[2023] UKUT 100 (AAC)
IN THE UPPER TRIBUNAL
Appeal No. UA-2021-000785-TC
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

G.L.

Appellant

- v –

HIS MAJESTY'S REVENUE AND CUSTOMS

Respondent

Before: Deputy Upper Tribunal Judge Buley KC

Decision/Hearing date: 1 April 2023
Decided on consideration of the papers

Representation
Appellant: None
Respondent: Rachel Dixon, Solicitor's Office and Legal Services, His Majesty's Revenue and Customs

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant's appeal to the Upper Tribunal ("the UT") is dismissed. The decision of the First-tier Tribunal ("FTT") dated 16 August 2021 did involve the making of an error of law in relation to its consideration of the Child Tax Credits ("CTC") element of her appeal, for the reasons acknowledged by the Respondent ("HMRC"), but that error is not material to the Appellant's ongoing entitlement to CTC for the reason given in the next paragraph. The FTT made no error of law in relation to Working Tax Credits ("WTC").

2. No error of law in the FTT's decision, including that in relation to CTC, could be material to the outcome of the Appellant's benefits entitlement, in circumstances

where HMRC made a final decision under section 18 of the Tax Credits Act 2002 ("the TCA") on 24 August 2021, shortly after the decision of the FTT that is under appeal. HMRC has acknowledged its error in relation to CTC and indicated that it will give effect to that error. It will also undertake a mandatory reconsideration of the decision of 24 August 2021, thus ensuring that the Appellant has the ability to pursue a further appeal if she is minded to do so. In those circumstances, in line with the approach in *LS and RS v HMRC* [2017] UKUT 257 (AAC), I conclude that it is not appropriate to set aside the decision of the FTT under section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 ("the TCEA").

3. Permission to appeal was granted in this case on the basis that it might be desirable for the UT to give guidance as to cases where travel restrictions arising from the Covid-19 pandemic mean that, for reasons beyond their control, a tax credit claimant has found themselves unable to comply with the "8-week rule", that any temporary absences from the UK should not exceed 8 weeks at a time. The 8-week rule is found in reg 4 of the Tax Credits (Residence) Regulations 2003 ("the Residence Regs"). With that in mind, I will summarise my key conclusions on that issue:

   (i) HMRC did not put in place any legislative "easement" or amendment of the 8-week rule for any period of the pandemic, with the result that, at least for cases involving WTC, the 8-week rule remains a condition of entitlement which must be applied in accordance with its terms. The 8-week rule does not admit of any possibility of extension. A person who is absent from the UK for a period exceeding 8 weeks will (other than in certain cases of medical treatment abroad, where a longer 12-week period is permitted) cease to be "in" the UK for the purposes of section 3 of the TCA, and therefore cease to be entitled to WTC.

   (ii) The same applies to CTC, other than in cases where the claimant's absence from the UK is occasioned by their presence in an EU Member State. In such cases, for so long as it continued to apply, HMRC concedes that the effect of EU Reg 883/04, "on the coordination of social security systems", is that the 8-week rule could not apply to a person whose absence from the UK was occasioned by their presence in an EU Member State. This rule under Reg 883/04 was not in any direct way linked to the Covid-19 pandemic, and will apply regardless of the reason for absence from the UK in excess of 8 weeks, but it would continue to apply at least for much of the period of the pandemic (at least until the end of the "implementation period" of the UK's exit from the EU, on 31 December 2020).

   (iii) HMRC appears to consider that it has a discretion, in exceptional cases, to waive the requirements of the 8-week rule in "cases … where the customer was unable to return to the UK from overseas as a result of Covid-related travel restrictions". The extent of this discretion, and the extent to which HMRC has exercised this discretion in practice, is unclear. I strongly doubt whether HMRC is correct to believe that it has this power. However, the exercise of this discretion is in any event outside the remit of the statutory appeal system, and accordingly tribunals must decide appeals by reference to the 8-week rule. Tribunals have no power or discretion to extend time by reference to extenuating reasons for the person's absence beyond 8 weeks.

