DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision of the Birmingham First-tier Tribunal dated 15 January 2018 under file reference SC024/17/00836 does not involve any error of law. The decision of the First-tier Tribunal stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This is a tax credits appeal which ultimately turned on the credibility of the account provided by the Appellant as regard both her employment and her childcare arrangements that underpinned her tax credits claim – and both of which were disputed by HMRC, which argued neither was genuine.

2. This case was one of some 40 interconnected tax credit appeals, being interconnected in the sense that the identities of the appellants' employers and childcare providers were similar and/or identical, in terms of their names and the individuals involved in corporate governance. The appeals were actively case managed and heard in a series of tranches, with some issues being taken in common. For the reasons that follow, I conclude there was no error of law in the approach taken by the First-tier Tribunal to the present appeal.

The delay in resolving the Upper Tribunal proceedings

3. There has been an unfortunate delay in resolving this appeal in the Upper Tribunal. The final First-tier Tribunal hearing was on 15 January 2018 (p.562). The District Tribunal Judge's admirably legible statement of reasons runs to 52 pages (pp.562-613). The Tribunal issued its Decision Notice dismissing the appeal on 6 February 2018 (p.658). The Tribunal's Statement of Reasons was issued on 26 April 2018 (p.660ff). The District Tribunal Judge refused permission to appeal in a ruling issued on 28 June 2018 (p.686A). The Appellant's application to the Upper Tribunal for permission to appeal was received on 30 July 2018 (p.688). On 3 September 2018, as the grounds of appeal were stated in general and unspecific terms, Upper Tribunal Judge Jacobs directed that they be particularised (p.693). The Appellant complied on 30 September 2018 (pp.694ff).

4. On 4 October 2018 Judge Jacobs directed an oral hearing of the application, partly because the Appellant had requested one and partly because "the tribunal's findings amount to a conclusion of deliberate and sophisticated misrepresentation and fraud by the claimant" (p.711). An oral hearing was duly arranged in Birmingham for 11 January 2019. Less than a week before the hearing, the Appellant applied for a postponement, which Upper Tribunal Judge Hemingway reluctantly granted (p.714). The hearing was relisted for 15 March 2019 and Upper Tribunal Judge Poynter refused a further request for a postponement (p.717). Judge Poynter also refused permission to appeal at the oral hearing. However, he invited the Appellant to apply for a set aside as it transpired representations sent in by her new representative had been posted to the wrong tribunal office, and had not been before

him when he made his ruling. On 8 May 2019 Judge Poynter duly set aside his refusal of permission.

5. On 15 May 2019 Judge Hemingway granted permission to appeal, while noting that this grant of permission "is not, of itself, an indication she is ultimately likely to succeed" (p.719). The parties then made written submissions on the appeal. The case file has now been transferred to me for decision.

The First-tier Tribunal's decision

6. As noted above, this appeal was dealt with alongside several other appeals which raised similar and in some respects identical issues. So far as the present case is concerned, the First-tier Tribunal refused the appeal and confirmed HMRC's decisions of 10 October 2016. As such the Tribunal decided that the Appellant (i) was not entitled to Working Tax Credit (WTC) for the tax years 2015/16 or 2016/2017; (ii) was not undertaking paid work for an orphanage charity during the 2015/16 tax year; (iii) had not worked sufficient hours in a self-employed capacity in her health foods business to qualify for WTC in 2016-17; and (iv) had not genuinely incurred and paid for the childcare fees as claimed.

The Appellant's grounds of appeal

7. Putting to one side the very generalised and initially unparticularised grounds of appeal in the original application, the Appellant has advanced various grounds of appeal. First, these are contained in the original application for permission to appeal made to the First-tier Tribunal (pp.678-686) and reiterated to the Upper Tribunal (pp.695-703, to which were annexed submissions to the First-tier Tribunal on the evidence, pp.704-710), following Judge Jacobs's direction ("the Appellant's original grounds of appeal"). Second, there are the submissions originally sent to the wrong address and so which were not before Judge Poynter (now pp.720-728) ("the Appellant's supplementary grounds of appeal"). Third, and lastly, there is the brief reply by Mr Thomas Crowley, the Appellant's representative (p.734), to the HMRC response to the Upper Tribunal appeal ("the Appellant's reply").

