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 Leeds First-tier Tribunal dated 8 January 2019 under file reference SC007/17/02524 involves an error on a point of law. The Tribunal's decision is therefore set aside.

The Upper Tribunal is not able to re-make the decision on the original appeal by the father against the decision of the Secretary of State dated 5 July 2017. It therefore follows that the original appeal against the Secretary of State's decision is 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 (which may be a "virtual hearing", e.g. by telephone or Skype)

(2) The new tribunal should not involve the tribunal judge or financially qualified panel member who sat on the last tribunal on 8 January 2019.

(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 Leeds within one month of the issue of this decision.

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

(5) 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, Tribunal Registrar or Tribunal Judge in the First-tier Tribunal (Social Entitlement Chamber).

REASONS FOR DECISION

The Upper Tribunal's decision in summary

1. I allow the father's appeal to the Upper Tribunal. The decision of the Leeds First-tier Tribunal ("the FTT") on 8 January 2019 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 First-tier Tribunal at a suitable venue. Given both the current and foreseeable circumstances, that may have to be a "virtual hearing". An Upper Tribunal oral hearing of this appeal is not needed.

The question of a possible oral hearing of the appeal before the Upper Tribunal

2. Neither the mother nor the Secretary of State's representative has requested an oral hearing before the Upper Tribunal. The father says he wants an oral hearing of the Upper Tribunal appeal because he has "further evidence to send to the Tribunal".

3. I have considered all the parties' views, as I am required to do under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). I am satisfied that an oral hearing of the appeal before the Upper Tribunal is unnecessary, not least as it would cause further delay in a case which has suffered more than its fair share of delays. There will need, in any event, to be a fresh First-tier Tribunal hearing as a result of my decision and directions. If there is any further evidence, that will be the time and place to produce it (and in advance, not simply on the day).

The role of the Upper Tribunal

4. The parents, and especially the father, have understandably focussed on the alleged facts and the respective merits of the broader dispute between themselves, as they each see it. My role, however, is a narrower one, namely, to decide whether the First-tier Tribunal's decision involved any error of law. I cannot say whether the First-tier Tribunal came to the right decision on the facts (which it may well have done).

The reasons why the Upper Tribunal has allowed this appeal

5. The parents, and especially the father, must also understand why this appeal has been allowed.

6. The Upper Tribunal appeal has been allowed because the First-tier Tribunal (1) did not deal properly with the issue of the admissibility of the documentation from the parallel family court proceedings; and (2) did not adequately investigate the question of a possible application of a variation based on an alleged (and I emphasise *alleged*, and not *proven*) diversion of income by the mother.

7. The Upper Tribunal appeal has <u>not</u> been allowed because the mother's child support liability should have been set at a higher level. That may or may not be right. That factual question remains to be decided by the new First-tier Tribunal.

The background to the appeal to the First-tier Tribunal

8. The circumstances of this appeal are atypical in that the father is the 'parent with care' and the mother is the 'non-resident parent' for the purposes of the Child Support Act 1991. However, this makes no difference in terms of the principles to be applied under the 1991 Act and the associated regulations.

9. The appeal concerns the mother's child support liability in respect of the couple's son, who I will call M to protect his privacy, and who is now aged 15. The couple married in 1990 but the relationship finally broke down in November 2016, when the mother left the matrimonial home. M's sister lives with the mother (or at least did at

the material time). There have been parallel financial provision proceedings in the family court, which have been bitterly contested. Indeed, the breakdown has been so acrimonious that there has been some social services and also police involvement (in August 2017 the police issued the father with a written warning, which is not a criminal record as such, following an allegation of harassment made by the mother (p.422)). It is not my role to adjudicate on that matter, but the fact is a police warning was issued.

The Child Maintenance Service decision under appeal

10. The father, who is disabled and in receipt of state benefits, made a claim for child support on 7 June 2017. The mother, who is a business analyst, provides professional services through a limited company. The Child Maintenance Service (the CMS) made an initial decision that the mother was liable to pay him £21.70 a week in child support for their son (as from 13 June 2017). This was calculated because HMRC, though no fault of the mother, reported her income to the CMS as being a little over £10,000 p.a. In fact, that was just her PAYE salary, one element of her overall income package.

