IN THE UPPER TRIBUNAL **Appeal No: CTC/865/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Fox Court on 5 October 2015 under reference SC242/14/05428 involved an error on a material point of law and is set aside.

The Upper Tribunal redecides the appeal and gives the decision the First-tier Tribunal ought to have given. That decision is that the appellant was entitled to child tax credit, but not working tax credit, amounting to £9,110.12 for the tax (credit) year from 6 April 2013 to 5 April 2014.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Appearances: The appellant (claimant) appeared at the first hearing of the appeal (which was rendered ineffective due to the late arrival of the interpreter) but neither appeared nor was represented at the second (substantive) hearing of the appeal.

Ms Galina Ward of counsel appeared on behalf of the respondent at both hearings.

REASONS FOR DECISION

Introduction and background

1. The issue that this decision seeks to address is how decisions of the First-tier Tribunal take effect under the Tax Credits 2002, particularly in the context of the basis, if there is such, of HMRC's ability to change such decisions under that Act.

2. Given the nature of the main issue with which this appeal is concerned and given HMRC's concessions on the appeal, it is unnecessary to identify in any detail the underlying factual circumstances that led HMRC and the First-tier Tribunal to 'remove' (to use what I hope is a neutral, non-statutory word) the appellant's working and child tax credits for the tax (credit) year 6 April 2013 to 5 April 2014. It is sufficient to say that the tax credits were removed on the basis that the appellant had not in fact worked sufficiently in that year and as a result also did not have a right to reside as a qualified person in the United Kingdom under regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 (as were then in force). The sole ground on which I gave the appellant permission to appeal concerned the child tax credit part of the award and was on the basis:

> "Did HMRC and the First-tier Tribunal investigate sufficiently and explain adequately the basis for non-entitlement to child tax credit in that year[?] Being in work of itself is not a necessary condition for qualifying for child tax credit. As an Italian (i.e. EU) national it might provide a basis under the right to reside test for saying [the appellant] was not a qualifying person based on her being a "worker" (that is, in work) in 2013/2014. However given her evidence.....about having worked in the UK since 2011 and the school age of at least two of her children, did HMRC and the First-tier Tribunal look sufficiently at whether she could in 2013/2014 have had what is called a 'derivative right to reside' under article 10 of Regulation (EU) No. 492/2011 based on her work in 2011 (assuming it can be properly evidenced) and her children being in education? In other words, if the basis for the child tax credit decision was the right to reside test, ought HMRC and the First-tier Tribunal [to] not have addressed and explained why [the appellant] did not have a derivative right to reside under article 10 of Regulation (EU) No. 492/2011?"

Subject to the jurisdictional issue to be explored below and the issue of the statutory basis of the decision which was under appeal, HMRC now concede that the First-tier Tribunal did err in law in the way I raised when giving permission to appeal. Indeed, they go further and concede that the appellant was on the facts entitled to child tax credit for the year 2013 to 2014. In the circumstances, I do not investigate the factual issue of entitlement to child tax credit any further.

3. The issue identified in the opening paragraph of this decision arises in the context of an appeal which reveals yet again the inadequacy of first instance decision making conducted by HMRC under the Tax Credits Act 2002 and the inadequacy of HMRC's explanation for its decision making in its decisions and appeal responses provided to the First-tier Tribunal. That has been the subject of commentary in, regrettably, too many Upper Tribunal decisions. HMRC's own submission writer in his submissions to the Upper Tribunal described HMRC's decision making process in this case as "somewhat perplexing" and that its "administration of its decisions and the appeal in this case has been entirely inept, and it is HMRC's submissions that led the [First-tier Tribunal] down an incorrect path".

4. This submission was based, at least in part, on that submission writer's view that the decision under appeal to the First-tier Tribunal, said to be dated 8 September 2014, could not have been made under section 16 of the Tax Credits Act 2002 as it was made after the tax (credit) year to which it related, that being the year 6 April 2013 to 5 April 2014. If section 16 was the basis of the 8 September 2014 decision then that submission is plainly correct: see, for example, paragraph 13 of *DG –v- HMRC and EG* (TC) [2016] UKUT 0505 (AAC).

5. However, in fairness to the original decision maker(s) within HMRC, it is not correct to say that they consistently ascribed the legal basis for their decision to section 16 of the Tax Credits Act 2002; though the inconsistency in HMRC's approach may itself qualify as being "inept".

6. HMRC's appeal response to the First-tier Tribunal gives the decision date of 8 September 2014. It is described in that response as "The Decision: Final entitlement for tax year 2013-2014: [the appellant] was not entitled to tax credits for 2013 – 2014", and the appeal response states that the legal basis for the decision was section 18 of the Tax Credits Act 2002. The appeal response includes the (at least then) standard passage stating that HMRC had not included a copy of this decision as it was unable to do so. For the reasons I gave in paragraph 26 of *DG –v-*

HMRC and EG referred to above, that stance is wrong and unlawful. I would respectfully endorse Upper Tribunal Judge Poynter's provisional reasons in paragraphs 16-28 of *CTC/3475/2016* for agreeing with paragraph 26 of *DG*.

7. What does appear in the appeal bundle is, first (in terms of relevance), an HMRC letter to the appellant dated 9 June 2014 which stated that it had selected the appellant's claim for tax credits for the year to 5 April 2014 "for review", and the letter then asked the appellant to provide evidence to substantiate that claim. I will return to the language of "claim" and "review" later in this decision. Nothing was said in this 9 June 2014 letter about the legal basis for this "review" power. However, the letter was then followed up with an HMRC letter to the appellant of 4 August 2014 in which HMRC said it needed "more evidence about your circumstances to make sure that we have awarded you the right amount of tax credits". This letter said that the further request for evidence was "**a formal request under the Tax Credits Act 2002, Section 18(10)**". Further evidence was provided by the appellant but on 5 September 2014 HMRC issued her with a letter in which it said:

> "From the information you [have] provided I cannot confirm that some of the employment documents you have sent me are genuine. I will now terminate your tax credits award for the year 2013 to 2014. This is because our records do not show enough information to confirm you were working.....
>
> If you think that <u>the decision</u> on (sic) this letter is wrong then contact us straightaway and we will try to put it right. If we cannot resolve your problem or you are not satisfied with how we have resolved it, then write to us at the address shown at the top of this letter and ask us to look at our decision again. You must do this within 30 days of the date of this letter. We call this mandatory reconsideration." (my underlining added for emphasis)

8. Although this appeal does not turn on the terms of this letter, I consider its contents merit four observations.

   (i) First, the language of "I will now...." may be consistent with the decision still having to be made three days later on 8 September 2014, but if this is the case then it is difficult to identify what this

5 September 2014 letter was communicating in terms of the adjudicatory regime under the Tax Credits Act 2002. Moreover, if this was not in fact notice of the decision (as is required by section 23 of the Tax Credits Act 2002), this would seem to be contradicted by the words I have underlined later in the letter.

(ii) Second, as will be seen from the relevant sections of Tax Credits Act 2002 set out below, the language of terminating a tax credits award is exclusive to section 16 of that Act

(iii) Third, if this 5 September 2014 letter is notice of a decision under the Tax Credits Act 2002, it would appear to have been given in breach of section 23(2) of that Act because it does not, per s.23(2), include "details of any right to…..appeal against the decision under section 38".

(iv) Fourth, it is not apparent, to me at least, from the terms of the statutory scheme under the Tax Credits Act 2002 that there is any requirement, as the letter implies, to seek some form of resolution of a dispute about a decision *before*, and/or as a condition of making, a mandatory reconsideration request under sections 21A and 38(1A) of the Tax Credits Act 2002.

9. The decisions in the *DG* case referred to above and *TM –v-HMRC* [2016] UKUT 512 (AAC) have already mapped out a number of unfortunate consequences that have arisen from HMRC issuing non-statutory notices which on their face purport or appear to be decision notices. It seems the 5 September 2014 letter might also fall into that unhappy category. Perhaps more worryingly, the wrong notion that a claimant had to apply for some form of preliminary reconsideration before seeking mandatory reconsideration could (but in this case did not) have led to the mandatory reconsideration request being delayed. I cannot, of course, identify whether the decision notice, if there was such, of 8 September 2014 put right any of the above concerns because

of HMRC's failure to include the 8 September 2014 decision notice in the relevant papers it put before the First-tier Tribunal.

