DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 22 February 2011 at Cardiff under reference 188/09/05793) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 20(7)(a) of the Child Support Act 1991, any other issues that merit consideration.

REASONS FOR DECISION

A. The parties

1. The parties in this case are Mr J, the Secretary of State who has now taken over the jurisdiction of the Child Maintenance and Enforcement Commission, and the mothers of Maxon and Abbey who are Mr J's children.

B. The hearing in absence

2. The background is very simple and unrelated to the merits of the case before the First-tier Tribunal.

3. The appeal was brought before that tribunal in July 2009 by Maxon's mother. Mr J was, therefore, a respondent to the appeal. The appeal came on for hearing on 22 February 2011. Mr J did not attend. The judge made detailed inquiries into what had happened. What he found was this. The appeal had first been listed in November 2009, when notice had been sent to Mr J at the address held by the tribunal. I call this his 'original address'. Both mothers attended the hearing, but Mr J did not. One mother told the tribunal that he had moved to what I call his 'new address'. The tribunal adjourned and sent the notice of the adjournment to the original address. It did, though, direct the Commission to check Mr J's current address. There was then a long delay; I do not understand what caused it. In the meanwhile neither the Commissioner nor Mr J notified the tribunal of a new address. The case was eventually listed for hearing in February 2011 and notice was sent to Mr J's original address. It was not until the hearing itself that the Commission's presenting officer told the tribunal that Mr J had given notice of his new address in November 2010. A Land Registry search had shown that Mr J's original address was owned by a woman, said to be Mr J's partner. One mother told the tribunal that they rented out the original address and lived at the new address.

4. The result was that the tribunal knew at the date of the hearing that it did not hold Mr J's correct address. Nevertheless, it proceeded in his absence. The tribunal decided that it was 'most probable' that Mr J knew of the hearing because post 'would most likely have been passed to him or forwarded on to him'

and he 'would have received actual notice … in this way.' Even if he did not, the tribunal considered that it was 'overwhelming likely that he knew there was an on-going appeal', since some of the correspondence from the tribunal would have reached him. So his non-attendance was more likely due to choice rather than ignorance. It was entitled to assume that a party's notified address remained the proper address for correspondence.

5. Nothing that I say is a criticism of the judge who heard this case. The issue arose at the hearing and he dealt with it on the spot in detail and with care. His attention to the issue is in marked contrast to the typical case of non-attendance that comes before the Upper Tribunal.

C. The rules

6. The tribunal had to apply the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI No 2685). In particular, it had to apply rule 31, which deals specifically with hearings in the absence of a party:

> **31 Hearings in a party's absence**
>
> If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing.

Rule 13(5) is relevant, as it deals specifically with addresses:

> **13 Sending and delivery of documents**
>
> …
>
> (5) The Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary.

Both rule 31 and 13(5) have to be applied in conjunction with rule 2, which deals with the overriding objective and the duty to co-operate:

> **2 Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

D. Analysis

7. The issue is whether the tribunal made an error of law when it proceeded in Mr J's absence. The answer is found at the confluence of the rules on notice of hearing, the overriding objective and natural justice.

8. The focus of these provisions differs. The focus in rule 31 is on the quality of the tribunal's decision-making. The focus in rule 2 is on interpretation and application in order to achieve a particular result. And the focus of natural justice is on whether that result was achieved. In their operation, they cannot be kept separate.

9. Rule 31 contains two paragraphs; both must be satisfied. Paragraph (a) concerns notice of the hearing; paragraph (b) concerns justice. For the First-tier Tribunal, the question is whether it *is satisfied* as regards notification and whether it *considers* that justice allows it to proceed. For the Upper Tribunal, the question is whether the First-tier Tribunal was entitled to make those decisions.

10. Starting with rule 31(a), this requires notice of hearing. It is not sufficient that the party has notice of the proceedings. There is no definition of *notify*. The contrast between notifying and taking reasonable steps to notify suggests that notification means actual communication to an address. Rule 13(5) is relevant here, as it allows the tribunal to *assume* that an address remains current. This can be seen as a corollary to the duty to co-operate under rule 2(4) by notifying a tribunal of any change of address. But rule 13(5) contains only a power and an assumption. It must be applied in order to further the overriding objective.

11. The tribunal's principal finding was that Mr J did receive notice through the tenant at the original address. The Secretary of State's representative has argued that its reasoning was not sound. Why, she asks, should a new tenant pass correspondence to someone who has a different name from their landlord and whose name they may not know? I accept that argument. The representative also

challenges the tribunal's alternative reasoning that Mr J must have known that there were proceedings ongoing. As she points out, the notice that has to be given is of the hearing. I accept that argument also.

12. The judge did not expressly deal with rule 31(b). It is, though, possible to read his entire reasoning as directed also at the justice of the hearing proceeding. However, with his findings undermined, the basis for any assessment of justice that he did make falls with them. I will merely note for tribunals in the future that there is some overlap between paragraph (b) and rule 2, as both concern justice. The specifics of the overriding objective help to give meaning to the term *justice*. And the duty to co-operate with the tribunal in rule 2(4) imposes responsibilities as part of the analysis of what justice requires. In this case, as the representative points out, rule 2(2)(c) is relevant. Knowing that the tribunal had used an out-of-date address, was it practicable to take more steps to allow Mr J to participate. Tribunals must, of course, be alert to prevent tactical delay in proceedings, but they must also be alert to prevent the consequences when circumstances conspire to disrupt normal procedures.

13. Finally, there is natural justice. This is of more concern to me than the soundness of the tribunal's findings of fact. The issue is whether Mr J had a fair hearing. It is not whether the tribunal reasonably believed that he did. The tribunal, having dealt with rule 31 in detail, should have considered whether its conclusion allowed it to give a fair hearing. The factor that troubles me in this case is that the tribunal knew it had used the wrong address. The officers seem to have relied on an address that the tribunal knew might be out of date and the Commission had not informed the tribunal of a notified change. In those circumstances, the tribunal should at least have asked whether there could be a fair hearing in those circumstances. Whatever Mr J's motivation might have been is speculation. The fact is that he did notify the Commission of his new address, which does not suggest that he was trying to avoid contact. The tribunal did not show any concern for that. I accept the representative's argument that there was more the tribunal could have done to ensure that all the parties had a fair hearing, even at the expense of delay. That was an error of law.

14. There will now be a rehearing before a different panel of the First-tier Tribunal.

Signed on original
on 5 December 2012

Edward Jacobs
Upper Tribunal Judge