IN THE UPPER TRIBUNAL **Case No.** CF/1077/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The Claimant's appeal is allowed in part. The decision of the First-tier Tribunal dated 20 September 2016 is set aside and there is substituted a decision that there were no grounds for superseding the decision awarding child benefit to the claimant that was in force on 8 August 2011, and so the claimant remained entitled to child benefit until 16 January 2012 and there was no overpayment between those dates, but he was not entitled to child benefit from 19 March 2012 and the overpayment in respect of the period from 19 March 2012 to 2 March 2015, amounting to £7,284.30, is recoverable from him.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 20 September 2016, whereby it dismissed his appeal against decisions of the Respondent that, following revision on 30 July 2015, were to the effect that the claimant had been overpaid child benefit amounting to £808.80 from 8 August 2011 to 16 January 2012 and to £7,284.30 from 19 March 2012 to 2 March 2015 and that those sums were recoverable from him.

2. The claimant is a Nigerian national. He was given indefinite leave to remain in the United Kingdom on 23 November 2003 and was, on a date not revealed in the papers before me, awarded child benefit in respect of his two sons who were born in, respectively, 2007 and 2009. That award was in force on 8 August 2011. Payment continued until 16 January 2012 but the award was terminated with effect from 17 January 2012 because he had failed to respond to enquiries.

3. In June 2012, following the birth of his third son on 3 April 2012, new claims were made in respect of all three sons. Child benefit was awarded from 19 March 2012 in respect of the two older sons, and from 9 April 2012 additionally in respect of the youngest, and remained in payment until at least 2 March 2015.

4. On 26 June 2015, the Respondent revised, under section 9 of the Social Security Act 1998 and regulation 10(2)(b) of the Child Benefit and Guardian's Allowance (Decisions and Appeals) Regulations 2003 (SI 2003/916), the awards made in June 2012 on the ground that the claimant had been subject to immigration control since 3 August 2011, and had therefore not been entitled to child benefit since 8 August 2011. The Respondent also decided that the overpayment made in respect of the period from 19 March 2012 to 2 March 2015 was recoverable from the claimant under section 71 of the Social Security Administration Act 1992. The Respondent does not seek the recovery of any sum that may have been paid after that date, possibly because that was when it was first alerted to the change in the claimant's immigration status.

5. The claimant applied for a further revision, described as "mandatory reconsideration", but that was less than successful because, on 30 July 2015, the Respondent maintained the revision of the 2012 awards but also decided that the

earlier award should have been superseded and terminated with effect from 8 August 2011, under section 10 of the 1998 Act and regulations 13(2)(a)(i) and 16(5) of the 2003 Regulations, and it further decided that the overpayment from 8 August 2011 to 16 January 2012 was recoverable from the claimant in addition to the overpayment resulting from the 2012 awards.

6. The decisions were made on the ground that the claimant's leave to remain had been terminated on 3 August 2011 when a deportation order against him was signed. It appears from doc 110 that, in 2009, he had been arrested in connection with a fraud-related crime and that he had subsequently been convicted and sentenced to 32 months' imprisonment. Section 115(1)(i) and (3) of the Immigration and Asylum Act 1999 provides that, subject to immaterial exceptions, a person is not entitled to child benefit if he or she is "a person subject to immigration control". Section 115(9) provides–

> "(9) 'A person subject to immigration control' means a person who is not a national of an EEA State and who—
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> (a) requires leave to enter or remain in the United Kingdom but does not have it;
> (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
> (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
> (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4."

By virtue of section 5(1) of the Immigration Act 1991, "a deportation order against a person invalidates any leave to enter or remain in the United Kingdom given him before the order is made or while it is force".

7. The claimant appealed to the First-tier Tribunal but his appeal was dismissed. He applied to the Upper Tribunal for permission to appeal. After an oral hearing, I gave permission, saying that it was arguable that the First-tier Tribunal had erred in respect of both the periods before it but doubting that the error as regards the period from 19 March 2012 to 2 March 2015 was material. The Respondent concedes that the earlier award should not have been superseded but submits that the First-tier Tribunal did not materially err in law in respect of the later period and the consequent overpayment. The claimant continues to argue that the whole decision of the First-tier Tribunal should be set aside.

