## DECISION OF THE UPPER TRIBUNAL
## (ADMINISTRATIVE APPEALS CHAMBER)

**The DECISION of the Upper Tribunal is to allow the appeal by the Appellant ("the father").**

**The decision of the Port Talbot First-tier Tribunal dated 9 October 2017 under file references SC195/15/01784, SC195/16/00105 & SC195/16/00575 involves an error on a point of law. The Tribunal's decision is therefore set aside.**

**The Upper Tribunal is not in a position to re-make the decision on the original appeal by the mother against the decisions of the Secretary of State dated 21 January 2015 (file 15/01784), 24 September 2015 (file 16/00105) and 17 August 2016 (file 16/00575). It therefore follows that the mother's original appeals against the three Secretary of State's decisions are remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.**

This decision is given under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

## DIRECTIONS

**The following directions apply to the re-hearing:**

(1) The re-hearing should be at an oral hearing.

(2) The new tribunal should not involve the tribunal judge or financially qualified panel member who sat on the last tribunal on 7 April 2017 and 9 October 2017.

(3) If either parent has any further written evidence to put before the tribunal, this should be sent to the regional office of HM Courts and Tribunals Service in Cardiff within one month of the issue of this decision. Given the amount of evidence already on file, they should consider very carefully whether any further evidence is indeed needed.

(4) The Secretary of State should be represented at the new hearing by a presenting officer.

(5) Before the case is relisted for hearing, a District Tribunal Judge should consider what further case management directions are required.

(6) In doing so the District Tribunal Judge will doubtless consider whether the re-heard appeals should (or should not) be heard alongside the more recent FTT appeal with the file reference SC304/17/02633 (and indeed any other appeals that may be 'in the system').

(7) The new tribunal must consider all the evidence afresh and is not bound in any way by the decision of the previous tribunal.

**These directions may be supplemented as appropriate by later directions by a Tribunal Case Worker, Registrar or District Tribunal Judge in the First-tier Tribunal (Social Entitlement Chamber).**

## REASONS FOR DECISION

### Introduction

1. These three appeals have a long, troubled history. They have also been beset by a series of delays. For the following reasons I have decided the case needs to be re-heard by a fresh First-tier Tribunal. It is to be hoped that can be arranged as soon as is reasonably practicable, given the delays experienced to date by the parties.

2. The parties to this appeal are the father, who is the Appellant, the Secretary of State for Work and Pensions, who is First Respondent, and the mother, who is Second Respondent. The individuals concerned are the parents of Danielle, aged 9. On the mother's account the father has never taken any interest in Danielle and has singularly failed throughout her life to provide proper child maintenance, resulting in both emotional harm and serious financial disadvantage. Indeed, it appears that the Child Support Agency (CSA) has obtained liability orders and subsequently charging orders against the father's property (p.751).

3. I appreciate, therefore, that this Upper Tribunal decision will come as a disappointment to the mother. However, it is important to be clear about the scope of the Upper Tribunal's powers. The Upper Tribunal is solely concerned with whether the decision of the First-tier Tribunal involves any error of law. It is not directly concerned with the wider rights and wrongs of any disputes between the parents. This has a bearing on the evidence produced by the mother, as I try and explain later.

### The Upper Tribunal's decision in outline

4. The father's appeal to the Upper Tribunal is allowed. The decision of the Port Talbot First-tier Tribunal ("the FTT"), taken on 9 October 2017 in chambers after an oral hearing on 7 April 2017, involves an error on a point of law. The FTT's decision is therefore set aside. There will have to be a re-hearing before a new FTT at a suitable local venue.

### The background to the appeals to the First-tier Tribunal

5. Although the mother technically had three appeals before the FTT, in reality they all raised the same issue – had the CSA correctly assessed the father's income?

6. The first disputed decision in point of time (at least for the purpose of these proceedings) was the CSA decision dated 21 January 2015 ('CSA Decision 1'). This was the decision that the father was liable to pay £0 a week (i.e. nil) in child maintenance from the effective date of 1 December 2011. For this decision the CSA had assessed the father's income as being just a monthly annuity of £95.40, which fell to be disregarded, resulting in the nil assessment. The appeal against this decision carries the FTT case number reference SC195/15/01784 and the Upper Tribunal case reference CCS/1136/2018.