The proceedings in the Upper Tribunal

8. I have had detailed written representations from the Appellant's representative, as noted above. I have also seen the response by Miss Rachel Dixon on behalf of HMRC (pp.731-733). Even if I have not dealt with every point in these various submissions in this decision, I have considered all the matters raised in those representations.

9. I have also considered afresh whether to hold an oral hearing of this appeal. There has been no request from either party for an oral hearing of the appeal proper. Indeed, Mr Crowley specifically disavows any request for an oral hearing at this stage (p.735), as does Miss Dixon (p.733). Notwithstanding the seriousness of the First-tier Tribunal's findings, I do not consider an oral hearing of this appeal is in keeping with the overriding objective. The Upper Tribunal is not the place to relitigate the factual issues. Moreover, the parties have set out their respective arguments clearly in the written submissions. I have therefore decided not to hold an oral hearing of the appeal itself.

The Upper Tribunal's analysis of the grounds of appeal

The Appellant's original grounds of appeal

10. Much of the document comprising the original grounds of appeal was devoted to rehearsing the Appellant's account of the background to the case and/or to criticisms of the HMRC's conduct of its investigation. To that extent they did not shed much light on how it was argued that the First-tier Tribunal itself had erred in law. Insofar as

the original grounds of appeal purported to identify errors of law by the Tribunal, they are unpersuasive for the following reasons.

11. First, the original grounds suggested the First-tier Tribunal had applied the wrong standard of proof in relation to the PAYE records, given the HMRC requirements for running a PAYE scheme. However, whatever the HMRC requirements, the absence of proper PAYE and payroll records was simply one factor in the Tribunal's overall decision-making on the facts.

12. Second, the original grounds sought to rely on my previous decision in *JF v HMRC (TC)* [2017] UKUT 334 (AAC), where I emphasised the importance of tribunals being realistic about the level of record-keeping kept by self-employed small traders. The problem with this submission is it completely sidesteps the question of credibility. In *JF v HMRC (TC)* there was no dispute that the claimant was starting up a painting and decorating one-man business. The question was rather if it met the statutory definition of self-employment. In the present case the First-tier Tribunal did not accept most of the narrative with which it was presented, so the cases are readily distinguishable.

The Appellant's supplementary grounds of appeal

13. The Appellant's supplementary grounds of appeal are primarily focussed on what are described as "the regulatory or technical issues". These are described at pp.721-728 but again are almost entirely concerned with HMRC's conduct of the decision-making and investigative process. It is not immediately obvious how criticisms of HMRC's handling of a tax credits enquiry equates to an error of law by the First-tier Tribunal. Accordingly, I have read and re-read the supplementary grounds of appeal in an attempt to discern how it is said the Tribunal erred in law. The Tribunal is criticised in the following respects.

14. First of all, the First-tier Tribunal is attacked for unquestioningly accepting a narrative which is said to be promulgated by HMRC, namely "that single female claimants newly arrived in the UK have been involved in an organised and sustained attack on the tax credit regime" (p.723). In short, it is suggested that the First-tier Tribunal has been hoodwinked into accepting such a "moral panic" narrative. The difficulty with this line of argument is that it has more the ring of a political critique than a ground of appeal on a point of law. Furthermore, this First-tier Tribunal's decision ultimately comes down to issues of credibility in fact-finding, matters which I revert to further below.

15. Secondly, there is, as previously noted, a lengthy discussion by the Appellant's representative of the compliance process and, in particular, the decision-making history under the Tax Credits Act 2002, sections 17-19. However, at the end of the day the procedural issues were relatively straightforward. So far as this Appellant was concerned, the First-tier Tribunal was properly charged with resolving two appeals.