11. Following the father's request, the CMS revisited the decision on 4 July 2017 and decided to apply a "positive income variation" (a decision issued on 5 July 2017). This meant that the mother's income was assessed to be £10,594 (as before) plus a further £28,613.91 in dividend income (as also now identified by HMRC) and so £39,207 in total. The result was the mother was now liable to pay £80.31 a week in child support (again as from 13 June 2017). The decision was not changed by the CMS on mandatory reconsideration (on 24 July 2017). This was the decision the father appealed to the First-tier Tribunal (the 'FTT'). The father's grounds of appeal were essentially that the mother's income was higher still than the figure accepted by both HMRC and the CMS (p.14).

12. On 9 October 2017 the mother responded to the father's appeal, explaining that she had co-operated with the CMS throughout (p.38). I should add that she had in no way sought to disguise the fact that part of her income was received by way of dividends. She expanded on her reasons for opposing the appeal on 28 March 2018 (see p.88).

The First-tier Tribunal proceedings

13. A District Tribunal Judge (a 'DTJ'), sitting with a financially qualified panel member (a 'FQPM'), issued directions on 11 June 2018 requiring the mother to file various company accounts and her HMRC tax returns for 2015/16 and 2016/17, along with a schedule of dividends (p.109). The mother's reply is on file at pp.110-164, together with the relevant documentation.

14. The mother included copies of her HMRC tax returns for both 2015/16 and 2016/17. The 2015/16 return disclosed dividend income of £28,606 (p.140) and PAYE wages of £10,594 (p.146). The final income calculation for 2015/16 was £42,388 (p.149), being the sum of those figures, with 10% dividend tax credits added in along with £10 in investment income. Meanwhile, the 2016/17 return figures were £30,000 (p.154) and £10,996 (p.160) respectively. The final calculation for 2016/17 was the sum of those two figures, being £40,996 (p.163).

15. The father continued to argue that these figures did not reflect the true picture about the mother's income (p.174). On 8 January 2019, following a FTT oral hearing in Leeds before a DTJ and a FQPM, the tribunal allowed his appeal, set aside the CMS decision dated 5 July 2017 and substituted a decision to the effect that the mother's income at the effective date was £42,388 p.a., so slightly higher than the

last CMS figure. The FTT also directed CMS to recalculate the child support liability accordingly (see further the CMS letter of 15 February 2019, implementing the FTT's decision, at p.204).

16. On 22 March 2019 the father (who by then was out of time) requested a statement of reasons from the FTT. He explained his request was late because on the day of the hearing the FTT would not admit further documents from the financial relief proceedings. The FTT Judge instead required him to get an order from Bradford county court, permitting their production in the child support proceedings, which he now attached (dated 18 February 2019; see pp.182-183). On 26 March 2019 another DTJ refused to extend time to admit the father's request and directed that a statement of reasons was not to be provided (p.184). On 23 April 2019 the same DTJ refused to admit the application for permission to appeal to the Upper Tribunal (p.187).

The father's application for permission to appeal to the Upper Tribunal

17. On 30 April 2019 the father made an application for permission to appeal direct to the Upper Tribunal (p.189ff). His main ground of appeal was that he had not been allowed to put in evidence on the day of the hearing before the FTT the various financial documents he had brought with him (which I refer to simply as the 'Form E evidence': the Form E is a sworn statement in statutory form setting out a person's financial circumstances for the purposes of financial relief proceedings on divorce). He argued that as a result the child support assessment did not properly reflect the mother's true income position and so their son was losing out. At the Upper Tribunal oral permission hearing, the father explained that he had tried to submit the Form E evidence online, but the FTT's portal had been unable to cope with the size of the files. He said he had phoned the FTT office for advice and had been told to bring the paperwork along to the hearing. He had done so, but the District Tribunal Judge had refused to admit the evidence.

18. The absence of a statement of reasons would normally put an applicant for permission to appeal in a very difficult position, given the need to identify an arguable error of law on the part of the FTT. However, in the present case the digital record of proceedings was available. I was able to satisfy myself on two points as a result of listening to the digital recording of the hearing.

19. First, and near the start of the FTT hearing, there was undoubtedly a discussion about the evidence in the case. The Judge commented that the mother had provided everything that she had been asked to produce (see paragraph 13 above). The father, however, interjected that he did not believe the mother's accounts and that something was "seriously amiss". At that point in the hearing he tried to introduce a sheaf of further documentation, comprising the Form E evidence from the family court financial relief proceedings in Bradford County Court. The Judge then asked the father if he had the leave (permission) of the county court to introduce that evidence. The Judge further remarked that at the head of the Form E it states a person needs the court's permission to use the documents in other proceedings.[1] Having established that the father had not obtained such permission, the Judge declined to admit the further evidence.

