# DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 1 October 2018 at Nottingham under reference SC319/18/01762) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

# REASONS FOR DECISION

1. This case concerns contributions credits while caring for a parent and raises the issue of the correct approach that the First-tier Tribunal should take to the power to extent the time within which an application for credits can be made.

## A. Contributions credits while caring for a parent

2. Section 23A of the Social Security Contributions and Benefits Act 1992 provides for contributions credits for some parents and carers. The Social Security (Contributions Credits for Parents and Carers) Regulations 2010 (SI No 19) were made under that section. Regulation 12 is relevant to this appeal:

> **12. Time limit for applications**
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> An application under regulation 9 or 10 must be received—
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> (a) before the end of the tax year following the tax year in which a week, which is the subject of the application, falls; or
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> (b) within such further time as the Secretary of State or the Commissioners for Her Majesty's Revenue and Customs, as the case may be, consider reasonable in the circumstances.

3. The claimant cared for his mother from at least 2012 until her death on 4 June 2017. He has been awarded credits for the inclusive period from 6 April 2016 to 27 August 2017. The start date for that award was fixed under regulation 12(a). The issue is whether the claimant was entitled from 1 January 2012. He applied for a carer's allowance in that year, but was not entitled because his mother was not receiving an attendance allowance; she had been reluctant to make a claim. He was not advised about contribution credits at that time. The decision-maker refused to exercise the power under regulation 12(b) on the ground that it was reasonable to expect the claimant to make enquiries and that information was available on the Government website. The First-tier Tribunal dismissed the claimant's appeal, but I gave him permission to appeal to the Upper Tribunal. The Secretary of State has supported the appeal.

## B. The approach to an exercise judgment on an appeal to the First-tier Tribunal

4. It is established beyond argument that an appeal to the First-tier Tribunal in its social security jurisdiction is an appeal by way of rehearing, subject to the

statutory provisions in section 12(8) of the Social Security Act 1998 and the requirement that the claimant have a fair hearing. That was the effect of the decision of the Tribunal of Commissioners (what would now be called a three-judge panel) in *R(IB) 2/04*, but the tribunal did no more than affirm what had been the position for over half a century. In the case of an exercise of judgment, whether or not technically a discretion, the nature of a rehearing requires the tribunal to exercise the judgment afresh.

5. There are decisions expressly to that effect in social security (*R(SB) 5/81* at [8]) and war pensions (*MC v Secretary of State for Defence* [2009] UKUT 173 (AAC), [2010] AACR 20 at [10]-[16]). This approach has been required by statute, since section 12(8)(b) of the Social Security Act 1998 and its equivalent provisions for child support and war pensions came into force. That paragraph provides:

> (8) In deciding an appeal under this section, the First-tier Tribunal-
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> …
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> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

The corollary is that the tribunal is allowed to take into account the circumstances obtaining at that time. Indeed, it must do so, because the effect of the provision can only be to require the tribunal to base its decision on the circumstances obtaining at the time. How could it properly decide otherwise? And how can the tribunal properly take account of all the circumstances obtaining at the relevant time unless it forms its own opinion on how the discretion or judgment should be exercised?

6. This approach to appeals is consistent with court authorities over a long period and in various jurisdictions.

7. In *Banbury Visionplus Ltd v Revenue and Customs Commissioners* [2006] STC 1568, the Commissioners had a statutory discretion on the method used to attribute input tax to taxable supplies. The VAT and Duties tribunal decided on appeal that it had limited jurisdiction to review the Commissioners' exercise of their jurisdiction:

> In our view it follows that the jurisdiction of the tribunal is limited to determining whether the discretionary power in regulation 102 was properly exercised having regard to the statutory condition in section 26(3). We should, therefore, consider whether the Respondents acted in a way which no reasonable panel of commissioners could have acted, or whether they took into account some irrelevant matter, or disregarded something to which they should have given weight, or whether they erred in law. We should limit ourselves to considering facts and matters which were known when the disputed decision was made. And we cannot exercise a fresh discretion. It would be otherwise if there were to be an appeal against a decision relating to the operation of the standard method; there section 83(e) gives the right of appeal but the statutory provisions would be found in regulation 101 where the Respondents do not have a discretion. In such an appeal the Tribunal would have a full jurisdiction.

Etherton J held that that approach was wrong:

> 43. In my judgment, the jurisdiction of the Tribunal on the appeals by the Appellants was not a limited jurisdiction.
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> 44. No such limitation is apparent from the wording of s.83(e) of the 1994 Act, which confers a perfectly general appellate jurisdiction. Any limitation must, therefore, be found by examination of the nature of the decision from which the appeals were brought and the legislative context in which that decision was made.
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> 45. What was in issue before the Tribunal in the present case was the decision of the Commissioners that the PESM should be replaced by the standard method. It is common ground that Regulation 102(3) confers on the Commissioners a discretion to terminate the use of a special method. It is also common ground, and I hold, that the discretion must be exercised so as to achieve the statutory objective in s.26(3) of the 1994 Act, that is to say to secure a fair and reasonable attribution of input tax to taxable supplies. The issue whether a decision of the Commissioners achieves the s.26(3) objective is, on the face of it, perfectly susceptible to a full appellate review.
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> …
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> 52. I can see no practical or jurisprudential difficulty in conferring on the tribunal a full appellate jurisdiction to determine, on the basis of all the facts and matters found by it at the time of its decision, whether a decision of the Commissioners under Regulation 102 substitutes, in place of an existing method, a method which secures, or at least better secures, a fair and reasonable attribution of input tax to taxable supplies for the purposes of s26(3) of the 1994 Act. That would be consistent with the unqualified wording of the appeal provisions in s.83(e) of the 1994 Act. It imposes an objective test which, as Mr Peacock observed, is consistent with the provisions of Articles 17 and 19 of the Sixth Directive, and which the tribunal, as a body with the requisite specialist expertise, is well qualified to conduct.