10. On 25 September 2014 the appellant wrote to the relevant HMRC office in reply to the letter of 5 September 2014. (It is noteworthy that her letter makes no reference to any decision notice of 8 September 2014.) In this letter the appellant set out why she disagreed with "you[r] decision of (sic) terminating my tax credits entitlement". As far as is shown by the appeal bundle, and despite the 5 September 2014 letter's apparent requirement that the appellant seek some prior form of resolution, it would appear that this letter was accepted as a request for mandatory reconsideration because a mandatory reconsideration notice was issued to the appellant by HMRC on 7 October 2014. (This notice does refer to HMRC having received the appellant's request for mandatory review on 29 September 2014. There is nothing in the appeal bundle other than the appellant's 25 September 2014 letter which can constitute such a request. Quite where his leaves the 8 September 2014 'decision' is a mystery.)

11. The mandatory reconsideration notice informed the appellant that the decision had not been changed. HMRC said it had "looked at your claim using the Tax Credits Act 2002, Section 16(3)(a). Section 16(3)(a) gives us power to amend or terminate an award of a tax credit claim during a tax year".

12. Before turning to describe the appeal history of this case, which gives rise to the issue of how a First-tier Tribunal's decision takes effect and may then be changed by HMRC under the Tax Credits Act 2002, I need first to set out the relevant law.

Relevant Law[1]

13. I have commented before – in the *DG* case and *ME –v- HMRC* (TC) [2017] UKUT 0227 (AAC) – on the different adjudicatory world which tax credits inhabit under the Tax Credits Act 2002 ("TCA") when compared with the other schemes for social security within Great Britain. Perhaps most notably, the concept of "entitlement" to either working or child tax credit is something that only arises at the end of the tax year for which any award has been made. What is legally in place during the course of the tax year is simply an "award" of tax credit and once made the award may only be changed during the year for which it has been made in certain defined statutory circumstances. This difference of approach is both fundamental and deliberate: see paragraphs 28 and 29 of *ZM and AB –v- HMRC* (TC) [2013] UKUT 547 (AAC); [2014] AACR 17.

14. The general scheme for claims and decisions under the TCA starts with section 3(1) of that Act. This provides as follows:

> "3.-(1) Entitlement to a tax credit for the whole or part of a tax year is dependent on the making of a claim for it."

The phrase "tax year" is defined by section 48(1) of the TCA as meaning "a period beginning with 6th April in one year and ending with 5th April in the next".

15. The annual focus of the tax credits scheme is emphasised by section 5 of the Tax Credits Act 2002. This deals with the period of awards and provides:

[1] The law as set below does not take account of the (temporary) modifications introduced to parts of the Tax Credits Act 2002 by regulation 17 of, and the Schedule to, the Universal Credit (Transitional Provisions) Regulations 2013. Those modifications took effect between 29 April 2013 and 16 June 2014 (save for very limited exceptions – see regulation 3 of the Universal Credit (Transitional Provisions) Regulations 2014), and so could have applied to the period in issue in this appeal. However there is nothing in the papers or the arguments on this appeal to indicate that the modifications had any application to this appeal.

> "5.-(1) Where a tax credit is claimed for a tax year by making a claim before the tax year begins, any award of the tax credit on the claim is for the whole of the tax year.
>
> (2) An award on any other claim for a tax credit is for the period beginning with the date on which the claim is made and ending at the end of the tax year in which that date falls.
>
> (3) Subsections (1) and (2) are subject to any decision by [HMRC] under section 16 to terminate an award."

16. Section 14 of the same Act is concerned with what its heading calls "Initial decisions". It provides as follows:

> "14.-(1) On a claim for a tax credit [HMRC] must decide—
>
> (a) whether to make an award of the tax credit, and
>
> (b) if so, the rate at which to award it.
>
> (2) Before making their decision [HMRC] may by notice—
>
> (a) require the person, or either or both of the persons, by whom the claim is made to provide any information or evidence which [HMRC] consider they may need for making their decision, or
>
> (b) require any person of a prescribed description to provide any information or evidence of a prescribed description which [HMRC] consider they may need for that purpose,
>
> by the date specified in the notice.
>
> (3)[HMRC]'s power to decide the rate at which to award a tax credit includes power to decide to award it at a nil rate."

The effect of regulations 11 and 12 Tax Credits (Claims and Notifications) Regulations 2002 enables a reply made by a claimant to an end of year notice under section 17 of the TCA to be treated in addition as a claim for tax credits for the following year, which then calls for a section 14 decision for that next year.

17. The effect of the provisions set out thus far is that a claim is needed for each tax (credit) year, albeit the reply to the end of year notice for one year may be treated as a claim for the following year.

18. Changing an award of tax credit in-year can only be addressed under sections 15 or 16 of the TCA. Section 15 concerns increases in tax credit awards in-year based on notified change of circumstances made in year. It provides as follows:

> "15 (1)Where notification of a change of circumstances increasing the maximum rate at which a person or persons may be entitled to a tax credit is given in accordance with regulations under section 6(1), [HMRC] must decide whether (and, if so, how) to amend the award of the tax credit made to him or them.
>
> (2)Before making their decision [HMRC] may by notice—
>
> (a) require the person by whom the notification is given to provide any information or evidence which the Board consider they may need for making their decision, or
>
> (b) require any person of a prescribed description to provide any information or evidence of a prescribed description which the Board consider they may need for that purpose,
>
> by the date specified in the notice."

The language of "may be entitled" is not contemplating an entitlement decision being made at this stage but rather is looking to what the person may be entitled to by way of tax credits by the end of the year, and the same applies to the language of entitlement used in section 16 of the TCA: see paragraph 32 of *CTC/2662/2005 and CTC/3981/2005*.

19. Section 16 of the TCA is the more directly relevant provision to this appeal because it was the statutory provision HMRC's mandatory reconsideration said its decision had been made under. It provides:

> 16 (1) Where, at any time during the period for which an award of a tax credit is made to a person or persons, [HMRC] have reasonable grounds for believing—
>
> (a)that the rate at which the tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the tax credit for the period, or
>
> (b) that he has, or they have, ceased to be, or never been, entitled to the tax credit for the period,
>
> [HMRC] may decide to amend or terminate the award.

> (2)Where, at any time during the period for which an award of a tax credit is made to a person or persons, [HMRC] believe—
>
> (a)that the rate at which a tax credit has been awarded to him or them for the period may differ from the rate at which he is, or they are, entitled to it for the period, or
>
> (b)that he or they may have ceased to be, or never been, entitled to the tax credit for the period,
>
> [HMRC] may give a notice under subsection (3).
>
> (3)A notice under this subsection may—
>
> (a)require the person, or either or both of the persons, to whom the tax credit was awarded to provide any information or evidence which [HMRC] consider they may need for considering whether to amend or terminate the award under subsection (1), or
>
> (b)require any person of a prescribed description to provide any information or evidence of a prescribed description which the Board consider they may need for that purpose,
>
> by the date specified in the notice." (my underlining added for emphasis)

20. Two features of section 16 are immediately striking in the context of this case. The first is that the emphasised word "during" makes it clear that section 16 may only apply *before* the end of 5 April in the tax year for which the award has been made. It cannot be used after the end of the tax year to change the award for that year, and so could not, as a matter of law, have been used between June and October 2014 to alter or terminate the appellant's award of tax credits for the year 6 April 2013 to 5 April 2014. The second feature is that, contrary to what HMRC said in its mandatory reconsideration notice, section 16(3) provides no authority to amend or terminate a tax credit award, even during a tax year. That power vests in section 16(1) of the TCA. All section 16(3) authorises is the scope of the evidence gathering notice HMRC may serve on the tax credit claimant, but even then that notice may only be served if the terms of section 16(2) have been met during the tax credit year to which the notice relates. Common to both features is that the language of "during the period for which an award of a

tax credit is made" used in section 16(1) and 16(2) must be read subject to section 5 of the TCA, and so in effect means during the in-year period of the award.

21. By way of contrast, sections 17 and 18 of the TCA are concerned with deciding a claimant's entitlement to tax credits for the year. Section 17 deals with "Final Notices" and provides as follows (so far as is relevant):

> 17 (1) Where a tax credit has been awarded for the whole or part of a tax year—
>
> (a) for awards made on single claims, [HMRC] must give a notice relating to the tax year to the person to whom the tax credit was awarded……
>
> (2) The notice must either—
>
> (a) require that the person or persons must, by the date specified for the purposes of this subsection, declare that the relevant circumstances were as specified or state any respects in which they were not, or
>
> (b) inform the person or persons that he or they will be treated as having declared in response to the notice that the relevant circumstances were as specified unless, by that date, he states or they state any respects in which they were not.
>
> (3) "Relevant circumstances" means circumstances (other than income) affecting—
>
> (a) the entitlement of the person, or joint entitlement of the persons, to the tax credit, or
>
> (b) the amount of the tax credit to which he was entitled, or they were jointly entitled,
>
> for the tax year.
>
> (4) The notice must either—
>
> (a) require that the person or persons must, by the date specified for the purposes of this subsection, declare that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified or comply with subsection (5), or
>
> (b) inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified unless, by that date, he complies or they comply with subsection (5).

