IN THE UPPER TRIBUNAL **Appeal No. UA-2020-001557-TC**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Her Majesty's Revenue and Customs (HMRC)

Appellant

— v —

R.S.

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 9 September 2022
Decided on consideration of the papers

Representation:

Appellant: Mr H. Ellinson, Haffner Hoff Ltd.
Respondent: Mrs E. Collins, HMRC

DECISION

The decision of the Upper Tribunal is to allow the appeal by HMRC.

The First-tier Tribunal's decision dated 27 April 2020 involved the making of a legal error.

I set aside the First-tier Tribunal's decision and re-make it as follows:

> ***Tax credits are not awarded to the claimant in respect of any period after 25 June 2019.***

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

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal about tax credits originally raised three discrete issues.

2. The first issue, procedural in nature, was about the about the power of the First-tier Tribunal to refer a matter to the Upper Tribunal under section 9(5) of the Tribunals, Courts and Enforcement Act 2007.

3. The second issue, jurisdictional in nature, was about whether the claimant had a right of appeal to the First-tier Tribunal against a particular type of tax credits decision made by Her Majesty's Revenue and Customs (HMRC).

4. The third and substantive issue was about the circumstances in which a claimant who has been awarded tax credits in the past may continue to claim them, notwithstanding the introduction of universal credit.

5. For the reasons that follow, this decision needs only resolve the third and last of these three issues.

The partly set aside decision in *HMRC v RS (TC)* [2021] UKUT 310 (AAC)

6. Upper Tribunal Judge Poynter originally decided this appeal under the guise of *HMRC v RS (TC)* [2021] UKUT 310 (AAC) on 3 December 2021. However, on 22 June 2022 Judge Poynter set aside the greater part of his decision for certain procedural reasons (which need no longer concern us). As a result, the published version of *HMRC v RS (TC)* [2021] UKUT 310 (AAC), as now available on the Upper Tribunal (AAC) decisions website, deals only with the first issue raised by this appeal (which was not affected by the procedural difficulty referred to above). Consequently, and as matters stand today, the only extant reasons for the decision in *HMRC v RS (TC)* [2021] UKUT 310 (AAC) are paragraphs 18 and 49-63. Paragraphs 1-17 and 19-48 of Judge Poynter's reasons have been officially expunged from the record as a result of his subsequent set aside ruling.

7. Accordingly, the decision signed off by Judge Poynter on 3 December 2021 (and as modified by the set aside ruling) has ceased to be a final decision. It is in effect now a ruling on the preliminary first issue raised by the appeal. For what it is worth, I agree with Judge Poynter's reasoning on that first issue. In short, and as the Judge explains in the context of the scheme laid down by the Tribunals, Courts and Enforcement Act 2007, "the power to refer a matter to the Upper Tribunal under section 9(5)(b) exists if—and only if—the Tribunal's substantive decision has been set aside" (paragraph 53). Thus "a simultaneous grant of permission to appeal and a reference [to the Upper Tribunal] under section 9(5)(b) is therefore an impossibility" (paragraph 55).

8. It follows from Judge Poynter's set aside ruling that the second and third issues raised by this appeal have not been determined and must be considered afresh.

Terminology

9. As this is HMRC's appeal to the Upper Tribunal, the claimant was the appellant before the First-tier Tribunal but has now changed places to become the

respondent to HMRC's further appeal. To avoid any confusion, in this decision I simply refer to the parties as the claimant and HMRC respectively.

10. This decision, also to avoid confusion and to distinguish it from the set aside decision referred to above, carries the case name *HMRC v RS (TC) (No.2)* and will carry a different neutral case number (NCN).

11. I should add that neither party's representative has sought an oral hearing of this appeal before the Upper Tribunal. The parties have also not taken up the invitation in Judge Poynter's set aside ruling to make any further submissions on the appeal. Given the detailed and extensive written arguments on file, I am satisfied that the case can be dealt with fairly and justly by considering those submissions and without an oral hearing.

The background to this appeal

12. Notwithstanding the set aside ruling, I am also satisfied that I can rely on Judge Poynter's account of the factual background to the appeal, which I reproduce in its entirety below (including an original footnote). Neither representative has taken issue at any stage with this purely factual account.

