JMcG-v-Department for Communities (CS) [2021] NICom 52

Decision No: CSC1/18-19

**THE CHILD SUPPORT (NORTHERN IRELAND) ORDERS 1991 AND 1995**

Appeal to a Child Support Commissioner
on a question of law from a Tribunal's decision
dated 12 October 2016

DECISION OF THE CHILD SUPPORT COMMISSIONER

1. The decision of the appeal tribunal dated 12 October 2016 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the power set out in Article 25(2) of the Child Support (Northern Ireland) Order 1991 I set aside the decision of the appeal tribunal.

2. For further reasons set out below, I am unable to exercise the power conferred on me by Article 25(3)(a) of the Child Support (Northern Ireland) Order 1991, as amended to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, to which I have not had access, and there may be further findings of fact which require to be made. Further I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

3. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his child support liability remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

**Background**

4. In the Case Summary which he prepared for the oral hearing of the application, Mr Crilly set out the following background:

> ‘A child support maintenance calculation, assessed under the rules for applications made after 03.03.03, had been in place for the parent with care (“PWC”), (the second respondent), and the non-resident parent (“NRP”), (the appellant) from the effective date of 30.09.13.
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> Both (the second respondent) and (the appellant) were informed by Child Maintenance Services (“CMS”) in letters dated 23.04.15 that their child support case under the 2003 reformed scheme would be closed with effect from 26.10.15. As a result, both parents were advised to consider making a new child maintenance arrangement.
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> (The second respondent) elected on 10.08.15 to make an application for child support maintenance under the new child support scheme that had been introduced on a phased basis from December 2012.
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> As a result of (the second respondent’s) application, a decision maker in CMS decided on 02.12.15 that (the appellant) was liable to pay weekly child maintenance of £13.55 from the effective date of 27.10.15. (The second respondent) was notified of this outcome in a letter dated 03.12.15 whilst (the appellant) was notified of the same on 04.12.15.
>
> (The appellant) appealed against the decision dated 02.12.15 in a letter dated 18.12.15 which was received in CMS on 22.12.15.
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> The decision dated 02.12.15 was reconsidered on 09.02.16 but was not changed. (The appellant) was notified of this on the same date. As a result, his appeal continued.
>
> The first hearing of the appeal took place on 14.04.16 but was adjourned. After 2 further postponements, the substantive hearing took place on 12.10.16.’

5. To that I would add that the appeal tribunal disallowed the appeal and issued a decision notice to the following effect:

> ‘Appeal disallowed, the decision of the Department notified on 3 December 2015 is confirmed.
>
> (The appellant) is liable to pay £13.55 per week in respect of his son … from the effective date of 27 October 2015.’

6. On 20 January 2017 an application for leave to appeal to the Child Support Commissioner was received in the Appeals Service (TAS).

7. On 6 March 2017 the Legally Qualified Panel Member (LQPM) determined (i) that the application for leave to appeal had been received outside of the time limits for making such an application (ii) that the application contained no grounds on which the extension of the time limits could be sought and (iii) that, accordingly, he did not need to make a determination on the merit of the application for leave.

8. Nonetheless, on 6 March 2017 the LQPM rejected the application for leave to appeal.

**Proceedings before the Child Support Commissioner**

9. On 7 April 2017 a further application for leave to appeal was received in the office of the Child Support Commissioners. The file was forwarded to me on 17 May 2017. On 20 June 2017 I issued a direction to the Legal Officer. The file was returned to me with a response from the Legal Officer on 27 June 2017. Following a further exchange with the Legal Officer, on 26 October 2017 I accepted the late application for special reasons.

10. On 10 November 2017 I directed that written observations on the application for leave to appeal from Decision Making Services ('DMS'). In written observations dated 7 December 2017, Mr Crilly, for DMS, supported the application for leave to appeal, requested that I set aside the decision of the appeal tribunal and remit the case to a differently constituted appeal tribunal for re-determination. Written observations were shared with the appellant and the second respondent on 7 December 2017.