(5) To comply with this subsection the person or persons must either—

(a) state the current year income or his or their estimate of the current year] income (making clear which), or

(b) declare that, throughout the period to which the award related, subsection (1) of section 7 did not apply to him or them by virtue of subsection (2) of that section."

22. Section 18 is titled "Decisions after final notice", and provides (again so far as is relevant:

18 (1)After giving a notice under section 17 [HMRC] must decide—

(a) whether the person was entitled, or the persons were jointly entitled, to the tax credit, and

(b) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,

for the tax year.

(2) But, subject to subsection (3), that decision must not be made before a declaration or statement has been made in response to the relevant provisions of the notice.

(3) If a declaration or statement has not been made in response to the relevant provisions of the notice on or before the date specified for the purposes of section 17(4), that decision may be made after that date.....

(5) Where [HMRC] make a decision under subsection (1) on or before the date referred to in subsection (3), they may revise it if a new declaration or statement is made on or before that date.....

(10) Before exercising a function imposed or conferred on them by subsection (1), (5).....[HMRC] may by notice require the person, or either or both persons, to whom notice under section 17 was given to provide any further information or evidence which [HMRC] considers they may need for exercising the function by the date specified in the notice.

(11) Subject to sections 19, 20, 21A and 21B and regulations under section 21 (and to any revision under subsection (5).....and any appeal)—

(a) .....

(b) ..... 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, or the joint entitlement of the persons, to the tax credit for the tax year and the

> amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year."

As I set out in *ME*, a section 18 decision is made at, or usually after, the end of the tax (credit) year to which it relates. Thus, section 18(1) provides that after giving a notice under section 17, HMRC must decide whether the person *was* entitled to the tax credit and, if so, the amount of the tax credit to which they *were* entitled for the tax year.

23. Sections 19 and 20 of the TCA deal with changing entitlement decision made under section 18. The former, titled "Power to enquire", provides, so far as is relevant, as follows:

> "19(1) [HMRC] may enquire into—
>
> (a) the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year, and
>
> (b) the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year,
>
> if they give notice to the person, or each of the persons, during the period allowed for the initiation of an enquiry.
>
> (2) As part of the enquiry [HMRC] may by notice—
>
> (a) require the person, or either or both of the persons, to provide any information or evidence which [HMRC] consider they may need for the purposes of the enquiry, or
>
> (b) require any person of a prescribed description to provide any information or evidence of a prescribed description which [HMRC] consider they may need for those purposes,
>
> by the date specified in the notice.
>
> (3) On an enquiry [HMRC] must decide—
>
> (a) whether the person was entitled, or the persons were jointly entitled, to the tax credit, and
>
> (b) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,
>
> for the tax year.
>
> (4) The period allowed for the initiation of an enquiry is the period beginning immediately after the relevant section 18 decision and ending—

(a) if the person, or either of the persons, to whom the enquiry relates is required by section 8 of the Taxes Management Act 1970 (c. 9) to make a return, with the day on which the return becomes final (or, if both of the persons are so required and their returns become final on different days, with the later of those days), or

(b) in any other case, one year after the beginning of the relevant section 17 date……..

(11) Where the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year has been enquired into under this section, it is not to be the subject of a further notice under subsection (1).

(12) Subject to sections 20, 21A and 21B and regulations under section 21 (and to any appeal), a decision under subsection (3) in relation to a person or persons and a tax credit for a tax year is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year."

24. Section 20 deals with what its title calls "Decisions on discovery" and provides relevantly that:

"20(1) Where in consequence of a person's income tax liability being revised [HMRC] have reasonable grounds for believing that a conclusive decision relating to his entitlement to a tax credit for a [tax year (whether or not jointly with another person) is not correct, [HMRC] may decide to revise that decision…….

(3) But no decision may be made under subsection (1)—

(a) unless it is too late to enquire into the person's entitlement under section 19, or

(b) after the period of one year beginning when the person's income tax liability is revised.

(4)Where [HMRC] have reasonable grounds for believing that—

(a) a conclusive decision relating to the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year is not correct, and

(b) that is attributable to fraud or neglect on the part of the person, or of either of the persons, or on the part of any person acting for him, or either of them,

[HMRC] may decide to revise that decision.

(5) But no decision may be made under subsection (4)—

> (a) unless it is too late to enquire into the entitlement, or joint entitlement, under section 19, or
>
> (b) after the period of five years beginning with the end of the tax year to which the conclusive decision relates.
>
> (6) "Conclusive decision", in relation to the entitlement of a person, or joint entitlement of persons, to a tax credit for a tax year, means—
>
> (a) a decision in relation to it under section 18(1), (5), (6) or (9) 0r 19(3) or a previous decision under this section, or
>
> (b) a decision under regulations under section 21 relating to a decision within paragraph (a),
>
> (c) a decision within paragraph (a) or (b) as varied under section 21A(5)(b), or
>
> (d) a decision on an appeal against a decision within paragraph (a), (b) or (c).]
>
> (7) Subject to any subsequent decision under this section and to regulations under section 21 and to any review under section 21A (and to any appeal), a decision under subsection (1) or (4) in relation to a person or persons and a tax credit for a tax year is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year."

25. There are two further statutory routes by which HMRC may change an entitlement decision which has been made under section 18 of the TCA. These are the revision for official error powers contained in section 21 of the TCA and the mandatory reconsideration powers in respect of decisions being appealed found in section 21A of the same Act. The former is not limited, however, to section 18 entitlement decisions. Section 21 provides:

> "Regulations may make provision for a decision under section 14(1), 15(1), 16(1), 18(1), (5), (6) or (9), 19(3) or 20(1) or (4) to be revised in favour of the person or persons to whom it relates if it is incorrect by reason of official error (as defined by the regulations)."

26. The regulations made under section 21 are the Tax Credits (Official Error) Regulations 2003. They provide, so far as is material, as follows:

> "2.—(1) In these Regulations.....

> "official error" means an error relating to a tax credit made by—
>
> (a) an officer of [HMRC],
> (b) an officer of the Department for Work and Pensions,
> (c) an officer of the Department for Social Development in Northern Ireland, or
> (d) a person providing services to [HMRC] or to an authority mentioned in paragraph (b) or (c) of this definition, in connection with a tax credit or credits,
>
> to which the claimant, or any of the claimants, or any person acting for him, or any of them, did not materially contribute, excluding any error of law which is shown to have been an error by virtue of a subsequent decision by a Social Security Commissioner[2] or by a court;...
>
> "Social Security Commissioner" has the meaning given by section 63 (13) [of the TCA];.....
>
> 3.—(1) A decision under section 14(1), 15(1), 16(1), 18(1), (5), (6) or (9), 19(3) or 20(1) or (4) may be revised in favour of the person or persons to whom it relates if it is incorrect by reason of official error, subject to the following paragraphs.
>
> (2) In revising a decision, the officer or person in question need not consider any issue that is not raised by the application for revision by the claimant or claimants or, as the case may be, did not cause him to act on his own initiative.
>
> (3) A decision mentioned in paragraph (1) may be revised at any time not later than five years after the end of the tax year to which the decision relates."

27. Mandatory reconsideration is provided for under section 21(A) (though it has to be read with section 38 of the TCA), and is as follows:

> "21A(1) [HMRC] must review any decision within section 38(1) if they receive a written application to do so that identifies the applicant and decision in question, and—
>
> (a) that application is received within 30 days of the date of the notification of the original decision or of the date the original decision was made if not notified because of section 23(3), or

[2] Presumably it is simply by way of inadvertent omission that this regulation has not been amended to reflect the fact that the Upper Tribunal (Administrative Appeals Chamber) has, in effect, replaced the Social Security Commissioners for virtually all purposes in Great Britain. Section 63(13) of the TCA is at best confined to defining what is meant by "Northern Ireland Social Security Commissioner". However, unless the definition of the Upper Tribunal as a "superior court of record" provided for by section 3(5) of the Tribunals, Courts and Enforcement Act 2007 means the Upper Tribunal is (also) a 'court' for the purposes of these regulations, on the face of it an error shown to have been such by a subsequent decision of the Upper Tribunal **will** count as an 'official error' under these regulations.

(b) it is received within such longer period as may be allowed under section 21B.

(2) [HMRC] must carry out the review as soon as is reasonably practicable.

(3) When the review has been carried out, [HMRC] must give the applicant notice of their conclusion containing sufficient information to enable the applicant to know—

(a) the conclusion on the review,

(b) if the conclusion is that the decision is varied, details of the variation, and

(c) the reasons for the conclusion.

