UPPER TRIBUNAL CASE NOS: CCS/1771, 1772, 1773, 1775, 1776 and 1777/2016

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

CCS/1771, 1772, 1773, 1775 and 1776/2016

The decision in these appeals are given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decisions of the First-tier Tribunal under references SC186/15/00851, 00853, 01401, 01949 and 01950, made on 15 February 2016 at Bristol, did not involve the making of an error on a point of law.

CCS/1777/2016

As the decision of the First-tier Tribunal (made on 15 February 2016 at Bristol under reference SC186/15/02271) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the appeal to the First-tier Tribunal under this reference is struck out for lack of jurisdiction.

For convenience, this appeal relates to the Secretary of State's decision of 26 November 2013 from the effective date of 20 September 2013. It covers the inclusive period from that date to 20 February 2014.

REASONS FOR DECISION

1. Ultimately, these six cases concern the amount of the non-resident parent's income that should be taken into account through variations in calculating his child support liability in respect of Julian with effect from these dates:

    17 August 2012

    24 May 2013

    20 September 2013

    21 February 2014

    23 May 2014

    20 March 2015.

2. In essence, the non-resident parent's grounds of appeal raise three issues.

- whether the First-tier Tribunal had jurisdiction to hear five of the appeals; there is no dispute about its jurisdiction to hear the appeal against the final calculation;

- whether the tribunal had given adequate reasons for agreeing to a variation; and
- whether the tribunal had properly taken into account the practicalities of running and funding the non-resident parent's business.

I deal with the issues in that order. As the first issue involved questions of mandatory reconsideration, I first set out the relevant legislation.

A. Mandatory reconsideration

3. Mandatory reconsideration is a convenient non-statutory term that refers to the obligatory requirement that the Secretary of State must consider whether to revise a decision before a party may appeal against it. It came into force on 28 October 2013.

The legislation

4. Section 20 of the Child Support Act 1991 provides for a right of appeal to the First-tier Tribunal:

> **20 Appeals to First-tier Tribunal**
>
> (1) A qualifying person has a right of appeal to the First-tier Tribunal against-
>
> (a) a decision of the Secretary of State under section 11, 12 or 17 (whether as originally made or as revised under section 16);
>
> (b) a decision of the Secretary of State not to make a maintenance calculation under section 11 or not to supersede a decision under section 17;
>
> …
>
> (2) In subsection (1), 'qualifying person' means-
>
> (a) in relation to paragraphs (a) and (b)-
>
> (i) the person with care, or non-resident parent, with respect to whom the Secretary of State made the decision, …
>
> (2A) Regulations may provide that, in such cases or circumstances as may be prescribed, there is a right of appeal against a decision mentioned in subsection (1)(a) or (b) only if the Secretary of State has considered whether to revise the decision under section 16.
>
> (2B) The regulations may in particular provide that that condition is met only where-
>
> (a) the consideration by the Secretary of State was on an application,
>
> (b) the Secretary of State considered issues of a specified description, or
>
> (c) the consideration by the Secretary of State satisfied any other condition specified in the regulations.

The regulations under section 20(2A) and (2B) are made by the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI No 991):

> **3B Consideration of revision before appeal in relation to certain child support decisions**
>
> (1) This regulation applies in a case where-
>
> (a) the Secretary of State gives a person written notice of a decision; and
>
> (b) that notice includes a statement to the effect that there is a right of appeal against the decision only if the Secretary of State has considered an application for a revision of the decision.
>
> (2) In a case to which this regulation applies, a person has a right of appeal under section 20 of the Child Support Act 1991 (as substituted by section 10 of the Child Support, Pensions and Social Security Act 2000) against the decision only if the Secretary of State has considered on an application whether to revise the decision under section 16 of that Act.
>
> (3) The notice referred to in paragraph (1) must inform the person of the time limit specified in regulation 3A(1)(a) for making an application for a revision.
>
> (4) Where, as the result of paragraph (2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 16 of that Act.
>
> (5) In this regulation 'decision' means a decision mentioned in section 20(1)(a) or (b) of the Child Support Act 1991 (as substituted by section 10 of the Child Support, Pensions and Social Security Act 2000).

The time limit specified in regulation 3A(1)(a) is 'within one month of the date of notification of the decision or within such longer time as may be allowed under regulation 4'.

