

Case No: 3BF01181

**BARNET COUNTY COURT**



St Mary's Court  
Regents Park Road  
N3 1BQ

Thursday, 26 February 2015

BEFORE:

**HER HONOUR JUDGE KARP**

BETWEEN:

**SECRETARY OF STATE FOR WORK AND PENSIONS**

Appellant

- and -

**KA**

Respondent

ZOE LEVENTHAL (instructed by Treasury Solicitor's Department) appeared on behalf of the Applicant

KA appeared in person

**Judgment**  
(As Approved)

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(Official Shorthand Writers to the Court)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be contempt of court.

1. JUDGE KARP: This is the hearing of an appeal brought by the Secretary of State for Work and Pensions pursuant section 111A of the Magistrates Court Act 1980 against the decision of a lay bench of the Willesden Magistrates' Court on 21 June 2013 in which they dismissed the Child Support Agency's application for a liability order under section 33 of the Child Support Act 1991 in the sum of £2,817.55. The appellant is represented by counsel and the respondent, a barrister, appears in person.
2. I have considered the appeal bundle including the appellant's notice and grounds of appeal dated 10 July 2013, the Magistrates' decision and hand-written notes of the legal advisor, the skeleton arguments of both parties and further submissions of the appellant. In addition, I have heard oral argument from both parties. The background and history to this matter is set out in the skeleton arguments.
3. Mrs A, the parent with care ("PWC"), made an application to the Child Support Agency on 6 July 2005 for child maintenance. The Agency made a maintenance calculation in which it determined that KA, the non-resident parent ("NRP"), was liable to pay a weekly sum of child maintenance in respect of their son. The effective date, the date on which the liability commenced, was 14 October 2005. Arrangements were made that maintenance would be paid directly between the parties from 14 October 2005 onwards. On 26 June 2007, the PWC requested that the payments be collected via the Agency. The appellants argue that by a letter dated 11 July 2007, KA was notified to commence payment via the Agency.
4. There are significant factual disputes between the parties about which correspondence was in fact sent by the Agency and what documents were received by KA. The appellants say that they explained to KA how to make payment on many occasions. Examples include 25 November 2009, a direction to pay via standing order and a standing order mandate issued and on 8 December 2009 a further notification to pay via the Agency monthly by cheque. It is not the purpose of the appeal court to resolve those factual disputes between parties.
5. The appellants' case is that, whilst the respondent made some payments to the Agency as directed, substantial arrears accrued on the account. They say that, despite repeated directions to pay via the Agency, KA continued to pay sums directly to the PWC. Some of those sums were accepted against his liability but others were not. On 1 April 2012 KA wrote to the Agency stating that he had made a payment of £5,000 to the PWC on 22 November 2010. There was some discussion as to whether that sum was paid pursuant to a spousal maintenance order or was for child support maintenance. There was detailed correspondence between the parties. The Agency made a decision not to accept, in the exercise of its limited discretion, that the sum was paid in lieu of child support maintenance and notified the parties of this decision. There is no dispute as to this decision of the Agency.
6. The Agency made an application to Willesden Magistrates' Court for a liability order in respect of outstanding payments. It is clear that the magistrates were directed to the case

of Bird v Secretary of State for Work and Pensions [2008] EWHC 3159 (Admin), summarised in Stone's Justices Manual. They decided to dismiss the Agency's application for a liability order. The hand-written reasons which form part of the bundle are:

"We have heard from the applicant that there is money outstanding. We have also heard that the respondent has made payments in excess of the amount owed to the parent with care. The applicant states that there is a spousal order which is why the payments were made. Although there is a spousal order, it is not before us (accounts). Respondent stated in evidence that the payments were child support and we are satisfied by his evidence. The CSA have not shown us on BOP that the money was not child support. Dismissed".