Background

4. The Appellant has been in receipt of tax credits for each year starting with 2009/10. This case concerns her award for the year 2020/21. She made a renewal claim for this tax year, and on 1 July 2020 her award was calculated as £2063.12 WTC and £1370.48 CTC. That included a claim on behalf of her son, whose date of birth is 18 February 2001. HMRC's decision was made under section 14 of the Tax Credits Act 2002 ("the TCA").

5. However, in a decision dated 16 February 2021, made under section 16 of the TCA, HMRC decided that GL was not entitled to claim tax credits from 28 August 2020, on the basis that she had been outside the UK for a period of more than 8 weeks from 1 July 2020, and hence could no longer be treated as being in the UK from 28 August. That decision was upheld on 31 March 2021 following a request for mandatory reconsideration, and GL appealed to the FTT.

6. It is not in dispute that GL was indeed outside of the UK, in Spain, for the following periods of time in 2020 / 2021:

   (i) Departed from the UK on 1 July, and returned on 19 September (slightly over 11 weeks);

   (ii) Departed from the UK on 22 September, returned 7 October (just over 2 weeks); and

   (iii) Departed from the UK on 24 October, and returned on 27 January (about 13 ½ weeks).

7. GL states that she left the UK to seek paid work only because her paid work in the UK had been cancelled due to the Covid-19 pandemic. Furthermore, on each occasion that she had left, she had expected it would be for a short period on only a few weeks. However, in each case her return to the UK was delayed by difficulties relating to the Covid-19 pandemic, such as the need to quarantine and problems with cancelled flights. In her grounds of appeal to the FTT, she stated, for example, in relation to the first period, that she had "tried to return to the United Kingdom within the 8 week period but was unable to do so", and said:

   I was unable to return during this period because several people with whom I had been in contact with had contracted corona virus. As a result I too had to self-isolate and was unable to return to the United Kingdom. In addition all return flights were cancelled due to the high COVID death rate in the United Kingdom. …

8. In observations submitted to the Upper Tribunal, the Appellant has been at pains to emphasise this position. She said:

   I'd like to reiterate that the circumstances which caused me to be absent from the UK longer than I would normally have been in 2020 were beyond my control and due to the global pandemic. I did not break the terms of my benefits scheme on purpose or by neglect.

9. This position was accepted, or at any rate not rejected, by the FTT. In its Statement of Reasons ("SOR"), dated 20 September 2021, the FTT did not make

detailed findings about each of these trips, in terms for example of the extent of the difficulties which GL faced or whether she had sought to come back within the permitted 8 week period, because on its approach to the law it did not need to do so. However, it did not reject any part of her factual case, and it indicated broad acceptance of her evidence as to reasons for her travel and the delays and difficulties which she encountered, including as follows:

> *17. I accept* [GL]*'s evidence that she travelled to Spain during these periods only in connection with self-employed work as an artist and they were always intended to be short trips …*
>
> *24. … The Tribunal accepts that Ms Lee found herself in difficult circumstances due to the impact of the Covid-19 pandemic …*

10. The FTT nevertheless refused GL's appeal, essentially on the basis that the relevant law, which I will turn to below, was clear that a person cannot be treated as being "in" the UK following a period of temporary absence in excess of 8 weeks, regardless of the reasons for that absence. The FTT did consider whether the approach of the Upper Tribunal in *GC v HMRC (TC) (Residence and Presence Conditions: ordinary residence)* [2014] UKUT 251 (AAC) could assist the Appellant, and concluded that it could not.

Appeal to the Upper Tribunal

11. Permission to appeal to the Upper Tribunal was granted by District Tribunal Judge Harrington, in the FTT, who observed that:

> *… I am not satisfied that the Tribunal's decision is clearly wrong in law but it is likely to be helpful for the Upper Tribunal to give further guidance (if possible) on the relevant of a claimant's planned return to the United Kingdom being disrupted by Covid travel restrictions and their associated eligibility to tax credits.*

12. Judge Harrington made the point that it was known to the Tribunal that in some situations the Department for Work and Pensions (who administer many other social security benefits, but not tax credits) had applied a relaxation to the rules in relation to other benefits, and that it might be useful to consider how HMRC had approached these issues, for example in any guidance it had given.