> **4 Late application for a revision**
>
> (1) The time limit for making an application for a revision specified in regulation … 3A(1)(a) may be extended where the conditions specified in the following provisions of this regulation are satisfied.
>
> (2) An application for an extension of time shall be made by the relevant person … or a person acting on his behalf.
>
> (3) An application shall–
>
> (a) contain particulars of the grounds on which the extension of time is sought and shall contain sufficient details of the decision which it is sought to have revised to enable that decision to be identified; and
>
> (b) be made within 13 months of the date of notification of the decision which it is sought to have revised, but if the applicant has requested a

statement of the reasons in accordance with regulation 3ZA(3)(b) or regulation 28(1)(b) the 13 month period shall be extended by–

(i) if the statement is provided within one month of the notification, an additional 14 days; or

(ii) if it is provided after the elapse of a period after the one month ends, the length of that period and an additional 14 days.

(4) An application for an extension of time shall not be granted unless the applicant satisfies the Secretary of State … that–

(a) it is reasonable to grant the application;

(b) the application for revision has merit, except in a case to which regulation … 3B applies; and

(c) special circumstances are relevant to the application and as a result of those special circumstances it was not practicable for the application to be made within the time limit specified in regulation … 3A.

(5) In determining whether it is reasonable to grant an application, the Secretary of State, shall have regard to the principle that the greater the amount of time that has elapsed between the expiration of the time specified in regulation … 3A(1)(a) for applying for a revision and the making of the application for an extension of time, the more compelling should be the special circumstances on which the application is based.

(6) In determining whether it is reasonable to grant the application for an extension of time, except in a case to which regulation … 3B applies, no account shall be taken of the following–

(a) that the applicant or any person acting for him was unaware of or misunderstood the law applicable to his case (including ignorance or misunderstanding of the time limits imposed by these Regulations); or

(b) that the Upper Tribunal or a court has taken a different view of the law from that previously understood and applied.

(7) An application under this regulation for an extension of time which has been refused may not be renewed.

B. CCS/1771 and 1772/2016

5. *CCS/1771/2016* concerns a decision made on 10 October 2012 from the effective date of 17 August 2012 following a report by the non-resident parent of a change of circumstances. *CCS/1772/2016* concerns a decision made on 30 August 2013 from the effective date of 24 May 2013 following a further report by the non-resident parent of a change of circumstances. Both decisions were made before the mandatory reconsideration provisions came into force.

6. There is no doubt that both decisions were covered by the parent with care's letter of appeal of April 2015, but that came too late. The matter came before a

judge of the First-tier Tribunal who decided that there were valid appeals in both cases. In doing so, he took account of the series of telephone calls that the parent with care had made in 2012 and letters that she wrote in February and September 2013.

7. There was this further complication. In June 2014, the parent with care brought judicial review proceedings against the Secretary of State in respect of the implementation and significance of the previous First-tier Tribunal's decision of 2012. She was given permission, but her claim was dismissed in November 2014. The non-resident parent has argued that, given the parent with care's familiarity with the appeal process, the decision to take judicial review proceedings indicates an intention not to appeal. I do not accept that. Action taken in June 2014 does not necessarily indicate that action taken and letters written in 2012-2013 were not intended to be an appeal. The judge had to decide whether at that earlier time the parent with care had in substance, if not in form, made an appeal. He decided that she had and he based that decision on what she had said and written in that period. I can find no error in what he did. It is right, as he noted, that she had said that she did not want to be 'forced' back to a tribunal and that remark had to be given appropriate significance in the judgment the judge had to make. It is also right to take account of the parent with care's familiarity with the appeal process, which the judge was aware of. But those factors were not decisive. The judge had to look at the actions and language in their totality and make a judgment. The existence of factors pointing in both directions merely emphasises that there was a judgment to be made. It does not show that he came to the wrong decision. From his detailed reasons, it seems to me that he was aware of the relevant background and made a rational judgment. It is not for the Upper Tribunal to substitute its view on how that judgment should have been exercised. The issue is whether he went wrong in law in finding that the parent with care had appealed. He did not.

8. That leaves the issue of lateness. Even looking at the letters of 2013 as sufficient to amount to a written appeal, there was still the lateness in respect of the October 2012 decision. The judge extended time. This was a sensible decision to make. It would have been wholly artificial to consider the 2013 letters in isolation from the 2012 contact. Once the judge interpreted the letters and contact as he did, it was almost inevitable that he would have to extend time. It would require some delicate reasoning and special factors to justify not doing so, and I have been unable to find any in this case.

9. The appeals in these two cases were properly before the First-tier Tribunal.

C. CCS/1777/2016

10. *CCS/1777/2016* concerns a decision made on 26 November 2013 from the effective date of 20 September 2013. By November 2013, the mandatory reconsideration provisions were in force. No application for a mandatory consideration was made in respect of this decision, so there was no right of appeal against it.