7. The respondent to the appeal argues that he made payments between April 2012 and February 2013 directly to the PWC and that they should be treated as child maintenance payments. It is his case that the Child Support Agency were notified, both in advance and at the time that the payments were made, of those payments. There is no dispute that in April 2011 the respondent came to an agreement with the Child Support Agency to make payments of outstanding child maintenance liabilities to them by cheque on a monthly basis. The respondent's case is that he wrote to the Child Support Agency in April 2012 informing them that, due to his insolvency, he no longer had a cheque book and requesting their bank account details into which a standing order could be set up. It is his case that the CSA did not respond to that request and that, with the agreements of his ex-wife (the person with care), he paid the child maintenance directly to her. The appellants do not accept as a matter of fact that the person with care agreed to accept direct payments.
8. The respondent argues that each time a payment was made directly to the PWC, the CSA were informed by letter and that he continued to make requests for details of their bank account but that no response was forthcoming. He argues that the CSA therefore acquiesced and allowed him to act to his detriment in making payments directly to the person with care, when they could have written to him informing him that they would not consider the payments as child maintenance. It is agreed that the CSA did provide the respondent with details of their bank account by early 2013 and that direct payments were then made. There is a dispute of fact as to whether the respondent was provided with the CSA bank account details earlier.
9. The respondent argues that there therefore has been no failure to make payments by him since the agreement on 6 April 2012 and therefore no legal basis for the liability order. He says that the magistrates used common sense and fairness and that I too should not be mechanistic or pedantic, that he had acted reasonably throughout and that he had agreed with the person with care to make direct payments. He submits that I should apply the rules of natural justice.
10. Helpfully the relevant statutory provisions have been set out by the appellant's counsel in their skeleton argument. Section 4 of the Child Support Act 1991 provides:

"(1) A person who is, in relation to any qualifying child or any qualifying children, either the person with care or the absent parent may apply to the

Secretary of State for a maintenance calculation to be made under this Act with respect to that child, or any of those children.

(2) Where a maintenance assessment has been made in response to an application under this section the Secretary of State may, if the person with care or absent parent with respect to whom the calculation was made applies to him under this subsection, arrange for—

(a) the collection of the child support maintenance payable in accordance with the calculation;

(b) the enforcement of the obligation to pay child support maintenance in accordance with the calculation.

(3) Where an application under subsection (2) for the enforcement of the obligation mentioned in subsection (2)(b) authorises the Secretary of State to take steps to enforce that obligation whenever he considers it necessary to do so, the Secretary of State may act accordingly."

Section 1(3) of the act provides:

"Where a maintenance assessment made under this Act requires the making of periodical payments, it shall be the duty of the absent parent with respect to whom the assessment was made to make those payments."

Under Section 3(6) child support maintenance is defined as:

"Periodical payments which are required to be paid in accordance with a maintenance calculation."

Section 11(2) provides that the amount of child support maintenance is to be fixed

"The amount of child support maintenance to be fixed by any maintenance assessment shall be determined in accordance with the provisions of Part I of Schedule 1."

11. The maintenance calculation itself is not at issue in this case. Section 29 of the Act provides that:

"(1) The Secretary of State may arrange for the collection of any child support maintenance payable in accordance with a maintenance calculation where:

ii. where a maintenance calculation is made under this act payments of child support maintenance under the calculation shall be made in accordance with regulations made by the Secretary of State.

...

(3) The regulations may in particular make provisions

(a) for payments of child support payments to be made

- i. to the person or persons caring for the children in question;
- ii. or through the Secretary of State;
- iii. to or through such other person as the Secretary of State may from time to time specify.

(b) as to the method by which child support maintenance payments are to be made."

12. The relevant regulations made under this provision are the Child Support Collection and Enforcement Regulations 1992. Regulation 2, entitled 'Payment of child support maintenance', provides:

"(1) Where a maintenance assessment has been made under the Act and the case is one to which Section 29 of the Act applies, the Secretary of State may specify that payments of child support maintenance shall be made by the liable person—

(a) to the person caring for the child or children in question or, where an application has been made under section 7 of the Act, to the child who made the application;

(b) to, or through, the Secretary of State; or

(c) to, or through, such other person as the Secretary of State may, from time to time, specify."