11. On 12 February 2018 observations in reply were received from the second respondent which were shared with the appellant and Mr Crilly on 16 February 2018. On 29 March 2018 a submission was received from the appellant which were shared with the second respondent and Mr Crilly on 10 April 2018.

12. On 15 June 2018 I granted leave to appeal. When granting leave to appeal I gave, as a reason, that the grounds of appeal were arguable. On 5 July 2018 I directed an oral hearing of the appeal. The appeal was listed for oral hearing on 16 August 2018.

13. On 2 August 2018 a further submission was received from Mr Crilly. In this submission, Mr Crilly resiled from the position which he had adopted in his original observations and requested that I set the decision of the appeal tribunal and, for further reasons which he provided, asked that I give the decision which the appeal tribunal ought to have given. On the same date I directed that the oral hearing arranged for 16 August 2018

should be postponed. The parties were to be so advised. I directed that the further submission dated 2 August 2018 should be shared with the other parties to the proceedings who were to be given a period of one month to provide a submission(s) in response. Further submissions were received and were cross-shared.

14. The file was forwarded to the Legal Officer on 5 September 2018. There were periods of file activity between then and 10 December 2018. There was no further file activity until 13 March 2019 and from that date until 31 January 2020. There was no further action taken by the Legal Officer until the file was returned to me on 26 May 2020. It is not clear to me why this was the case.

15. On 1 July 2020 I directed that the parties to the proceedings be advised that I was minded to direct an oral hearing in the case and that they be issued with the appropriate Covid-19 remote hearing protocol letters. Following receipt of replies, I directed an oral hearing of the appeal. The appeal was listed for oral hearing on 1 December 2020. On 27 November 2020 the office was informed that the appellant would be unable to take part in the oral hearing. On that basis I consented to an application for a postponement of the oral hearing. Email correspondence was forwarded to the appellant's representative in the first half of 2021 and following receipt, on 20 May 2021, of confirmation that the appellant's health had improved, the appeal was listed for oral hearing on 29 June 2021. Once again, however, the oral hearing had to be postponed.

16. The substantive oral hearing took place on 19 October 2021. The appellant was represented by Dr McCord. The first respondent was represented by Mr Crilly. The second respondent was not represented. Both Dr McCord and Mr Crilly had provided written Case Summaries for which I was grateful together with their detailed and constructive oral observations, comments and suggestions.

17. Following the oral hearing, further written submissions were received from the second respondent and when cross-shared additional submissions were received from the other parties. I dealt with these post- hearing submissions in a case management direction dated 22 October 2021.

**Errors of law**

18. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

19. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department*

([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

> "(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
> (ii) failing to give reasons or any adequate reasons for findings on material matters;
> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
> (iv) giving weight to immaterial matters;
> (v) making a material misdirection of law on any material matter;
> (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …

Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

**Certain of the submissions of the parties**

20. In his written Case Summary, Dr McCord made the following submissions on behalf of the appellant:

> 'The Appellant respectfully refers to paragraphs [12]-[19] of his submissions dated 29 October 2019.
> He contends that the Tribunal erred in law on the application of Regulation 49(2) and in further refusing to consider the appropriate issues and evidence raised by the Appellant which related to, inter alia, the Department had not followed decision making guidance; had made decisions in advance of evidence, had relied on evidence that it ought not to have relied on and had not relied on evidence from the Appellant which it ought to have considered. These were matters for the Appeal Tribunal. Regrettably, the Appeal Tribunal would not permit the Appellant make his case on these matters or on the correct the application of Regulation 49 at all.
>
> The correct arena to test the Department's compliance with guidance, regulation and use of evidence, including the 2nd Respondent's purported claims and the Court Order was at the Appeal below. Undeniably, the Appellant was prevented from doing so. Likewise, The Appeal Tribunal should also have permitted the Appellant to rely on the correct court order, all his evidence and to

test the claims advanced by the 2nd Respondent to avoid falling into error and allow justice to be done. It did not. The Appellant contends that Appeal tribunal impaired the Article 6 Rights of the Appellant in that he was not able to advance his case to its height or in fact at all. He was not permitted to effectively participate in the hearing or to conduct or contest the arguments or evidence to influence the outcome in his favour. The hearing was adjourned and a decision made without hearing or reasonably allowing the Appellant to make his case.