[1] In fact, no such statement is contained on the front of the mother's Form E which the father was seeking to adduce in evidence. That is not to say that such statements have not appeared on Forms E in the past and may in some circumstances still do so.

20. Second, and further on in the hearing, the digital recording makes it clear the FTT accepted the mother's total income figure of £42,388 p.a., as identified on the 2015/16 HMRC return (at p.149). The Judge and the FQPM explained that whatever else they decided they would find the mother's total income figure to be at least £42,388 p.a. The FQPM went into some detail in the hearing explaining to the parties how the tax treatment of dividends had changed over time.

21. As this was a case where the applicant (the father) did not have a statement of reasons for the FTT's decision, I had to consider why his application to the FTT for a statement was late and whether it was in the interests of justice to admit the application (Tribunal Procedure (Upper Tribunal) Rules 2008, rule 21(7)). I found the father's application to the FTT was late because he was confused about the procedure and had misunderstood what the CMS had told him after the hearing. Given what he had been told at the FTT hearing, he had also quite reasonably waited until he had the approval of the Bradford family court for release of the documents. The delay in making the request was not long and was excusable.

22. I also considered it was in the interests of justice to admit the application, not least as I concluded there were two reasons why the FTT might have erred in law. The first reason concerned the refusal to admit the Form E evidence and the second reason concerned the possibility of a variation. So, on 6 November 2019, following the permission hearing attended by both parents, I granted the father's application for permission to appeal to the Upper Tribunal.

The proceedings before the Upper Tribunal

23. Both parents have made lengthy written submissions on the appeal. Understandably they have tended to focus on the rights and wrongs of the dispute between themselves rather than the grounds of appeal. Ms Joyce Mdumulla, on behalf of the Secretary of State, has also provided a written submission on the appeal. She supports the father's appeal to the Upper Tribunal for the two reasons identified in the grant of permission to appeal. She proposes that I should allow the father's appeal to the Upper Tribunal and send the matter back for re-hearing before a new Tribunal. I agree that a new FTT is the best place for the disputed facts to be resolved. I set out my reasons on both grounds of appeal for the benefit of the new FTT and other tribunals where the same point may arise.

Ground 1: the Form E evidence

24. The first ground concerns the question of the Form E evidence. Was the DTJ correct to say that the father had to get permission from the family court to produce the documents from the financial relief proceedings that he had brought along with him to the FTT hearing?

25. The short answer is No.

26. The longer answer is more complicated but comes to the same result. The general position is reflected by rule 29.12 of the Family Proceedings Rules 2010 (SI 2010/2955; 'the FPR'), which provides as follows:

> "(1) Except as provided by this rule or by any other rule or Practice Direction, no document or copy of a document filed or lodged in the court office shall be open to inspection by any person without the permission of the court, and no copy of any such document or copy shall be taken by, or issued to, any person without such permission."

27. The key expression there is "except as provided by this rule or by any other rule or Practice Direction".

28. So, for example, chapter 7 of Part 12 of the FPR deals with the disclosure of documents filed in proceedings relating to children. Rule 12.73 of the FPR provides that "for the purposes of the law relating to contempt of court, information relating to proceedings held in private … may be communicated" where e.g. either the court gives permission (paragraph (1)(b)) or in accordance with Practice Direction 12G (paragraph (1)(c)). Practice Direction 12G enables a party – without seeking prior approval of the court – to communicate such information to CMS or to the FTT. Such a disclosure must be for the purposes of making or responding to a child support appeal or the determination of such an appeal. It follows that evidence about one parent's income filed in financial proceedings in court under Schedule 1 to the Children Act 1989 could be used in tribunal proceedings without the court's prior approval (see *DR v Secretary of State for Work and Pensions [SSWP] and NR (CSM)* [2015 UKUT 274 (AAC)).

29. The decision of Upper Tribunal Judge Gray in *DR v SSWP and NR (CSM)* is not directly applicable in the current context. Judge Gray's case concerned children's proceedings (under the Children Act 1989) whereas the present case concerns matrimonial proceedings (under the Matrimonial Causes Act 1973). In this context it is noteworthy that section 39 of the Child Maintenance and Other Payments Act 2008 sought to provide that a disclosure of information relating to family proceedings by a parent to the Secretary of State would not be a contempt of court. However, this section, inserting section 49B into the Child Support Act 1991, has never been brought into force. It followed that the position under the FPR at the time with which *DR v SSWP and NR (CSM)* was concerned was that in principle Form E (including any exhibits) and any other documents filed in relation to financial relief proceedings could not be disclosed to the tribunal in child support proceedings without the permission of the family court. So, the DTJ in the present case *used* to be right.