13. Regulation 3, entitled 'Method of Payment', reads:

"(1) Payments of child support maintenance shall be made by the liable person by whichever of the following methods the Secretary of State specifies as being appropriate in the circumstances

(a) by standing order;

(b) by any other method which requires one person to give his authority for payments to be made from an account of his to an account of another's on specific dates during the period for which the authority is in force and without the need for any further authority from him;

(c) by an arrangement whereby one person gives his authority for payments to be made from an account of his, or on his behalf, to another person or to an account of that other person;

(d) by cheque or postal order;

(e) in cash;

(f) by debit card."

14. Once maintenance payments are made to the Agency they are then transferred on to the person with care pursuant to Regulation 5 of the 1992 Regulations. Section 33 of the Act provides for liability order. It states that:

"(1) This section applies where—

(a) a person who is liable to make payments of child support maintenance ("the liable person") fails to make one or more of those payments; and

(b) it appears to the Secretary of State that—

(i) it is inappropriate to make a deduction from earnings order against him (because, for example, he is not employed); or

(ii) although such an order has been made against him, it has proved ineffective as a means of securing that payments are made in accordance with the maintenance assessment in question.

(2) The Secretary of State may apply to a magistrates' court or, in Scotland, to the sheriff for an order ("a liability order") against the liable person.

(3) Where the Secretary of State applies for a liability order, the magistrates' court or (as the case may be) sheriff shall make the order if satisfied that the payments in question have become payable by the liable person and have not been paid.

(4) On an application under subsection (2), the court or (as the case may be) the sheriff shall not question the maintenance assessment under which the payments of child support maintenance fell to be made.

(6) Where regulations have been made under Section 29(3)(a)—

(a) the liable person fails to make a payment (for the purposes of subsection (1)(a) of this section); and

(b) a payment is not paid (for the purposes of subsection (3)),

unless the payment is made to, or through, the person specified in or by virtue of those regulations for the case of the liable person in question."

15. In addition, the 1991 Act makes specific limited provision for circumstances in which payments made directly by the non-resident parent to the person with care or to third parties, may be taken into account even though those payments have been directed to be made through the Agency. These limited exceptions include voluntary payments at an interim stage in the proceedings and payments where each parent owe the other maintenance obligations and certain other limited exceptions which do not apply in this case. There are no other express statutory provisions which empower the Agency to take into account payments made directly to the person with care where the non-resident parent has been directed to pay through the Agency. But the Agency does have a residual discretion to take account of such payments (known as direct payments) in limited circumstances where they are made in lieu of child support maintenance or where the parent with care accepts that they were made as such. Any challenge to this discretionary

decision must be made by a request for a review and, if all appropriate alternative remedies have been exhausted, then finally by way of a judicial review to the High Court.

16. If a decision has been made by the Agency that payment through them is the appropriate course, this prevents the person with care from having to deal directly with the non-resident parent or accept payments at times or by methods that they do not want. The higher courts have dealt with the policy reasons behind this scheme which was set up to remove disputes about maintenance for the children from other disputes between the parents. Important authorities are R (on the application of Kehoe) v Secretary of State for Work and Pensions [2003] EWHC 1021 (Admin) at 17. The role of a Magistrates' Court, therefore, on an application for a liability order is a limited one. It is to determine whether payments have become payable by the liable person and have not been paid. If that is established, the magistrates are bound to make a liability order. The authority for this is Secretary of State for Social Security v Shotton [1996] 2FLR 241 per Latham J. Section 33(4) precludes the Magistrates' Court from questioning the maintenance assessment underlying the liability order. The maintenance assessment is subject to a substantive right of appeal under Section 20 of the 1991 Act. In Farley v The Child Support Agency [2006] UKHL 31, Lord Nicholls explained that the Magistrates' Court function is to check that the assessment relates to the defendant brought before the court and that the payments in question have become payable and have not been paid.