8. There was nothing new in this approach and it is not limited to the tax context. It was applied to appeals to magistrates against a decision that a trader was unsuitable to hold a licence in *Stepney Borough Council v Joffe* [1949] 1 KB 599. The Divisional Court of Queen's Bench held that the magistrate was required to exercise the judgment afresh, as otherwise (at 602) 'the right of appeal … would be purely illusory'. And it was applied to appeals to Quarter Sessions against decisions by a local authority exercising an express statutory discretion to refuse a permit to provide amusements with prizes in a café in *Godfrey v Bournemouth Corporation* [1969] 1 WLR 47. The Divisional Court of Queen's Bench held (at 51-52) that the legislation as a whole required Quarter Sessions to exercise the discretion afresh and that doing otherwise 'would be placing an undue restriction on the powers of quarter sessions in a matter of absolute discretion.' Quarter Sessions were, though, required to take account of the way the local authority had exercised its discretion: see the Court of Appeal

decision in *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614 at 636-637 and 639-640.

9. Outside the criminal and licensing context, it was applied in the case of a teacher who had been barred from teaching in *Secretary of State for Children, Schools and Families v Philliskirk* [2009] ELR 68. The teacher had been barred but appealed against the decision to the Care Standards Tribunal, which allowed the appeal. Collins J held that the tribunal was required to exercise afresh the Secretary of State's judgment on the risk the teacher posed in exercising his profession:

> 19. … as it seems to me, the Tribunal has its own independent judgment to exercise. It looks at the material that was before the Secretary of State and it decides, on that material, whether in its judgment the relevant prohibition or the relevant sanction was or was not one which ought to have been, in its view, imposed. It may be that one can say, if one is talking in strict judicial review terms, that the decision of the Secretary of State was reasonable in the sense that it is one which was open to him. But that would mean, if that is the narrow basis upon which the Tribunal approaches the matter, that it is disabled from exercising its own judgment. It is the exercise of its own judgment that is important. …
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> …
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> 30. In reality, this appeal is no more than an attempt to overturn a decision which the Secretary of State feels, on its facts, was one which was inappropriate because it did not accord with the view that he had formed. But that is what the Tribunal is there for - to form its own judgment, and that it has done. …

## C. Why the First-tier Tribunal's decision was in error of law

10. The tribunal's decision is unclear on the approach it took. In the decision notice, the judge wrote:

> 7. … I am of the view that it was open to the appellant at all times to take independent advice as to entitlement and that the respondent was correct to refuse to exercise the discretion she has to backdate further in circumstances where a claimant is unaware of the existence of the benefit/credit in question.

That can be read as consistent with the tribunal applying the proper approach. However, in the written reasons the judge wrote:

> 13. Regulation 12(b) gives the respondent a discretion to backdate an award to earlier than the date set out in regulation 12(a). I accepted that the appellant was not aware of the existence of CC until he made his application in January 2018 and that he was not advised by the respondent when he made contact in 2012. However, for the reasons set out in paragraph 7 of the Decision Notice, I was of the view that the respondent in considering the exercise of that discretion was entitled to make the decision that it did.

That paragraph is more consistent with the tribunal having exercised a reviewing function rather than an appellate one, by which I mean that it did not consider afresh the judgment required by regulation 12(b), but merely asked whether the decision-maker had been entitled to decide as they did.

11. Reading the decision as a whole, and looking at the substance of the judge's reasons as well as the language used, the tribunal has not shown that it took the correct approach. The language of paragraph 13 suggests that it did not and the decision notice merely adds confusion. The substance of the reasoning does not resolve the uncertainty. It does not show that the tribunal made its own fresh and independent assessment of how regulation 12(b) applied to the circumstances of the case.

12. This failure to show an independent exercise of judgment is apparent in relation to the claimant's argument about the availability of information on the Government's website. The tribunal rejected this argument on the general ground that 'new benefits and credits are widely publicised.' That may be correct as a general proposition, but it does not come to grips with the argument. For a start, the point about *initial* publicity does not apply here because the credits were introduced in 2010. The claimant had no reason to register the information at that time, as far as I know. There is also the point that the claimant made in his letter of 5 June 2018: 'you have to know of the existence of something to ask for details of it.' That is true, although it does not take account of the possibility that the claimant could reasonably have asked whether there might be some form of financial support. The tribunal dealt with that in paragraph 7 of the decision notice, but did not explore the significance of the lack of advice in 2012. Was it reasonable to expect the claimant to rely on receiving advice on an obviously related matter rather than looking for himself?

13. For those reasons, the decision was in error of law.

**Signed on original**
**on 30 August 2019**

**Edward Jacobs**
**Upper Tribunal Judge**