(4) The conclusion on the review must be one of the following—

(a) that the decision is upheld;

(b) that the decision is varied;

(c) that the decision is cancelled.

(5) Where—

(a) [HMRC] notify the applicant of further information or evidence that they may need for carrying out the review, and

(b) the information or evidence is not provided to them by the date specified in the notice,

the review may proceed without that information or evidence."

28. Pausing at this point, it is apparent that the "final" nature of the entitlement decision made under section 18 of the TCA has to be read subject to the ability of HMRC to enquire into and then change the entitlement decision (section 19), within time limits; but even if those time limits have passed a decision on discovery may be made under section 20 to revise the section 18 decision (if the other conditions in section 20 are satisfied). Furthermore, the "conclusive" nature of the section 18 entitlement decision under s.18(11), is subject to the decision being changed under sections 19 or 20, or by way of revision for official error (s.21), or on mandatory consideration (s.21A), or its being subject of "any appeal". And in the case of section 20 it is expressly provided

that HMRC's ability to revise a tax credits entitlement decision (whether made under section 18, 19 or a previous decision under section 20 'on discovery') includes revising an entitlement decision that was made "on an appeal" (s. 20(6)(d) TCA); the breadth of which expression would seem to cover decisions made on appeal (so presumably not on judicial review) by the First-tier Tribunal, Upper Tribunal and from appeal thereon.

29. It is at this point that it may be useful to digress a little from the legislative journey and revert to the language of selecting "your claim for review" used by HMRC in its letter of 9 June 2014 (see paragraph 7 above). That language may have been chosen for simplicity and to ease the reader's understanding. However, it is not language that reflects the statutory scheme. As the legislation mapped out above shows, what the appellant had in place for tax credit year 6 April 2013 to 5 April 2014 was an **award** of tax credits (though she could then have been treated as having made a *claim* for the following year (see paragraph 16 above), but the letter was of 9 June 2014 was not concerned with that claim). Further, neither sections 16 or 18 of the TCA vest any 'review' power in HMRC (their language is of 'amending' or 'terminating' "the award" and deciding 'entitlement'). The only place where the word "review" is used in the statute is in 'mandatory reconsideration' provisions found in section 21A of the TCA, but the 9 June 2014 letter could not have been issued under that section.

30. Coming back to the statute, section 23 of the TCA deals with HMRC giving notice of its decisions and provides as follows :

> "23 (1) When a decision is made under section 14(1), 15(1), 16(1), 18(1), (5), (6) or (9), 19(3) or 20(1) or (4) or regulations under section 21, [HMRC] must give notice of the decision to the person, or each of the persons, to whom it relates.
>
> (2) Notice of a decision must state the date on which it is given and include details of any right to a review under section 21A and of any subsequent right of appeal against the decision under section 38....."

> (3) Notice need not be given of a decision made under section 14(1) or 18(1) or (6) on the basis of declarations made or treated as made by the person or persons in response to the notice given to him or them under section 17 if—
>
> (a) that notice, or
>
> (b) in the case of a decision under subsection (6) of section 18, that notice or the notice of the decision under subsection (1) of that section, the notice of the decision under subsection (1) of section 18,
>
> stated what the decision would be and the date on which it would be made."

It has not been argued that section 23(3) applied in this case such as to exempt HMRC from providing the appellant with a notice of its decision of 8 September 2014. HMRC's case is simply that it cannot now provide a copy of that notice. Nor has it been argued that the letter of 5 September 2014 somehow constituted a section 17 notice telling the appellant what the section decision would be and the date on which it would be made.

31. To complete the relevant legislative architecture on decision making and appeals, decisions against which there is a right of appeal are dealt with in section 38 of the TCA. This provides, so far as is relevant for present purposes, as follows:

> "38(1) An appeal may, subject to subsection (1A), be brought against—
>
> (a) a decision under section 14(1), 15(1), 16(1), 19(3) or 20(1) or (4) or regulations under section 21,
>
> (b) the relevant section 18 decision in relation to a person or persons and a tax credit for a tax year and any revision of that decision under that section,...
>
> (1A) An appeal may not be brought by virtue of subsection (1) against a decision unless a review of the decision has been carried out under section 21A and notice of the conclusion on the review has been given under section 21A(3).
>
> (1B) If in any case the conclusion of a review under section 21A is to uphold the decision reviewed, an appeal by virtue of subsection (1) in that case may be brought only against the original decision.

> (1C) If in any case the conclusion of a review under section 21A is to vary the decision reviewed, an appeal by virtue of subsection (1) in that case may be brought only against the decision as varied.]
>
> (2) "The relevant section 18 decision" means—
>
> (a) in a case in which a decision must be made under subsection (6) of section 18 in relation to the person or persons and the tax credit for the tax year, that decision, and
>
> (b) in any other case, the decision under subsection (1) of that section in relation to the person or persons and the tax credit for the tax year."

32. The exercise of the right of appeal provided in section 38 is addressed in section 39 of the TCA; though since 6 April 2014 section 39 is largely empty of content, at least as far as Great Britain is concerned, as it provides only as follows:

> "39:- (6) Part 5 of the Taxes Management Act 1970 (appeals and other proceedings) applies in relation to appeals under section 38 (as in relation to appeals under the Taxes Acts, within the meaning of that Act), but subject to such modifications as are prescribed."

33. The only remaining relevant part of the TCA is section 63, which is titled "Tax credits appeals etc.: temporary modifications" and provides, so far as is relevant to this appeal, as follows :

> "63 (1) Until such day as the Treasury may by order appoint, Part 1 of this Act has effect subject to the modifications specified in this section; and an order under this subsection may include any transitional provisions or savings which appear appropriate.
>
> (2) Except in the case of an appeal against an employer penalty, an appeal under section 38 is to—
>
> (a) in Great Britain, the First-tier Tribunal; or
>
> (b) in Northern Ireland, the appeal tribunal;
>
> and in either case section 39(6) shall not apply…….
>
> (8)Regulations may apply any provision contained in—
>
> (a) Chapter 2 of Part 1 of the Social Security Act 1998 (c. 14) (social security appeals: Great Britain),

(b) Chapter 2 of Part 2 of the Social Security (Northern Ireland) Order 1998 (S.I. 1998/1506 (N.I. 10)) (social security appeals: Northern Ireland), or

(c) section 54 of the Taxes Management Act 1970 (c. 9) (settling of appeals by agreement),

in relation to appeals which, by virtue of this section, are to the First-tier Tribunal or the appeal tribunal or lie to a Northern Ireland Social Security Commissioner, but subject to such modifications as are prescribed."

The decision making

34. Having rehearsed the law I need to address in more detail the decision making that occurred on this appeal. This includes HMRC's decisions and the decisions made by the First-tier Tribunal. I have already referred to some of HMRC's letters to the appellant in paragraphs 7-11 above. Stripped to its essentials it would appear the relevant decision making ran as follows.

35. Either on 5 or 8 September 2014 a decision was made by HMRC. Whether that decision was made under section 16 or section 18 of the TCA I will return to shortly. Insofar as it may matter, it would appear that both the appellant and HMRC treated the decision as having been made on 5 September 2014, as HMRC treated the appellant's letter of 25 September 2014 as a request for mandatory reconsideration of its decision pursuant to section 21A of the TCA, and I would therefore be inclined to find that the decision was in fact made on 5 September 2014. Furthermore, I do not see why HMRC's continued (and wrongful) failure to produce the decision notice of 8 September 2014, which it claims is the decision date, should count against my making such a finding

36. The mandatory reconsideration decision, refusing to change the decision, was issued to the appellant on 7 October 2014. The appellant was then able to appeal against the 5 September 2014 decision. However her appeal was heard and dismissed by the First-tier Tribunal

on 20 January 2015. In its *Decision Notice* the tribunal said that the appellant was not entitled to tax credits for the tax year 2013/2014. This was because she had not been in qualifying remunerative work.

37. It is shortly thereafter that matters began to go awry, or at least called for explanation. This because on 9 March 2015 HMRC purported to make a decision under section 18 of the TCA in virtually the same terms as the First-tier Tribunal's decision, but finding entitlement to both tax credits in respect of the appellant for one day only (on 6 April 2013). (The reasons for this award being for one day need not trouble this decision. For the record, however, I was told that the award for one day "is as close as HMRC's computer systems come to implementing a decision that there was no entitlement for the entire tax year where an award has previously been made". This therefore seems to be a different species of award from the nil award contemplated by section 14(3) of the TCA: and see further on this paragraph 62 of *ME v HMRC* (TC) [2017] UKUT 0227 (AAC).)

