DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Scolding QC **CTC/886/2021**
Decision made on the papers

DECISION

I allow this appeal and set aside the decision of the FTT made on 17 March 2021 under reference SC246/19/01663 that it had no jurisdiction to hear this appeal. I reinstate the appeal and direct the FTT to consider the appeal in accordance with the directions given below.

DIRECTIONS

To the First-tier Tribunal

1. The First-tier Tribunal must hold an oral hearing at which it must undertake a consideration of all the issues raised by this appeal, in particular whether to extend time to permit the appeal to take place and then considering the merits of the appeal.

2. The members of the FTT who are to consider this appeal must not include the judge who made the decision that I have set aside.

To the claimant

3. You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal made a legal error, not because I have decided that your appeal against the decision made by HMRC about your tax credit entitlement was wrong. Whether or not you can extend time to have this appeal considered and to consider this appeal are matters to be determined by the new Tribunal.

REASONS

Introduction

1. This appeal considers whether or not a refusal to extend time to apply for a mandatory review of a decision of HMRC concerning working tax credit and child tax credit gives rise to a right of appeal to the First-tier Tribunal or whether the only right of redress is a judicial review in these circumstances. HMRC argues that it does not, the Appellant argues that it does.

The background

2. The actual decision made by HMRC does not appear in either the FTT or the UT bundle. It appears that a decision was made on 30 April 2019 by HMRC which concerned the 2018/19 tax year. On 5 July 2019 (so approximately 5

weeks, or 35 days outside the 30-day time period within which an application should be made) the Appellant applied for mandatory reconsideration of the decision. In this form [17 of the FTT bundle], the Appellant says that the decision was made on 3 June 2019. HMRC say that no decision was issued then.

3. HMRC, in its submissions to the Upper Tribunal say that HMRC were notified by the DWP that a claim to universal credit had been made on 11 March 2019 by the Appellant, and therefore an award of tax credit would terminate from 10 March 2019. On receipt of this, HMRC ceased payment of the award of tax credit and made a final, conclusive decision upon entitlement to tax credit under s18 of the Tax Credit Act 2002.

4. In this request, the Appellant indicated that he had contacted HMRC by telephone after her received the letter as "he needed help understanding" the letter. He then had to wait for the form to arrive. He said that he did not agree with the decision as it showed that he had been self-employed and with income of £10,602.00, but this had not been the case. HMRC say that they received this form on 9 July 2019.

5. On 23 July 2019, HMRC made a decision. In it, they determined that the request was late, and they can only look at it therefore in "s*pecial circumstances*". They then went on to examine the substantive reason given by the Appellant as to why the tax award was late. The decision then said that having examined the claim, there has been "*no official error*" in the calculation. The reason given for this is that HMRC say that the Appellant had told them in a telephone call on 3 August 2018 that he was now self-employed and that HMRC had estimated his income based upon his hours. HMRC said that they could not accept the request for a mandatory consideration, and that "*there is no further right of appeal to HMCTS* ".

6. The Appellant immediately sought to appeal this decision, appealing on 9 August 2019. In a letter dated 8 August 2019 addressed to HMCTS, the Appellant said:

a. His request was late because he needed help understanding the letter as English was not his first language.
b. He was unwell from 22 February 2019 – 3 June 2019 and was signed off work (he enclosed copies of his sick notes with this letter and details of his operation and other illnesses. He had an operation on his knee because of a meniscal tear and a ruptured cyst. He also has diabetes (Type 2) and high blood pressure. Information about these conditions were sent with this letter.
c. He says that the conversation he had with HMRC, and the information given within it was not correct, and he struggled to understand the conversation as

English was not his first language. He says that he was not self-employed – he had been employed by an agency as a temporary production operative – he then became a permanent employee on 9 July 2018 and was doing the same job but with the company. He provided a copy of his contract with this letter. He says that he replied "yes" by mistake to the question about his self-employment because he did not fully understand what this meant. He has never been self-employed. He enclosed his P60 certificates as well.