7. The second disputed decision was the CSA decision dated 24 September 2015. This was the decision that the father was liable to pay the flat rate of £7 a week in child maintenance from the effective date of 16 August 2015 ('CSA Decision 2'). For these purposes the CSA had assessed the father's annual income as being just £1,144.00. This was based on HMRC data for the 2013/14 tax year. The appeal against this decision carries the FTT reference SC195/16/00105 and the Upper Tribunal reference CCS/1134/2018.

8. The third and final disputed decision was the CSA decision dated 17 August 2016. This was the decision that the father was liable to pay (again) £7 a week in child maintenance from the effective date of 16 August 2016 ('CSA Decision 3'). For these purposes the CSA had assessed the father's annual income as being again just £1,144.00. This was based on HMRC data, this time for the 2014/15 tax year. The appeal against this decision carries FTT reference SC195/16/00575 and Upper Tribunal reference CCS/1130/2018.

9. For the avoidance of doubt, I should make it clear that nothing I say has any direct bearing on the subsequent FTT appeal which goes under case reference SC304/17/02633 (or indeed any other FTT appeals involving the same parties that may be outstanding).

10. Reverting to this appeal, the mother's challenge in each of the three cases, in short, was that the CSA assessment had hopelessly underestimated the father's true income. Her 'headline' grounds of appeal were that the CSA had systematically refused to take timely and appropriate action to establish the father's true income, had systematically failed to secure child maintenance payments from the father, had systematically failed to take enforcement action to secure regular maintenance and had systematically and repeatedly procrastinated and failed to provide adequate and timely responses to the mother's correspondence. She also argued that the CSA should have applied a variation on the basis of the father having assets over £65,000, income not taken into account, diversion of income and lifestyle inconsistent with declared income.

11. The CSA, however, refused following mandatory reconsideration to change any of their decisions or to make any variation on any of the claimed grounds.

12. The FTT sensibly treated the first appeal in point of time as the lead case, and I have done likewise. All page references in this decision are to that file accordingly, unless otherwise stated.

**The First-tier Tribunal proceedings**

13. By the time the FTT decided these appeals, the file for the lead case ran to nearly 700 pages. What follows is necessarily an abbreviated account, concentrating on the what seem to be the pertinent 'edited highlights'.

14. On 2 March 2016 a District Tribunal Judge (DTJ) issued a lengthy directions notice, detailing various documentary evidence that he required the father to produce, referring to certain itemised matters under the headings A-L (pp.71-73; 'the FTT's disclosure directions'). The father responded in June 2016 by providing the further evidence now held on file at pp.102-426. He sent in further material in September 2016, although this appeared mostly to relate to the equally lengthy and contested family law proceedings in the courts (pp.427-509).

15. On 28 February 2017 another DTJ issued further directions (p.513) admitting some evidence submitted by the mother, but also excluding some of the material, presumably on the basis that it was not relevant to the appeals. The mother's admitted evidence is on file at pp.514-571.

16. On 7 April 2017 a FTT comprising a DTJ and a financially-qualified panel member (FQPM) held an oral hearing, attended by both parents. The hearing lasted for about 1 hour 20 minutes (pp.572-580). Following the hearing, the FTT issued further directions (p.581), requiring the father to produce four types of further documentation. The father replied on 3 May 2017 with additional documentary

evidence (pp.583-625). The mother then responded to the FTT's invitation to make any representations (p.626) by sending in further material, comprising a mixture of submissions and new evidence (pp.627-688).

17. On 9 October 2017 the FTT, as previously constituted, held a hearing in chambers and without the parties being present. The FTT issued a decision notice recording that CSA Decision 1 was set aside. The FTT found that (i) the father had a source of undeclared earned income as a self-employed IT consultant, "paid in such a way that it was not captured fully by HMRC"; (ii) the father's income was estimated to be £44,977 p.a. gross (on the basis of the Annual Survey of Hours and Earnings, or 'ASHE'); and (iii) it was just and equitable to direct a variation on the ground of diversion of income.