13. Directions were then given by Upper Tribunal Judge Wright, who invited submissions from HMRC on this issue of whether HMRC had put in place any "easements", whether by way of legislation, policy or guidance. He also invited submissions on the appeal generally, and raised the question of whether the appeal was affected by *LS and RS,* in so far as any decision had been made under section 18 TCA.

14. In submissions prepared by Rachel Dixon, of HMRC's Solicitor's Office, HMRC observed / submitted as follows:

    (i) That no section 18 decision had been made before the FTT issued its decision on 16 August 2021, but that a decision had been made under section 18 on 24 August 2021. The FTT therefore did have jurisdiction at the time that it made its decision, and the UT also has jurisdiction, but any decision made by the UT "will not assist the claimant because it will not be legally binding".

(ii) In those circumstances, to ensure that the Appellant is not disadvantaged, HMRC would (with the UT's approval) exercise its discretion to treat the request for permission to appeal against the FTT as an in-time request for mandatory reconsideration of the section 18 decision made on 24 August 2021.

(iii) That the FTT had erred in law, albeit for a reason not drawn to its attention, in relation to the CTC element of the Appellant's award, because CTC is a "family benefit" within article 1(z) of EU Reg 883/2004 (which remained in force during the "implementation period" of the UK's departure from the EU, at least until 31 December 2020). As such Article 7 of Reg 883/2004 prohibits the suspension or termination of payment of CTC by reason of absence from the UK occasioned by presence in an EU Member State.

(iv) That, however, the benefit to the Appellant of this was limited, because CTC was payable to the Appellant by reason of her son receiving full-time education, which had had ceased to do on 31 August 2020 (only four days later than the CTC award had been terminated by HMRC).

(v) That WTC is not a "family benefit" within the meaning of Reg 883/2004, and hence this point did not assist in relation to this element of the Appellant's case. There had been no legislative amendment to the 8-week rule during the Covid pandemic. Ms Dixon then said:

> *HMRC does have the ability to exercise Payment and Management powers in very limited circumstances, however these are exercised in very few cases where the customer was unable to return to the UK from overseas as a result of Covid-related travel restrictions.*

Ms Dixon then set out why HMRC did not consider that that applied in the claimant's own case.

(vi) That, in the result, the UT should dismiss the appeal, in light of the approach taken in *LS and RS*, leaving HMRC to rectify the error in relation to CTC and to issue a further decision on mandatory reconsideration of the section 18 decision (thus permitting the Appellant to pursue an appeal if she wished to do so).

15. Judge Wright then made further directions, seeking (a) clarification of the legal basis for what was proposed in relation to the CTC element of the case, and (b) "more importantly", clarification of the "Payment and Management Powers" that Ms Dixon had referred to.

16. Ms Dixon then provided a further submission, setting out the legal basis for what had been said in relation to CTC in greater detail, and setting out the basis of HMRC's asserted Payment and Management Powers. I will return to these points below.

Jurisdiction: the effect of *LS and RS*

17. Both CTC and WTC are paid pursuant to the TCA. There is a common decision-making process for both benefits, which differs from that which applies to social security benefits administered by the DWP. Section 14 of the TCA provides for an "initial decision" (sometimes referred to as an "award"), which will be made

pursuant to a claim for tax credits, and such decisions may be made before the end of the tax year to which the claim relates. Sections 15 and 16 provided for "revised decisions" where (in essence) new information comes to light in the course of the tax year.

18. However, section 17 then provides for the issue to the claimant of a "final notice", generally at the end of the relevant tax year, requiring certain information to be provided, which may then be followed by a further decision under section 18. This final "entitlement" decision, once made, will replace any earlier decisions made under sections 14-16, with the effect that any earlier decision will cease to have any operative effect on the claimant's tax credits entitlement, which will then be governed by the new section 18 decision (and any reconsideration or appeal relating to that decision).