8. As regards the earlier period, the claimant's appeal must plainly be allowed.

9. The Respondent provided with its response to the appeal to the First-tier Tribunal a witness statement from a civil servant in the Home Office which stated that the deportation order had been served on the claimant on 22 September 2011 and that the claimant had appealed against it but that he had exhausted all his appeal rights on 27 January 2012, the implication being that his appeal was unsuccessful.

10. In the response itself, reference was made to paragraph 17 of Schedule 4 to the 1999 Act, which is mentioned in section 115(9)(d). As originally enacted, paragraph 17 of Schedule 4 provided –

> "17.—(1) While an appeal under section 61 or 69(2) is pending, the leave to which the appeal relates and any conditions subject to which it was granted continue to have effect."

The Respondent correctly submitted to the First-tier Tribunal that neither section 61 nor section 69(2) applied to the claimant's case. However, section 115(9)(d) was altogether a red herring (and perhaps is a provision that ought to have been repealed) because the whole of Schedule 4 had been repealed with effect from 1 April 2003 by section 161 of, and Schedule 9 to, the Nationality, Immigration and Asylum Act 2002, subject to an immaterial saving.

11. What the Respondent and the First-tier Tribunal overlooked was section 3D of the Immigration Act 1971 (not "Section 3C of the Immigration Rules 1971" to which reference was made in the grounds of appeal), which has since been repealed but, at the time material to this case, provided–

> **"3D.**—(1) This section applies if a person's leave to enter or remain in the United Kingdom—
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> (a) is varied with the result that he has no leave to enter or remain in the United Kingdom, or
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> (b) is revoked.
>
> (2) The person's leave is extended by virtue of this section during any period when—
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> (a) an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 could be brought, while the person is in the United Kingdom, against the variation or revocation (ignoring any possibility of an appeal out of time with permission), or
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> (b) an appeal under that section against the variation or revocation, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).
>
> (3) A person's leave as extended by virtue of this section shall lapse if he leaves the United Kingdom.
>
> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section."

12. The Respondent now concedes that the claimant's leave to remain was "revoked" for the purpose of section 3D(1)(b) by the deportation order and was therefore extended under section 3D(2) until his appeal rights were exhausted on 27 January 2012. He therefore continued to be entitled to child benefit until the original award of child benefit was terminated with effect from 17 January 2012 (which decision was not challenged – or, at least, was not successfully challenged – at the time). Accordingly, there were no grounds for superseding the original awards and there was no overpayment from 8 August 2011 to 16 January 2012. The claimant's appeal must be allowed to that extent. (It is therefore unnecessary to consider whether, absent section 3D, the deportation order could have invalidated the claimant's leave to remain in respect of any period before it was served (see *Regina v Secretary of State for the Home Department, ex parte Anufrijeva* [2003] UKHL 36; [2004] 1 A.C. 604.)

13. In paragraphs 1 and 2 of the claimant's reply to the Respondent's response to this appeal, the Respondent's concession is noted and the Upper Tribunal is asked

to order the Respondent to pay the claimant's legal costs of pursuing the appeal. However, the Upper Tribunal has no power to award costs on an appeal from the Social Entitlement Chamber of the First-tier Tribunal (see rule 10(1)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), read with rule 10 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685).

14. As regards the period from 19 March 2012 to 2 March 2015, paragraphs 3 to 11 of the claimant's reply raise three contentions, which echo points made in the application for permission to appeal. An oral hearing is requested. However, I am satisfied that the case can properly be decided without a hearing. If there was any legal basis for the contentions, that should, and no doubt would, have been made clear in the application for permission to appeal or, especially given that I had expressed the view (doc 153) that the points lacked any merit, the reply. The contentions are plainly unarguable.

