IN THE UPPER TRIBUNAL

[2022] UKUT 138 (AAC)
Application No. UA-2020-000886-CSM
(formerly CCS/393/2020)

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference:	SC242/17/17434
Venue:	Fox Court
Decision date:	25 September 2019

Between:

VSN

Applicant

-v-

Secretary of State for Work and Pensions

First Respondent

-and-

JN

Second Respondent

Before: Upper Tribunal Judge Poynter

Hearing date:	17 November 2021
Decision date:	17 May 2022

Representation

Applicant:	In person, assisted by Mr Holden
First Respondent	Not represented
Second Respondent	In person

DECISION

Permission to appeal to the Upper Tribunal is refused.

REASONS

Introduction

1. These proceedings are about two children, L and K, and how much the second respondent and non-resident parent ("the Father") must pay each week to support them.

2. In a maintenance calculation notified on 8 December 2017 ("the Maintenance Calculation"), the Secretary of State (who is first respondent to this application) decided that the Father had to pay £105.05 per week from the effective date of 8 December 2017.

3. The appellant, who is L's and K's mother and the person with care ("the Mother"), appealed against that decision. She disputed the Secretary of State's jurisdiction to make the Maintenance Calculation. Her position was that the Father's liability continued to be governed by an order made by a court in Hong Kong ("the HK Order"), the terms of which were subsequently repeated in a consent order made by District Judge Hess in the Central Family Court ("the Mirror Order"). Under those orders, the Father was obliged to pay considerably more than under the Maintenance Calculation.

4. The Tribunal rejected that submission, refused the appeal and confirmed the Maintenance Calculation. The Mother now seeks permission to appeal to the Upper Tribunal against that decision.

Factual background

5. I take this from the judge's clear and thorough statement of reasons. Whenever I quote from that statement in this decision I have deviated from the actual wording by using "the Father" and "the Mother" in place of those parties' names, by redacting the names of the children and of the company from which the Father draws dividends, and by removing references to the page numbers in the First-tier Tribunal's papers, which—though they were helpful to me—are no longer relevant given my decision to refuse permission to appeal. I have also changed some of the abbreviations used by the judge to promote internal consistency in this decision.

6. What the learned judge said was as follows:

> "12. The Father and Mother moved to Hong Kong from the UK in 2011. They had two children, L and K. Following the breakdown of the marriage, the Hong Kong court made the HK Order.

> 13. Under the HK Order, the Father was required to pay £1,750 pcm for each child until they reached the age of 18; finished secondary education, or there was a further Order."
>
> [It is convenient to add at this point that the HK Order included an undertaking by both the Father and the Mother to use their best endeavours to obtain a mirror order in England "recording the terms of this Order".]
>
> "14. The Mother and the children then came to the UK and the Father followed in early 2015.
>
> 15. On 15/6/15, District Judge Hess made [the Mirror Order]. This reflected the entirety of the HK Order."
>
> 16. On 22/9/16 the Father applied to the Secretary of State to pay CS. On 27/10/16 the Secretary of State made a decision on the basis of the Father's latest available tax year. This figure was from 2011/12 i.e. before the Father had moved to HK.
>
> 17. The Mother appealed the decision, and requested a variation. On 7/12/16 the Secretary of State agreed a variation under Reg 69 of the Child Support Maintenance Calculation Regulations to include dividends from [redacted] of £49,999.97. The Father's CS liability was therefore £105.05 pw. The Mother appealed."

The First-tier Tribunal's reasons

7. The judge gave the following reasons for concluding that the Secretary of State had had jurisdiction to make the Maintenance Calculation:

> "**Whether the Tribunal has jurisdiction**
>
> 18. The Mother's position was that the HK Order was still valid and enforceable, and that the Secretary of State (and therefore the Tribunal) had no jurisdiction to decide the CS liability payable by The Father.
>
> 19. Having considered the parties' submissions on this issue, in my judgment the position is as set out below.