19. Decisions under sections 14-16, and 18, are appealable to the FTT (subject to going through the process of mandatory reconsideration).

20. The consequences of this for appeals against the earlier decisions was discussed by the three-judge panel in *LS and RS,* the key conclusions of which are as follows:

    (i) Where an appeal is pending before the FTT at the time that a section 18 decision is made, that appeal will "lapse", because there will cease to be any operative decision of HMRC which is capable of being the subject of an appeal. In such a case the FTT is bound to strike-out the appeal under reg 8(2)(a) of the Tribunal Procedure (FTT) (SEC) Regulations 2008 ("the FTT Regs"), since it will lack jurisdiction to hear the appeal.

    (ii) On the other hand, the same result does not follow for appeals to the UT, even where the section 18 decision was made before the FTT decision so that the FTT itself should have made a strike-out decision in accordance with the previous paragraph. The UT's jurisdiction is to hear appeals from the FTT (rather than from the underlying decision of HMRC), and accordingly, once the FTT makes a decision, the UT will have jurisdiction to hear that appeal. In the course of deciding such an appeal it is free to give such rulings or guidance as it sees fit, even in cases which are "academic" (subject to observing the appropriate strictures on making rulings on matters which are academic).

    (iii) This is true *a fortiori* in cases where a section 18 decision is made only after the FTT made its decision, because in such a case the FTT did not lack jurisdiction and it was not confined to striking out the appeal. The correctness of the FTT's ruling will therefore be an appropriate matter for the UT to consider.

    (iv) It remains the case, even where the section 18 decision is made only after the FTT decision, that the claimant's tax credit entitlement will be governed by the new section 18 decision rather than the decision against which the appeal has been brought. To this extent any decision the UT makes will have no direct or binding effect on the claimant's entitlement, and it is likely to be appropriate for the tribunal to decide (in the exercise of its discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007) not to set aside the FTT decision even if it finds an error of law by the FTT.

That is the approach which the three-judge panel took in *LS and RS* itself, in the second of the two cases before it (see paragraph 56).

21. Applying that approach here, the position is that the FTT had full jurisdiction to hear and decide the Appellant's appeal, since no section 18 decision was made until after it gave its decision. I have jurisdiction to consider the correctness of its decision on the basis that the FTT made it. In the course of doing so I have jurisdiction to make such observations as I consider may be helpful to the parties, to any future FTT which is concerned with the Appellant's case, or more generally. On the other hand, since any ruling I may make will have no direct effect on GL's tax credits entitlement, which is now governed by the new section 18 decision given on 24 August 2021, it is unlikely to be appropriate for me to set aside the FTT decision even if I find an error of law.

Tax credits and temporary absences during the Covid-19 pandemic

22. As I have said, permission was granted by District Judge Harrington on the basis that it would be helpful for the UT to consider, and if possible to give guidance on cases where a claimant's absence from the UK was extended by reason of the covid-19 pandemic. I will therefore take the opportunity to give some consideration to that issue.

<u>The 8-week rule, and its application to the Appellant's case</u>

23. Section 3(3) of the TCA provides that a claim for tax credits may be made by a person or persons who are "in the United Kingdom". Section 3(4) provides that entitlement to a tax credit pursuant to a claim will cease where the claimant or claimants "could no longer make a … claim". Thus eligibility for tax credits from time to time depends upon a person's continued presence in the United Kingdom, albeit section 3(7) provides that regulations may prescribe for circumstances where a person is, or is not, to be treated as being in the UK.

24. The relevant regulations are the Residence Regs. Reg 3(1) provides that a person is to be treated as not being in the UK if he is "not ordinarily resident" in the UK. As the FTT observed, there is no dispute that GL remained ordinarily resident in the UK throughout 2020/21.

