CTC/1518/2009

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Leicester First-tier Tribunal dated 18 March 2009 involved an error on a point of law, for the reasons given below, and is set aside. It is appropriate to re-make the decision on the claimant's appeal against the Commissioners' decision dated 27 June 2008 (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii) and (4)(b)). That decision is that the appeal is allowed and that the claimant is entitled to child tax credit in respect of his daughter Asiya for the period from 8 December 2007 to 20 January 2008, in addition to the entitlement already determined for the period from and including 21 January 2008 to 5 April 2008.

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has in the end been supported in very helpful written submissions by Mr D P Eland on behalf of the Commissioners of Her Majesty's Revenue and Customs (HMRC). As a result the decision can be much briefer than it otherwise would have needed to be.

2. The claimant and his wife were initially awarded child tax credit (CTC) for the period from 6 April 2007 to 5 April 2008 in respect of two dependent children. On 12 December 2007 he telephoned the tax credits helpline to say that three more of their children had joined the household, including Asiya, then aged 17. She therefore no longer came within the definition of "child", but could have been within the basic definition of a "qualifying young person" if she were "receiving full-time education, not being advanced education" (Child Tax Credits Regulations 2002, regulation 5(2) and (3)(a)(i)).

3. As at December 2007 regulation 5(5) of those Regulations provided as follows, apart from the words underlined (which were omitted by virtue of an amendment with effect from 16 August 2007 and put back into the definition of full-time education in regulation 2(1) by virtue of a further amendment with effect from 1 September 2008, when other significant changes were made, including to regulation 5(5) itself):

> "(5) For the purposes of paragraphs (3) and (4) full-time education is education received by a person attending a course of education--
> (a) at a recognised educational establishment, or
> (b) if the education is recognised by the Secretary of State, the Scottish Ministers, [HMRC] or the Department for Employment and Learning, elsewhere;
> where in pursuit of that course, the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any

> exercise, experiment or project for which provision is made in the curriculum of the course, exceeds or exceeds on average 12 hours a week in normal term-time, and shall include normal gaps between the ending of one course and the commencement of another, where the person is enrolled on and commences the latter course."

"Recognised educational establishment" was defined in regulation 2(1) as:

> "an establishment recognised by the Secretary of State, the Scottish Ministers or the Department for Education and Learning, as the case may be, as being, or as comparable to, a university, college or school;"

4. Regulation 5(7) provides:

> "(7) In determining whether a person is undertaking a course of full-time education or approved training, there shall be disregarded any interruption--
> (a) for a period of up to 6 months, whether beginning before or after the person concerned attains age 16, to the extent that it is reasonable in the opinion of [HMRC] to do so; and
> (b) for any period due to illness or disability of the mind or body of the person concerned provided that it is reasonable in the opinion of [HMRC] to do so.]"

5. Asiya was not in December 2007 attending any course of education in Great Britain. It appears that the award was amended on 14 December 2007 to include the other two additional children from 8 December 2007, but not to include Asiya. The claimant was asked to contact the CTC office if she did commence full-time non-advanced education. He did so on 25 January 2008 to say that she had started a course on 21 January 2008. The award was amended to include Asiya as a qualifying young person from that date. The notice of final entitlement for the year, reflecting those dates, was issued on 27 June 2008.

6. The claimant's appeal against that decision was only in respect of the treatment of Asiya. He had by then gained the assistance of Mrs Jay Jobanputra of Leicester City Council's Welfare Rights Service. The argument was that Asiya should have been included from the same date as the other two additional children and that he had been paid child benefit for her from 8 December 2007.

7. The findings of fact made by the tribunal of 18 March 2009 included that Asiya had to have a written examination and an interview at Leicester College before she was allowed to enrol on a course, which all happened on 21 January 2008. The tribunal appeared to accept that claimant had made every effort to get her into education as soon as practicable. The tribunal accepted that Asiya had been in full-time education in Kenya before she was able to come to Great Britain to re-join her family. It said this in its statement of reasons:

> "It has been suggested, on [the claimant's] behalf, that Asiya was always in Full Time education, as she had been so before she arrived in the UK. However, the legislation refers to the qualifying young person being enrolled and accepted for approved training. Additionally, the Regulations apply to Northern Ireland, as it does to Great Britain or England and Wales. In essence, time began to run when Asiya arrived in England and not while she was in Kenya."