The Father's right to apply to the Secretary of State

20. Section 4 of the Child Support Act 1991 ("the Act") is headed "Child support maintenance" and (so far as relevant to this appeal) it reads as follows:

> "(1) A person who is, in relation to any qualifying child or any qualifying children, either the person with care or the non-resident parent may apply to the Secretary of State for a maintenance calculation to be made under this Act with respect to that child, or any of those children.
>
> (2)-(9) …
>
> (10) No application may be made at any time under this section with respect to a qualifying child or any qualifying children if—
>
> (a) there is in force a written maintenance agreement made before 5th April 1993, or a maintenance order made before a prescribed date, in respect of that child or those children and the person who is, at that time, the non-resident parent; or
>
> (aa) a maintenance order made on or after the date prescribed for the purposes of paragraph (a) is in force in respect of them, but has been so for less than the period of one year beginning with the date on which it was made; or…"

21. The effect of s 4(1) is that an NRP such as the Father may make an application to the Secretary of State for a CS maintenance calculation. However, s 4(10) provides that this does not apply if there is:

    a. a written maintenance agreement made before 5th April 1993, but that predates this appeal by over 20 years;

    b. a maintenance order made before "a prescribed date". By the Child Support (Applications: Prescribed Date) Regulations 2003, Reg 2(a), the prescribed date is 3 March 2003. As a result, this exception also does not apply; or

c. a maintenance order made after that prescribed date, which has been in force for less than a year.

22. Section 8(11) of the Act explains what is meant by a "maintenance order"

"In this Act "maintenance order", in relation to any child, means an order which requires the making or securing of periodical payments to or for the benefit of the child and which is made under—

(a) Part II of the Matrimonial Causes Act 1973;

(b) the Domestic Proceedings and Magistrates' Courts Act 1978;

(c) Part III of the Matrimonial and Family Proceedings Act 1984;

(d) the Family Law (Scotland) Act 1985;

(e) Schedule 1 to the Children Act 1989;...

(ea) Schedule 5, 6 or 7 to the Civil Partnership Act 2004; or

(f) any other prescribed enactment,

and includes any order varying or reviving such an order.""

8. I would only add that the enactments prescribed for the purposes section 8(11)(f) are those set out in by regulation 2 of the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992 ("the MAJ Regulations"). On the facts of this application, none of those enactments are relevant.

9. The statement of reasons continues:

"23. The Mirror Order was made under Part III of the Matrimonial and Family Proceedings Act 1984. It is thus a "maintenance order" for the purposes of the Act.

24. As set out above, s 4(10) of the Act bars a person from applying to the Secretary of State where a maintenance order made after 3 March 2003 has been in force for less than a year.

25. However, the Father applied to the Secretary of State on 22/9/16, and the Mirror Order was made by the Family Court on 15/6/15, so by the time he made the application, that order had been in force for <u>more</u> than a year.

26. In other words, once twelve months had passed since making of the Mirror Order, the Father had the right to make an application to the Secretary of State for his CS liability to be calculated by them.

Whether the Mirror Order continued to have effect

27. Section 8 of the Act is headed "Role of the courts with respect to maintenance for children" and provides (emphasis added):

> (1) This subsection applies in any case where the Secretary of State would have jurisdiction to make a maintenance assessment maintenance calculation with respect to a qualifying child and a non-resident parent of his on an application duly made by a person entitled to apply for such a calculation with respect to that child.
>
> (2) ….
>
> (3) Except as provided in subsection (3A), in any case where subsection (1) applies, <u>no court shall exercise any power which it would otherwise have to make, vary or revive any maintenance order in relation to the child and non-resident parent concerned</u>.
>
> (3A)-(4)…"

[The statement of reasons included a footnote explaining why subsection (3A) did not apply in this case, which I have omitted.]

28. The effect of s 8(3) of the Act is therefore to bar the courts from making orders for child maintenance once the NRP (or the PWC) has made an application to the Secretary of State. In other words, the jurisdiction of the Secretary of State ousts that of the Family Court, subject to the exceptions noted below:

    a. If no application has been made to the Secretary of State by either parent, the Court retains jurisdiction if the parties consent: this is the effect of s 8(5). That is not the position here: The Father does not consent.

b. That situation apart, the Court only retains jurisdiction in the limited circumstances set out in the rest of s 8, including where a child is disabled, incurs training expenses, and/or the NRP's gross weekly income exceeds a specified threshold, currently £2,000, and then only in relation to the excess, see s 8(6).

29. None of those exceptions is relevant to the issue before the Tribunal, which is whether the Secretary of State has the jurisdiction to make a CS calculation, and if so, whether it displaces the Mirror Order. As can be seen from the law set out above, the answer to both those questions is yes, because:

a. The Father has applied to the Secretary of State and is not barred from doing so, since he made the application more than a year after the Mirror Order was made (s 4 of the Act); and

b The Secretary of State's jurisdiction ousts that of the Family Court (s 8(3) of the Act).