18. At the same hearing the FTT issued a second decision notice setting aside CSA Decision 2 (although the decision notice refers to the CSA's decision dated 24/09/2016, from the context that must be a misprint for 24/09/2015). The decision notice stated that a variation was just and equitable on the basis of diversion of income and so the maintenance calculation of £7 a week in force as from 16 August 2015 should be varied and so re-calculated on the basis of an income of £44,977 gross p.a.

19. In the same way the FTT issued a third decision notice setting aside CSA Decision 3. This decision notice stated that a variation was just and equitable on the basis of diversion of income and so the maintenance calculation of £7 a week as from 16 August 2016 should likewise be varied and so re-calculated on the basis of an income of £44,977 gross p.a.

20. On 21 December 2017 the FTT issued two statements of reasons. The first statement of reasons ('SoR1') covered the first appeal against CSA Decision 1. The second statement of reasons ('SoR2') dealt with the appeals against both CSA Decisions 2 and 3.

21. SoR1 found that in regard to the mother's application for a variation the mother had "made various allegations but none was supported by any evidence" (para.2). However, the FTT then went on (paras.2-6 inclusive) to refer to the father's evidence that since he had stopped receiving JSA in 2011 he had been supporting himself from savings and then borrowings, including financial support from his adult son. The father stated that he had no self-employed income. He lived in a house with this son and the two of them had applied for a joint mortgage in December 2011 on the basis of the son's gross earnings of £21,000 p.a. (£16,642 net). Moreover, analysis of the father's bank accounts showed that between December 2011 and May 2012 his expenditure was £14,802, equivalent to £29,604 a year – about £13,000 more than his son's net earnings. Allowing for mortgage and loan repayments made by the son, the son would have just £10,832 left from his salary. Furthermore, "even if he were using the whole of this sum, which was most unlikely, to fund his father, there would still be a shortfall of some £19,000 between his contribution and his father's annual level of expenditure". SoR1 then continued as follows:

> "7. In his evidence [the father] was vague about his borrowings which were variously stated to be from his mother, £50,000 from his ex-wife and some from his girlfriend. Also doubt arose about the reliability of his evidence when he was asked about payments from his bank account in respect of vehicle road fund licence. There were three payments made in January 2012, April 2012 and August 2012. His evidence prior to this point in the hearing was that he had only had one vehicle since 2004 and had it for the duration of the

> period of the three appeals. When asked for an explanation why there were three payments in six months he pointed out that two were for six months license but he could not explain why there had been three payments in six months, apart from stating he did have a second vehicle but it was many years ago and had been sold, a Vauxhall Omega. We did not find this explanation credible because he would not be paying road fund licence on a vehicle he no longer owned. It was also difficult to understand why he was paying Class 2 self-employed National Insurance contributions if he was not earning a self-employed income. We also noted he had failed to comply with one of the key directions of the Tribunal which was to complete an income and expenditure schedule for his household for the relevant 12 month period.
>
> 8. From all these factors we concluded that firstly his evidence was not to be relied on and secondly, in view of his expenditure level, that he had a source of earned income, probably as a self-employed IT consultant and his income was paid, for example, to a company of which he was not a director or shareholder so was not captured by HMRC. We found, therefore, that he had earned income which he had diverted.
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> 9. We therefore estimated the income he would have had based on the data on the ASHE website. We used the figure for an employed IT Consultant in 2012 of £44,977.00 p.a. gross and directed the First Respondent to calculate the maintenance liability accordingly."

22. SoR2 was more succinct. It repeated the FTT's decisions on the latter two appeals. It then proceeded (in its entirety) as follows:

> "**THE LAW**
>
> This is set out in the Responses. Both decisions were made under the Child Support Maintenance Regulations 2012.
>
> **THE HEARING**
>
> The details were the same in respect of appeal reference number SC156/15/01784.
>
> **STATEMENT OF REASONS**
>
> Requested by [the father].
>
> **FINDINGS OF FACT AND REASONS**
>
> The findings of fact and reasons for these two decisions are the same as for the main appeal case SC156/15/01784 and are to be treated as incorporated into this Statement of Reasons, with the exception of the reference to regulation 21(1) of the Child Support (Variations) Regulations 2000. However the reasons for the variations being just and equitable are the same."

