify the view that it is not the "institution" of "legal proceedings" for the purpose of the 1898 Act. In *Lord Advocate v McNamara*, Lord Reed had emphasised that the section should be applied restrictively rather than expansively because it authorised an interference with the rights of the citizen (paragraphs 11, 19 and 20). On this approach, she submitted that the correct view was that the underlying "proceedings" were the administrative application to HMRC and that the appeal against HMRC's decision was the continuation of those proceedings.

37. In respect of the question whether an appeal to the UT is the "institution of legal proceedings", Ms Irvine relied heavily on Lord Reed's analysis of the meaning of that phrase contained in *McNamara*. He decided, *obiter,* that a reclaiming motion (an appeal) from the Outer House to the Inner House of the Court of Session was not the "institution" of legal proceedings; it was the continuation of the proceedings which had been started in the court below. I do not need to refer to the detailed and instructive analysis carried out by Lord Reed, because I am entirely satisfied that it does not apply to an appeal to the FTT from an administrative decision. *McNamara* and the cases referred to in the judgment were concerned with an appeal from one court (or one House of the Court of Session) to another.

38. Decisions as to entitlement to benefits by HMRC or other government agencies such as the Department for Work and Pensions are administrative in character. Decision-makers apply the law, but the application and decision-making process are not "legal proceedings". An administrative decision-making process such as that by which HMRC makes tax credits decisions does not have any of the characteristics of legal proceedings, which will typically comprise parties submitting evidence and arguments to a body empowered to determine a legal dispute. Section 1 of the 1898 Act, like section 42 of the 1981 Act, is concerned with proceedings before a body which is in substance a court. Bringing an appeal to the FTT from an administrative decision is the first stage at which proceedings before such a body are engaged. That is the point at which legal proceedings are instituted.

Conclusion and disposal

39. For the reasons given above, the appeal to the FTT was the institution of legal proceedings in a court for the purpose of section 1 of the 1898 Act. The order of 6 January 19995 prohibited the institution of those proceedings without leave of a Judge of the Outer House. No such leave had been obtained. The consequence was that the FTT did not have jurisdiction to determine the appeal and it should have struck it out pursuant to its powers in rule 8(2)(a) of its rules of procedure.

40. That does not, however, deprive the UT of jurisdiction: see *LS and RS v HM Revenue and Customs (TC)* [2017] UKUT 257 (AAC), [2018] AACR 2 at paragraphs 23 and 33. The UT has jurisdiction to decide how to dispose of the application. It would serve no purpose to decide whether the section 1 order applies to the application for permission to appeal to the UT. The Appellant was not entitled to appeal to the FTT. There should have been no such appeal and so, in my discretion, I refuse him permission to appeal to the UT. As the FTT dismissed the appeal, HMRC's decision stands undisturbed as it would have done if the FTT had struck out the appeal. It follows that neither party is inconvenienced if the FTT's decision is left to stand.

41. Although the hearing was listed to determine the preliminary issue of jurisdiction, it was made clear that the resolution of the issue could result in final disposal of this matter by way of strike out. For the reasons that I explain above, I have not struck out the application but have refused permission. The effect is the same (albeit that the routes of challenge are different). It would have served no purpose to allow further representations on the permission application following determination of the jurisdiction issue as, in the light of my conclusion on the FTT's jurisdiction, only one result could follow.

42. I also point out that, even if I had decided that the section 1 order did not apply to the proceedings in either the FTT or the UT, I would have refused permission to appeal on the merits. The Appellant sought permission to appeal on two grounds: a) breach of rules regarding sending documents: a number of documents in the appeal were not sent to him in time and that some could not have been received prior to the hearing on 5 September 2019; b) the FTT did not give adequate reasons for the decision. He claims that he was sent an "unreadable audio", that he was not provided with a transcript to enable preparation of his case and he makes a bare assertion of "bias and obstruction".

43. As for (a), most of the documents referred to were either documents prepared by the Appellant or documents receipt of which he had previously acknowledged. One of the documents was a decision notice refusing postponement of the hearing and issued by post only 2 days before the hearing. It is possible that the Appellant did not receive it but on 3 September an administrator spoke to him on the telephone and told him that the postponement had been refused and that the appeal would proceed on 5 September. There was no breach of any rule and, in any event, there was no arguable unfairness.

44. As for (b), the written statement of reasons is clear and comprehensive. It addressed the Appellant's case, in so far as that was discernible, referred to the relevant evidence and explained the FTT's conclusions on the evidence. The statement is not arguably inadequate. In accordance with the Senior President of Tribunal's Practice Statement "Record of Proceedings in Social Security and Child Support Cases in the Social Entitlement Chamber", the presiding judge determined that the record of proceedings would be made digitally. That record was provided. The Appellant had no entitlement to a transcript. Finally, the serious allegation of "bias and obstruction" is not substantiated and I reject it.

Kate Markus QC
Judge of the Upper Tribunal

Authorised for issue on 18 November 2020