15. The first contention is that a letter from the Home Office dated 10 November 2015 had the effect of extending the claimant's leave to remain. That letter was written after the end of the period in issue, but it was before the First-tier Tribunal (see docs 89-94). It responded to a letter sent by the claimant's solicitors in accordance with the Pre-action Protocol for Judicial Review in relation to proposed judicial review proceedings. Sections 4 and 5 of the letter were in the following terms (with underlining added by the claimant's solicitors when sending the document to the First-tier Tribunal) –

> "**4. Details of the matter being challenged**
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> You wrote to the Home Office on 20 October 2015, which we received on 23 October 2015, alleging that you are challenging your client's deportation from the United Kingdom and that you will be lodging a Judicial Review if the deportation order is not revoked.
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> You have asked for the following relief:
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> Your client's Article 8 claim is reconsidered in light of the outcome from the most recent appeal (Decision and reasons promulgated dated 1 October 2015) with regards to his relationship with his son.
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> <u>You state that in light of the signed Deportation Order against your client and in particular the findings from the Tribunal's determination dated 1 December 2011 has by virtue of the erroneous findings been found to be seriously impugned, flawed and unsustainable.</u>
>
> Your client's Article 3 claim is considered. You state that your client and his son would be victimised, harassed and be rendered vulnerable if required to relocate to Nigeria. You also state your client and his child would suffer degrading and inhumane treatment contrary to Article 3 of the ECHR.
>
> You request that the signed deportation order against your client to be revoked and your representations considered as an application for Humanitarian Protection and Discretionary Leave to Remain in the UK.

5. Response to the matters raised

i) The Secretary of State has reviewed the decision to refuse your client's human rights application and will now proceed to reconsider the matter in the light of the evidence and representations you have made. You will be contacted within 3 months of the date of this letter regarding the outcome of this reconsideration."

There were no further paragraphs within Section 5 of the letter.

16. Whether or not the first of the two paragraphs underlined by the claimant's solicitors was a faithful reproduction of what they had written, that paragraph is garbled. However, it is fairly obvious that the point being made on behalf of the claimant was that the findings in the decision dated 1 October 2015 (which, I presume, was made on the appeal against a refusal of an EEA residence card mentioned on doc 58) had undermined the findings of the determination dated 1 December 2011 on the original appeal against the deportation order.

17. In any event, it is asserted on behalf of the claimant that the second underlined paragraph had the effect of extending the claimant's leave to remain from the date it had been revoked until three months after the date of the Home Office's letter. However, no justification for that assertion has been provided and it is plainly wrong. The Secretary of State had reviewed the decision to refuse the claimant's "human rights application" but she had not revoked the deportation order which, as the claimant had clearly acknowledged, remained in force until she did so. There was no material appeal on foot and so section 3D of the 1971 Act did not apply.

18. On the strength of that letter, the claimant had asked for a postponement of the hearing before the First-tier Tribunal. I need not set out the procedural history of the case before the First-tier Tribunal but the upshot was that various postponements were directed and, by the time the case came before the First-tier Tribunal on 20 September 2016, the Secretary of State had refused to accept the claimant's human rights arguments and, the First-tier Tribunal was told, judicial review proceedings had been issued. It refused any further postponement. No arguable error of law arises out of that refusal. If the judicial review proceedings had been successful, I would doubtless have been told but, in any event, any decision to give the claimant leave to remain on human rights grounds would not have had retrospective effect and so would have had no bearing on the question of the claimant's entitlement to child benefit up to 2 March 2015. The focus would have been on whether deportation at the time the decision was made would be incompatible with Convention rights, rather than whether deportation in 2012 would have been. If, in the event of being given leave to remain, the claimant had wished to contend that there would be a violation of his human rights in recovering the overpayment, he could have tried to challenge any enforcement decision, by way of judicial review if no other avenue was available to him, but it would not have been arguable that there had been no overpayment or that the conditions of recoverability under section 71 of the Social Security Administration Act 1992 were not satisfied.