The First Tier Tribunal decision

7. The FTT struck out the appeal on 17 March 2021. The FTT found that there was no jurisdiction to hear the appeal. This was because the mandatory reconsideration process had not taken place, and therefore there was no right of appeal.

The Upper Tribunal

8. Permission to appeal was granted on 1 July 2021 by the Upper Tribunal. The Appellant submits that the process of considering whether or not to accept the request for reconsideration outside the 30-day time limit is a mandatory reconsideration decision which therefore engages the jurisdiction of the Tribunal, as they are considering whether or not to revise the decision, and a mandatory reconsideration notice should have been issued. The Appellant relies upon *R(CJ) v SSWP (ESA)* [2017] UKUT 324 at which the Upper Tribunal determined that when deciding whether to accept a late request for mandatory reconsideration in respect of appeals concerning Employment and Support Allowance ("ESA") the decision maker was considering whether to revise the decision – and therefore if it is refused a mandatory reconsideration notice should be issued which then gives rise to a right of appeal.

9. The Appellant's submission is that the purpose of mandatory reconsideration is not to deprive someone of the right of appeal. He submits that there should be no difference of approach between DWP administered benefits and HMRC administered benefits in the approach to be taken in respect of such mandatory reconsiderations, and that there should not be two different approaches depending upon the benefit claimed. Furthermore, he argues that Article 6 of the European Convention on Human Rights ("ECHR") is engaged

10. The Respondent submits that the legislative scheme does not permit a person to submit an appeal against a refusal to extend time to request a review and is not a decision which can be appealed, relying upon *SJ v HMRC* [2018] UKUT 83. I note here that SJ dealt with a situation where the underlying decision

being attacked by the Appellant in that case could not be subject to appeal. That is different to this case where there could be a right of appeal save for the issue of mandatory reconsideration. As there is no appealable decision, there can be no jurisdiction to bring an appeal. The decision by HMRC to extend the time limit does not amount to a "carrying out" of a review. Further, the case of *CJ* (supra) cited by the Appellant does not apply as it deals with a different statutory scheme and does not apply given the clarity of the legislation relating to tax credits.

The legislative scheme

11. I have not seen the underlying decision under s18 of the Tax Credits Act 2002 (TCA 2002), nor the notice which should have preceded that decision under s17 (a final decision cannot be issued without a notice having been made first under s17). A decision under s18 concerns whether or not someone was entitled to tax credit, and, if so, how much. Section 18 (11) of the TCA 2002 provides:

> "*Subject to sections 19, 20, 21A, 21B and 21C and regulations under 21 (And to any revision under subsection (5) and (9) and any appeal …*
>
> *(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....to the tax credit for the tax year and the amount of the tax credit to which he was entitled.... for the tax year."*

12. Section 21A-C were inserted by the Tax Credits, Child Benefit and Guardians Allowance Reviews and Appeals Order 2014 (SI 2014/886) from April 2014. Section 21A introduces a policy of requiring any prospective appellant to apply for mandatory reconsideration by HMRC of any decision made about tax credits before an appeal could be made. The language used in practice is that of "mandatory reconsideration" which is identical language to that used by the DWP since October 2013 when considering revisions of decisions made about social security benefits. An application must be reviewed if the application is received within 30 days of the date of the notification of the original notification (s21A(1)(a)) or it is received within such longer period as may be allowed under s21B. When the review has been carried out, HMRC is obliged to give notice of their conclusions containing sufficient information to enable someone to know the conclusion, and the reasons for the conclusions (s21A (3)).