> **Factual background and procedural history**
>
> 3. Those [three] issues arise from facts that are not in dispute. The following chronology is a re-statement of the facts that were accepted by the First-tier Tribunal, interspersed with the dates of relevant developments in the law.
>
> 4. Before the events that gave rise to these proceedings, the claimant had an award of tax credits for the tax year from 6 April 2018 to 5 April 2019.
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> 5. By 12 December 2018 (and therefore during the 2018/2019 tax year) universal credit had been brought fully into force for the whole of the United Kingdom.[1] As universal credit is intended to replace tax credits, the effect was that—as a general rule—it was no longer possible to make a claim for tax credits: prospective claimants are now normally obliged to claim universal credit instead.
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> 6. However, that general rule was subject to a number of exceptions, one of which applied (and, for the moment, I paraphrase) to those with tax credit awards for one year who claim tax credits for the next year.
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> 7. On 1 February 2019, tax credits were abolished by s.33(1)(f) of the Welfare Reform Act 2012 by article 2 of the Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order 2019 (SI 2019/167) ("the No.32 Order").
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> 8. But the abolition was subject to the savings set out in that Order. One of those savings applied (and, again, I paraphrase) to some people who had had awards of tax credits in the past.

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1 See Article 3 of, and the final line of the Schedule to, the Welfare Reform Act 2012 (Commencement No. 17, 19, 22, 23 and 24 and Transitional and Transitory Provisions (Modification) (No. 2)) Order 2018 (SI 2018/881).

> 9. It is not in dispute that, when the 2018/2019 tax year came to an end, the claimant fell within the exceptions and savings described in paragraphs 6 and 8 above. As a result, tax credits continued to exist in his case and he continued to be able to claim them.
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> 10. In those circumstances, the claimant's award for 2018/2019 took effect as a claim for the 2019/2020 tax year in the usual way.
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> 11. On 1 July 2019, HM Revenue & Customs ("HMRC") made an initial decision on the claim for 2019/2020 under section 14 of the Tax Credits Act 2002 ("the Act"). They awarded the claimant tax credits of nil for the period from 6 April 2019 to 25 June 2019.
>
> 12. That award did not last for the full 2019/2020 tax year because the claimant had applied for childcare payments under the Childcare Payments Act 2014 and section 30(3) of that Act had the effect of terminating the tax credits award.
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> 13. That initial decision was not challenged at the time and, as I understand matters, has not been challenged subsequently.
>
> 14. For reasons that are unclear from the papers, the claimant's application for child care payments appears to have been unsuccessful and, at some point between 27 June and 1 August 2019, he decided not to pursue it further.
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> 15. In those circumstances, he attempted to make a claim for tax credits by telephone on 1 August 2019. HMRC took the view that no claim could be made because tax credits had been abolished for him and, even if they had not, it was no longer possible for him to claim them.
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> 16. Following a review under s.21A of the Act, the claimant then appealed to the First-tier Tribunal. HMRC resisted the appeal on for the reasons set out in the previous paragraph and further asserted that the claimant had no right of appeal against a decision not to accept a claim.
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> 17. On 27 April 2020, the First-tier Tribunal allowed the claimant's appeal. It held that it did have jurisdiction over it and that the claimant fell within the exception referred to in paragraph 6 above.
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> 18. On 15 September 2020, a District Tribunal Judge (not the Judge who made the decision on 27 April 2020), whose signature is illegible and who is not otherwise identified, made a decision that—for the reasons given in paragraphs 49 to 59 below—I have treated as giving HMRC permission to appeal to the Upper Tribunal.

13. As already noted above (at paragraph 6), only paragraph 18 of this passage survived Judge Poynter's set aside ruling of 22 June 2022. However, I have revived paragraphs 3-17 of Judge Poynter's original decision of 3 December 2021 (as set out immediately above) for the purposes of the present decision as they clearly and helpfully set out factual matters that are not in dispute.

The first issue arising on this appeal

14. This procedural issue—about the power of the First-tier Tribunal to refer a matter to the Upper Tribunal under section 9(5) of the Tribunals, Courts and Enforcement Act 2007—was determined by Judge Poynter in *HMRC v RS*

[2021] UKUT 310 (AAC), in the decision that survived his later set aside ruling. Accordingly it does not arise for decision now and in any event, as indicated above, I agree with that approach.