25. However, reg 4 then provides materially:

> *4(1) A person who is ordinarily resident in the United Kingdom and is temporarily absent from the United Kingdom shall be treated as being in the United Kingdom during the first-*
>
> *(a) 8 weeks of any period of absence; …*
>
> *(2) A person is temporarily absent from the United Kingdom if at the beginning of the period of absence his absence is unlikely to exceed 52 weeks.*

26. There is an extended period, of 12 weeks, in cases where the temporary absence is in connection with certain medical treatment or illness, but I need not set out the detail of that here since it is not suggested that it applies to GL.

27. Although I understand that legislative amendments or "easements" may have been made to other analogous provisions relating to other benefits in the period

of the Covid-19 pandemic, it appears that no such legislative changes were made so as to affect the rules regarding absence from the UK in relation to tax credits. HMRC were directed by Judge Wright to provide details of any such "easements" in the case of tax credits, and, other than in relation to their "Payment and Management Powers", which I discuss below, no such details have been provided.

28. This "8-week rule" was discussed by Judge Rowland in the *GC* case, to which the FTT referred. In that case he made the point that reg 4(1) could apply to a series of temporary absences, each of which was shorter than 8 weeks, though in aggregate they exceeded it, and that a person who regularly travels abroad but then returns to the UK in between, even for short periods, would not necessarily cease to be ordinarily resident in the UK. He also made the point that (contrary to a submission made by HMRC in the present case) there was nothing in the eligibility requirements relating to tax credits that eligible work had to be undertaken in the UK as opposed to abroad.

29. The FTT rightly held that this case could not benefit the present Appellant, for the simple reason that the first (and, it may be added, the third) period of her absence exceeded the permitted 8-week period. HMRC's decision correctly treated her as present in the UK for the first 8 weeks of that first period of absence, so that the termination of her entitlement took effect on 28 August 2021. *GC* did not permit any further extension beyond that.

30. What *GC* does call attention to, at least on the Appellant's case, is the possible unfairness of the Appellant losing her benefit in circumstances where she had hoped and expected to be able to return to the UK within a shorter period, but was prevented from doing so by circumstances, beyond her control, pertaining to the Covid-19 pandemic. Such circumstances, it may be said, would not have been envisaged when the 8-week rule was enacted. In its submissions to the Upper Tribunal, HMRC has made certain additional points about whether the Appellant's claims in this regard should be accepted, for example because she left the UK on three separate occasions, but those points were not made to, or not accepted by, the FTT, and in view of *GC* the mere fact that the Claimant had more than one period of absence is not particularly germane. At any rate, for present purposes I proceed on the basis that there is no finding rejecting the Claimant's account as untrue or exaggerated.

31. Despite that, in my view the FTT was *prima facie* correct to proceed on the basis that the 8-week rule did not provide for exceptions or extensions by reference to the Covid-19 pandemic. The 8-week rule is clear, that the first 8 weeks of any period of absence from the UK is to be disregarded, regardless of the reason for that absence and subject only to reg 4(2), but that any period of absence beyond 8 weeks will mean that the person has ceased to be in the UK. That is again regardless of the reason for that absence.

32. Accordingly, the FTT was correct, on the basis of the arguments presented to it, to conclude that it must apply the 8-week rule strictly, with the result that it must uphold HMRC's decision that she ceased to be entitled to any form of tax credit from 28 August 2020, when she had been absent from the UK for more than 8 weeks. However, I must consider to what extent that conclusion should be qualified by points now raised on this appeal to the UT.

(a): HMRC's "Payment and Management Powers"

33. As set out above, in its submissions to the UT HMRC has asserted the existence of "Payment and Management Powers", which it appears to suggest could be used, at least in an exceptional case, to waive the requirements of the 8-week rule or the conditions of entitlement to tax credits more generally. Its position however is that the exercise of such powers is not subject to appeal within the unified tribunal system.