**The grant of permission to appeal to the Upper Tribunal**

23. The father's application for permission to appeal to the Upper Tribunal was refused in the first instance by the DTJ who chaired the FTT. The father subsequently renewed the application, with expanded grounds, before the Upper Tribunal. I gave the father permission to appeal, while recognising that several of the grounds appeared to be an attempt to re-argue the case on its factual merits.

However, I recognised that there were four matters that might give rise to an arguable error of law. These related to (1) the father's alleged failure to complete an income and expenditure schedule in contravention of the FTT's directions; (2) the adequacy of the FTT's explanation as to how it had arrived at an expenditure figure for the father of £14,802 for the six months from December 2011 to May 2012; (3) the evidence relating to the father's ownership of a car, or cars, and his dealings with DVLA; and (4) the FTT's findings as to the father's explanation for paying NIC Class 2 contributions.

**The proceedings in the Upper Tribunal**

24. All parties have made written submissions. Ms Joyce Mdumulla for the Secretary of State (pp.724-727) argues that the FTT's reference to the father's alleged failure to complete an income and expenditure schedule was not material. She also contends that the FTT was entitled to find the father's evidence lacked credibility, given his expenditure, and was also entitled to fix the father with an estimated income based on the ASHE data. However, she accepts that the FTT erred in law in (i) failing adequately to explain how it arrived at an expenditure figure of £14,802; (ii) failing to make adequate findings of fact in relation to the father's car ownership; and (iii) failing to deal adequately with the issue of the payment of NIC Class 2 contributions. On balance, Ms Mdumulla suggests that I allow the father's appeal to the Upper Tribunal and send the matter back for re-hearing before a new Tribunal.

25. The father's representative has filed a submission maintaining the original grounds of appeal (pp.730-734).

26. The mother has filed a lengthy submission in reply with documentation annexed, some of which was already on file, some of which was historic and some of which related to a further and more recent appeal (see paragraph 9 above) which is not the subject matter of the present proceedings (pp.736-781). The mother clearly has a very strongly held sense of grievance about both the father's failure to pay child maintenance and the way the case has been handled by the CSA (and indeed the Independent Case Examiner has upheld several of her complaints about the CSA). However, all this has unfortunately led her to adopt a somewhat 'scattergun' approach and a tendency, understandably enough, to seek to argue the case on its merits, as much by reference to past events as to the current grounds of appeal, rather than address those grounds in a more focussed way. In addition, the mother has produced letters purportedly written by Danielle, addressed to the judges involved in these proceedings (e.g. p.814). Regrettably such correspondence is likely to generate more heat than light, and is not directly relevant to the legal issues arising on the appeal.

**Where did the First-tier Tribunal go wrong in law in the lead appeal?**

*Introduction*

27. I need only deal with the four points I identified in the grant of permission to appeal as being potential errors of law.

*The alleged failure to comply with the First-tier Tribunal's directions*

28. At the very end of para.7 of SoR1, almost as an afterthought, the FTT noted that the father "had failed to comply with one of the key directions of the Tribunal which was to complete an income and expenditure schedule for his household for the relevant 12 month period". The father's original grounds of appeal, as submitted to the FTT, identified this as the primary basis for challenging the FTT's decision, stating that the first the father knew of this requirement was when it was mentioned in SoR1. The DTJ, when refusing permission to appeal, conceded that the FTT had fallen into error on this point, and accepted no such direction had ever been made.

However, the DTJ observed that this was only one reason for concluding that the father's evidence could not be relied upon, and so the error was not material. Ms Mdumulla for the Secretary of State adopts the same position. I am unable to take such a sanguine view. I say that for two principal reasons.

29. The first is that any failure to comply with the FTT's directions, especially on the disclosure of documents, is likely to be a significant breach of a party's obligations to the Tribunal and is at least suggestive of the possibility that the party concerned has something to hide. Additionally, the FTT itself showed that it viewed the claimed breach as being serious, as this supposed direction was one of its "*key* directions". If it was "key", then its non-observance, by definition, was surely a material matter that influenced the FTT's thinking. However, there was indeed no such direction ever made, even in the very detailed and carefully itemised set of the FTT's disclosure directions issued in March 2016 (pp.71-73).