16. The first appeal concerned the tax credits assessment for the tax year 2015/16. The initial section 14 notice is evidenced at p.13 (13.07.2015). A section 17 final notice was then issued as shown by p.16 (21.04.2016), followed by a finalised section 18 decision shown at p.20 (01.08.2016). Following a section 19 enquiry, this was followed by a final entitlement decision for 2015/16 at p.12 (10.10.2016), and explained in the letter at p.292, also dated 10.10.2016). The main effect of this decision was in effect to remove entitlement to working tax credit for the year. The Appellant sought a mandatory reconsideration that was refused at pp.1-4 (23.12.2016), prompting her appeal to the First-tier Tribunal (pp.5-11).

17. The second appeal concerned the tax credits assessment for the following year 2016/17. The sequence of events here is rather less clear, if only because of confusing pagination on file. As the First-tier Tribunal noted (Statement of Reasons at para.81), HMRC's original response to the appeal dealt solely with the 2015/16 tax year. However, there was a further detailed HMRC submission prepared and dated 9 January 2018 which set out the history for 2016/17. This showed the final section 18 decision for 2016/17, with a nil entitlement to working tax credit, as evidenced at p.506 (or p.343, depending which pagination is used), and dated as issued on 23.06.2017, after the end of that tax year. A mandatory reconsideration notice for that year is at pp.507-510 (08.01.2018). While this notice was generated in the week between the adjourned and final hearings, it seems to me there was no unfairness. There were no surprises in the mandatory reconsideration notice as it essentially repeated the findings by HMRC in the much earlier letter at p.292, dated 10.10.2016, insofar as they related to the 2016/17 tax year.

18. The short answer to this ground of appeal is that for both tax years there had been finalised section 18 decisions, each of which had been subject to the mandatory reconsideration process. Accordingly, the First-tier Tribunal had jurisdiction to consider appeals relating to each of the two tax years in question. In her opening remarks at both the adjourned and the final hearing, the District Tribunal Judge identified the key issues she had to determine, namely whether the Appellant was (a) in employment in 2015/16; (b) in self-employment in 2016/17; and (c) liable for childcare fees that had been genuinely incurred and paid.

The Appellant's reply

19. The Appellant's reply, in brief, criticises the HMRC response for selectivity and repeats its reliance on the original and supplementary grounds of appeal. This takes us no further forward, as for the reasons indicated above much of the previous grounds were not germane to the issue of whether the First-tier Tribunal itself had erred in law in any way.

Conclusion

20. It follows I do not find the grounds of appeal persuasive and the appeal must be dismissed. However, I mentioned above that I would return to the issue of credibility, as this was central to the case as argued (and also relevant to the Appellant's submissions on the 'moral panic' narrative).

The credibility issue

What does the law require?

21. There is ample case law on both the proper approach by tribunals to deciding issues of credibility and the adequacy of reasons for any such findings, as well as the appropriate level of scrutiny on appellate review.

22. As to the former, a good place to start is with the dicta of Leveson LJ in the Court of Appeal's judgment in *Secretary of State for Work and Pensions v Roach* [2006] EWCA Civ 1746 (at paragraph [31]), namely:

> "... it is trite to say that the credibility of a witness depends upon an assessment by the fact-finder of a number of features. Without being exhaustive these include what is said, the way it is said, its internal consistency and the extent to which it corresponds with known facts or human experience; all this must be considered in the context of the perceptions of the witness."

23. More recently, Judge Markus QC has helpfully reminded us in *JH v HMRC (TC)* [2015] UKUT 397 (AAC) as follows:

> "6. The Upper Tribunal will be slow to interfere with the First-tier Tribunal's findings of fact. It may only do so if those findings were made in error of law. This includes making perverse or irrational findings on material matters, which includes findings which are not supported by the evidence; failing to take into account material matters; or taking into account immaterial matters. See *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9] – [11].
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> 7. The assessment of the credibility or plausibility of a witness's evidence is primarily a question of fact for the tribunal. In *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 Neuberger LJ said, at [30], that rejection of an account on grounds of implausibility must be done "on reasonably drawn inferences and not simply on conjecture or speculation". In addition, a tribunal may properly draw on its common sense and ability, as practical and informed people, to identify what is or is not plausible."