34. HMRC's position as to the extent of those powers is a little unclear. However, there are passages in HMRC's submissions, and in its published "Admin Law Manual", sections ADML 3300 and 3400, to which I have been referred (and which is available online), which suggest that HMRC considers that it has power, in exceptional cases, to waive or disapply the requirements of the TCA as to when a tax credit should be paid. The relevant parts of the Admin Law Manual are not, as I understand it, specific to payment of tax credits as opposed to wider issues of tax collection, but HMRC's submission makes clear that it regards these passages as equally relevant to the payment and management of tax credits.

35. First, it is right that HMRC does have powers of this general kind in relation to the enforcement and collection of tax: *R v Inland Revenue Comrs, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. Such powers derive from the general statutory functions of HMRC in relation to the care and management of tax collection. Even in that context the discretion is circumscribed, and should be used for essentially managerial purposes with the overall intention of obtaining the best net tax return (see for example Lord Phillips in *R (Wilkinson) v Inland Revenue Comrs* [2003] 1 WLR 2683, at ¶45). In *Wilkinson,* as in earlier cases such as *Vestey v Inland Revenue Comrs (No 2)* [1979] Ch 198, [1980] AC 1148, judges have been at pains to emphasise that HMRC and its predecessors were not entitled to exercise a general dispensing power as to what taxes should or should not be collected. As Lord Phillips put it in *Wilkinson*:

> *46. … in the light of the authorities that we have cited above and of fundamental constitutional principle we do not see how section 1 of the 1970 Act can authorise the commissioners to announce that they will deliberately refrain from collecting taxes that Parliament has unequivocally decreed shall be paid, not because this will facilitate the overall task of collecting taxes, but because the commissioners take the view that it is objectionable that the taxpayer should have to pay the taxes in question*

36. Secondly, however, the present case is not concerned with the collection of tax, but rather with the payment of a benefit or allowance in the form of tax credits. Entitlement to such tax credits is subject to specific statutory conditions, set out above, and by the same token the *power* of HMRC to make such payment is subject to the same conditions. I do not understand it to be suggested that HMRC has any power to make payments on an *ex gratia* basis, rather than as a payment of tax credit under the TCA, nor that it has any wish or intention to do so.

37. Rather, HMRC appears to be asserting a power to exercise discretion as to the payment of tax credits under the TCA itself. The basis on which HMRC asserts relevant "Payment and Management Powers" in relation to tax credits is said to be, in Ms Dixon's second submission, section 2 of the TCA, under which HMRC is "responsible for the payment and management of tax credits …", and section

5 of the Commissioners for Revenue and Customs Act 2005, which is to the same effect. On this basis, HMRC submits that:

> *The circumstances, in which the Commissioners can exercise their discretion under their powers of payment and management, are analogous to the powers to collect and manage tax. While the circumstances are not defined in statute, they are determined by reference to administrative law principles and case law.*

38. Although the submission goes on to refer to *Wilkinson* in the Court of Appeal, to the effect that the powers cannot be used "to override clear statutory limitations", it continues to submit that the powers can be used not only to ensure that payment result in the highest net return to the exchequer but also to avoid "anomalies and injustices". The submission concludes by saying, in the context of decision-making about the payment of tax credits:

> *HMRC will only exercise managerial discretion in the claimant's favour. Generally, it will only be appropriate to exercise managerial discretion, to override statutory limitations, in exceptional circumstances.* [Emphasis added]

39. So HMRC's position does seem to be that it has power, albeit in exceptional circumstances, to "override statutory limitations" on the payment of tax credits, so as to exercise a discretion to pay a tax credit even where the conditions of entitlement are not met. That is also the position taken in Ms Dixon's first submission, where she expressly envisages that HMRC might exercise discretion not to terminate a tax credit where "*the customer was unable to return to the UK from overseas as a result of Covid-related travel restrictions*".

40. What this leaves unclear is the circumstances in which HMRC might exercise this discretion. HMRC's first submission appears to indicate that HMRC recognises travel difficulties relating to Covid-19 as a specific category of case where discretion may be exercised, and perhaps to suggest that HMRC did in fact exercise discretion in some such cases. I take it that no published or unpublished policy or guidance exists to that effect, since that would have been provided to the tribunal if it did exist, but that leaves unclear the extent to which an informal practice may have developed.