11. It follows that the tribunal had no jurisdiction to deal with this purported appeal. The proper course was to strike it out. I have re-made the decision to that effect in accordance with the decision of the three-judge panel in *LS and RS v Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 257 (AAC).

CCS/1776/2017

12. *CCS/1776/2016* concerns a decision made on 30 April 2014 from the effective date of 21 February 2014. As in *CCS/1777/2016*, the mandatory reconsideration provisions were in force. The parent with care applied for a reconsideration, but only on 4 March 2015. That was within the time that a reconsideration is permissible, but only if the Secretary of State extends time for applying. The Secretary of State did not deal with the lateness issue, but revised the decision. There was then a further mandatory reconsideration, followed by the parent with care's appeal to the First-tier Tribunal. This raises the issue of the effect, if any, of the failure to consider the lateness issue.

R (CJ) and SG v Secretary of State for Work and Pensions [2017] UKUT 324 (AAC)

13. This is the decision of a three-judge panel in a social security case. The issue there arose when the Secretary of State received a late application for reconsideration and refused to extend time. There is no appeal against that decision. However, the panel decided that the Secretary of State had sufficiently considered the matter and the refusal to extend time did not prevent the claimant appealing against the benefit decision to which the reconsideration related. The panel rejected the Secretary of State's argument that the only way to challenge the lateness issue was on judicial review. The panel's reasoning was influenced by the need to prevent the Secretary of State's control of lateness becoming a barrier to the exercise of the right of appeal to an independent tribunal. The lateness issue and the merits of the application were not separate stages, but merely different aspects of a single process.

My direction and the parties' arguments

14. When the decision of the three-judge panel became available, I issued a direction in which I said:

> It seems to me that, applying the panel's analysis, there has in these cases been a valid reconsideration despite the failure of the Secretary of State to consider lateness. If a decision to refuse to extend time is not a bar to an appeal to the First-tier Tribunal, it is difficult to understand why it should be any different if the lateness issue has been overlooked. There has in each case been a consideration. But, as I have said, that is just my provisional view.

15. The parent with care wrote that she agreed with my analysis, but was puzzled by why it needed to be taken into consideration at all. The Secretary of

State's representative agreed with my analysis. The non-resident parent's representative presented a detailed analysis. Its key points are that:

- The three-judge panel was not concerned with the issue in this case.
- There is no equivalent in section 20 of the Child Support Act 1991 of section 12(7)(b) of the Social Security Act 1998, which provides that regulations may permit a purported appeal to be treated as an application for revision.
- The dynamics and policy of social security are different from child support, as there is an imbalance between the parties that needs to be redressed and can be redressed without adversely affecting the other.
- The mental health issues of the claimants before the panel raised an obvious sympathy vote to facilitate access to the appeal process. In contrast, in child support the parents are usually competent and a decision in favour of one may adversely affect the other.

My conclusion

16. I accept that the dynamics of child support cases are different from those of social security cases in that there is potentially more conflict between the interests of the parties. However, I can see no way of interpreting the legislation differently between child support and social security. The provisions are the same. The panel's reasoning did not take account of the particular dynamics of social security cases. I am sure all the judges were aware of them, but they did not figure in their reasoning. More importantly, the panel's reasoning on barriers to accessing the appeal process is just as relevant to child support as to social security. The fact that there is power to treat a purported appeal as an application for revision, that is for a mandatory reconsideration, does not affect the analysis; the Secretary of State surely has this power anyway as applications must be considered on their substance as well as their form. Finally, I cannot identify any respect in which the personal circumstances of the claimants in the cases before the panel affected their reasoning on the interpretation and application of the mandatory reconsideration provisions.

17. I remain of the view I expressed in my direction. The decision-maker may have not have dealt with all the issues that arose on mandatory reconsideration, but what happened was a consideration nonetheless. The appeal in this case was properly before the First-tier Tribunal.

D. CCS/1773/2016

18. *CCS/1773/2016* concerns a decision made on 12 February 2015 from the effective date of 23 May 2014. It concerned what was in form an application for a variation submitted by the parent with care in 2014, but which took effect as an application to supersede the existing maintenance calculation. The parent with care applied for a mandatory reconsideration on 4 March 2015, which was within one month of the date of the decision she wished to challenge. The non-resident parent argued that this was tainted as a result of the lack of a mandatory reconsideration in *CCS/1776/2016*. As I have decided that there was no defect in

the mandatory reconsideration in *CCS/1776/2017*, it cannot have infected in any way the reconsideration in this case. The appeal in this case was properly before the First-tier Tribunal.