13. Under s21B, HMRC has a discretion to extend the time limit for making an application for a review if all of the following conditions are met (s21B (1)). These are that:

    (1) That the person has sought an extension of time (s21B (2))
    (2) Explains why the extension has been sought and is made within 13 months of the original notification being made (s21B (3))
    (3) Due to special circumstances, it was not practicable for the application for a review to have been made within the time limit (s21B (4))
    (4) HMRC are satisfied that it is reasonable in all the circumstances to grant the extension (s21B (5)).
    (5) The greater the length of time that has elapsed then the more compelling the special circumstances should be (s21B (6)).
    (6) An application to to extend the time limit which has been refused may not be renewed.

14. Section 38 of the TCA sets out when appeals can be brought against decisions of HMRC. Section 38(1) provides that an appeal may be brought against a decision under s18 (s38(1)(b). Section 38 (1A) says that:

    "*((1A)) An appeal may not be brought under S38(1) against a decision unless a review of the decision has been carried out under s21A notice of the conclusion on the review has been given under s21A(3)).*"

15. The appeal provisions in respect of *"mandatory consideration*" in cases concerning benefit entitlement is provided for at s12 of the Social Security Act 1998 ("SSA 1998"). Like s38, there is a general power of appeal to any decision made under s8 or s10 of the SSA 1998 which s made on a "claim for" or "award of" a relevant benefit. Section 12(3A) provides that where regulations prescribe circumstances, there would be a right of appeal only if the Secretary of State has considered whether to revise the decision. Section 12(3B) of the SSA 1998 provides that there may be conditions imposed by regulations which is only met if the consideration by the Secretary of state was on an application and met certain conditions. These regulations were introduced by regulation 7 of the UC, PIP etc (Decisions and Appeals) Regulations 2013 and regulation 3ZA of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

16. Regulation 3ZA provides that where the Secretary of state has given a person written notice of a decision under s8 or s10 of the Act, and the notice includes a statement that there is a right of appeal only if the Secretary of State has considered an application for a revision of the decision. The relevant regulation dealing with late applications is written in similar (albeit not identical) terms to that for CTC/WTC in granting discretion for an application

to be admitted "late" but only if conditions are met – concerning the rationale for the lateness and the degree of tardiness of the application.

17. Whilst the wording is not identical in the two statutory sections, they both have the same underlying statutory purpose – which is to create a stage prior to an appeal where the Secretaries of State for Work and Pensions or HMRC can consider the decision again in order to reduce the number of appeals.

18. The appellant, as identified above, relies upon a case concerning s12 of the SSA 1998 – *CJ v SSWP* (supra). This is a decision of a three-judge panel including the President of the AAC at the time and so is considered to be a case of general importance to this Chamber. It concerned whether or not social security claimants had a right to appeal to the FTT where they make a late request for mandatory reconsideration of the Secretary of State's decision on entitlement, and the Secretary of State does not exercise his power to extend time. The Secretary of State argued that in those circumstances, the appellant had no right of appeal and could only proceed by way of judicial review of the decision of the Secretary of State.

19. The Upper Tribunal's focus in that case was upon whether or not the Secretary had "considered where the revise" the decision under s12 of the SSA 1998. The Upper Tribunal considered the position prior to the 2013 changes (which in effect made the FTT the gatekeeper to the independent tribunal system and where there was a "one step" approach to an appeal to becoming a "two step" approach with the Secretary of State becomes the Gatekeeper to the system.

20. In *CJ*, the Secretary of State submitted (paragraph 24) that the broad purpose of the amendments made to the SSA 1998 were to enable the Secretary of State to have the first opportunity to consider the correctness of the decision, including any new material so preventing the need for the case to proceed on appeal. The Upper Tribunal in *CJ* looked at the Explanatory notes to the amendments made to the SSA 1998 by the Welfare Reform Act 2012 which squarely frame the amendments in order to streamline the appellate process: there was no mention of excluding a right of appeal if it lay within the 13 month period for "late applications".