19. The claimant's second contention is that it was in the best interests of the children that child benefit continue being paid in respect of them and that effect had to be given to that "primary and paramount consideration" in any decision affecting them. Again, no justification for that assertion has been suggested. Nor can there

be one. Apart from any question as to what the best interests of the children might have been, this case involved no exercise of discretion or judgment to which those interests might have been relevant. Section 115 of the 1999 Act cannot be overridden in the way suggested.

20. The claimant's third contention is that the amount of the overpayment had not been adequately particularised by the First-tier Tribunal. At one time (see doc 153), I thought there might be something in this point as the Respondent appeared to me not to have explained the calculation, although I suggested that the Respondent would probably be able to cure the defect before I considered whether to give permission to appeal. However, the Respondent subsequently pointed out that a schedule setting out the calculation of the overpayment had in fact been before the First-tier Tribunal (see doc 60). It was a perfectly adequate explanation of the total amount, showing the amount of entitlement in respect of various periods and enabling it to be seen that the figures corresponded with the rates of child benefit then in force. Before the First-tier Tribunal, the claimant neither challenged the figures nor argued that he had not received the amounts set out and the First-tier Tribunal was therefore entitled to accept the figures without comment.

21. For these reasons, I reject all three of the claimants' contentions in respect of the period from 19 March 2012 to 2 March 2015.

22. The issue that I raised in respect of that period when I gave permission to appeal was different. I said –

> "9. It is arguable that the First-tier Tribunal failed adequately to address the question whether the claimant had made a misrepresentation or had failed to disclose a material fact so as to make the overpayment recoverable, but it is difficult to see how it could have decided the issue of recoverability in favour of the claimant on the evidence before it. The circumstances surrounding the termination of the award with effect from 17 January 2012 and the making of a new claim with effect from 19 March 2012 are unclear, it not even being absolutely clear whether the claimant was required to complete a new claim form, but he appears to have accepted that he did not inform the Respondent that a deportation order had been served upon him or that he had ceased to have leave to remain and therefore it seems inevitable that, even if there was no misrepresentation on a claim form, there was at least a failure of disclosure when the claimant made his new claim for child benefit from 19 March 2012, with the result that the overpayment from 19 March 2012 to 2 March 2015 was recoverable under section 71 of the Social Security Administration Act 1992."

23. The Respondent had not produced to the First-tier Tribunal a claim form actually completed by the claimant but it had produced a copy of the "Payment Advice Notes" provided to claimants, requiring them to inform the Respondent if "[your[immigration status is changed by the Home Office", and a copy of a blank claim form, showing that claimants are required to state whether they are "subject to immigration control" and the accompanying notes explaining what that meant. The Appellant has not argued, either before the First-tier Tribunal or on this appeal, that any overpayment that occurred was not recoverable under section 71 of the 1992 Act and I am quite satisfied that the First-tier Tribunal did not err in law in not fully explaining why it accepted that the sum of £7,284.30 was recoverable from him in

respect of the period from 19 March 2012 to 2 March 2015. Either, as is probable, he completed a new claim form in June 2012 and the award was made because he made a misrepresentation in stating that he was not subject to immigration control or, if no such form was completed, the overpayment was due to his failure to disclose while in receipt of child benefit before 17 January 2012 that the deportation order had been served on him on 22 September 2011. (As I said when giving permission to appeal, I doubt the correctness of the Respondent's submission to the First-tier Tribunal that the claimant was obliged to inform it that the Secretary of State for the Home Department was "reviewing his status" before he received the deportation order that was the decision on that review, but the point does not require determination in view of the Respondent's concession that there had been no overpayment before 19 March 2012.)

24. Accordingly, while I allow the claimant's appeal in respect of the period from 8 August 2011 to 16 January 2012, I dismiss the claimant's appeal in respect of the period from 19 March 2012 to 2 March 2015.

Mark Rowland
2 October 2018