The Appeal Tribunal demonstrably fell into error in both fact and law.

Following the Appeal below, the Department aver that the clear error in law by the Appeal Panel, on the central issue of the appeal being the Appellant's contention that there was no liability due to the exactly equal share care of the subject child, would not have resulted in a different outcome. The Appellant would say this is wholly incorrect and runs contrary to the principles of fair and natural justice and his Article 6 rights to a fair hearing.'

21. In his Case Summary, Mr Crilly made the following submissions in response:

'(The appellant) has submitted that the evidence upon which the Department now relies is untested and therefore prejudicial. The tribunal should have tested the credibility of this and then balanced it against the evidence in his possession. The tribunal did not do this and, in adjourning the hearing, the LQM breached his rights to a fair trial.

I submit that the tribunal decision under appeal included all the elements required for a fair hearing. The tribunal was independent, impartial and established by law. I further submit that (the appellant) was invited to attend the tribunal hearing in order to present his case and that both he and the Department were given the opportunity to examine and comment on each other's submissions prior to the hearing. In addition, the tribunal issued a decision which included its reasoning in relation to the issue before it. (The appellant) had been afforded the opportunity to appear at the hearing and to provide evidence in support of his appeal. It appears from the papers that the only reason that stopped this being met in full was his own conduct during the proceedings.'

**The record of proceedings for the appeal tribunal hearing**

22. As the issue of what transpired at the appeal tribunal is central to my decision I set out the complete record of proceedings as follows:

> 'LQM effects introductions and clarifies independence of the Tribunal. LQM makes reference to the decision under appeal.
>
> (The appellant's representative): I will not be making oral submissions – (The appellant) will conduct his appeal.
>
> LQM: You have read the Department's submission: Where has the Department got its facts wrong or misstated the law?
>
> (The appellant): As per (second respondent's) own statements there is 50/50 shared care and I am not liable to pay any child support.
>
> (The Presenting Officer): I refer the Tribunal to Regulation 49(3) of the Child Support Maintenance Calculation Regulations (NI) 2012 - see page L9. (The second respondent) receives child benefit and in the circumstances she is assumed, in the absence of evidence to the contrary, to provide day to day care to a greater extent than (the appellant). That makes (the appellant) the non-resident parent and liable for payment of Child Support. (The appellant) has provided no evidence to the contrary about greater provision of day to day care.
>
> LQM: (The second respondent) has replied to the Department's letter of 12.1.16 but you, (the appellant), have made no reply to the similar enquiry letter at page B44. (The second respondent) has provided evidence of day to day care in her letter of 29.1.16 at page B55. Your son is registered with a doctor and a dentist at (the second respondent's) address. Your son's passport has been arranged by (the second respondent) as has his medical card which is registered to her address. What evidence do you have about day to day care?
>
> (The appellant): I don't need to provide this. I don't need to go beyond Regulation 49(2). There is 50/50 shared care. My appeal is that I am not liable for payment. My appeal is about why my case has not been listed by the Department as sensitive ...

LQM: (Interrupting): No that is not what this appeal is about. Those are administrative matters. I repeat where is your evidence to show greater day to day care?

(The appellant): Why do you (to LQM) keep looking at him (meaning (the Presenting Officer).

((The appellant) then begins loudly to confer with (his representative) while (the Presenting Officer is speaking).

LQM: Please don't interrupt the hearing.

(The appellant): Why not? You can't make me listen.
LQM: I am going to suspend this hearing. Please leave.

(The appellant): (Rising to his feet) I may not come back. The whole atmosphere has been hostile from the beginning (as he exits). You (to LQM) may be looking for another job. I will be getting another Tribunal.

LQM: (To remaining parties after (the appellant) and (his representative) have left). I am sorry, but the hearing cannot continue in the Appellant's absence. We must ask everyone to leave and we will consider what to do next.

(All parties then leave).'