38. The First-tier Tribunal on 14 April 2015 gave its reasons for its decision of 20 January 2015. In those reasons it set out its view that the decision it had made was wrong on child tax credit and that it ought to have decided that the appellant was entitled to child tax credit for the 2013/2014 tax credit year. It invited either party to the appeal to apply to set aside the decision of 20 January 2015. Such an application was made by the Wandsworth CAB on behalf of the appellant on 18 May 2015. This was treated as an application for permission to appeal by the First-tier Tribunal and pursuant to that application the tribunal's decision of 20 January was set aside on 7 July 2015.

39. In the meantime, however, on 25 June 2015 HMRC took a further decision, spurred it would seem by the First-tier Tribunal judge's change of view in the statement of reasons, and re-awarded the appellant child tax credit for the 2013/2014 tax credit year. It was presumed at one point by HMRC's submission writer to the Upper Tribunal that this decision had purportedly been made under section 21

of the TCA. However, as HMRC has failed also to produce these decision notices, its own presumption may be no more than speculation. It is obvious but nonetheless worth emphasising that at the time of this HMRC 'decision' the First-tier Tribunal's decision of 20 January 2015 holding that the appellant had no entitlement to any tax credits for 2013/2014 was still in place. Perhaps the best attempt to understand this HMRC decision was it was a well-meaning if legally misguided attempt as HMRC put it to "effectively [implement] what the [First-tier] Tribunal had set out in the statement of reasons".

40. It is unclear if this decision was communicated to the appellant. Assuming it was, she may therefore have been surprised to have received a supplementary appeal response from HMRC to First-tier Tribunal on or about 11 August 2015 in respect of her appeal against the 5 September 2014 decision (the supplementary response gives the decision date as 8 September 2014) in which HMRC (a) made no reference to its 'decision' of 25 June 2015 re-awarding her child tax credit for the 2013/2014 year, and (b) argued that the 5/8 September 2014 decision that she was not entitled to child tax credit (or working tax credit) for the 2013/2014 year was correct. In its first submission to the Upper Tribunal HMRC's submission writer candidly stated that he could not "explain why this view was presented to the [First-tier Tribunal] as HMRC's earlier decision of 25 June 2015, that the claimant was entitled to [child tax credit] for the entire tax year 2013/2014, had been implemented".

41. The First-tier Tribunal reheard the appeal on 5 October 2015, when it refused the appeal. It did so because it found the appellant's evidence about her working to be unreliable and concluded in consequence that she was not in qualifying remunerative work in the tax year 2013/2014. In so far as it is now of any relevance, it considered that the HMRC decision under appeal to it was made under section 16(1) of the TCA. It found that "HMRC had a reasonably held belief that the documents provided by [the appellant] to support her claim for tax credits were not genuine. Consequently, there were reasonable grounds to end her entitlement". This

aspect of the First-tier Tribunal's decision has not featured on the appeal before me so I would simply observe that the legal soundness of tribunal's approach to section 16 of the TCA may be cast in doubt by the decision in *ME v HMRC* (TC) [2017] UKUT 0227 (AAC).

42. As I have already noted at the outset of this decision, it is now accepted that both HMRC and the First-tier Tribunal(s) were wrong to decide that the appellant was not entitled to child tax credit for the tax year 2013/2014.

Directions on HMRC's tribunal-related decision making, HMRC's response and whether 5 September 2014 decision made under sections 16 or 18 of the TCA

43. The real issue on this appeal concerns the First-tier Tribunal related decision-making of HMRC mapped out in paragraphs 37-39 above. This caused me to issue detailed directions in which I raised the following.

> "…..the status of the [5/]8 September 2014 decision. I am inclined to accept at present that it could not have been a decision under section 16 of the Tax Credits Act 2002. There is, however, no evidence that it was a SLAN (see [*DG –v- HMRC and SG* (TC) [2016] UKUT 0505 (AAC)]), so why ought it to not be treated as having been a decision under section 18 of the Tax Credits Act 2002 following [*TM –v- HMRC* (TC) [2016] UKUT 0512 (AAC)]? If, however, there is no evidence of any notice having been issued under section 17 of the Tax Credits Act 2002, would this invalidate it being a section 18 decision?
>
> Assuming that it was a section 18 decision, the appeal [the appellant] made against it would have been conferred by section 38(1)(b) of the Tax Credits Act 2002. In refusing the appeal, what was the effect of the First-tier Tribunal's decision under the Tax Credits Act 2002? The traditional, social security view of the First-tier Tribunal is that it is the superior fact finding body as against the first instance decision maker (see paragraph 14 of *R(IB) 2/04*). However, even in the social security context, all the First-tier Tribunal's powers on appeal have to be implied (*R(IB) 2/04* at paragraphs 11-33). Is that the same also for its powers on tax credit appeals? And is it accepted that the First-tier Tribunal decision of 20 January 2015 replaced the HMRC decision of 8 September 2014: per paragraph 25 of *VW –v- LB Hackney* (HB) [2014] UKUT 0277 (AAC) applying *R(I)9/63*[?] If it did not replace the HMRC decision, what effect did the tribunal's decision have under the Tax Credit Act? For example, and assuming the decision under appeal was a section 18 decision, is the First-tier tribunal's decision of 20 January 2015 to be treated as a decision under section 18 (whether

or not it in substance altered the decision under appeal)? If not, on what legal basis may the First-tier Tribunal's decision be altered in the absence of it being appealed to the Upper Tribunal and set aside?

In a social security appeal context, any decision of a First-tier Tribunal is made final by virtue of section 17 of the Social Security Act 1998, subject to any further appeal or revision or supersession allowed for in and under sections 9, 10 and 12 of that Act. However, the superior and independent status of the First-tier Tribunal's decision in the decision making hierarchy is reflected in social security cases by the limited grounds by which that tribunal's decision may be superseded by the first-tier agency: see, for example, regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (which allows a First-tier Tribunal's decision to be changed if there has been a relevant change of circumstances since that decision had effect). Is there anything in the tax credits statutory scheme which either expressly or by implication preserves the status of First-tier Tribunal decisions on tax credit appeals? If not, subject to answering how such tribunal decision take effect under the Tax Credits Act 2002, does that mean that HMRC can change such decision under, say section 20 or 21 of the Tax Credits Act 2002. And what effect, if any, would *res judicata* and issue estoppel have on HMRC's ability to change a First-tier Tribunal's decision?

Section 63(8) of the Tax Credits Act 2002 enables regulations to apply any provision in Chapter 2 of Part I of the Social Security Act 1998 in relation to tax credit appeals to the First-tier Tribunal. The said Chapter II covers, amongst other things, revision, supersession and section 17 on finality of decisions. On its face therefore section 63(8) of the Tax Credits Act 2002 could have applied Chapter II in Part I of the Social Security Act 1998 so as to ensure First-tier Tribunal decisions on tax credit appeals were final and could only be superseded on limited grounds.

The effect of the Tax Credits (Appeals) Regulations 2002 (SI 2002/2926) was indeed to apply parts of the Chapter 2 of Part I of the Social Security Act 1998 to tax credit appeals, but only, insofar as is relevant, sections 12 and 17 and not sections 9 and 10 on revision and supersession. Under regulation 10 of those Regulations, section 17(1) of the Social Security Act 1998 read:

> "17(1) Subject to the provisions of—
> (a) sections 12 to 16 of this Act, and
> (b) the Tax Credits Act 2002,
> any decision made in accordance with those provisions in respect of an appeal which, by virtue of section 63 of the Tax Credits Act 2002 (or of provisions of this Act applied by regulations made under that section), is to an appeal tribunal or lies to a Commissioner, shall be final."

Even if somehow still in force (see below), however, how the Tax Credits 2002 could apply to alter a 'final' decision of a First-tier Tribunal is perhaps unclear.

The Tax Credits (Appeals) No.2 Regulations 2002 (SI 2002/3196) deal, or dealt, mainly with issues of procedure for getting and progressing tax credit appeals and do not seem, at least to me at present, to touch on how a tribunal's decision once made may be altered.

In any event, on the basis of the analysis in *JI –v- HMRC* (TC) [2013] UKUT 0199 (not doubted it would seem in *VK –v- HMRC* (TC) [2016] UKUT 0331 (AAC)), neither of these 2002 Appeals Regulations was in force or had effect either when [the appellant] made her appeal in November 2014 or when the appeal was decided (on either date). If that is correct then, other than the Tax Credits Act 2002 what (if any) provisions of the law (statutory or otherwise) act to inhibit or enable HMRC to alter a tribunal decision, and, relatedly, how does a tribunal decision have legal effect under the Tax Credits Act 2002[?]

