

IN THE UPPER TRIBUNAL

Appeal No. CCS/2492/2016

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Gray

This appeal by the claimant succeeds. Having granted permission to appeal on 30 August 2016, in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Hull and made on 7 April 2016 under reference SC 147/15/01982 and remit the case to the First Tier Tribunal for re-hearing with the following directions:

- (i) The rehearing may, but need not, be listed in front of a different judge.
- (ii) The District Tribunal Judge is to give consideration to joining HMRC for the reasons which I give at the conclusion of this judgement.
- (iii) The fresh evidence supplied by the father within these proceedings, as well as the submissions are to be before the tribunal rehearing the case.

REASONS FOR DECISION

1. In this child support case the appellant is the father of Katherine, born on 10 June 1996, who at all material times has lived with her mother. He is, in the terms of the applicable legislation, a non-resident parent who is liable to be assessed for child support maintenance in respect of a qualifying child. Katherine's mother is the second respondent.
2. The Secretary of State for Work and Pensions is the first respondent, but I will refer to the body that has from time to time been administering child support maintenance as the agency.
3. Child support maintenance in this case is based on the statutory scheme in force from 3/3/2003.

The decision under appeal and the issue for the FTT

4. The issue for the first-tier Tribunal was the date upon which the father's liability to pay child support for Katherine ended. A decision was made by the agency on 23 September 2015 which closed the case from 3 September 2015. That date was challenged by the father.
5. The basis of the agency decision was that child benefit remained in payment for Katherine until 7 September 2015, which resulted in a cancellation from the start of the payment week in which that day fell. The father argued that she had been working full-time since September 2014 and that if child benefit was being paid it was an error.

6. The FTT, in confirming the decision of the agency, expressed the view that the rules linked child support liability to the payment of child benefit and not the commencement of employment. It saw the payment of child benefit as outcome determinative, so made no findings in relation to the employment issue.
7. Permission to appeal was refused by the FTT.

Proceedings before the Upper Tribunal

8. I granted permission to appeal, citing a decision by Upper Tribunal Judge Wikeley, *JF-v-Secretary of State for Work and Pensions & DB (CSM)*[2013] UKUT 209 (AAC), and [2014] AACR 3 (hereafter *JF*). Its inclusion in the Administrative Appeal Chamber Reports indicates that it was a decision on a new issue of law with which the majority of other judges in the Chamber agreed.
9. That case decided the meaning of paragraph 1A of schedule 1 to the Child Support Maintenance Calculation Procedure Regulations 2000 (as amended). The provision will be set out in full below, but the short point is that Judge Wikeley said “payable” in the phrase “a person in respect of whom child benefit is payable” meant “properly or lawfully payable”. That is very clear.
10. I was conscious, however, of the need for argument on whether, or to what extent, legislative change since *JF* may have affected the position; *JF* was decided in respect of the legislation before changes to schedule 1 which took effect on 10 December 2012.
11. I granted permission and made directions for the filing of submissions, which are now to hand. No party has requested an oral hearing, and this is a case in which I am able to do justice without one.

The position of the Secretary of State

12. The Secretary of State supports the appeal accepting that an error of law was made, and invites me to remit the case to the FTT for findings of fact as to whether child benefit was lawfully in payment. Mrs Massie, in her helpful submission which I have used extensively in my remarks below, deals with the legislative change to which I referred, but is of the view that it does not alter the position as it is set out in *JF*.

The position of the parents

13. The father maintains his position and has sent in further evidence in support of his argument that Katherine was in employment between September 2014 and September 2015, for some of that time at the “family firm” run by him. That is evidence which will be considered by the next tribunal.
14. The mother played no part in the proceedings below, neither has she put forward her views before me, although she has been invited to do so.

The relevant legal provisions

15. The meaning of “child” is set out in section 55 Child Support Act 1991. The version of that provision in force from 10 December 2012, and therefore at the relevant time in this case, is as follows:

55(1) In this Act, “child” means (subject to subsection (2)) a person who –

- (a) has not attained the age of 16, or*
- (b) has not attained the age of 20 and satisfies such conditions as may be prescribed.*

The other parts of that section are not relevant to the circumstances of this case.

16. Schedule 1 sets out the prescribed conditions. The previous provision read:

Meaning of “child” for the purposes of the Act-

Persons of 16 or 17 years of age who are not in full-time non advanced education

1 (1) the conditions which must be satisfied for a person to be a child within section 55 (1) (c) of the Act are that the person –

- (a) is registered for training with a qualifying body; and*
- (b) is a person in respect of whom Child benefit is payable.*

1A Where a person (P) has ceased to fall within section 55 (1) of the Act, P is to be treated as continuing to fall within that subsection for any period during which P is a person in respect of whom Child benefit is payable.

17. Below is the text as it applied to Katherine: paragraph 1 is substituted; paragraph 1A omitted and words in paragraphs (2) and (3) substituted and inserted by regulation 3 (2) - (5) of SI 2012/2785 which is in force from 10 December 2012.

1-(1) a person satisfies such conditions as may be prescribed for the purposes of section 55 (1) (b) of the Act if that person satisfies any of the conditions in subparagraphs (2) and (3).

(2) the person is receiving full-time education (which is not advanced education) –

- (a) by attendance at a recognised educational establishment; or*
- (b) elsewhere, if the education is recognised by the Secretary of State*
- (3) the person is a person in respect of whom child benefit is payable.*

18. The critical phrase at (3) “a person in respect of whom child benefit is payable” remains in identical form, and the context, also, is unchanged. Accordingly Judge Wikeley’s interpretation in *JF* continues to apply under the new form of schedule 1.

19. The tribunal therefore fell into error of law in failing to investigate the father’s contention that Katherine was working; under the Child Benefit regulations working is relevant to entitlement for a person over 16, although the regulations themselves are complex and the matter is not necessarily as straightforward as the father maintains. The Child Benefit (General) Regulations 2006 (SI 2006/2 to 3) set out prescribed conditions, and detailed fact-finding will be required.

20. In my judgement where there is a suggestion which is not fanciful, that child benefit was not properly or lawfully payable, it should be investigated by a child support tribunal. As Judge Wikeley stated at paragraph 34, “the issue of parallel child benefit entitlement is thus part and parcel of the statutory test for child support”.

My conclusion

21. This is a factual matter, and it is appropriate for the evidential issues to be dealt with by the FTT, particularly in view of the possible participation of Her Majesty’s Revenue and Customs which administers child benefit. In my directions I invite the District Tribunal Judge to consider adding HMRC as a party to the fresh proceedings. Should HMRC be joined, having had sight of the original bundle and the submissions before me as well as the fresh evidence from the father, they could make an informed submission as to the period for which child benefit was properly and lawfully payable. I do not, however, direct that HMRC is joined; that must be a matter for the District Tribunal Judge in considering matters prior to listing.

22. I will explain my direction that the matter may but need not be listed in front of a different judge. The judge in this case erred in law in relation to a somewhat unusual provision, the meaning of which had only recently been clarified. There seems to me no reason why he should not sit again to decide the facts, basing his legal conclusion on this decision and that of Judge Wikeley which accompanies it. The listing of the case should be done with the appropriate use of judicial resources in mind, and his continuing with the case or otherwise will depend upon that.

Upper Tribunal Judge Gray

Signed on the original on

14 February 2017