24. It is widely acknowledged that judging credibility on the basis of demeanour is fraught with danger. As Leggatt LJ held in *R (On the application of SS) (Sri Lanka), v Secretary of State for the Home Department* [2018] EWCA Civ 1391:

> "41. … Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.
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> 42. This was the approach which the FTT judge adopted in the present case. It appears that the FTT judge did in fact recall when writing the determination the manner in which the appellant gave evidence at the hearing, as he commented (at para 59):
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> > "When [the appellant] gave evidence before me, some of his answers were inconsistent and variable but there was no suggestion that he could not remember things."
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> This suggests that the way in which the appellant answered questions did not create a favourable impression. Quite rightly, however, the FTT judge did not attach weight to that impression in assessing the credibility of the appellant's account. Instead, he focussed on whether the facts alleged by the appellant were plausible, consistent with objectively verifiable information and consistent with what the appellant had said on other occasions (in particular, at his asylum interview and in recounting his history to the medical experts). Applying those standards, the FTT judge found numerous significant inconsistencies and improbable features in the appellant's account which he set out in detail in the determination. As the FTT judge explained, it was 'the cumulative effect of the implausible and inconsistent evidence' given by the appellant which led him to conclude that the core of the appellant's account was not credible.
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> 43. Accordingly, even if the appellant had through his demeanour when answering questions given the FTT judge the impression that he looked and sounded believable, the suggestion that the FTT judge should have given significant weight to that impression, let alone that he could properly have

> treated it as compensating for the many inconsistencies and improbabilities in the content of the appellant's account, cannot be accepted."

25. As to the latter question (adequacy of reasoning), over ten years ago I summarised a tribunal's duty to give reasons on its findings on credibility in the following terms, when sitting as a Deputy Commissioner in CIS/4022/2007:

> **"**51. Moreover, I am not convinced, despite first appearances, that there is in fact a conflict between the views expressed by the Great Britain Commissioners in R(I) 2/51 and R(SB) 33/85 on the one hand and the Northern Ireland Tribunal of Commissioners in R 3/01(IB)(T) on the other. The differences are more a matter of tone than substance.
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> 52. In my assessment the fundamental principles to be derived from these cases and to be applied by tribunals where credibility is in issue may be summarised as follows: (1) there is no formal requirement that a claimant's evidence be corroborated – but, although it is not a prerequisite, corroborative evidence may well reinforce the claimant's evidence; (2) equally, there is no obligation on a tribunal simply to accept a claimant's evidence as credible; (3) the decision on credibility is a decision for the tribunal in the exercise of its judgment, weighing and taking into account all relevant considerations (e.g. the person's reliability, the internal consistency of their account, its consistency with other evidence, its inherent plausibility, etc, whilst bearing in mind that the bare-faced liar may appear wholly consistent and the truthful witness's account may have gaps and discrepancies, not least due to forgetfulness or mental health problems); (4) subject to the requirements of natural justice, there is no obligation on a tribunal to put a finding as to credibility to a party for comment before reaching a decision; (5) having arrived at its decision, there is no universal obligation on tribunals to explain assessments of credibility in every instance; (6) there is, however, an obligation on a tribunal to give adequate reasons for its decision, which may, depending on the circumstances, include a brief explanation as to why a particular piece of evidence has not been accepted. As the Northern Ireland Tribunal of Commissioners explained in R 3/01(IB)(T), ultimately 'the only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it'."

26. I see no reason to depart from that analysis now, not least as that passage has been cited with implied approval by a three-judge panel of the Upper Tribunal in *FN v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 670 (AAC); [2016] AACR 24 at paragraph 110.

How did the First-tier Tribunal explain its credibility findings?