The second issue arising on this appeal

15. The second issue arising on this appeal is a jurisdictional question. The FTT found that the telephone call of 1 August 2019 (see paragraph 15 of Judge Poynter's summary above) constituted a claim to tax credits and that there was a right of appeal against HMRC's refusal to allow the claimant to make such a claim for tax credits. In summary, as the FTT (or 'the FtT') explained, it decided that the preponderance of Upper Tribunal authority showed that "there can be an appeal to the FtT using Art 6 of the ECHR rather than pursuing an action for judicial review. The FtT decided, following paragraphs 62 to 67 of [*ZM and AB v HMRC (TC)*] [2014] AACR 17, that it was possible to read and give effect to s. 14(1) of the Tax Credits Act 2002, read together with section 14(1) so as to have effect that HMRC was to be viewed as having taken a decision which then became appealable to the FtT" (statement of reasons, paragraph 11),

16. Put starkly, HMRC's position on this second issue is that the FTT had no jurisdiction to hear the appeal. This submission was made on the basis that no decision had been made against which a valid appeal could be brought. The claimant, in contrast, contends that the relevant HMRC decision was properly appealable to the FTT.

17. HMRC relies on regulation 5(2)(b) of the Tax Credits (Claims and Notifications) Regulations 2002 (SI 2002/2014; 'the 2002 Regulations'), which provides that, in the absence of a written claim form, a claim for tax credits must be made "in such other manner as the Board may decide having regard to all the circumstances". HMRC further prays in aid my decision in *MK v HMRC (TC)* [2018] UKUT 238 (AAC) and seeks to distinguish the reported decision of Upper Tribunal Judge Ward in *ZM and AB v HMRC (TC)* [2013] UKUT 547 (AAC); [2014] AACR 17. HMRC's submission, in short, is that its discretionary decision under regulation 5(2)(b) is not one that gives rise to a right to request a review or an appeal under sections 21A and 38 respectively of the Tax Credits Act 2002.

18. However, the claimant's representative observes that since February 2019, and with the roll-out of universal credit, most people have not been able to make a new claim for tax credits. Indeed, in practice HMRC has not produced an approved claim form for tax credits for any year since the 2018/19 tax year. Thus, the reality is that HMRC has exercised its discretion to allow claims by telephone in all those cases where new claims for tax credits can be made. The claimant's representative further contends that in these changed circumstances judicial review is not an adequate remedy by way of making a challenge to an HMRC decision under regulation 5(2)(b).

19. In his now set aside decision, Judge Poynter declined to determine this second jurisdictional issue, on the basis that it was unnecessary to do so, given the conclusion he had reached on the third and substantive issue arising on the appeal (on which see further below). Judge Poynter further noted that in any event, and even if the FTT lacked jurisdiction, the Upper Tribunal enjoyed jurisdiction in such circumstances: see the decision of the three-judge panel in

LS and RS v Commissioners for Her Majesty's Revenue and Customs [2017] UKUT 257 (AAC); [2018] AACR 2 at [23].

20. In those circumstances I likewise adopt Judge Poynter's approach. If the point has not already been decided, it is better decided in a case which expressly turns on the point. The second issue arising on this appeal accordingly need not be definitively resolved here. I would simply observe that although regulation 5(2) of the 2002 Regulations has survived the roll-out of universal credit unamended, the tax credits decision-making landscape is now very different. Notwithstanding my decision in *MK v HMRC (TC)* [2018] UKUT 238 (AAC), this might on re-examination and closer scrutiny turn out to be a case of "The matter does not appear to me now as it appears to have appeared to me then" (*per* Baron Bramwell in *Andrews v Styrap* [1872] 26 L.T. 704 and 706).

The third issue arising on this appeal

Introduction

21. The third and substantive issue concerns the circumstances in which a claimant who has been awarded tax credits in the past may continue to claim them, notwithstanding the introduction of universal credit. This issue requires consideration of two discrete questions: first, had tax credits been abolished in relation to the claimant? Secondly, and if not, was the claimant still eligible to claim tax credits?