21. The introduction of s21A-s21C of the TCA 2002 was made by order, rather than by Act of Parliament (the Tax Credits, Child Benefit and Guardian's Allowance Reviews and Appeals Order 2014 No 886. An explanatory memorandum accompanied the laying of the order before the House of Commons. This can be used (*R(S) v Chief Constable of South Yorkshire* [2004] UKHL 39 [2004] 1 WLR 2196 at [4]) to seek to identify the context behind the statute and the "*mischief at which it is aimed*". In this case, the "purpose" of the instrument as drafted by HMRC was to:

"*2.1 This instrument amends legislation so that a person will need to ask HMRC to reconsider its decision on tax credits, child benefit or guardian's allowance awards before making an appeal to the tribunal, similar to the process for universal credit."*

22. The "mischief" therefore aimed at by this change was not to erode rights of appeal, but to provide a system of review prior to an appeal.

23. The primary legislation, furthermore, permits a right of appeal against decisions made by HMRC in respect of both an award, and entitlement of that award, and determinations of a penalty. This includes decisions on entitlement, and revision of previous decisions because of official error and an amendment of any award or termination of it.

24. As is outlined in C*J* (at [43] and [44]), the legislation does not say how the Secretary of State is to carry out the review of the decision under s21A. The distinction is that whilst in the SSA 1998 the legislation says "only if" a reconsideration has occurred can an appeal be brought: in s38(1A) , the statutory language used is that an appeal "may not be brought" unless a review "has been carried out". But it seems to me that the same point in respect of the statutory language applies: the primary legislation does not support the proposition that the right of appeal is restricted to those cases which meet the narrower precedent of having been considered only if they are in time. I accept that use of the words "carry out" may imply that a substantive review has to be undertaken, however, I do not consider that this can be what Parliament had intended given the explanatory notes.

25. In this case, the submissions of HMRC are that the decision made by HMRC to refuse to extend time and to therefore not entertain the review further is a decision which does not give rise to a ground of appeal. The Appellant says that it does. I pause here to note that whilst no "notice" has been issued by HMRC, it appears that aspects of the merits of the application for a review were substantively engaged with by the decision maker, as they had listened to a tape recording and make decisions as to whether or not an "official error" has been made - I question therefore whether or not, in fact a substantive review decision has been made in this case.

26. Just as with *CJ*, I accept that it is a tenable reading of the statutory language that the argument of HMRC that the relevant language requires that a review has occurred: and that does not include a situation where a review is refused on the grounds of time. However, I consider, as with *CJ* (at [59]) that I must have regard to the following:

(a) The scope of the enabling power

(b) The principle of legality

© Common law fairness

(d) Article 6 of the ECHR and s3 of the HRA 1998

27. I consider for the same reasons that all of these purposes must be taken into account when interpreting the language of the legislation – so that "*carrying out of a review*" under s38(1A) of the TCA 2002 must include considering whether to extend time to carry out the review. HMRC's submissions that there was no review in this case, in particular because that stage was not reached and so HMRC has not upheld, varied, or cancelled the decision but done nothing. I consider that fails to grapple adequately with the decision letter which does, implicitly, seek to uphold the decision. In particular, I concur with the rationale given in *CJ* at [63] as to the fact that judicial review is not an adequate alternative such as to satisfy Article 6 of the ECHR in the circumstances of these cases.

28. In certain circumstances (see *R(IS) 15/04* cited in *CJ* at [63]) judicial review is an answer to a claim that Article 6 would be breached if a statutory appeal is not available, but the facts of that case were that the individual had a chance to challenge the merits of the individual decision before a tribunal and could then challenge the refusal to revise if the refusal occurred more than 13 months after the original decision by way of judicial review. In *R (IS) 15/04*, there was not a limit the initial right of appeal against the decision – simply that which followed if a further revision was sought at a later date.