41. It is not necessary for me, in order to decide this appeal, to rule on the legality of any such practice, and I have not heard full argument on these issues, but I think it is right for me to record that I have serious doubts about the legality of any such practice.

42. It is one thing to say, in the context of tax collection, that HMRC has a discretion as to how it should use its resources to maximise the return to the exchequer. It is quite another to say that HMRC has a "management" discretion to pay a benefit which is subject to statutory conditions of entitlement, where it considers that those conditions are not met. *First,* it is very difficult to see how the making of such a payment could ever be for the purpose of maximising net return to the exchequer, so to do so would appear to contradict only the limitation identified in *Wilkinson et al,* that HMRC must not take upon itself the power to decide whether particular conditions laid down by Parliament are just or unjust. I am prepared to accept that it *arguable* be that this limitation can be got round, as suggested in ADML3400, to deal with "unforeseen … effects" of legislation that are "temporary", for example because of something like the pandemic, which created

conditions which would not have been anticipated when the legislation was drafted, but which might not be thought to justify an amendment, the need for which would have swiftly been removed. But such an argument seems to me to be far from straightforward.

43. Further, however, in the context of tax credits, however, I think there is a still more fundamental problem, which is that HMRC simply does not have any power to pay a tax credit to a person who does not satisfy the statutory conditions. That being so, section 2 of the TCA, which provides powers as to the management and payment of tax credits, cannot empower it to waive those statutory conditions. The "payment" of tax credits in section 2 TCA must mean payment *in accordance with*, rather than *outwith*, the statutory scheme. The concept of "management" in section 2 TCA does not, in my view, contemplate disregard or override of the statutory conditions.

44. Any doubt about this is in my view resolved by *Wilkinson* in the House of Lords ([2005] 1 WLR 1718). The actual issue in that case was whether the HMRC's predecessor, the Inland Revenue, could pay an allowance to widowers that was analogous to the statutory allowance paid to widows, on grounds of equity and / or to avoid a breach of Article 14 of the European Convention on Human Rights. The Court of Appeal held that it could not, essentially because, as explained above, HMRC could not exercise a discretion to pick and choose between different statutory requirements (¶¶45-6). Lord Hoffmann, in the House of Lords, agreed with this (¶20), but his reasoning also suggests this still more basic problem that the Inland Revenue, as a body created by statute, could not exercise a general dispensing power to pay out Crown resources. In relation to tax credits, HMRC does not assert any general power to make an *ex gratia* payment in lieu of a tax credit payment, and I do not see how section 2 can be interpreted to provide power to override the conditions of the tax credit scheme.

45. It may seem regrettable to impose a limit on HMRC's ability to act benevolently in cases of hardship, but the lack of clarity as how HMRC might exercise this power, and the consequential likelihood of inconsistency in its exercise, should in my view reduce this sense. The lack of any real clarity in terms of published guidance as to HMRC's asserted power to act outside the tax credit scheme (as opposed to the collection of taxes, which is what ADML 3300 and 3400 appear to be directed to at first glance), or the circumstances in which it might exercise that power, further limits the accessibility of this power to persons who might benefit from it.

46. The present case is a case in point. On the face of it, at least on her case, the Appellant's circumstances come squarely within the kind of case where Ms Dixon envisages that discretion could be exercised, namely where "the customer was unable to return to the UK … as a result of Covid-related travel restrictions". Ms Dixon's reasons for rejecting this, including that the Appellant went abroad more than once, seem unpersuasive, not least because *GC* makes clear that a person may have more than one temporary absence, provided that no single absence exceeds 8 weeks. As I have observed on more than one occasion, nothing in the FTT's conclusions involves any rejection of the Appellant's case that she found herself in difficulties that were unforeseeable and beyond her control.

47. In any case, desirable or otherwise, I doubt whether HMRC has the power which it asserts, to "override" statutory conditions as to eligibility for tax credits in "exceptional circumstances".