The First-tier Tribunal's decision

22. By way of a reminder, the FTT helpfully summarised the facts as follows in its statement of reasons:

> 3. The relevant facts in this paragraph and the next did not seem to be in dispute and were accepted as such by the tribunal. The Appellant had had an award of tax credits for the tax year 2018/19 and on 01.07.2019 he was awarded tax credits of nil under section 14 Tax Credits Act 2002 for the period 06.04.2019 to 25.06.2019. His award of tax credits was terminated on 25.06.2019 in accordance with section 30 Childcare Payments Act 2014.
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> 4. On 01.08.2019 the Appellant contacted HMRC by telephone to claim tax credits again for the tax year 2019/20 as he was no longer pursuing any claim under the Childcare Payments Act 2014. HMRC seems to accept that a telephone call was made on 01.08.2019 but HMRC refused to accept the claim because, HMRC claimed, tax credits as a scheme had been abolished for the Appellant because of the terms of Article 7(1) Welfare Reform Act 2012 (Commencement No.23) Order 2015 which, it was accepted, applied to the postcode in which the Appellant lived on 01.08.2019 when he attempted to claim tax credits by telephoning HMRC.

23. The FTT's statement of reasons then explained its conclusion that the claimant had a right of appeal against the HMRC's decision not to accept the claim on 1 August 2019 (paragraphs 5-11), i.e. on the second issue that arises on the present appeal. The FTT's reasoning continued as follows:

> 12. … the FtT also decided that it did not agree with HMRC that Commencement Order 23 had any impact in this case. Article 7(6) provides an exception to the rule in Article 7(1) that a claim for a tax credit

> cannot be made. The exception applies to "a claim for a tax credit where a person has or had, or persons have or had, an award of child tax credit or working tax credit in respect of a tax year and that person or those persons makes or make (or is or are treated as making) a claim for that tax credit for the next tax year."
>
> 13. When he telephoned on 01.08.2019 the Appellant was hoping to make a claim for a tax credit for the tax year 2019/20 having had an award for the preceding tax year 2018/19. 2019/20 was the next tax year after 2018/19 in which he had an award. The Tribunal considered that the exception in Article 7(6) therefore applied. The Tribunal also considered that the telephone call could be considered to be a claim for tax credits for the purposes of regulation 5 of the Tax Credits (Claims and Notifications) Regulations 2002 because HMRC should have allowed the claim to continue and only HMRC's incorrect (in the tribunal's judgment) application of Article 7 meant that the claim could not proceed.

Had tax credits been abolished in relation to the claimant?

24. Section 33(1)(f) of the Welfare Reform Act 2012 provides for the abolition of both child tax credit and working tax credit. Article 2 of the Welfare Reform Act 2012 (Commencement No.32 and Savings and Transitional Provisions) Order 2019 (SI 2019/167; 'the Commencement No.32 Order') brought section 33(1)(f) into force on 1 February 2019. Necessarily, therefore, the claimant could not have made a claim for tax credits on 1 August 2019 unless some saving or transitional provision applied such that the abolition of tax credits did not apply to him.

25. Article 3(1) of the Commencement No.32 Order provides for certain such exceptions:

> **Savings**
>
> **3.**—(1) Section 33(1)(f) of the Act, and the repeal of Part 1 of the 2002 Act (but not Schedule 1 or 3) by Part 1 of Schedule 14 to the Act, shall be treated as though they had not come into force, in relation to a case as referred to in paragraph (2), (3), (4), (5) or (9).

26. The claimant's representative contends that the claimant fell within Article 3(3)(a), on the basis that both he and his wife were below the age for state pension credit (being "the qualifying age" – see Article 1(2)):

> (3) The case referred to is the case of an award of a tax credit where the period for which it has effect begins on or after 1st February 2019 and where the claim for the award is made by—
>
> (a) a single claimant who is, or a couple both members of which are, aged under the qualifying age on the day that the claim is made; … .

27. HMRC, on the other hand, submits that the claimant is subject to the saving provision in Article 3(5)(c):

> (5) The case referred to is a case, not falling within paragraph (3) or (4), of—
>
> …

(c) an award of child tax credit or working tax credit where the period for which it has effect begins on or after 1st February 2019 and where the claimant or claimants who makes or make the claim for the award had an award of the same type of tax credit for the previous tax year to the tax year for which the award is made.