30. The second is that, looking at the matter in the round, and whatever his other failings may or may not be, the father could not seriously be criticised for refusing to engage with the FTT's process. As noted, the FTT's disclosure directions were lengthy and specific (even if they did not include a requirement to lodge an income and expenditure schedule). The father's response, following polite correspondence raising queries and requesting an extension (letters dated 30 March 2016 and 21 April 2016, which did not seemingly make their way on to the main appeal file), was to produce over 400 pages of documentary evidence, carefully and sequentially organised in response to the specific requirements of the FTT's disclosure directions. Tribunals are well used to non-resident parents who flagrantly flout disclosure directions. This non-resident parent deserved at least some credit for his (on the face of it) detailed compliance with the directions that were made. Whether that disclosure was fully comprehensive is another matter, but he cannot be accused of not trying.

31. Put very simply, the FTT made a finding of fact for which there was simply no evidence before it, and indeed which was without any foundation whatsoever. In the circumstances of this case, this finding was unfair and in error of law.

*The adequacy of the FTT's explanation as its findings on the father's expenditure*

32. The FTT stated at para.5 of SoR1 that the father's "bank statements showed that in the six month period from December 2011 to May 2012 his expenditure was £14,802.00 which was equivalent to £29,604.00". I readily accept, as Ms Mdumulla submits, that £14,802 scaled up to an annual figure was equivalent to £29,604. But I also agree with her that it remains unclear how the FTT arrived at the figure of £14,802. The spend from one account alone was £14,779 on my (quite possibly erroneous) arithmetic. It is unclear whether the figure cited by the FTT was gross or net and so what sort of offsetting if any took place. As I indicated when giving permission to appeal, there is actually the possibility that in finding as it did the FTT may have under-estimated the level of spend. I express no view either way on that possibility. The fact of the matter is I have not been able to replicate the FTT's calculation. It is also not clear why the FTT relied on the statements for the first six months from the effective date, when it had copies of bank statements for the rest of the year (and indeed for several years thereafter).

33. An example of the lack of clarity about the methodology used to arrive at the six-month total expenditure sum lies in a payment made to one of the father's previous partners (being his ex-wife, not the mother who is second respondent in the current appeal). The father made her a payment of £5,000 in December 2011. This payment, clearly evidenced on the relevant bank statement, was explained to be a one-off and not a recurring payment. The father's original grounds of appeal argued that the

inclusion of this sum gave a misleading impression of his regular expenditure (p.699). The DTJ's response, when refusing permission to appeal, was that in fact this figure had been excluded from the spreadsheet prepared by the FQPM (p.707). That may well be right, and indeed I readily accept it is right, but that was not explained in SoR1 and nor was the spreadsheet supplied (and nor does it appear to be on any of the files). I do not suggest that the spreadsheet should necessarily have been issued as part of the statement of reasons, but SoR1 should have explained more clearly how the expenditure sum had been arrived at in all the circumstances of the case.

34. Overall, given the considerable body of documentation provided by the father about his accounts – and whether or not that disclosure was complete – the FTT needed to do more by way of explaining how it had arrived at the global six-month figure. Its failure to do so amounted to an error of law.

*The father's ownership of a car or cars*

35. The mother's application for a variation included the claim that the father owned "several executive vehicles" (p.49). The father's response to the CSA's variation enquiry was that "I do not have multiple vehicles. I have one vehicle, a 22 year old pick up truck of minimal value." This prompted the DTJ who issued the FTT's disclosure directions to require the father to provide the following information under heading 'L', namely "L. Make and year of any vehicle that you drive together [with] the purchase documentation and if financed details of that arrangement". I observe that whereas several of the other directions refer to a specific timeframe (e.g. 2011-12 or 2011-15), this direction includes no such reference. In that context it seems to me the father was entitled to read the direction in the present tense. He duly produced a copy of a V5 for a 'K' reg Ford Ranger pick-up, first registered in 1999, and evidence that he paid £2,000 for it in 2004 (pp.403-406). I must say this is not my idea, or I suspect anyone's notion, of an "executive vehicle".

36. However, the FTT, on close scrutiny of the father's bank statements, found an apparent inconsistency in his account of his car ownership. The bank statements showed three payments of to DVLA in the space of 12 months (£143.00 on 15.01.2013, p.225, £121.00 on 16.04.2012, p.228 and £148.50 on 16.07.2012, p.232). The RoP notes these three payments, and then records what was presumably a question and answer (with my italicised addition):

> "2 are for 6 months – but [there] are 3 in 6 months?
> Did have a second vehicle but many years ago. Sold it. Vauxhall Omega – apologise if… Can show doc re [*final word illegible, but may be 'sale'*]."