**The statement of reasons for the appeal tribunal's decision**

23. The reasons for the appeal tribunal's decision are as follows:

'1. On 3.12.15 the Child Maintenance Service in the Department of Social Development ("the Department") made a decision ("the Decision") whereby (the appellant), the non-resident parent and father of the qualifying child … (born … ) ("the child") was liable to pay £13.55 per week for the child from the effective date of 27.10.15. ('The Appellant") wrote a letter of appeal against the decision. An initial hearing of the appeal on 14.4.16 was adjourned when the financially qualified member recused himself. A new hearing with a different financially qualified member proceeded on 12.10.16. Those attending the hearing are listed on the front page of the record of proceedings.

2. The Department's written appeal submission indicated that there had been proactive closure from a previous child maintenance scheme and explained selection of 27.10.15 as the effective date of initial maintenance

calculation under the current scheme. HMRC had provided the Department with evidence of the Appellant's income and the submission further explained the formula for the maintenance calculation and the relevant legislation. The Appellant's long appeal letter of 18.12.15 did not specifically challenge the accuracy of the evidence or of the maintenance calculation.

3. (The second respondent) ("the parent with care") is mother to the child. In correspondence with the Department she indicated that there was 50/50 shared care as defined by overnight stays. The Appellant refused to provide the Department's officials with any information on the phone and failed to respond to the Department's requests for information. Nonetheless, the Department accepted that there was precisely 50/50 shared care and applied a 3.5/7 reduction. This reduced the Appellant's weekly liability from £41.09 to £13.55.

4. The Appellant's demeanour throughout the appeal hearing was over bearing and indignant. He was evidently contemptuous of the Department. Some indication of that contempt is given by the Appellant's refusal to accept that he is liable for arrears of child maintenance and has written that he will not be paying any arrears.

5. What was the response of the Appellant to Regulation 49(3) of the 2012 Regulations? The Appellant replied that Regulation 49(3) did not apply to him, only Regulation 49(1) and (2) so applied. The Appellant did not want to discuss arrangements for the day to day care of his son … ; indeed at no point through the hearing did he refer to the child at all. By contrast the parent with care had provided the Department with considerable detail about her day to day care of the child. The Appellant's tactic was pointedly to argue with the Department's officials – and with the Tribunal - about what he perceived to be failures of process. When advised that administrative issues within the Department were beyond the remit of the Tribunal the Appellant's response was simply to contradict what had been said.

6. The Appellant was unwilling to accept the applicability of Regulation 49 (in its entirety) to his circumstances and he was evidently unwilling to provide any detail or evidence to show why the extent of his day to day care for the child exceeded that of the parent with care. The Appellant's conduct forced a suspension of the hearing

> and it is unfortunate that the parent with care was allowed no opportunity to speak to the Tribunal or to give evidence.
>
> 7. Immediately after the parties had left, the Tribunal decided that no useful purpose would be served by a restart. Throughout the Department's enquiries and also during the hearing the Appellant had been difficult and uncooperative. The Appellant denied that he was the non resident parent but at no stage did he submit any evidence to show that his day to day care of the child was greater than the care provided by the parent with care. The Appellant's case was that, because a 50/50 overnight child care arrangement was in place, he was subject only to Reg 49(1) and (2) of the Child Support Maintenance Calculation Regs (NI) 2012. The Tribunal rejected the Appellant's apparent interpretation of the legislation. Responsibility lay with the Appellant to provide evidence of greater day to day care and he had refused to do that. The Tribunal again carefully checked the Department's appeal submission and found the maintenance calculation, together with the decision under appeal, to be correct. The Appellant is liable to pay child support maintenance of £13.55 per week in respect of his son … from the effective date of 27 .10.15.'

**Analysis**

24. Dr McCord's reference to 'Article 6' is Article 6 of the European Convention on Human Rights and Fundamental Parties ('the Convention'). The Convention was incorporated into United Kingdom law through the Human Rights Act 1998. Article 6(1) provides:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …

25. As was noted by the authors of volume III of *Social Security Legislation 2021/22,* in paragraph 4.100 of that work, the significance of Article 6 has been noted by the Social Security Commissioners and judges of the Upper Tribunal.