8. The claimant was given permission to appeal against the tribunal's decision by a district tribunal judge. Among the points made by Mrs Jobanputra was that since Asiya had been in full-time non-advanced education at a secondary school in Kenya and had joined the claimant's household in Great Britain on the basis that she was to continue her full-time education, she should be regarded as still being in such education during the gap before she could actually start her course on 21 January 2008. The first submission for the HMRC did not really get to grips with the issues. I directed submissions particularly about the application of regulation 5(7) and about whether a school in Kenya could be a recognised educational establishment or, if not, education there could be recognised under regulation 5(5)(b). Mr Eland then produced the most detailed and constructive submission dated 23 October 2009. That submission suggested the setting aside of the decision of the tribunal of 18 March 2009 and the substitution of a decision that the appeal against the HMRC's decision of 27 June 2008 be adjourned for the claimant to supply details of Asiya's education in Kenya immediately before coming to Great Britain and for HMRC then to consider "settling" the appeal. Because of the information given in Mrs Jobanputra's reply dated 16 November 2009 and the desirability of keeping control of the outcome within the Upper Tribunal I directed a further submission on the substantive outcome after HMRC had had the opportunity to make factual enquiries of its own. That submission, dated 23 April 2010, supported the making of a decision in favour of the claimant.

9. Mr Eland's view was that the "gap" provisions in regulation 5(5) would most naturally be applied in circumstances where a pupil or student moves between different stages of education, as well as in other circumstances. But, whether the thinking behind the amendment of regulation 5(5) from 16 August 2007 was flawed or not, those provisions were not available at the dates relevant to the present case. Mr Eland went on to submit that, nonetheless, the "interruption" provision in regulation 5(7)(a) was capable of applying, so long as Asiya's education came within regulation 5(5) immediately before the interruption, and that determination of all the elements of that provision was within the powers of a First-tier Tribunal on appeal.

10. I agree in general with that submission, except for one small, but significant, part of it. It is an inherent requirement of regulation 5(7) that the child or qualifying young person in question should be undertaking a course of full-time non-advanced education immediately prior to any interruption that could then be capable of being disregarded. Apart from the question of whether full-time education is being received and of the deeming rule where 12 hours or more are spent on instruction, supervised study etc, the crucial issues in regulation 5(5) prior to 1 September 2008 were whether the education was either received at a recognised educational establishment

or, if received elsewhere, was recognised by a specified authority.

11. In relation to the recognition of the educational establishment under regulation 5(5)(a), Mr Eland submitted that in the context of CTC the question was for HMRC, and on appeal the tribunal. That was by analogy with Commissioner's decision R(F) 2/95 which held, according to Mr Eland, that the question whether an establishment should be so recognised was "a matter for the authority administering the child support scheme (at that time the Secretary of State for Social Security)". HMRC is now responsible for the CTC scheme. However, what was held in R(F) 2/95 was rather more limited. What was being considered was the definition of "recognised educational establishment" then in section 147 of the Social Security Contributions and Benefits Act 1992 requiring recognition by "the Secretary of State as being, or as comparable to a university, college or school". What Mr Commissioner Skinner decided in R(F) 2/95 was that there "the Secretary of State" meant not the Secretary of State for Education, but the Secretary of State for Social Security, since the latter was responsible for the Act and it was clear that functions under it were to be exercised by him unless there was an express reference to another Secretary of State. There is also authority in the child support context (CCS/2865/2001 and *CF v Child Maintenance and Enforcement Commission (CSM)* [2010] UKUT 39 (AAC)) that a requirement for recognition by the Secretary of State can be satisfied by any Secretary of State.

12. Those decisions cannot get over the difficulty that the definition of "recognised educational establishment" in the Child Tax Credit Regulations 2002 at the relevant time, set out in paragraph 3 above, required recognition (apart from the Scottish or Northern Ireland authorities) by the Secretary of State, and did not include HMRC either directly or through reference to "the Board". I agree with and adopt what Judge Wikeley said in paragraph 51 of *CF v CMEC*:

> "[S]ection 4(1) of the Commissioners for Revenue and Customs Act 2005 provides that the Commissioners for Her Majesty's Revenue and Customs and the officers of Revenue and Customs together now constitute a non-ministerial government department called Her Majesty's Revenue and Customs (HMRC). Although the Commissioners `act on behalf of the Crown' (section 1(4) of the 2005 Act), the HMRC Commissioners do not fall within the statutory definition of one of Her Majesty's Principal Secretaries of State [a reference to the definition in the Schedule to the Interpretation Act 1978]. So, for both those reasons, recognition by HMRC did not, in my view, amount to recognition by the Secretary of State within section 55(1)(b) [of the Child Support Act 1991]."

13. I cannot see how the Kenyan school attended by Asiya (see below) could have been recognised by any Secretary of State or by the Scottish or Northern Ireland authorities, whose responsibilities would not extend to establishments run in overseas countries. There are then at the very least grave difficulties in accepting that an ad hoc recognition by HMRC for the purposes of this case could satisfy regulation 5(5)(a). However, there is no need to express a definitive conclusion. That is first because I conclude below that regulation 5(5)(b) was satisfied,

which is enough to decide the case. And, second, as from 1 September 2008 regulation 5(5)(a) has only required that the full-time course be undertaken at a "school or college", without any test of recognition by any particular authority, and the definition of "recognised educational establishment" has been removed from regulation 1(2). Therefore, the answer on the pre-1 September 2008 law has no continuing significance for CTC purposes (or for child benefit, where a similar change occurred some years earlier). The question of whether an establishment is a school or a college under the post-1 September 2008 law is plainly for HMRC as part of the determination of the amount of an award of CTC and of entitlement, and for a tribunal on appeal.