28. On the face of it Article 3(3)(a) applies, at least if a nil award of tax credits after 1 February 2019 counts for that purpose, as Article 3(5) is subject to Article 3(3). But in the final analysis it does not matter which of these two heads applies – either way the parties are agreed that the abolition of tax credits did not take effect in relation to the claimant by virtue of a savings provision in Article 3 of the Commencement No.32 Order.

29. However, the fact that tax credits were not abolished in relation to the claimant does not mean that he was necessarily eligible to make a new claim for tax credits.

Was the claimant still eligible to claim tax credits?

The relevant statutory provisions: Article 7 of the Commencement No.23 Order

30. The question of eligibility to claim tax credits was governed by Article 7 of the Welfare Reform Act 2012 (Commencement No.23 and Transitional and Transitory Provisions) Order 2015 (SI 2015/634; 'the Commencement No.23 Order'). At the material time Article 7(1) provided as follows:

> **Transitional provision: claims for housing benefit, income support or a tax credit**
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> **7.**—(1) Except as provided by paragraphs (2) to (6), a person may not make a claim for housing benefit, income support or a tax credit (in the latter case, whether or not as part of a Tax Credits Act couple) on any date where, if that person made a claim for universal credit on that date (in the capacity, whether as a single person or as part of a couple, in which he or she is permitted to claim universal credit under the Universal Credit Regulations 2013), the provisions of the Act listed in Schedule 2 to the No. 9 Order would come into force under article 3(1) and (2)(a) to (c) of this Order in relation to that claim for universal credit.

31. The effect of Article 7(1) is that the default position is that a person who lives in an area in which universal credit has been brought into force cannot claim tax credits (or indeed housing benefit or income support). However, this is "except as provided by paragraphs (2) to (6)." So persons who can bring themselves within one of those exceptions may still claim tax credits (or one of the other legacy benefits mentioned). These exceptions are now considered in turn.

32. Paragraph (2) provided for an exception where other secondary legislation prevented persons from making a claim for universal credit because they were entitled to the severe disability premium (SDP) as part of their legacy benefit entitlement or were certain frontier workers. The claimant in this case did not fall into any of those special categories.

33. Paragraphs (3) and (4) both relate exclusively to housing benefit, and so cannot assist the claimant in the instant case.

34. Paragraph (5) provides for the following exception:

> (5) Paragraph (1) does not apply to a claim for a tax credit where a person or persons makes or make a claim for child tax credit or working tax credit and on the date on which he or she (or they) makes or make the claim he or she (or they) has or have an award of working tax credit or child tax credit respectively.

35. Therefore this exception allows a person with an award of working tax credit to make a claim for child tax credit and vice versa. It does not help the claimant in the present case because as of 1 August 2019 he had an award of neither tax credit, his previous tax credits award having been terminated with effect as from 26 June 2019.

36. Paragraph (6) is the sole remaining exception. Accordingly, the claimant has to show that he falls within the terms of this exception to be eligible to maintain a claim for tax credits. Failing that, he is subject to the default rule in Article 7(1), namely that he could not claim tax credits, instead having to claim universal credit. Paragraph (6) provides thus:

> (6) Paragraph (1) does not apply to a claim for a tax credit where a person has or had, or persons have or had, an award of child tax credit or working tax credit in respect of a tax year and that person or those persons makes or make (or is or are treated as making) a claim for that tax credit for the next tax year.

37. So, this exception applies if a person has, or has had, a tax credit award "in respect of a tax year" and makes a claim (or is treated as making one) for the same tax credit "for the next tax year".

38. The claimant had undoubtedly had a tax credit award for 2018/19, and so an award "in respect of a tax year", meaning that 2019/20 was necessarily "the next tax year". The question, however, was whether the claim made part way through that year (on 1 August 2019) was one made "*for* the next tax year", namely 2019/20.

39. The gist of the FTT's reasoning – that the claim was indeed made *for* the next tax year – was contained in paragraph 13 of its statement of reasons:

> When he telephoned on 01.08.2019 the Appellant was hoping to make a claim for a tax credit for the tax year 2019/20 having had an award for the preceding tax year 2018/19. 2019/20 was the next tax year after 2018/19 in which he had an award. The Tribunal considered that the exception in Article 7(6) therefore applied.