Reverting then to the narrative and seeking to apply some of the above questions to that narrative, first, what was the legal basis for HMRC making the purported section 18 decision on 9 March 2015? Even assuming the First-tier Tribunal's decision stood as a section 18 decision, was that not conclusive as to [the appellant's tax credit entitlement for 2013/2014 (per section 18(11) of the Tax Credits Act 2002), and therefore no fresh section 18 decision could in law be made for that year? If that is the case, then what other provision in the Tax Credits Act (or elsewhere) could lawfully have led to the 9 March 2015 decision? And how is the "superior" jurisdiction of the First-tier Tribunal respected if HMRC can simply come along and make a different decision (under section 18 or otherwise) after the First-tier Tribunal has decided the section 18 appeal?

Second, what was the legal basis for HMRC's decision of 25 June 2015? It would seem to have been a decision changing either the First-tier Tribunal's decision of 20 January 2015 (which by then had still not been set aside) or the later HMRC decision of 9 March 2015 (if lawfully made and not invalid). The best fit would seem to under regulations made under section 21 of the Tax Credits Act 2002, as [HMRC's submission writer] suggests, at least because it revised the entitlement decision in [the appellant's] favour. However, section 21 only allows for "a decision made under…section 18…" to be revised in favour of the claimant if it was incorrect by reason of official error. If what was being revised was the First-tier Tribunal's decision of 20 January 2015, in what sense was the tribunal making a decision under section 18? Was it not making its decision under or pursuant to section 38 of the Tax Credits Act 2002? Further, what was the official error and who made it? The Tax Credits (Official Error) Regulations 2003 – made under section 21 – would seem, at least for present purposes, to limit the error to officers of the HMRC or the DWP and not the First-tier Tribunal (see regulation 2 of those regulations). And, again, by regulation 3 of those regulations it is only decisions under sections 14, 15, 16, 18, 19 or 20 of the Tax Credits Act 2002 which may be revised for official error. Does this and the terms of section 21 therefore preclude a First-tier Tribunal's decision made on an appeal under section 38 from being revised under section 21? If so, and if the purported section 18 decision of 9 March 2015 was invalid, did the section 21 decision have anything to bite on?

> Third, assuming the section 21 decision was validly made, was its legal effect not to replace all the prior decisions made concerning [the appellant's] entitlement to tax credits for the tax credit year 2013/2014? And if this is correct, was the effect not therefore that there was no section 18 decision left under appeal to the First-tier Tribunal (and there being no appeal by [the appellant] against the section 21 decision)? In other words, did the section 21 decision (if validly made) not replace all and any prior section 18 decisions about [the appellant's] entitlement to tax credits for 2013/2014 (see *R(SB)1/82* and *R(IS)23/95*) and so lapse her appeal against the prior section 18 decision? If so, did the First-tier Tribunal in its decision of 5 October 2015 not err in law on the more fundamental basis of ruling on appeal which was no longer before it (though it cannot be criticised for so proceeding given HMRC's failure to inform it of its decisions of (9 March 2015 and 25 June 2015)?"

44. In submissions in reply to these directions written by Ms Ward of counsel for HMRC the following was contended.

45. First, it was said by HMRC that it was not possible to say definitively whether the 5/8 September 2014 decision[3] was intended to be taken under section 16 or section 18 of the TCA. HMRC's computer record of its decision recorded the "Award Type" as "AMENDED" whereas had it been intended to be a section 18 decision then the entry should have read "FINAL". The "AMENDED" entry was consistent with the section 16 language of 'terminated' used in the 5 September 2014 letter and the reference to section 16 in the mandatory reconsideration notice.

46. However, in my view all of the above may be explained on the basis of a wrong view taken by an official (or more than one) within HMRC of the decision making power which then found its way into the recording of the decision. Moreover, and of much greater substance, none of the above can be squared with the fact that the decision (and there is no doubt that *a* decision was made) was made after the end of the tax year 2013/2014 and so as a matter of law could not have been a section 16 decision for that year.

[3] Despite my view that on the evidence the decision was made on 5 September 2014, HMRC arguments before me proceeded on the basis that the decision was made on 8 September 2014. In the circumstances I use the somewhat clumsy '5/8 September 2014' to refer to the decision date. Nothing of substance turns on when in fact the decision was made.

47. HMRC posits on the basis that the decision could not have been made under section 16 of the TCA that three possibilities apply in respect of the decision of 5/8 September 2014. It argues that the decision was either:

(i) a nullity, in which case HMRC argues the appeal to the Upper Tribunal falls away as there was no decision to appeal against (an argument which I would have had considerable difficulty in accepting, at least without further exploration (see, for example, paragraphs 41-42 of *LS and RS v Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 0257 (AAC)), had it arisen on the facts of this case); or

(ii) a statement like an award notice (or 'SLAN'), which would also generate no appeal right: see further on SLANs paragraph 19 and 21 of the *DG* case referred to above. However, as paragraph 21 of *DG* observed, a SLAN seemingly covers "the period after one tax credit year has ended but the s.18 entitlement for that year has not yet been decided not has the s.14 award for the new tax credit year been decided, and allows tax credit payments to <u>continue</u> during this interregnum" (my underlining added for emphasis). The difficulty in a SLAN applying on the facts as I have rehearsed them above is that the 5/8 September 2014 notice did not purport to continue any payments: quite the opposite in fact as it said HMRC was terminating the tax credit awards for 2013/2014 and made no reference to any claim for, or awards, in the tax year 2014/2015. Moreover, any characterisation of the 5/8 September notice as a SLAN sits very oddly with the mandatory reconsideration which was then carried out by HMRC in respect of it; or

(iii) a decision taken under some other statutory power in the TCA but which had been wrongly characterised as a section 16 decision. The most obvious other power would be section 18.

48. My directions above had queried whether as a matter of law any section 18 decision could arise if no section 17 notice had been issued. HMRC submits that it "is plainly right that that a section 18 decision cannot be taken in the absence of a section 17 notice having been issued". However HMRC has advanced evidence, in the form of its computer records, on the appeal to the Upper Tribunal which on the face of it shows that a section 17 notice was issued to the appellant on 13 April 2014 for the tax year 2013/2014. It is unclear how this notice fits with HMRC's later letter of 9 June 2014 selecting the 2013/2014 "claim for review" or the other letter referred to in paragraph 7 above, but it would seem at least that the letter of 4 August 2014 was seeking further information from the appellant pursuant to section 18(10) of the TCA.

49. In all of the above circumstances I accept, despite the shambles in HMRC's decision-making and its records of the same, and applying Upper Judge Wikeley's 'duck thesis' in *TM –v- HRMC* (TC) [2016] UKUT 0512 (AAC), that the 5/8 September 2014 decision was in fact a decision made under section 18 the TCA. In terms of my so finding, it is either necessary for me to decide this as a precedent fact for the purposes of the legal analysis set out below or it is open to me to decide it as a fact as part of my re-deciding the first instance appeal.

Analysis and conclusion

50. The First-tier Tribunal in the decision under appeal to the Upper Tribunal did not carry out any of the above analysis as to the statutory authority for the HMRC decision under appeal to it. That was itself an error of law, for two related reasons. First, it was a failure adequately to investigate the facts relating to HMRC's decision making given the contradictory indicators in the papers as to it being either a section 16 or a section 18 decision. Second, this investigation was central to the First-tier Tribunal's appreciation of the legal test it had to apply to the facts as found. Was it a test of having "reasonable grounds for believing" that the appellant was never entitled to tax credits (per section 16) for the tax year 2013/2014, or a test of whether the

appellant was in fact and law entitled to tax credits for that year (per section 18)? As the decision of the Upper Tribunal in the *ME* case referred to above shows, the tests are qualitatively different.

51. In addition, the First-tier Tribunal on 5 October 2015 failed to carry out an analysis of whether, in the light of the 'decisions' HMRC had made subsequent to the first First-tier Tribunal's decision of 20 January 2015, it had any appeal before it against the section 18 decision of 5/8 September 2014. The First-tier Tribunal on 5 October 2015 was not to blame for this failure because HMRC had not made it aware of those decisions and nor had the appellant (assuming she was aware of them, as I have noted above none of the 'decisions' made in this period were produced before me by HMRC). However, if (which I examine below) any of those decisions had lawfully overset the section 18 decision of 5/8 September 2014 then very arguably the appeal against that decision would have lapsed: see, again, the *LS and RS* decision referred to in paragraph 47(i) above.