30. However, as from 7 December 2015 the law changed. The new rule 9.46 of the Family Proceedings Rules 2010 (inserted by rule 7 of the Family Procedure (Amendment No.3) Rules 2015 (SI 2015/1868)) allows information from financial remedy proceedings to be communicated to certain third parties in accordance with Practice Direction 9B. Although the rule is "subject to any direction of the court", there is no need for prior approval as a matter of course:

> **"9.46.— Communication of information: Practice Direction 9B**
> (1) For the purposes of the law relating to contempt of court, information from financial remedy proceedings may be communicated in accordance with Practice Direction 9B.
> (2) Paragraph (1) is subject to any direction of the court.
> (3) Nothing in this rule permits the communication to the public at large, or any section of the public, of any information relating to the proceedings. (Rule 29.2 makes provision about disclosure of information under the 1991 Act.)"

31. Practice Direction 9B permits information from financial proceedings to be communicated for the purpose of child support appeals in the same way as Practice Direction 12G. Thus, the relevant extracts from Practice Direction 9B read as follows:

> **"1.1** Subject to any direction of the court, information from financial remedy proceedings may be communicated for the purposes of the law relating to contempt of court in accordance with this Practice Direction.

Communication of information by a party etc. for purposes relating to appeals under the Child Support Act 1991
2.1 A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose specified in the fourth column –

A party	The Secretary of State, a McKenzie Friend, a lay adviser or the First-tier Tribunal dealing with an appeal under section 20 of the Child Support Act 1991	Any information relating to financial remedy proceedings	For the purposes of making or responding to an appeal under section 20 of the Child Support Act 1991 or the determination of such an appeal"

32. I can only conclude that the DTJ was relying on his understanding of the pre-December 2015 version of the FPR and not the current version of the law. Rule 9.46 (as amended) and Practice Direction 9B indicate that the father was entitled to put the Form E evidence before the FTT without seeking the express consent of the family court. That does not mean the FTT should have allowed him to do so on the day, as that may well have been unfair on the mother. However, at the very least the FTT should have considered an adjournment. Its failure to admit the evidence and/or to consider an adjournment amounts to an error of law.

Ground 2: the possibility of a diversion variation
33. The CMS response to the father's original appeal was somewhat sparse on relevant information about its decision-making process, but it appeared to accept that the father had asked for a variation to be applied. Certainly, the CMS decision issued on 5 July 2017 was described as a "positive income variation". In the course of this further appeal to the Upper Tribunal, the father has placed considerable emphasis on the cash assets held within the mother's company. It was not in dispute that the mother is the director and secretary (p.125) and effective sole controller of the company (see p.135). The FTT plainly did not agree to a variation on this basis, and although we do not have its statement of reasons there are at least two reasons why a variation, at least on the basis of capital assets, may well not be available in this case.

34. The first reason is quite simply that the legal principle of separate corporate personality means that as a matter of law the company's assets belong to the company and not to the mother (even if she is the sole controller of the company). Her control may give rise to a variation based on diversion, but that is a separate issue (see below).

35. The second reason is that, at least at the material time, the new child support scheme in any event did not include any assets variation rule. The first and second child support schemes (under the Child Support Act 1991 as amended first by the Child Support Act 1995 and secondly by the Child Support, Pensions and Social Security Act 2000) both provided for a departure or variation to be applied where a non-resident parent had assets in excess of £65,000. However, the assets variation was not carried over into the third child support scheme when it began (for a judicial critique, see Mostyn J's judgments in *Green v Adams* [2017] EWFC 24; [2017] 2 FLR 1413 at paragraph [22] and also at [2017] EWFC 52; [2017] 2 FLR 1423 at paragraphs [23]-[25], discussed in *BB v SSWP and CB (CSM)* [2019] UKUT 314 (AAC) at paragraphs 62-64).

36. However, a new type of variation for assets exceeding a prescribed value, being £31,250, has since been introduced, but only with effect from 13 December 2018 (see regulation 69A of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) [CSMCR 2012], inserted by regulation 2 of the Child Support (Miscellaneous Amendments) Regulations 2018 (SI 2018/1279)). The timing means the reintroduction of a form of an assets variation could not assist the father in the present case as the Secretary of State's decision was made on the law as it stood in July 2017, and not as it stood 18 months later in December 2018. The new FTT is subject to the same constraint (see Child Support Act 1991, section 20(7)(b)), so ruling out a new-style assets variation.