The parties' submissions

40. In its notice of appeal to the Upper Tribunal, HMRC submitted that the benefit of Article 7(6) of the Commencement No.23 Order was confined to those cases where there was what was commonly referred to as a 'renewal claim' for tax credits. On this analysis, the claimant had gained the benefit of Article 7(6) when the final decision on his 2018/19 claim had led to him being treated as having made a further such renewal claim as from 6 April 2019 and in respect of the 2019/20 tax year (under the procedure mandated by section 17 of the Tax Credits Act 2002 and regulation 11(2) and (3) of the 2002 Regulations). However, that award for 2019/20 was later terminated and consequently the subsequent claim made on 1 August 2019 (assuming it was a valid claim) was

not a renewal claim. As such, it did not fall within the scope of Article 7(6) and so the claimant was subject to the default rule in Article 7(1), meaning that he was now barred from claiming tax credits. This approach, HMRC argued, was consistent with the underlying policy intention governing renewal claims.

41. In response, the claimant's representative submitted that there was no warrant for reading Article 7(6) as being confined to renewal claims, there being no such limitation in the wording of the provision. The representative further argued that there was no reason why the policy intention could not have been to allow anyone entitled to tax credits in a previous year to continue on tax credits even when it was not strictly a renewal claim. It was further noted that Upper Tribunal Judge Mitchell's decision in *W v HMRC* [2020] UKUT 239 (AAC) did not suggest that Article 7(6) was confined to renewal claims.

42. In reply, HMRC reiterated its contention that Article 7(6) is limited to renewal claims. On that basis, it was not intended to permit a fresh claim for tax credits in circumstances where a prior award of tax credits has terminated owing to an event that required such termination (as on the facts here). HMRC submitted that to hold otherwise would be inconsistent with the policy objective that, going forward, means-tested state support for people of working age should be delivered via universal credit rather than via tax credits.

43. The parties' arguments were further developed in several later written submissions, culminating in Judge Poynter's set aside ruling.

Discussion and analysis

44. There is no dispute that the claimant had a tax credits award "in respect of a year" for 2018/19. There is also no argument that in principle in such a case "the next tax year" was necessarily 2019/20. However, I conclude that the claim made on 1 August 2019 and so <u>in</u> 2019/20 was not made "<u>for</u> the next tax year".

45. In essence, my reasoning is largely in accord with the reasoning of Judge Poynter in the decision that he has set aside. In summary, it runs as follows.

46. A tax year runs from 6 April in one calendar year to 5 April in the following year (see Tax Credits Act 2002, section 48, which applies to relevant subordinate legislation by virtue of section 11 of the Interpretation Act 1978). Article 7(6) of the Commencement No.23 Order makes a distinction between the previous *award* (which must have been made "in respect of a tax year") and the new *claim* (which must have been "for the next tax year"). The phrase "for the next tax year" involves a reference to the next tax year as a whole, from 6 April in one year to 5 April in the following year, and not to a part tax year. This interpretation is consistent with both the statutory wording and the underlying policy intent.

47. As to the wording, if the draftsman had wanted to include within the scope of Article 7(6) tax credits claims which were made in year, and for part of a current tax year, it would have been a straightforward matter to do so. If that had indeed been the policy intention, the Order could have made provision for those persons who make "a claim for that tax credit for the next tax year *or part of that tax year*". Thus, for example, section 3(1) of the Tax Credits Act 2002 concerns "entitlement to a tax credit for the whole or part of a tax year" (see also section 17(1)).

48. As to the policy intent, the purposes of the Welfare Reform Act 2012 include the replacement of tax credits (and other means-tested legacy benefits) by universal credit. Transitional protection typically has the effect that a claimant remains on an 'old' benefit until that person ceases to satisfy the relevant entitlement conditions, at which point the individual must make a claim for the 'new' benefit (or not at all). It is entirely consistent with this approach that transitional protection ceased (and so the option of claiming the 'old' benefit disappeared) once any entitlement to tax credits had terminated.