52. The starting point for the analysis of the legal effect, if any, of HMRC"s purported decisions of 9 March 2015 and 25 June 2015 is that the decision of 5/8 September 2014 was a decision under section 18 of the TCA. That decision was upheld by the First-tier Tribunal in its decision of 20 January 2015 and that decision of the First-tier Tribunal remained in force until it was set aside (by the First-tier Tribunal exercising its powers under section 9(4)(c) of the Tribunals, Courts and Enforcement Act 2007) on 7 July 2015. Accordingly, HMRC's 'decisions' of 9 March and 25 June 2015 both have to be understood in a context in which each was purporting to decide a matter (broadly speaking, the appellant's entitlement to child tax credit for the tax year 2013/2014) that the First-tier Tribunal had already decided.

53. HMRC did not seek to suggest that it was not bound by decisions of the First-tier Tribunals on decisions made under section 38 of the TCA. In consequence, it accepted that if the decision of 5/8 September 2014

was a section 18 decision for the tax year 2013/2014 then HMRC did not have power following the First-tier Tribunal's decision of 20 January 2015 to make a different section 18 decision for that tax year, nor did it need to make any decision to implement the First-tier Tribunal's decision. HMRC's position was that the reasoning in paragraphs 11-18 of the Tribunal of Commissioner's decision in *R(IB) 2/04* applies equally to decisions of the First-tier Tribunal on appeals under the TCA (that is, that all powers of the First-tier Tribunal must be implied). Moreover, it considered that it was appropriate, as a minimum, to imply to the First-tier Tribunal the power to substitute the proper decision on a claim or award when allowing an appeal (per paragraph 18 of *R(IB) 2/04*), and accepted that a decision to refuse an appeal meant that HMRC's decision was replaced by the decision of the First-tier Tribunal (cf *R(I) 9/63*). And it did not seek to suggest that would have had any power in law to alter the First-tier Tribunal's decision on the facts of this case.

54. It seems to me that broadly speaking this is a sensible approach and one that ought to be welcomed if consistent with underlying legal principle, and is one which hopefully HMRC will now at least adhere. However, can this sensible approach fit with legal principle and the structure of the TCA?

55. Before turning to address that question I should record HMRC's explanation for its decisions of 9 March 2015 and 25 June 2015. Both it says were predicated on the 5/8 September 2014 decision being made under section 16 of the TCA, however wrong in fact and law that may have been. It is argued that what then occurred on 9 March 2015 was an end of year section 18 decision *after* the First-tier Tribunal had been thought to have upheld the (in-year) section 16 decision. Given the section 17 notice of 13 April 2014 and the sometime practice of HMRC not to make any section 18 decision until any appeal against the section 16 decision had concluded, factually this may be plausible; and for the reasons I develop below it was legally plausible as well.

56. HMRC adds that if however the 5/8 September 2014 decision was made under section 18 of the TCA then its section 18 decision of 9 March 2015 would not have been necessary and would have had no effect in law, and would only have regularised the position on HMRC's computer system.

57. Turning to the decision of 25 June 2015, HMRC says that this appears to have been an attempt to implement what the First-tier Tribunal had said in its statement of reasons of 14 April 2015, namely that the appellant was entitled to child tax credit for 2013/2014. If, however, and as I have found, the 5/8 September 2014 decision was a section 18 decision, HMRC accepts that it had no power to make the 25 June 2015 decision as the First-tier Tribunal's 'nil entitlement' decision of 20 January 2015 had not been set aside at this point in time and so remained legally effective.

58. However, on the basis HMRC was wrongly working on the view that the 5/8 September decision was a decision made under section 16 of the TCA, HMRC argues that "the indication given by the [First-tier Tribunal] in its Statement of Reasons was that the section 18 decision of 9 March 2015 was also wrong" and it "would therefore have been appropriate for HMRC to alter it under section 21 of the [TCA] on the ground of official error".

59. None of the above is of course helped by HMRC's continued (and wrong) insistence that it is unable to produce the decision notices for any of the above decisions, and so their reconstruction has to proceed on the somewhat shaky and perhaps imperfect basis of what is recorded in HMRC's computer records. Not only is the failure to produce the decision notices unhelpful and unlawful, but it gives rise to the impression that by failing to work through its decisions in a written form which addresses the legal test or tests in issue, and by failing to maintain records of such decisions and thus provide a proper history of decision making, HMRC is not assisting itself in making decisions rooted in the tax credits statutory scheme which it is required lawfully

to administer. My remarks here may have parallels with what was said by Mr Justice Sedley's (as he then was) in *R-v- Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 W.L.R. 242, about the duty to give reasoned and recorded decisions "[concentrating] the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached".

60. These comments aside, HMRC's submission on this hypothetical may be plausible.

61. I return to identify the legal principle underpinning HMRC's approach to the superiority of First-tier Tribunal decisions in paragraph 53, with which as I have said I agree.

62. An important starting point is that I accept following *JI –v- HMRC* (TC) [2013] UKUT 0199 (AAC) that the Tax Credits (Appeals) Regulations 2002 have not applied in Great Britain since 1 April 2009. Nothing that was said by the three judge panel in *VK –v- HMRC* (TC) [2016] UKUT 331 (AAC); [2017] AACR 3 overrules *JI* on this point. This means that sections 12 and 17 of the Social Security Act 1998 ("the SSA") did not apply to the decisions made by HMRC and the First-tier Tribunal in this case. However, as I found in the *ME* case referred to above, the absence of the 'down to the date of decision' provisions of s.12(8)(b) of the SSA does not create any problems in the context of section 16 decisions because section 16(1) provides its own focus for the date when consideration has to be given as to when the "reasonable grounds for believing" have to be established.

63. The more important missing part of the SSA for tax credits decision-making may be thought to be section 17 and its provisions for finality in decision making. I was concerned about this when I gave the directions set out above. However I have now concluded that that concern was misplaced. This is for two essential reasons.

64. The first reason is that the TCA itself builds in finality and properly demarcates between different species of decision to be made in-year and after the end of the tax year. The "at any time" language of section 16, for example, may allow for more than one section 16 decision to be made in-year, but as I explained in *ME* the "reasonable grounds for believing" have to be established at the time, or each time, the belief is formed on reasonable grounds. Turning then to section 18, the terms of section 18(11) builds in finality by making the section 18 decision on entitlement for tax credits for the previous tax year "conclusive". This is expressly subject, as I have noted in paragraph 28 above, to HMRC's ability to change such a conclusive decision on enquiry (s.19), on discovery (s.20), for official error (s.21), on mandatory reconsideration (s.21A), or on any appeal. But absent these particular and codified statutory exceptions, the section 18 decision is final and cannot be altered by any other means.

65. Therefore, ignoring section 18 decisions which are then appealed, if HMRC makes a section 18 decision which is not appealed, legally it is a final decision about tax credits entitlement for the relevant tax year unless and until it is changed under any of the statutory procedures provided for in sections 19-21A of the TCA. In short, section 18(11) of the TCA provides the same function as section 17 of the SSA as far as HMRC decision-making is concerned in respect of the end of year entitlement decisions for tax credits.

66. The second reason is related to the first and concerns the wording in section 18(11) of the TCA making the conclusive nature of the entitlement decision for the tax credit year subject also to "any appeal". Read with section 38 of the TCA that must at least include appeal to the First-tier Tribunal. In the statutory context this must mean in my judgment an appeal against the section 18 decision because: (a) sections 19 and 20 also contain "subject to any appeal" exceptions to the decisions made under those sections, (b) the appeal is an exception to the section 18 decision being the conclusive entitlement decision for the tax year and so must be in connection with the section 18 decision,

and (c) given the strictly demarcated in-year and end-of-year nature of the annual tax credits scheme, it is difficult to understand the basis on which a First-tier Tribunal decision about the in-year award under sections 14 or 16 should act to remove the finality of a tax credit decision made under section 18. However, in my judgment the recognition in the statutory language that the final nature of a section 18 decision is subject to an appeal against that decision under section 38 in itself provides a strong implication that the decision on the appeal will overset or replace the HMRC decision under section 18.

67. I recognise that sections 19 and 20 both contain materially identical "subject to any appeal" exceptions to the likewise conclusive decisions which may have been made under those sections. However, those sections embody decisions which are made *after* the section 18 decision and which allow for that section decision to be changed. This has two consequences. First, if the section 18 decision has been changed under sections 19 or 20 then finality in respect of the changed section 18 decision needs to re-imposed. Second, as the section 18 decision has changed fresh appeal rights need to apply to the changed section 18 decision.

68. This last point highlights an important consideration that the mechanisms under sections 19 and 20 are each concerned with changing decisions that were conclusive as to entitlement to tax credits for a tax year. In other words, they are both concerned with changing the end-of-year section 18 decision and so are not decision making functions which have a statutory purpose independent from section 18. Thus the conclusiveness (i.e. finality) spoken of in each of the provisions is always about the final nature of the section 18 entitlement decision. I can therefore identify nothing in the language of "conclusive" and "subject to any appeal" in sections 19 or 20 which take away from the view I have expressed in the concluding sentence in paragraph 66 above.