37. The FTT, on the basis of this brief exchange at the hearing, made the following finding (at para.7 of SoR1):

> "Also doubt arose about the reliability of his evidence when he was asked about payments from his bank account in respect of vehicle road fund licence. There were three payments made in January 2012, April 2012 and August 2012. His evidence prior to this point in the hearing was that he had only had one vehicle since 2004 and had it for the duration of the period of he [sic] three appeals. When asked for an explanation why there were three payments in six months he pointed out that two were for six months license but he could not explain why there had been three payments in six months, apart from stating he did have a second vehicle but it was many years ago and had been sold, a Vauxhall Omega. We did not find this explanation credible because he would not be paying road fund licence on a vehicle he no longer owned."

38. In his further submissions to the Upper Tribunal, the father says that he also had a Vauxhall, purchased in 2008 for £2,300 and sold in 2013 for £220, which accounted for the two 6-month payments of road tax in 2012.

39. My initial reaction was that while the FTT in 2017 was probably asking a lot to expect an individual to remember particular car transactions five years previously, the time to produce that evidence was at the hearing. That said, I know that I could not today confidently recall what car or cars I owned five years ago without ready access to the relevant paperwork. However, I am also conscious that the FTT had the advantage of hearing from the father at first hand. Moreover, the weight to be attributed to particular pieces of evidence is a matter for the fact-finding first instance tribunal. However, as the father also observes, he had in fact addressed this point previously and indeed before the FTT hearing – in an earlier written response, dated 9 September 2016 (p.453), the father had stated "My vehicle details have been supplied as requested by the court. I did own a 2003 Vauxhall Omega but it became uneconomical to repair and sold at scrap value. I believe this was in 2011 but I can try to locate the documents if required." Given the passage of time, the account he gave at p.453 is entirely consistent with what he said at the hearing in April 2017. Furthermore, although the FTT followed up that hearing with a request for further documents to be disclosed (p.581), there was no mention of any requirement to produce further documentation about car ownership.

40. I have concluded that the FTT's reliance on the father's answers about DVLA payments, in support of its finding as to the unreliability of his evidence, to be misplaced. It failed to take account of the passage of time and of the father's own earlier consistent evidence at p.453. He had offered to provide the relevant paperwork (definitely at p.453 and, by the looks of it, also at the hearing) but had not been taken up on that offer. In all the circumstances the finding was unfair and in error of law.

*The issue of the Class 2 NICs*

41. In para.2 of SoR1, where it was reviewing the evidence, the FTT noted that the father had "started to pay National Insurance Class 2 contributions in April 2013 (self-employed contributions) but denied earring any income from self-employment". I have read the RoP with care and it does not seem that the father was asked any questions about the payment of Class 2 NICs at the hearing. However, the finding that he had started making such payments is supported by the CSA investigator's letter at p.32 and the father's reply at p.35, where he explained that he had started paying the Class 2 NICs on advice from Maximus, following a referral from the JobCentre. In para.7 of the same statement of reasons (see paragraph 21 above), the FTT then gave as one of its reasons for questioning the father's credibility that "It was also difficult to understand why he was paying Class 2 self-employed National Insurance contributions if he was not earning a self-employed income".

42. I regret to say this reasoning is difficult to follow. Of course, self-employed earners whose taxable profits are above the small profits threshold (which was e.g. £6,025 in 2017/18) *must* pay Class 2 NICs. However, those self-employed earners who are not required to make such payments may *opt* to pay voluntary Class 2 NICs in order to protect their contributions record. Thus, section 11(6) of the Social Security Contributions and Benefits Act 1992 provides that "If the earner does not have relevant profits of, or exceeding, the small profits threshold, the earner may pay a Class 2 contribution of £2.95 in respect of any week in the relevant tax year that the earner is in the employment."