26. In *CJSA/5100/2001* the Commissioner said the following at paragraphs 5 and 6:

> 'I choose to explain my decision in terms of the claimant's Convention right to a fair hearing under article 6(1) of the European Convention on Human Rights and

> Fundamental Freedoms. In particular, I rely on the equality of arms principle that has developed in the jurisprudence of the Strasbourg authorities as part of that right. It requires that the procedure followed by the tribunal must strike a fair balance between the parties so that none is at a disadvantage as against the others …
> I could, no doubt, have reached the same conclusion under domestic principles of natural justice. However, the Human Rights Act 1998 provides a convenient opportunity for Commissioners to rebase their decisions on procedural fairness in fresh terms. In my view, this would be desirable. I am sure that tribunals are familiar with the principles of natural justice. However, increasingly the cases that come to me suggest that they are not applying them. If there is a common theme in those cases, it is that the tribunal has not provided a procedural balance between the parties. The introduction of the language of balance would provide a touchstone for tribunals.'

27. In *DG v SSWP (ESA)* ([2010 UKUT 409 (AAC), the Upper Tribunal Judge said the following, at paragraphs 25 to 28:

> '25. Quite apart from the errors of law which I have identified, there is a serious issue whether in all the circumstances of this case the claimant had the fair hearing to which he was entitled under article 6 of the European Convention on Human Rights. It is, of course possible to waive the right to an oral hearing, but, as was stated by Lord Phillips CJ in Peter Smith v Kvaerner Cementation Foundations Ltd (the Bar Council intervening) [2006] EWCA Civ 242 (Kvaerner), at paragraph 29 in relation to the question whether a right to object on the ground of bias had been waived:
>
> > "The vital requirements are that the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an un-pressured decision."
>
> 26. Here the claimant waived the right to an oral hearing, but appears to have done so on the basis of misinformation from the Jobcentre, without being aware of all the material facts or of the consequences of the choice open to him.
>
> 27. What a fair trial requires cannot be the subject of a single, unvarying rule or collection of rules. It is proper to

> take account of the facts and circumstances of particular cases, as the European Court has consistently done - see per Lord Bingham in Brown v Stott [2003] 1 AC 681, at p.693. Or, as it was put in CIS/540/2002 at paragraph 37, "…..it is the whole process and the way it actually works in the individual case that have to be judged for the purposes of Article 6"

28. As it was put in Dombo Beheer BV v the Netherlands, 27 October 1993, Series A, no 274, by the Court of Human Rights:

> "33. Nevertheless, certain principles concerning the notion of a "fair hearing" in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases as well as to criminal cases (see the Feldbrugge v the Netherlands judgment of 26 may 1986, Series A no 99, p 17, paragraph 44).
> The Court agrees with the Commission that as regard litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-a-vis his opponents.
> It is left to the national authorities to ensure that in each individual case the requirements of a "fair hearing" are met."'

28. Article 6 is concerned, *inter alia*, with the determination of civil rights and obligations and it covers social security adjudication – see *Feldbrugge v The Netherlands*, Series A No. 99; 91986) 8 E.H.R.R. 425; *Deumeland v Germany*, Series no. 120; (1986) E.H.R.R. 448; and *Salesi v Italy*, Series A No. 257-E; (1998) 26 E.H.R.R. 187. In *Schuler-Zgraggen v Switzerland*, Series A No. 2633; (1993) 16 E.H.R.R. 405, the European Court of Human Rights (ECtHR) said the following at paragraph 46:

> "… the development in the law that was initiated by [the] judgments [in *Feldbrugge* and *Deumeland*] and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6(1) does apply in the field of social assistance, including even welfare assistance."

29. In paragraph 4.107 of volume III of *Social Security Legislation 2021/22*, the authors provide an overview of the requirements of a fair trial under article 6. Reference is made to the decision of the ECtHR in *Kraska v*

*Switzerland* (Series A No. 254-B; (1994) 18 E.H.R.R. 188, where the court said the following, at paragraph 30:

> 'The effect of Article 6(1) is, inter alia, to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.'