30. That this analysis is right is confirmed by the authoritative guidance in "Child Support: the Legislation" edited by Edward Jacobs at p 29. That text cites *Philips v Pearce* [1996] 2 FLR 230, where Johnson J held that he was unable to make a maintenance order, because the Secretary of State … had jurisdiction.

31. My conclusions are the same as those of Ms Ellis, Counsel for the Father, and of the Secretary of State.

32. Mr Holden sought to rely on s 8(5), but as explained above, that subsection only applies where both parties consent that maintenance should be set by the Family Court, and that is not the position here."

10. For the reasons I give at paragraphs 62-68 below, I doubt whether it is necessary to decide whether the Mirror Order continued to have effect once the Maintenance Calculation had been made.

11. However, I agree with the learned judge that it did not, albeit that my reasoning differs from hers on this point.

12. Although what the statement of reasons says about section 8(3) is correct, that section is not, in my judgment, the relevant provision here. It applies where there is a maintenance calculation and an application is made to the Family Court either to make a new maintenance order or to "vary or revive" an old one.

13. That is not this case. There was a maintenance order in place when the maintenance calculation was made. The point is not whether a new maintenance order could be made thereafter: it could not for the reasons the judge gave. Rather, the question is whether a pre-existing maintenance order survives the making of a subsequent maintenance calculation.

14. That question is for the Family Court rather than the First-tier Tribunal or the Upper Tribunal. However, I believe the answer is that a maintenance order does not survive in those circumstances.

15. Subject to exceptions that do not apply in this case, section 10(1) of the Child Support Act 1991 and regulation 3(1)(s) (or (v)) and (2) of the MAJ Regulations provide that the making of a maintenance calculation has the effect that orders under Part III (and Schedule 1 to the Children Act 1989) "cease to have effect on the effective date of the maintenance calculation".

16. The fact that a maintenance calculation has this effect is one of the reasons that it is necessary for section 8(3) to prohibit a court from "reviving" a maintenance order.

17. Notwithstanding that small difference in reasoning, I concur with what the learned judge said about the (ir)relevance of the HK Order and her conclusion that the Secretary of State had jurisdiction to make the Maintenance Calculation:

> "*What about the HK Order?*
>
> 33. As the Father and Mother are habitually resident in the UK, they are within the jurisdiction of the Secretary of State, see s 44 of the Act. There is no provision in the Act for the Secretary of State's jurisdiction to be ousted by a foreign order.
>
> 34. Ms Ellis, for the Father, submitted that (pp 725):
>
> > it would be ludicrous to suggest that the parties would have to return to Hong Kong to litigate a variation of maintenance, especially when everyone is habitually resident here, and the likely outcome [if that course were adopted] is a remittance back to this jurisdiction.
>
> 35. She went on to say that the whole point of the Mirror Order was to prevent such a scenario, and that by applying for that Order, The Mother accepted that the UK Family Court had jurisdiction. As a result of s 8(3) of the Act, the Secretary of State now has that jurisdiction over the maintenance payable by the Father.

36. I agree with those submissions.

Conclusion on the jurisdiction issue

37. For the reasons set out above, I found that the Secretary of State and thus the Tribunal had jurisdiction, and thus that I could hear and determine The Father's CS liability following the Mother's appeal.

38. Like Ms Ellis, I think it likely that the HK court would remit an application back to the UK should one be made, because all parties are habitually resident here. However, that is a matter for the HK Court."

Reasons for refusing permission to appeal

The challenge to the First-tier Tribunal's findings of fact

18. Although the main thrust of the application relates to the status of the Mirror Order, paragraphs 9-13 of the proposed grounds of appeal relate to the evidence that the judge accepted and the fairness of procedural decisions she made.

19. I can deal with those grounds briefly, and in the round. The weighing of evidence is a matter for the First-tier Tribunal alone. It was not irrational for the judge to accept the Father's evidence over the Mother's and she has explained more than adequately why she did so. The refusal to grant the Mother an adjournment of the final hearing was self-evidently correct. Overall, I am satisfied that the Tribunal had adequate evidence on which to decide the appeal and, more importantly, to decide it fairly. As well as being experienced in the child support jurisdiction, the judge is also a Fellow of the Institute of Chartered Accountants and a Chartered Tax Adviser. She was therefore well able to form a judgment about the potential relevance of any further evidence that might become available. Given the judge's assessment that the Mother's evidence "consisted of inferences from the Father's work and lifestyle before the divorce, or from her internet researches" and that "[w]hen one avenue closed down, she sought to find another", the conclusion that the Mother had had sufficient time to marshal the necessary evidence was well-founded.