14. In relation to the test in regulation 5(5)(b), of whether education elsewhere than at a recognised educational establishment is recognised, the position is much more straightforward because the provision as in effect at the relevant time specifically allowed recognition by "the Board", ie HMRC, as well as by the Secretary of State etc. I can see no reason, in agreement with Mr Eland, why HMRC should not have been required to consider the matter of recognition, where relevant, as part of the determination of the amount of an award or of entitlement. If so, that is also part of what falls to be determined by a tribunal carrying out a rehearing on appeal. Paragraph 9 of Schedule 2 to the Social Security Act 1998, with regulation 25 of and paragraph 1 of Schedule 2 to the Child Benefit and Guardian's Allowance (Decisions and Appeals) Regulations 2003 makes such a recognition decision by HMRC not appealable, but that only operates for the purposes of child benefit and has never applied for the purposes of CTC. If Asiya's education in Kenya were recognised in that way and non-advanced and full-time, it would then need to be considered whether it was reasonable to disregard in the treating of her as receiving full-time non-advanced education the interruption between her leaving Kenya and being able to start a suitable course of non-advanced education in this country.

15. That, therefore, is where the tribunal of 18 March 2009 went wrong in law. The tribunal appeared not to give full and proper consideration to the combined effect of regulation 5(5) and (7) and, in the passage set out in paragraph 7 above, to think wrongly that a separate provision about approved training affected the outcome. It also appeared to think that only education in the United Kingdom could count as full-time education capable of recognition by HMRC, to which the interruption provision could then apply. There is no warrant whatsoever for such a limitation. The case had been made for the claimant, admittedly without much supporting detail at that stage, that Asiya had been in full-time secondary education immediately before leaving Kenya for this country. The tribunal dismissed that case without applying the correct rules of law.

16. For those reasons, the decision of the tribunal of 18 March 2009 is set aside as involving an error on a point of law.

17. So far as the decision to be made on the appeal against the decision of 27 June 2008 is concerned, I am in as good a position to make the decision as would be any new First-tier Tribunal. In the submission dated 16 November 2009, Mrs Jobanputra on the claimant's behalf gave the information that Asiya had been attending Moi Girls' School in Nairobi, in full-time

non-advanced education. She was studying several subjects at what was described as pre-GCSE level. Her last day of attendance had been around 5 December 2007, before she was brought to England with her two sisters after having been located by the Red Cross so that they could be re-united with their parents. After having had the opportunity to make independent enquiries, Mr Eland said this in his submission of 23 April 2010:

> "5. ...I have obtained further details about the school from the internet. I note that the education provided by the school is up to `KCSE' level and that it is normal for a person to study multiple subjects at once. I also note that KCSEs are widely considered to be equivalent to the GCSE or old `O Level' in the United Kingdom. On that basis I'd be content with a finding that [Asiya] was, immediately prior to her departure from Nairobi and arrival in Great Britain, in attendance at an educational establishment which can be recognised for the purposes of child tax credit. If necessary, or in the alternative, I am also content that the education provided to [Asiya] by the school in Nairobi could itself be recognised. In either event, the education was on a full-time basis.
>
> 6. If the Judge agrees with that then the position is that, immediately before the claimant's claim, [Asiya] was a `qualifying young person' (being a person who was not a child, was under the age of twenty years, and was receiving full-time education). For the reasons discussed in my earlier submission of 23/10/09, the circumstances are such that on [Asiya's] arrival in Great Britain on 8/12/07, and for the period up to her enrolment at Leicester College on 21/1/08, her education was subject to a period of interruption which could and should be disregarded (regulation 5(7)(a) of the Child Tax Credits Regulations 2002)."

18. As the information put forward for the claimant has not been challenged I accept it and therefore agree with the alternative conclusion at the end of paragraph 5 of Mr Eland's submission of 23 April 2010, that the education received by Asiya at her school in Nairobi was to be recognised, and that it was full-time and non-advanced. Accordingly the conclusions in paragraph 6 of the submission follow. It is clearly reasonable to continue to treat Asiya as receiving full-time non-advanced education through the short interruption before the necessary processes could be carried out for her to start on her course at Leicester College. The decision is

therefore that the claimant is entitled to child tax credit in respect of Asiya for the period from 8 December 2007 to 20 January 2008, in addition to that already included in the decision of 27 June 2008. I put the decision in terms of entitlement rather than an award because the decision under appeal was made under section 18 of the Tax Credits Act 2002.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 10 August 2010