37. There is, however, an alternative basis for a variation which the FTT should have explored. Regulation 71 of the CSMCR 2012 (which is discussed in *Green v SSWP and Adams (CSM)* [2018] UKUT 240 (AAC); [2019] AACR 3) states as follows:

> "**Diversion of income**
>
> **71.—**(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where—
>
> (a) the non-resident parent ("P") has the ability to control, whether directly or indirectly, the amount of income that—
>
> (i) P receives, or
>
> (ii) is taken into account as P's gross weekly income; and
>
> (b) the Secretary of State is satisfied that P has unreasonably reduced the amount of P's income which would otherwise fall to be taken into account as gross weekly income or as unearned income under regulation 69 by diverting it to other persons or for purposes other than the provision of such income for P.
>
> (2) Where a variation is agreed to under this regulation, the additional income to be taken into account is the whole of the amount by which the Secretary of State is satisfied that P has reduced the amount that would otherwise be taken into account as P's income."

38. The short point on the facts was that the turnover of the mother's company was approximately £100,000 in both 2015 and 2016 (p.116) but about half that in 2017 (p.128). The mother told me she had taken six months out from work in the winter of 2016/17 because of the acrimonious separation. I have no hesitation in accepting her evidence on that. However, the payment of a modest director's salary combined with limited dividend payments meant that the company's assets were not insubstantial (see pp.117 and 129). The mother may well have been acting on the advice of her accountant. Her decisions may not have been unreasonable within the terms of regulation 71. She has given further evidence on these matters in her response to the Upper Tribunal appeal, which the new FTT will doubtless take into account. However, having had the benefit of listening to the digital recording, I am satisfied that the FTT failed to act in a sufficiently inquisitorial way to explore whether a diversion variation was appropriate.

39. It follows that the father's second ground of appeal succeeds. To be absolutely clear, I am saying the FTT was wrong not to consider making a diversion variation. I am not saying the FTT was wrong not to make a diversion variation.

The First-tier Tribunal re-hearing

40. It is vital that the parents understand the scope of the re-hearing. It is solely concerned with the father's appeal against the Secretary of State's decision dated 5

July 2017. It will not be able to deal with subsequent CMS decisions unless there has been a further appeal and the matters are listed to be heard together.

Conclusion

41. For the reasons explained above, the Upper Tribunal allows the father's appeal. The decision of the First-tier Tribunal is set aside and the Upper Tribunal directs a re-hearing of the decision under appeal as set out above.

Postscript

42. Although I am allowing the father's appeal, it is only for the reasons set out above. I must make it clear I do not accept all the points that the father seeks to make. There are several places where he has plainly misunderstood the meaning of particular statements. For example, the mother's Form E stated that *during the marriage* the couple had enjoyed "5-star holidays – at least two per annum. No money worries/affluent lifestyle. New cars – replaced every few years" (p.75). The father (see p.76) appears to have read this as an admission by the mother that she continued to enjoy the same lifestyle *after the separation*. The mother's account is rather different ("I left the marital home with a couple of bin liners of my clothes": p.88).

43. The father also misunderstands aspects of the law, which is unsurprising and perhaps forgivable given the complexity of child support legislation. For example, he has repeatedly referred to the £31,250 capital assets rule, despite my earlier explanation when granting permission to appeal that this provision was not in force at the time this appeal is concerned with. Likewise, he asserts in his reply that "divorce settlements are nothing to do with child maintenance at all". That statement is only partially true. It is true that the child support formula-based calculation is not affected by the terms of a divorce settlement. However, if the CMS or a tribunal is considering whether to make a variation, then the requirement to consider what is "just and equitable" is all-embracing (Child Support Act 1991, section 28F), and may include consideration of the terms of a divorce settlement.

44. I accept that the father wants what is best for M. I appreciate that the father feels very strongly that he is the wronged party in this whole matter. I also understand that dealing with the CMS can be an extremely frustrating business. However, his habit of firing off multiple e-mails to HMCTS does not assist in the orderly case management of his appeal and indeed only generates further delays. Furthermore, the correspondence on file shows the father has an unfortunate tendency to let his language get carried away, which again does his case no favours. For example, in his reply he accuses the mother of "playing silly games" and "lying" (without being clear as to what it is she is supposed to be lying about) and seeking "to emotionally blackmail the Tribunal Judge". It is in his own interests to moderate his language, and focus on the facts, so as to dispel the suggestion that he is using these proceedings as a means of applying unfair pressure on the mother.

(Approved for issue on 12 May 2020)

Nicholas Wikeley
Judge of the Upper Tribunal