30. Thereafter, the authors submit that the over-riding requirement of fairness reflects five inherent requirements for a fair trial together with the four explicit requirements set out in article 6. The inherent requirements are:

(a) equality of arms'
(b) a judicial process;
(c) a right to an appearance in person;
(d) a right to effective participation; and
(e) a right to a reasoned decision.

The explicit rights are to:

(a) an independent and impartial tribunal established by law;
(b) a public hearing;
(c) a public judgment; and
(d) judgment in a reasonable time.

31. In this context I also note regulation 38 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, ('the 1999 Regulations), which provides:

> '38.—(1) The procedure in connection with the consideration and determination of an appeal or a referral shall, subject to the following provisions of these Regulations, be such as a legally qualified panel member shall determine.
>
> (2) A legally qualified panel member may give directions requiring a party to the proceedings to comply with any provision of these Regulations or the 2016 Regulations and may at any stage of the proceedings, either of his own motion or on a written application made to the clerk to the appeal tribunal by any party to the proceedings, give such directions as he may consider necessary or desirable for the just, effective and efficient conduct of the proceedings and may direct any party to the proceedings to provide such particulars or to produce such documents as may be reasonably required.

> (3) Where a clerk to the appeal tribunal is authorised to take steps in relation to the procedure of the tribunal he may give directions requiring any party to the proceedings to comply with any provision of these Regulations or the 2016 Regulations.'

32. Regulation 49, which is headed 'Procedure at oral hearings' and, in particular, paragraphs (1), (7(a)) (8) and (11) of that regulation, are equally important, and provide:

> '(1) Subject to the following provisions of this Part, the procedure for an oral hearing shall be such as the chairman or, in the case of an appeal tribunal which has only one member, such as that member, shall determine.
> …
> (7) At an oral hearing—
> (a) any party to the proceedings shall be entitled to be present and be heard;
> …
> (8) A person who has the right to be heard at a hearing may be accompanied and may be represented by another person whether having professional qualifications or not and, for the purposes of the proceedings at the hearing, any such representative shall have all the rights and powers to which the person whom he represents is entitled.
> …
> (11) Any person entitled to be heard at an oral hearing may address the tribunal, may give evidence, may call witnesses and may put questions directly to any other person called as a witness.'

33. The Article 6(1) right to a fair and trial and its inherent requirements and explicit rights have to be balanced by the requirement for the parties to recognise the importance of the proceedings and demonstrate respect for those participating in those proceedings whether the judicial members of the tribunal or the other parties to the proceedings. While tribunals adopt an ethos and approach which is less formal than court proceedings, it is important to note that tribunal proceedings are judicial proceedings.

34. We live in a society where those who provide a service to the public, either in the public or private sector, are entitled to respect and courtesy from those with whom they interact. In that context there is a frequent exhortation that disrespect in all of its forms will not be tolerated. Similar principles apply in tribunal proceedings. The President of Appeal Tribunals has published a Code of Practice for Tribunal Representatives which is published on the Appeals Service website. As the title suggests the Code is aimed at those who provide representation before appeal

tribunals. Nonetheless, there is one important section of it which has relevance here:

> '12. Representatives and appellants will be treated by the tribunal with courtesy, politeness and respect. It is expected that the tribunal members, clerks and administrators will be treated in a similar way by representatives and appellants. Representatives will use their best endeavours to ensure that appellants are aware of this and that they too will behave appropriately. For the avoidance of doubt representatives and appellants are informed that foul and abusive language, threats and/or acts of violence towards tribunal members or staff will not be tolerated under any circumstances and may be the subject of a report to the police and, in the case of a representative, to his/her employer, funding organisation and/or professional body.'

35. Appeal tribunals have a range of powers which they may employ to address the consequences of a failure by any party to adhere to appropriate standards of conduct. The decision of Upper Tribunal Judge Jacobs in *AD v Information Commissioner and Devon County Council* ([2013] UKUT 0550(AAC)) was in the context of a tribunal's powers to strike out proceedings but his comments in paragraphs 16, 17 and 19 of the decision are apposite:

> 'Most appellants correspond with the tribunal only when necessary, make moderate criticisms and allegations, and express themselves politely. There is, however, a small body of appellants who are persistent in their correspondence which contains wild allegations that are expressed in an intemperate or aggressive tone. This is true of all the tribunals I have been involved in over the last quarter of a century and is probably true of all judicial bodies.
>
> It is usually possible to deal with that small minority of appellants without resorting to the power to strike out proceedings. It is possible to ban a party from using emails and direct that any that are sent will be ignored. Another way is to limit a party to communicating in writing and only when requested, with other letters being filed but ignored. At a hearing, it is possible to limit the time allowed to a party or, if necessary, to require a party to leave the hearing room. In my experience, measures such as this are usually effective. The tribunal is also able to protect the other parties by directing that all correspondence be channelled through the tribunal.