20. Finally, the judge stated (at paragraph 64 of the statement of reasons) that "Mr Holden accepted by the end of [the final hearing] that all challenges had fallen away and that the Father's company had not purchased personal assets for his private benefit. I prefer that statement to the Mother's subsequent assertion that "no such acceptance was given and indeed entirely taken out of context". I have difficulty understanding how something that apparently was not said could have been taken out of context.

21. I therefore conclude that those grounds of appeal that challenge the substance of the Maintenance Calculation (*i.e.*, as opposed to those challenging its validity) have no realistic prospects of success.

Was the Mirror Order a "maintenance order"?

22. On behalf of the Mother, Mr Holden submitted that the learned judge had erred in law by concluding (at paragraph 23 of the statement) that the Mirror Order was a "maintenance order" and, in particular, that it was made under Part III of the Matrimonial and Family Proceedings Act 1984 ("Part III").

23. I therefore gave the following directions:

> "(a) [The Mother] submits, at paragraphs 2-5 of the proposed grounds, that the Mirror Order was not made under Part III of the Matrimonial Proceedings Act 1984 and, at paragraphs 6 and 7, that it was not made under any of the other enactments listed in section 8(11) of the Child Support Act 1991 or prescribed for the purposes of that section by regulation 2 of the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992. She must therefore either:
>
> (i) identify the statutory provision that she says does form the jurisdiction for the Family Court to have made the mirror order; or
>
> (ii) confirm that it is her case that the mirror order was made without jurisdiction.
>
> In the latter case, she must also explain why she applied to the Family Court for the Mirror Order, if it had no jurisdiction to make such an order.

24. As it seems to me, the Mother has never given a satisfactory response to that direction. She has certainly not identified any positive provision other than Part III under which she says the Mirror Order was made.

25. Rather she has relied on observations made by Singer J in *Re P (A Child: Mirror Orders)* [2000] 1 FLR 435 and members of the Court of Appeal in *W v W* [2011] EWCA Civ 703 which suggest that the jurisdictional basis on which a court in England and Wales makes mirror orders is doubtful and that such orders are ancillary or auxiliary in character and made for pragmatic reasons under the inherent jurisdiction of the court rather than under a particular statute.

26. In particular, she draws my attention to what Thorpe LJ said at paragraph 54 of *W v W*, namely:

> "54. It has long been perceived by specialist judges and practitioners that in England and Wales there is no clear jurisdiction to make a mirror order in response to an appropriate request. As a matter of history the International Family Law Committee has repeatedly drawn attention to this deficit and requested an enabling section in a related statute."

27. It is notable that Thorpe LJ anticipated that the problems he identified in paragraph 54 of *W v W* were unlikely to subsist after the autumn of 2011. At paragraph 60, he stated:

> "60. The problems encountered by Singer J in the case of *Re P* should be largely overcome by the commencement of the 1996 Child Protection Convention when it comes into force this autumn. Article 24 of that Convention provides jurisdiction for advance recognition orders."

28. It therefore seems possible that paragraph 54 of *W v W* does not describe the law as it existed in 2015 when the Mirror Order was made.

29. However, it is unnecessary for me to speculate about that because *Re P* and *W v W* are readily distinguishable from the current application.

30. A mirror order can contain a number of different provisions; its contents will depend upon what was said in the original order that is being mirrored. In *Re P*, the original order of the Californian court "regulat[ed] rights of contact by the child to the father" and in *W v W*, the order of the Malaysian court concerned the "custody, care and control" of the parties' child and visitation rights in respect of that child. Even if it is the case that by 2015, the Courts of England and Wales lacked statutory jurisdiction to make a mirror order in respect of such subject matter, it does not follow that they also lacked such jurisdiction when the original order provided for ancillary financial relief.

31. Part III is headed "Financial Relief in England and Wales after Overseas Divorce etc.". The first section of that Part reads as follows:

> "**Applications for financial relief after overseas divorce etc.**
>
> **12.**—(1) Where—
>
> (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and

(b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,

either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.

(2) If after a marriage has been dissolved or annulled in an overseas country one of the parties to the marriage forms a subsequent marriage or civil partnership, that party shall not be entitled to make an application in relation to that marriage.

(3) The reference in subsection (2) above to the forming of a subsequent marriage or civil partnership includes a reference to the forming of a marriage or civil partnership which is by law void or voidable.

(4) In this Part of this Act except sections 19, 23, and 24 "order for financial relief" means an order under section 17 or 22 below of a description referred to in that section."