49. This analysis can then be applied to each of the claimant's two tax credit claims.

50. The first was the renewal claim he was treated as having made by virtue of having an award "in respect of" 2018/19. This claim was for "the next tax year", being the whole of 2019/20, and so satisfied the terms of Article 7(6). The fact that the claim led to a nil award and subsequent events led to the award's early termination after three months or so makes no difference in this respect.

51. The second was the brand new claim he made at a date when he had no extant award (on 1 August 2019). He may still be a person who "had" (rather than "has") an award of tax credits "in respect of a tax year" within the first part of Article 7(6). However, his claim was not "for the next tax year" (being the period from 6 April 2019 to 5 April 2020) within the latter part of Article 7(6). Rather, it was only for the part tax year from 1 August 2019 (or any such earlier date within the preceding 31 days fixed by reference to regulation 7 of the 2002 Regulations) to 5 April 2020.

52. As a result, the claimant did not fall within the exception in Article 7(6) of the Commencement No.23 Order but rather was barred from claiming tax credits by virtue of Article 7(1) of that same Order.

53. I should make it clear I am not expressly deciding that the protection afforded by Article 7(6) only applies in the context of renewal claims. It may well be that a claimant with a renewal award under section 17 of the Tax Credits Act 2002 and regulation 11 of the 2002 Regulations is the paradigm case under Article 7(6). However, and in the absence of full argument on the point, I do not exclude the possibility that there may be other types of case which fall within the remit of Article 7(6).

54. In reaching my conclusions I have not overlooked the further arguments advanced by the claimant's representative on the proper construction of the Commencement No.23 Order. These relate to both the period that tax credit claims are made for and also the meaning of "for the next tax year".

55. As to the former, the representative's submission is that a claim for a tax credit is always made simply for a particular tax year and not for particular periods within any tax year. In addition, section 5 of the 2002 Act provides for the determination of the period of any tax credits award simply by reference to the date on which the claim is made. Whilst that may be an accurate portrayal of the general tax credits decision-making machinery, the issue here is the proper interpretation of the wording of the specific transitional provision in Article 7(6).

56. As to the latter, the representative's submission is that the phrase "for the next tax year" does not necessarily mean for the whole of the next tax year. While acknowledging that sections 3 and 17 of the Tax Credits Act 2002 specify "the whole or part of a tax year", reference is made to sections 18-20 where several

mentions of a "tax year" must from their context include part tax years. The difficulty with this argument is that it fails to give sufficient weight to the fact that the legislative phrase now under scrutiny is not simply "the tax year" but rather "the *next* tax year".

57. It is further argued that there should be no difference in terms of the provision for savings made by the Commencement No.32 Order and the Commencement No.23 Order. However, this submission overlooks the fact that the two Orders serve very different purposes. The Commencement No.32 Order deals with those categories of case who are protected from the (immediate) effect of the abolition of tax credits. The Commencement No.23 Order deals with the conceptually separate issue as to whether certain categories of claimants for whom tax credits have not been abolished can still actually make a fresh claim for such tax credits.

58. I have also considered Judge Mitchell's decision in *W v HMRC* [2020] UKUT 239 (AAC). That case concerned a different issue arising under Article 7(6) (whether a widower could claim the benefit of the provision when the previous year's claim had been a joint claim with his now late wife). It does not in any way address whether "for the next tax year" means the whole tax year or includes a part tax year.

59. Finally, reference is made to observations in Judge Poynter's now set aside decision to the possibility that "in respect of a tax year" could include part of a tax year. It is suggested that this could mean that a fresh tax credits claim could be made in April 2020 for the whole of the 2020/21 tax year. It is further argued that it would be wholly illogical to allow a new claim in April 2020 but not in August 2019. I express no view on the scope of the phrase "in respect of a tax year", and so the apparent illogicality simply does not arise.

Conclusion

60. I can sum up as follows.

61. I allow HMRC's appeal to the Upper Tribunal. The First-tier Tribunal's decision dated 27 April 2020 involved the making of a legal error. I set aside the First-tier Tribunal's decision and re-make it as follows (section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007):

> **Tax credits are not awarded to the claimant in respect of any period after 25 June 2019.**

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 9 September 2022