> These are just examples; they are not intended to be exhaustive.
>
> …
>
> In conclusion and despite the submissions of the respondents, I consider that the tribunal was not entitled to take the draconian step of striking out the proceedings in Mr D's appeal. This had the effect of bringing proceedings to an end and shutting him out from having a judicial consideration of his right to the information he had requested. This was not a proportionate response to his behaviour. There were more flexible responses that could have been employed. Mr D's behaviour could have been managed in ways that were just as effective. The tribunal could have protected itself, its staff and the other parties without depriving Mr D of his right of appeal. That is why I have set aside the First-tier Tribunal's decision and re-made it to provide that his appeal to that tribunal is not struck out. '

36. One important message from the cited paragraphs is that, *in an appropriate case*, the appeal tribunal may deal with the consequences of intemperate or aggressive behaviour by directing that a party must leave the appeal tribunal room. In my period as a salaried LQPM of Appeal Tribunals, I made such a direction in exceptional cases consequent on the degree of unreasonableness of the behaviour displayed to me.

37. A second lesson is that the appeal tribunal has alternative means of maintaining the balance between effective participation and respect for the dignity of proceedings. For example, a formal direction could be issued to a party under regulation 38 of the 1999 Regulations requiring him or her to comply with undertakings relating to his/her behaviour and setting out the consequences of a failure to comply with such undertakings. An LQPM could explain to a party at a hearing why certain submissions have no relevance to the issues which arise in the appeal or note that oral assertions are repetitive, or replicate what has already set out in writing or, as was noted above, limit the time allowed to a party. The LQPM could remind a party that courtesy and respect will be extended to him or her and that the expectation will be that this will be reciprocated to the members of the appeal tribunal. It is also important to note that the issues which arise in tribunal hearings involving social security benefits and, in particular, child maintenance, are often emotive and always of significance to the appellant as a party and that, accordingly, extra care may need to be taken. I repeat, however, that a party to the proceedings cannot do what they want, cannot display behaviour which is unacceptable and must, in appropriate cases, expect certain consequences in response.

38. I turn to the application of these principles to the instant case. While mindful that regulations 38 and 49 of the 1999 Regulations specify that the procedure in connection with the consideration and determination of an appeal or a referral shall be such as an LQPM shall determine, from my consideration of the record of proceedings and the statement of reasons, I conclude that in this case the LQPM's specification of the procedure was such that he would not permit the appellant to advance the arguments and submissions which he wished. The adoption of that procedure is contrary to the principle in *Kraska v Switzerland*. I repeat what the ECtHR said in the case:

> 'The effect of Article 6(1) is, inter alia, to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.'

39. Looking at the record of proceedings and the statement of reasons, it is clear that the appellant wished to advance the arguments that regulations 49(1) and (2) of the Child Support Maintenance Calculation Regulations (Northern Ireland) 2012 applied in his case. The LQPM, who will have prepared the record of proceedings, concedes that he interrupted the appellant when he attempted to make submissions about regulations 49(1) and (2). It was the LQPM's view, apparent from the statement of reasons, that regulations 49(1) and (2) did not apply. Despite that, his abrupt and rushed rejection of the appellant's submissions and arguments is clearly contrary to what was mandated by *Kraska*.