48. Whether or not I am right about that, HMRC is right that such matters are outside of the jurisdiction of the FTT (or, on appeal, the UT) to enforce. It follows that, in the present case, the FTT could not have reached any other conclusion, by reference to the exercise or non-exercise of such powers, than the one which it did reach, namely that the Appellant had been outside the UK for more than 8-weeks and that, subject to the next point, she ceased to be eligible for tax credits on that date.

(b): Family benefits under Reg 833/2004

49. As I have explained above, HMRC volunteer, and concede, that CTC is a "family benefit" within the meaning of EU Reg 833/2004, and that the Appellant remained "subject to" the legislation of the UK for the purposes of Article 11 of Reg 833/2004 for the period that she was in Spain. As such, Ms Dixon submits that the effect of Reg 883/2004 is to require "the UK to treat a claimant's presence in another member state as though it were presence in the UK which prevents the domestic temporary absence conditions" in the Residence Regs from being applied.

50. This point was not raised before the FTT and there can be no criticism of the FTT for not addressing it. That does not, however, prevent the FTT from having made an error of law, in so far as Reg 833/2004 prevents reg 4(1) of the Residence Regs from having legal effect.

51. I am content to accept HMRC's concession for the purposes of this appeal, though I have not heard opposing argument about it. Further, however, the concession, if correct, is wide-ranging in its consequences, since it appears that it must apply to every claimant for CTC who travels to an EU member state rather than to any other country outside of the EU, with the result that, for such persons, there is no rule that limits their absence from the UK to a period of 8 weeks. That will have consequences not only for those prevented from returning to the UK by reason of Covid-related travel restrictions, but also for those who do not return for any other reason. That would seem to apply for any period prior to the UK's exit from the EU, and during the implementation period up until 31 December 2020. Given the complexities of the status of retained EU law, including Reg 833/04, following the end of the implementation period, I make no comment one way or another as to its relevance thereafter.

52. HMRC are therefore to be commended for drawing this point to the tribunal's attention in the course of the appeal to the UT, but it is clearly regrettable that the point was not picked up at an earlier stage. I can only hope that the result of recording the concession in this judgment will be that the problem is less likely to recur in future.

53. Ms Dixon has made various submissions as to how this error can be corrected in the Appellant's case, in circumstances where the section 16 decision under appeal has been overtaken by the new section 18 decision. Since I am dismissing the appeal, I have no power to make directions in that regard, and I do not propose to rule on the appropriateness of the use of the powers to which she has

referred. However, as I have explained, the practical effect of this concession in the Appellant's own case is limited, in HMRC's view, by the fact that her son left full-time education only four days after the award had been terminated. I do not know whether the Appellant accepts this, or whether she has any basis to contest it.

54. In those circumstances, and where these issues were raised for the first time in the UT, it is important that the Appellant should have the ability to challenge HMRC's decision that her CTC entitlement came to an end on 31 August. Whilst not seeking to lay down the route as to how that should be achieved, it occurs to me that the obvious route would be for this issue to be dealt with in the mandatory reconsideration which HMRC have undertaken to provide of its section 18 decision. As Ms Dixon submits, the purpose of that mandatory reconsideration will be to ensure that "the claimant is not disadvantaged" by the new decision, and it may be equally apt to ensure that she is not disadvantaged by this new reason for terminating her CTC being raised for the first time before the UT.

Conclusion

55. For these reasons, I dismiss the appeal. The FTT made an error of law in concluding that the Appellant's CTC entitlement ended on 28 August 2020, but made no error in relation to her WTC entitlement. In circumstances where HMRC has made a new decision concerning the Appellant's tax credits entitlement for the tax year 2020/21, under section 18 of the TCA, and where it has undertaken to treat the application for permission to appeal to the UT as an "in-time" request for mandatory reconsideration of that decision, it is not appropriate for me to set the FTT's decision aside under section 12(2)(a) of the TCEA.

Tim Buley KC
Deputy Judge of the Upper Tribunal
Authorised for issue on 13 April 2023