29. Clear language is required to remove existing rights of appeal, including appeal rights to a tribunal (see *R(Saleem) v Home Office* [2001] 1 WLR 443 at 452H-453D (cited in *CJ* at [65-68]) given the need to ensure independent adjudication of rights in dispute between citizen and state. In this case, HMRC in effect submit that the introduction of s21A and s38(1A) creates a situation whereby those who may have a good substantive claim to the FTT over their entitlement to tax credits – a form of benefit for those with children or on low incomes. That is an interference with a fundamental right and so there needs to be absolute clarity that the rule or regulation authorises that interference.

30. I do not consider that Parliament could have intended that appeal rights would be curtailed in this manner. In line with the reasoning in *C*J. Section 21B provides for the same time limits as other appeals to the FTT has, and there is a symmetry between this statutory language, that of the regulations concerning the introduction of mandatory consideration by other social security benefits and of the general FTT regulations in respect of time limits. If HMRC is right, then as with other benefits as outlined in *CJ,* the consequence of removing an appeal right will results in a significant number

of those who may have entitlements or who have had their entitlements removed not being able to appeal that decision, and thus will have benefits not paid (or removed) from them because they miss the time limit for a mandatory reconsideration and they do not judicially review their decision.

31. I consider that this is something which Parliament cannot have intended, in particular given the explanatory memorandum which says nothing about the removal of a right of appeal. Furthermore, if a mandatory reconsideration is refused on the grounds of "time", and an appeal is permitted, then the Secretary of State will still be able to continue of examine the underlying merits of an appeal, and an appeal to an FTT is user friendly, and useful as well as having specific expertise of the members and its costs regime. Although the Appellant does have assistance from a welfare rights organisation, that is not routinely the case.

32. As the Appellant demonstrates in this case, many individuals wishing to appeal are vulnerable for many reasons and may be unwell for periods of time (as was the case here). There is therefore, like in *CJ* [83] a high risk that many of them with good claims on the merits will miss time limits. There are no obvious alternative and routine courses of action which the Secretary of State can follow to review and replace original decisions on their merits absent any appeal. The submission of HMRC will therefore result in a number of vulnerable individuals not getting the benefits to which they may be entitled.

33. Just as with *CJ*, I consider that the essential Parliamentary purpose in introducing the "review" mechanism was to give the Secretary of State a chance to get the decision on entitlement right, applying the relevant statutory tests, to thus lessen appeals by improving administrative justice. To adopt the approach of HMRC, which is identical to the approach adopted by the Secretary of State in *CJ* [90] is to frustrate the purpose of the legislation. Just as in *CJ*, my conclusions is that the interpretation fo the regulations must be one which seeks to promote the Parliamentary purposes – and so that any refusal to review, even if this is on time grounds rather than because of the merits should trigger a right of appeal to the FTT.

34. I do not agree with HMRC's submission that the structure of the legislation, and the Act is so clear as to require me to accept that there was an intention to exclude a class of vulnerable persons from being able to exercise their right of appeal, and, in effect, remove a decision from an independent adjudicative body to the same body which made the decision absent a clear and unambiguous intention that this was to be the case. The memorandum I have cited does not say this. In particular, the amendment seems to have been made to make the tax credits legislation in line with that applying to other benefits – such as universal credit (which is expressly mentioned). If that is the case, then I should, absent a clear Parliamentary intention to the contrary,

seek to construe the legislation in a comparable way. There is nothing to suggest that the Secretary of State sought to treat the tax credit regime of appeals differently to other appeals concerning benefit entitlement before the FTT. The solution suggested by HMRC is an impracticable way for the vast majority of Appellants to seek to ventilate their rights, and a costly one to the taxpayer in comparison to the (relatively) cheap, informal and user-friendly system of tribunals.

35. I therefore allow this appeal, quash the decision of Tribunal Judge and remit the matter back to the First-tier Tribunal to make a decision whether or not to extend time and deal with the merits of any appeal if time is extended.

Fiona Scolding QC

Judge of the Upper Tribunal

Signed on the original on 13 December 2021.