40. I accept that the LQPM was faced with a difficult situation. That much is evident by the LQPM's decision to ask the appellant and his representative to leave the hearing room and he may well have been justified in making that decision. I return to that decision below. The immediate consequences were that the second respondent and the presenting officer remained in the hearing room. I am somewhat perplexed by the LQPM's subsequent decision that they were also required to leave. The record of proceedings suggests that they were asked to leave the hearing room while the tribunal 'decided what to do next'. As will be discussed below, the tribunal's decision on what to do next was to continue with the hearing in the absence of all of the parties.

41. If the appellant's ejection from the hearing was due to his conduct and behaviour and the second respondent and the presenting officer were not culpable then I can see no reason why the second respondent and the presenting officer should not have been permitted to stay. It may be that the LQPM thought that the principle of equality of arms meant that the appeal could not continue to be heard without the appellant present but, as noted above, the removal of a party to the proceedings from a hearing for unacceptable behaviour and the continuation of the hearing in their absence is permitted in exceptional circumstances. It seems to me that

the LQPM had lost control of the proceedings and his direction that the second and respondent should also leave the room was rushed and muddled.

42. In the statement of reasons the LQPM concedes that:

> '… [the] appellant's conduct forced a suspension of the hearing and it is unfortunate that the parent with care was allowed no opportunity to speak to the Tribunal or to give evidence.'

43. It seems to me that the decision to require second respondent and the presenting officer to leave the hearing room and continue the hearing of the appeal in their absence infringed their Article 6 rights and that is despite the fact that the appeal was unsuccessful.

44. I return to the decision to require the appellant and his representative to leave the hearing room. In the record of proceedings and the statement of reasons the language used by the LQPM was that he was suspending the hearing. The inclusion of that description in the record of proceedings suggests that this is what the appellant and the presenting officer were told. The word 'suspension' is usually redolent of a temporary interruption with an expectation that what was suspended would resume although I do accept that the word can also be used as a substitution for postponement. Accordingly, the appellant and his representative would, in my view, have been entitled to assume that the hearing would re-commence or, if that was not to be the case, that the hearing was over as far as they were concerned. It is the case that the first occasion on which all of the parties to the proceedings were informed that the hearing would not be resumed was when the clerk to the appeal tribunal informed them of the outcome of the appeal.

45. I am of the view that the proceedings could and should have been handled in a different manner. In terms of the effect of what occurred on the outcome of the appeal, I am satisfied that the appeal tribunal has committed or permitted a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings and, accordingly, its decision is in error of law.

46. This is sufficient to dispose of the appeal which is before me. I have, not, therefore, considered the other arguments which have been advanced by Dr McCord and the reply to those arguments by Mr Crilly. I do not wish to do any disservice to the careful analysis advanced by them both.

**Disposal**

47. Both Dr McCord and Mr Crilly have asked that should I find the decision of the appeal tribunal to be in error of law the most appropriate form of disposal would be for me to make the decision which the appeal tribunal

ought to have made. They do not, however, agree on that that decision should be. Dr McCord submits that I should:

> '… determine that there is no maintenance liability pursuant to the exactly equal court order known to both the department and the 2nd Respondent when the application and original decision was made.'

48. Mr Crilly submits that despite the decision of the appeal tribunal being in error of law on another basis I should confirm the appeal tribunal's substantive decision that the appellant is liable to pay weekly child support maintenance of £13.55 from the effective date of 27 October 2015 after allowance has been made for the amount of shared overnight care that he provides.

49. I have concluded that I am unable to exercise the power conferred on me by Article 25(3)(a) of the Child Support (Northern Ireland) Order 1991, as amended to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, to which I have not had access, and there may be further findings of fact which require to be made. Further I do not consider it expedient to make such findings, at this stage of the proceedings. The more apposite fact-finding body is the appeal tribunal below.

50. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.

51. I make the following directions:

    (i) I direct that a further appeal submission is prepared for the further hearing of the appeal before the differently-constituted appeal tribunal and that the Department utilises the knowledge and expertise of Mr Crilly in the preparation of that submission.

    (ii) The President of Appeals Tribunals or the salaried LQPM may wish to consider whether additional directions for the procedure in connection with the consideration and determination of the further hearing of the appeal are required.

    (iii) Thereafter, it will be for all of the parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal.

    (iv) It will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed):  K Mullan

Chief Commissioner

3 November 2021