

Low Incomes Tax Reform Group
Case commentary on CTC 1487 2013
Judge NJ Wikeley



Marriage, civil partnerships.

This appeal concerns the legal test as to whether a married couple are “separated in circumstances in which the separation is likely to be permanent” within section 3(5A)(a)(ii) of the Tax Credits Act 2002. Can this expression cover a married woman who is living in both the same house and in the same household as her estranged husband?

Outline of the facts and issues

Mrs G had been claiming and receiving tax credits as a single person since tax year 2009-10. Having finalised her awards each year, HMRC continued to set up her initial award for tax year 2011-12 on the same single-person basis and then selected her case for review. HMRC had information which suggested that a man with the same name, Mr G, was also living at Mrs G’s address. In response to HMRC’s inquiry in January 2012, Mrs G informed them that Mr G did live at the same address and they were married but they had separated in 2008 and now lived separately. It was noted that Mrs G had previously sought confirmation from HMRC’s helpline that she should make a single claim but by January 2012, HMRC now said she should not have done so without formal separation documents as evidence that she was separated and she should, in fact, have made a joint claim.

HMRC then issued fresh decision notices for tax years 2010-11 and 2011-2012 declaring Mrs G’s entitlement to be nil, they did not mention the earlier years despite the circumstances being the same. Mrs G appealed these decisions.

Despite both Mrs G’s representative and the HMRC appeal case arguing their respective positions by reference to principles associated with whether or not Mrs & Mr G were to be regarded as living together, the first tier Tribunal correctly took reference to the point that Mr and Mrs G were a married couple and therefore the question of whether they were ‘living together’ was not the consideration in this case as it is for those who are not married or in civil partnerships. Rather the outcome of the case turned on whether the married couple were separated under a court order or in circumstances that were likely to become permanent.

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Decision of the First-tier Tribunal

The First-tier Tribunal held that Mr and Mrs G were not separated under a court order and decided as they were living under a communal household arrangement, they were not separated in circumstances that were likely to become permanent.

Mrs G appealed to the Upper Tribunal.

Claimant's view

There are a number of factual matters indicating both to there being a separation and to that separation being permanent.

- the fact that the divorce had gone through by the time of the hearing, although happening after the award period in question, demonstrates that the estrangement at the material time was permanent.
- that the first-tier Tribunal had failed to consider the emotional aspects of the case and the arrangement with the former husband was one forced on them both by circumstances and financial restraints.
- Mrs G's relationship with her new partner indicated that the breakdown of her relationship with her former husband was irreparable and permanent.

HMRC's view

- the question of whether there is an enduring household is an important and necessary consideration in relation to the question of whether a married couple are separated for the purposes of Section 3(5)(A)(a)(ii) Tax Credits Act 2002.
- the characteristics of a "household" are defined in the case law and can be distinguished from mere joint occupation of the same property (see e.g. *SW v Secretary of State for Work and Pensions (IS) [2011] UKUT 145 (AAC)*).
- the question of whether there is a household is one of fact and degree on the evidence.
- Evidence that there is a common household may also point to there being an enduring relationship of some degree.
- The first-tier Tribunal applies the correct legal test and reached a decision it was entitled to on the evidence before it
- HMRC found that the fact that the couple had two dependent children, an active joint mortgage, an active joint bank account and that Mrs G was financially dependent on Mr G meant they should have made a joint claim.
- HMRC stated that they would only change their original decision if they had 'factual documentary evidence' namely a legal separation order or evidence that such proceedings had been commenced, Mr G's car insurance proposal documents and proof of a formal or informal agreement that Mr G was to pay child maintenance.

Judge Wikeley's decision

The relevant statutory test

Judge Wikeley confirmed that the starting point in such cases must be the relevant statutory test in section 3(5A) Tax Credits Act 2002 (as substituted by section 254 and paragraph 144(3) of Schedule 24 to the Civil Partnership Act 2004).

He also confirmed that there is a distinct difference between the social security definition of spouses - a man and woman who are married to each other *and are members of the same household* - and that used for tax credits, which does not include reference to 'members of the same household' and that it is an important distinction otherwise those drafting the Tax Credits Act 2002 would have simply used the social security definition when instead they adopted the revenue law definition.

The case therefore turns on whether this married couple were 'separated in circumstances which are likely to become permanent'.

Previous case law

This involves two questions – was there a separation and if there was whether it was likely to be permanent. Most previous revenue law cases had explored the question of whether a separation was likely to be permanent (e.g. *Holmes v Mitchell (1991) 2 FLR 301*) rather than whether there was a separation at all. A similar issue was considered in R(TC) 2/06 where the Deputy Commissioner gave some helpful guidance on what should be considered when looking at separation, however again this focused on whether the separation was permanent.

Judge Wikeley spent some time considering the more recent case of *HMRC v TD (TC) (2012) UKUT 230 (AAC)* which involved a married couple who were living under the same roof during a relationship breakdown. The Judge in that case acknowledged that the tax credits legislation did not expressly refer to the need for a 'household' but that in their view, the determination of whether a couple is sharing a household is implicit in determining whether they are separated. HMRC relied on this decision to support their argument that it is entirely appropriate to consider whether the married couple are sharing a household.

The 'household' requirement

Judge Wikeley describes (paragraphs 31-36) in-depth arguments around whether a married couple can be regarded as separated even where they share a single household, and concludes (incorporating arguments from family law/separation and divorce proceedings and principles of non-separated married couples who simply live at different addresses) that they can – evidence of separate households, albeit under the same roof, is not a pre-requisite to accepting that a married couple have separated. Although the question of whether there is an enduring household (as put forward by HMRC) is often an important and necessary consideration, it is not determinative. Judge Wikeley also notes that neither limb of section 3(5A) is conclusively determined by physical separation (although physically living at different addresses may be good evidence of the separation required) instead, Section 3(5)(A) is at root concerned with emotional separation of estrangement.

The First-tier Tribunal decision

Judge Wikeley held that the Tribunal erred in law primarily because it applied the wrong legal test (that the income support test applied when as a matter of law it did not) and secondly that the

Tribunal regarded a finding that a couple shared a common household, however unhappily, as being incompatible with a finding that they were separated which is not correct.

They did not give fair weight to all the evidence presented before it, such as the presence of Mrs G's enduring relationship with her new partner, public acknowledgment that she and Mr G were separated, living and social arrangements. Giving fair weight to these, Judge Wikeley concluded that they were separated in circumstances that were likely to become permanent. Other factors mentioned were:

- There was, just about, a single albeit unhappy domestic household in existence
- The couple shared living accommodation out of necessity
- Plenty of evidence to suggest in practice they were separated – they barely spoke to each other, were in the process of disentangling their finances and each paying their own way
- They slept in separate bedrooms and meals were mostly taken separately
- When they did activities with their children, e.g. going on holiday, they did them as parents not as a married couple

He also set out that HMRC should consider all the evidence before it when making decisions, in particular those decisions (such as made under s16 of the TCA) which place the burden of proof on HMRC to establish the award is wrong.

Judge Wikeley is also critical of HMRC's advice to Mrs G. Namely that:-

1. HMRC's instruction that she needed to make the separation legal before she could be allowed to make a single claim was wrong, and
2. the further evidence which HMRC said would be needed in order to change its decision could only ever tell part of the story. All the evidence has to be considered in the round before deciding whether a couple have "separated in circumstances in which the separation is likely to be permanent". Paperwork alone can neither prove nor disprove that state of separation.