E. CCS/1775/2016

19. *CCS/1775/2016* concerns a decision made on 16 June 2015 from the effective date of 20 March 2015. The parent with care applied for a mandatory reconsideration on 14 July 2015, which was within one month of the date of the decision she wished to challenge. The appeal in this case was properly before the First-tier Tribunal. There is no dispute about this.

F. The adequacy of the First-tier Tribunal's reasoning

20. I now leave matters of jurisdiction and come the to the tribunal's decision on the facts.

21. The tribunal accepted the non-resident parent's evidence of his financial affairs. He is director of a company involved with software and telecommunications, which has contracts with the British and American military. It has 15 employees and 11 self-employed sub-contractors. The average salary is in the region of £50,000 a year. Its only debts are for tax. It held three months expenses as reserves.

22. The tribunal first dealt with a variation on the grounds of assets. It found that the non-resident parent's assets available for a variation comprised cash, ISAs, an endowment policy and shares. It applied the statutory interest rate of 8% to those assets and decided that it was just and equitable to do so.

23. The tribunal then dealt with a variation on the grounds of income not taken into account. This took the form of dividends that had been paid to the non-resident parent by attributing the amount to the director's loan account. The tribunal agreed to a variation on this ground, finding that it was just and equitable to do so.

24. Finally, the tribunal dealt with a variation on the grounds of diversion of income. This was in the form of retained profits. The tribunal in 2012 had decided that the company could and should have paid a dividend. The tribunal's detailed reasons were before the tribunal in these cases; they run to 146 paragraphs. I drew attention to paragraph 130 in my grant of permission. In essence, it said that the company paid the non-resident parent no salary and should have declared a dividend in view of its profitability and could without risk have paid out half its profits. The tribunal in these cases adopted the same approach. The company had continued to grow year on year with only one exception. The tribunal took account of the need for a cushion against future liabilities to the extent that this was required by prudence.

25. In total, the reasons cover five and a half pages of financial analysis and reasoning. They take up from the analysis of the 2012 tribunal, which was sensible given the continuity of time periods involved. Both parents knew about

the decision and reasoning of the 2012 tribunal. It was in the papers and the tribunal was entitled to use that as a starting point. The tribunal made clear the financial basis on which it was proceeding, which was an acceptance of the non-resident parent's evidence of his financial position. It analysed all the relevant heads for a variation and its explanation shows why it came to the conclusions it did.

26. I find no inadequacy in the tribunal's reasoning.

G. The practicalities of running and funding a business

27. The non-resident parent has argued that if he had taken out of the business the amount attributed to him by the tribunal, it might not have been viable. As I said in my grant of permission to appeal, this raises the issue of the extent to which a calculation on retained profits is a notional one and the extent to which it has to reflect what was feasible for the business at the time.

28. The Secretary of State's representative has cited the decision of Upper Tribunal Judge Gray in *CCS/0861/2013* at [41]-[42]. I agree with what she said. The child support authorities, including the First-tier Tribunal, do not change business decisions and they do not require the parents to change them. That should be obvious from the fact that the decisions made after the event could not dictate how the parent ran a business retrospectively, although they may affect the way the parent decides to run the business for the future. What the child support legislation authorises is a notional calculation of the amount of money that a non-resident parent had potentially available to meet the child support obligation imposed by section 1 of the Child Support Act 1991. How the parent meets the liability that then arises is a matter for them. It might have to be taken out the business, but there may be other options.

29. This does not mean that the tribunal is entitled to make its decision without any regard to business realities. But this feeds into the analyse in two ways. First, the tribunal has to be satisfied that the money was realistically available. That is inherent in the calculation of a notional dividend. A dividend cannot simply be paid. There are restrictions on when this is possible and the tribunal has to undertake its assessment within those limitations. Second, it is not permissible to agree to a variation unless it is just and equitable to do so. Although the legislation provides for factors that may and may not be taken into account, these are not exhaustive. It is, though, difficult to see how the feasibility might be relevant at this stage, given the context within which a notional dividend calculation has to be made.

30. Coming to this case, I have already explained why the tribunal's reasons are adequate. On their face, and by their reasoning, the tribunal sought a decision that took account of the business sense in retaining some funds within the company. It considered prudence from the business perspective and balanced it against the obligation to pay child support maintenance. I find no error in this aspect of the tribunal's decision.

UPPER TRIBUNAL CASE NOS: CCS/1771, 1772, 1773, 1775, 1776 and 1777/2016

Signed on original
on 17 December 2017

Edward Jacobs
Upper Tribunal Judge