69. Nor do I consider that there is anything in sections 21 or 21A which calls that view into question either. Section 21A is a logically prior parasitic provision in respect of the "any appeal" under section 38 which section 18(11) identifies. As for the official error revision powers in section 21, these may only be exercised if the, here, section 18 decision was incorrectly made *against* the claimant because of an official error. There is nothing on the face of that provision which cuts down the ability of a First-tier Tribunal to overset a final entitlement decision made by HMRC under section 18.

70. The third reason that I now consider my concern about section 17 of the SSA not applying to tax credits adjudication and appeals was misplaced is because arguably section 17 does no more than replicate or replace the legal rule or principle of issue estoppel. As Lord Hoffmann explained in paragraph [31] of *Watt (formerly Carter) –v- Ahsan* [2007 UKHL 51, [2008] AC 696:

> "Issue estoppel arises when a court of competent jurisdiction has determined some question of fact or law, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties: see *Thoday v Thoday* [1964] P 181, 198."

See also *CH/704/2005*.

71. Applying this principle to the TCA and the right of appeal it provides to the First-tier Tribunal under section 38 identifies, in my judgment, the First-tier Tribunal as the 'court' (in this case tribunal) of competent jurisdiction on tax credit decisions which may be appealed. It is on this basis that I am satisfied that HMRC is correct in its view that where a First-tier Tribunal decides and appeal under section 38 – be it under section 14(1), 15(1), 16(1), the entitlement decision for the tax year under section 18, section 19(3), 20(1) or (4), or regulations made under section 21 – HMRC are prevented (i.e. estopped) from remaking that decision under the same section for the same period. Had section 17 of the SSA remained in place then the effect would have been the same.

72. I do not consider that the fact that sections 18-20 of the TCA import in, so to speak, the First-tier Tribunal as the superior decision maker lessens or removes that tribunal from having the same status in respect of appeals under sections 14(1) or 16(1) of the TCA. The language of conclusiveness in sections 18-20 of the TCA is in part a product of the yearly nature of the tax credit scheme and fixing entitlement at the year's end. The section 14 and 16 decisions on the other hand fall in-year, may be altered in year, but are provisional in the sense that they are made before the yearly entitlement is finally decided. Given this structure of the tax credit scheme, it makes no sense to make a section 14 award final for the year or to say the section 16 decision is conclusive for the whole year (given it is only based on a belief (on reasonable grounds) about the likely future entitlement formed at one given point in the year). However, if a First-tier Tribunal on an appeal overturns an HMRC decision not to make an award of tax credits to a claimant that section 14(1) decision as much binds HMRC as it does the claimant.

73. It is important, however, to be clear about this last point. As the three-judge panel pointed out in the *LS and RS* decision referred to above, the First-tier Tribunal's jurisdiction is governed by the decision which is under appeal to it as provided for in section 38 of the TCA. If the decision under appeal is made under section 14(1) of the TCA then it is section 14(1), nothing more or less, which is the subject matter of the appeal and governs the First-tier Tribunal's jurisdiction. It is for this fundamental reason why it is of cardinal importance that the decision under appeal is properly identified to or by the First-tier Tribunal.

74. However, as with the SSA the TCA says nothing about what the First-tier Tribunal's powers are on an appeal, the basis on which it may allow an appeal or even the form of the decisions it may make; and the terms of the Tribunals, Courts and Enforcement Act 2007 do not provide any assistance either (contrast, for example, section 58 of the Freedom of Information Act 2000). The appeal right is given in section 38 of the TCA but a blank canvas is left in terms of the First-tier Tribunal's

decision making powers on an appeal under that section. It was in a similar context that decisions such as *R(IB) 2/04* and *R(I)9/63* sought to paint in the blank canvas. I can see no reason why what is laid down in those decisions should not also apply to tax credit appeals under section 38 of the TCA.

75. The result is that on such an appeal the First-tier Tribunal stands in the shoes of the HMRC decision maker and gives the decision the HMRC decision maker was empowered to give under the legislation they exercised when making the decision under appeal. I stress the definite article to emphasise that what is under appeal is the HMRC decision made under one of the sections identified in section 38 of the TCA. If there is no such decision then as *LS and RS* decided the First-tier Tribunal lacks any substantive jurisdiction. However, by the same reasoning, if the appeal is against, say, a section 18 decision, then that acts to limit the subject matter before the First-tier Tribunal and thus its jurisdiction. Moreover, if standing in HMRC's shoes the First-tier Tribunal on appeal upholds or changes the section 18 entitlement decision under appeal, its decision replaces the decision made by HMRC: per *R(I)9/63* and *VW –v- LB Hackney* (HB) [2014] UKUT 0277 (AAC).

76. Whether this last point is couched in terms of the First-tier Tribunal making its own section 18 entitlement decision for the tax year, its decision taking effect under section 18 of the TCA or the tribunal making the decision under section 18 of the TCA does not matter in my judgment. The legal consequence is that the First-tier Tribunal's decision takes effect as the operative section 18 entitlement decision for the relevant tax year. If what was in issue on the appeal was a section 16(1) decision, the same result applies: the tribunal's decision takes effect as the operative decision at the time the HMRC section 16(1) decision was made.

77. The above is subject to two provisos.

78. First, if challenged on further appeal the First-tier Tribunal's decision will cease to have any effect if set aside by the Upper Tribunal.

79. Second, and perhaps more importantly, the decision of the First-tier Tribunal may be the subject of further and separate decisions by HMRC if allowed for under the statutory mechanisms provided in the TCA. This is because the First-tier Tribunal's decision is (only) a decision on the decision which was under appeal to it. Therefore, if, as I have decided was in fact the case in this appeal, the 5/8 September 2014 decision was a section 18 decision, the First-tier Tribunal's decision of 20 January 2015 took effect (until set aside on 7 July 2015) as the operative section 18 entitlement decision for the tax year 2013/2014.

80. For the reasons I have given above, the First-tier Tribunal's 'section 18' decision precluded HMRC from making a further section 18 entitlement decision for the same year. Insofar as HMRC purported to do so in its 'decision' of 9 March 2015 – rather than simply issuing a letter implementing the First-tier Tribunal's decision – then it had no lawful basis to do so and the tribunal's decision remained effective and binding on HMRC and the appellant (until set aside by the First-tier Tribunal)

81. However, HMRC would not in my judgment have been prevented, had the circumstances and evidence merited it (and I emphasise that this did not arise in this case), from changing the First-tier Tribunal's 'section 18' decision pursuant to its powers under section 19, 20 or even arguably section 21 of the TCA. For example, in theory it could make a decision on enquiry under section 19 of the TCA if that enquiry is begun within one year of the relevant section 17 notice. Whether in fact such an enquiry would be a useful use of resources if an appeal has already been made against the section 18 decision but not yet heard, or there would be any time to launch any enquiry within the one year time frame after the First-tier Tribunal's decision on appeal, would seem doubtful. The five year time period in section 20 for making a decision on discovery may more realistically allow for HMRC to seek to change a

First-tier Tribunal's 'section 18' decision. However, real difficulties may arise in satisfying the "reasonable grounds for believing that the [tribunal's 'section 18' decision] was not correct and that is attributable to fraud or neglect on the part of the [claimant]" in section 20(4)(b) of the TCA if HMRC cannot show the basis on which the First-tier Tribunal made its decision.

82. Further difficulties may also arise in establishing that a First-tier Tribunal's 'section 18' entitlement decision was wrongly made against a claimant *by reason of* official error (as defined). It is for this reason that I accept that the 25 June 2015 'decision' was also ineffective in changing the First-tier Tribunal's 'section 18' decision of 20 January 2015. No proper evidence has been advanced by HMRC to show it was an official error decision made pursuant to section 21 of the TCA (and HMRC do not even suggest it was a decision under sections 19 or 20) nor have they advanced any basis on which the First-tier Tribunal's decision of 20 January 2015 was wrongly made against the appellant in terms of her child tax credit entitlement for 2013/2014 <u>because of</u> an error made by an official.

83. In the circumstances I am not prepared to accept that the First-tier Tribunal's decision of 20 January 2015 was anything other than set aside by that tribunal on 7 July 2015.

84. None of this however in my judgment puts a statutory bar on the above powers being exercised in an appropriate case after a First-tier Tribunal has made its decision. Moreover, it must be the case that a First-tier Tribunal's decision on a section 16(1) appeal cannot preclude HMRC from making the end-of-year section 18 decision the statute calls to be made.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 16th March 2018