17. At paragraph 32 Lord Nicholls says:

“My conclusion, therefore, is that section 33(4) precludes the justices from investigating whether a maintenance assessment, or maintenance calculation in the current terminology, is a nullity. That has been the position ever since Section 33 was enacted in 1991. Such an investigation is a matter to be pursued today through the statutory appeal structure.”

18. In Bird v Secretary of State for Work and Pensions [2008] EWHC 3159 (Admin), Slade J found at paragraph 23:

“Section 33(3) requires a Magistrates' Court to make a liability order where it is satisfied that child support maintenance has become payable and has not been paid. In determining whether a child maintenance payment has been paid, Section 33(6) provides that a payment is not paid for the purposes of making a liability order under Section 33(3) unless the payment is made to or through the person specified in or by virtue of Regulations made under Section 29(3)(a). There is no power to make regulations under that provision to specify the method by which payments of child support maintenance are to be made. Such a power is derived from Section 29(3)(b).

24. Section 33(6) of the Child Support Act 1991 requires a Magistrates' Court to find that child support maintenance has not been paid where it is not paid to or through the person specified by virtue of the Regulations made under Section 29(3)(a). However there is no similar provision requiring the Magistrates to find that payment has not been made where it is not made by the method specified by virtue of the Regulations made under Section 29(3)(b). The absence of such a provision leads me to the conclusion that Magistrates are not obliged to make a

liability order if they are satisfied that payment was made by the liable person but by a method other than that notified by the CSA.”

19. In the case before me, the magistrates were directed to the Bird decision as summarised in Stone’s Justice Manual which states:

“Whilst under section 33(6) maintenance has not been paid where it is not paid to or through the person specified by virtue of the Regulations, there is no similar provisions requiring payment by the method specified by virtue of the Regulations made under section 29(3)(b). Therefore magistrates are not obliged to make a liability order if they are satisfied that payment was made by the liable person but by a method other than that notified by the CSA.”

20. The magistrates failed to distinguish between the person to whom the respondent had been directed to pay child support maintenance, i.e. the Agency, and the method by which it had directed that it should be paid, i.e. by cheque or standing order. They had no power to refuse a liability order if the payment had not been made to a directed person. The magistrates had no power to determine whether payments made to the person with care directly were or were not payments of child support. This is a clear breach of section 33(6). The respondent seeks to argue that the appellant should be estopped from arguing that the CSA were the person to whom he should pay because he no longer had a cheque book and they failed to advise him of their account details for direct payments. The question of whether any direct payments made by KA were payments of child support are matters for the CSA and subject to their internal complaints procedures and ultimately a judicial review, and were not a matter that could have been argued before the magistrates on an application for a liability order.
21. The factual questions which the magistrates should have answered were: (1) To whom had KA been directed to pay child support maintenance at the relevant time?; (2) Had he paid that person? (3) If he had not paid that person, then they were required to make the liability order under section 33(6). Under section 29(3)(a) and Regulation 2, payments are not to be regarded as paid unless they have been paid to the person through whom the Agency had directed them to be paid. The magistrates therefore had no power to adjudicate upon whether payments made other than to this person were nevertheless payments of child support. It is clear from their decision that they purported to do so, and thus exceeded their powers.
22. It is for this reason that I allow the appeal and set aside the decision of 21 June 2013 and remit the matter back to the Magistrates' Court to decide the relevant factual issues. It is a source of great concern to me that the listing of this appeal has taken some 20 months, which is totally unconscionable. The case appears to have been transferred from one court to the next. I shall take steps to ensure that the Designated Family Judge is made aware of this so that proper procedures are put in place, directing appeals to the correct court, now that the Family Court is in existence.