43. The father's evidence was that he had registered as self-employed in the expectation of finding work and had received official advice to make payments of voluntary Class 2 NICs which he had followed. The account he had given was plausible and supported by the contemporary documentation. He was apparently not challenged about this at the hearing. In the circumstances, it is difficult to see how the FTT could come to the view that such payments could only be consistent with actually earning a self-employed income. Both by law and in the light of official advice, such payments could well have been made simply to protect his contributions record and yet in the absence of any significant self-employed income. Whether this is seen as a failure by the FTT to adopt a sufficiently inquisitorial approach, or a failure to find sufficient facts or give adequate reasons, I am satisfied that the FTT's decision involves an error of law in this respect.

**Conclusion on the lead appeal**

44. My conclusion is that the FTT's decision in the lead case involves an error of law for each of the four reasons identified above. It may well be that had the only error been e.g. over the issue of car ownership I might well have taken the view that the FTT's decision was sustainable on the other grounds, and so such single error was not material. However, given my conclusions overall, I must allow the father's appeal, set aside the FTT's decision and direct a re-hearing of all three appeals. The new FTT is the place where the disputed facts must be resolved. The fact that I have allowed the father's appeal to the Upper Tribunal does not necessarily mean that the FTT re-hearings will find in his favour. It all depends on the findings that new FTT makes in the light of all the available evidence.

**Where did the First-tier Tribunal go wrong in law in the other two appeals?**

45. In its SoR2, the FTT declared that "the findings of fact and reasons for these two decisions are the same as for the main appeal case SC156/15/01784 and are to be treated as incorporated into this Statement of Reasons". As the decision based on SoR1 has been found to involve an error of law, its follows that SoR2 necessarily falls with it and so both appeals must be allowed and the FTT's respective decisions on the appeals against CSA Decisions 2 and 3 both set aside and a re-hearing directed.

46. It is also arguable that the FTT's decision on the other two appeals is flawed in other respects. I did not ask for submissions on these points but simply set out my concerns here so that they can be borne in mind by the FTT charged with taking the re-hearing of these appeals.

47. The fundamental point is that CSA Decisions 2 and 3 were taken by the CSA after the case had been closed and "transitioned" to the 2012 child support scheme. The only inkling that the FTT was aware of this was its statement that SoR1 applied "with the exception of the reference to regulation 21(1) of the Child Support (Variations) Regulations 2000". However, the position is more complex than that.

48. CSA Decisions 2 and 3 were taken as a result of the 2015 and 2016 annual reviews. These decisions were based on information provided by HMRC about the father's income for 2013/14 and 2014/15 respectively. This was because in cases decided under the 2012 child support scheme the CSA starts from the presumption that the non-resident parent's "historic income" applies (Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677), regulations 4 and 34-36 inclusive), being the "HMRC figure" mandated by regulation 36(1). This figure applies unless one of the exceptions in regulation 34(2) is in play, e.g. where the non-resident parent's "current income" differs from the "historic income" by at least 25% of the

latter figure (regulation 34(2)). "current income" is defined for present purposes by regulations 37 and 39.

49. It may well be that the FTT considered that the 25% variance exception applied, but it did not explain its thinking on this matter. Further findings of fact and reasoning were needed, not least as the FTT's findings were focussed on 2011/12 while CSA Decisions 2 and 3 were concerned with later tax years. I recognise that HMRC's review of self-employed earnings may not be as exacting as that undertaken by a FTT. However, the FTT also needed to explain what it made of the HMRC letter at p.69 of the file in FTT case reference SC195/16/00575. This was a closure letter under section 28A of the Taxes Management Act 1970 to the effect that HMRC was content that the father's self-assessment tax return for 2014/15 was "complete and correct". I reiterate – that conclusion may have been accurate or inaccurate, but it needed to be addressed by the FTT.

50. In addition, the FTT needed to explain how it concluded that regulation 71 (diversion of income) of the Child Support Maintenance Calculation Regulations 2012 applied on the facts of this case.

**Conclusion**

51. For the reasons explained above, the Upper Tribunal allows the mother's appeal. The decision of the First-tier Tribunal is set aside and the Upper Tribunal directs a re-hearing of the decisions under appeal as set out above. Given the age of this case, it is to be hoped that in fairness to all concerned that this matter can be relisted before a new First-tier Tribunal at an early opportunity.

**Signed on the original**
**on 14 May 2019**

**Nicholas Wikeley**
**Judge of the Upper Tribunal**