27. To recap, the three central factual issues the First-tier Tribunal had to determine were as follows. First, had the Appellant been undertaking paid work of 16 hours a week or more for an orphanage charity during the 2015/16 tax year? Secondly, had she been working for at least 16 hours a week in a self-employed capacity in her health foods business in 2016-17? Third, had she genuinely incurred and paid for the childcare fees as claimed?

28. As to the first question, the First-tier Tribunal found that any such charitable work in 2015/16 was voluntary and not paid for 16 hours a week. The reasons given for not accepting the Appellant's account were, in summary (all paragraph references are to the statement of reasons):

- the supposed job duties were not credible for such a small outfit (para.90);

- there were major inconsistencies in the Appellant's oral evidence (para.91);
- going to Leicester to be paid in cash was not plausible (para.92);
- the contract of employment was not changed to reflect job changes (para.93);
- there was no employer payroll number or P14 record for the Appellant (para.95).

29. For my own part I would not have placed much if any weight on the fourth point, as it is not unknown even in large organisations for contractual documents to fail to keep pace with changes in job duties on the ground. However, that is ultimately a matter of weight for the first instance Judge to determine. Taken together, the reasons adequately explain why the Tribunal accepted the Appellant was a volunteer but not a paid employee in the orphanage charity.

30. As to the second question, the Tribunal found that the Appellant had been engaged in setting up a health foods business in 2016/17 but had not been working for 16 hours a week in that capacity. The reasons given for not accepting the Appellant's account were, in summary:

- the claimed hours were not plausible given the location of the business (para.97);
- the Appellant's own earlier evidence pointed to 4 or 15 hours a week (para.98).

31. As to the third question, the Tribunal found that the Appellant's evidence as to childcare arrangements and charges was not credible. The reasons given for not accepting the Appellant's account were, in summary:

- HMRC records did not reveal any employee of the childcare company (para.99);
- the claimed hours did not match the documentation (para.100);
- the claimed operating hours did not match other parents' evidence (para.100);
- conflicts between the oral evidence and the documentation (para.101);
- the childcare company was a sham based on the related appeals (para.103);
- the Appellant's evidence was simply not credible (para.102):

> "102. [The Appellant] was not able to provide a credible description of her reason for choosing [the childcare company] as a childcare provider, or of precontractual checks that she undertook to ensure she was happy with it as a care venue for her son. She was incapable of providing a description of the premises that was convincing in detail. Her descriptions were so vague and non committal that the Tribunal could not accept that she was describing a real venue that she had actually used and paid for (RoP p44 on)."

32. I readily acknowledge accept that tribunals need to be aware of cultural issues when evaluating evidence (see e.g. *VMcC v Secretary of State for Work and Pensions (IS)* [2018] UKUT 63 (AAC) and *UA v Her Majesty's Revenue and Customs (TC)* [2019] UKUT 113 (AAC)). However, an appropriate cultural awareness is not a guarantee that evidence will be found to be credible. As in *R (On the application of SS) (Sri Lanka), v Secretary of State for the Home Department,* the First-tier Tribunal dismissed the appeal because of "the cumulative effect of the implausible and inconsistent evidence" advanced by and on behalf of the Appellant. This is not a case where the First-tier Tribunal fell into the trap of reliance on some objective standard of reasonableness to judge credibility or on demeanour. The Tribunal, in short, principally relied on <u>what</u> the Appellant said in evidence, not <u>how</u> she appeared in giving evidence.

33. By way of a postscript to the question of cultural awareness, the District Tribunal Judge is to be commended for directing and arranging (and at very short notice between the adjourned hearing and the final hearing) for an all-female tribunal environment (a female Judge, clerk, presenting officer and interpreter), given the Appellant's religious sensitivities.

Conclusion

34. For the reasons above the decision of the First-tier Tribunal does not involve any material error of law. I therefore dismiss this appeal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 10 December 2019

Nicholas Wikeley
Judge of the Upper Tribunal