32. In broad terms, sections 17[1] and 22 empower a court to make the standard range of orders for financial relief that would have been open to it had the marriage been dissolved or annulled in England and Wales. In particular, and so far as is relevant, section 17(1)(a) empowers the court to make:

> "…any one or more of the orders which it could make under Part II of the 1973 Act [*i.e.*, the Matrimonial Causes Act 1973] if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation in respect of the marriage had been granted in England and Wales, that is to say—
>
> (i) any order mentioned in section 23(1) of the 1973 Act (financial provision orders);"

and section 23(1)(d) of the 1973 Act empowers the court to make:

> "… an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified".

In those circumstances, if the Family Court in this case had jurisdiction at all, it clearly had power under Part III to make an order for requiring periodical payments to be made for the benefit of L and K.

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1 Section 17 is subject to section 20, but the latter section is not relevant in this case.

33. Section 13 is in the following terms:

> “**Leave of the court required for applications for financial relief.**
>
> **13.**—(1) No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.
>
> (2) The court may grant leave under this section notwithstanding that an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property to the applicant or a child of the family.
>
> (3) Leave under this section may be granted subject to such conditions as the court thinks fit.”

34. Finally, section 15 governs the jurisdiction of a court in England and Wales to entertain an application under section 12:

> “**Jurisdiction of the court.**
>
> **15**.—(1) Subject to subsection (1A) below, the court shall have jurisdiction to entertain an application for an order for financial relief if any of the following jurisdictional requirements are satisfied, that is to say—
>
> (a) either of the parties to the marriage was domiciled in England and Wales on the date of the application for leave under section 13 above or was so domiciled on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or
>
> (b) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or
>
> (c) either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house situated in England or Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

> (1A) If an application or part of an application relates to a matter in relation to which Article 18 of the 2007 Hague Convention applies, the court may not entertain the application or that part of it except where permitted by Article 18.
>
> (2) …
>
> (3) In this section, "the 2007 Hague Convention" means the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance concluded on 23 November 2007 at The Hague."

I should add that it is for the Family Court itself to determine whether the conditions in section 15 that establish its jurisdiction are satisfied. Neither the First-tier Tribunal nor the Upper Tribunal has any power to disregard or set aside an order under Part III merely because it takes a different view on the point. Moreover, I do not take a different view.

35. I regard it as beyond argument that, taken together, the provisions set out immediately above confer power on the Family Court to make the type of order that was made in this case.

36. But was that order actually made under powers conferred by Part III?

37. In my judgment, it was:

(a) the Mother made an application under "section 13 of the Matrimonial and Family Proceedings Act 1984" for "permission to apply for financial relief after an overseas divorce". That application would not have been necessary unless the substantive application was being made under Part III;

(b) the Mirror Order itself states that it is made under the "Matrimonial and Family Proceedings Act 1984";

(c) the Mirror Order:

  (i) recites that the Father had consented to the Mother being given permission to make the application (as to which, see (a) above);

  (ii) orders (in paragraph 11) that the Father should make certain payments to the Mother for the benefit of the children under; and

  (iii) dismisses the Mother's application for:

> "[a]ll forms of financial provision under Part III Matrimonial and Financial Provision Act [*sic*] 1984"

and

> "[a]ll forms of financial provision under Schedule 1 Children Act 1989 save as provided for in paragraph 11 above".

(It will be observed that the Mirror Order itself contemplates that the order for financial provision may have been made under Schedule 1 of the Children Act 1989. If correct, that would make no difference as the order would still be a "maintenance order" by virtue of section 8(11)(e) of the Act. However, for the reasons given in paragraph 32 above, the Family Court also had the requisite powers under Part III and, for the sake of brevity, I will continue to discuss the issues as if Part III were the only relevant provision.)

38. The Mother submits that a court's description of the powers that it is exercising is not conclusive and that one must look to the substance of what it has done.

39. Up to a point, I agree: it is possible that the wrong form may sometimes be used when an order is drawn up.

40. But the fact that something is not conclusive does not mean that it is irrelevant. In this case, the parties have applied for an order under the Matrimonial and Family Proceedings Act 1984 and the court has said that it has exercised its powers under that Act. To displace the conclusion that the Mirror Order is what it says it is, it would be necessary for the substance of what has been done to differ from what Part III permits.

41. In this case, the application made to the Family Court was for financial relief after an overseas divorce: that is what orders under Part III provide. The argument that one should look to the substance of the matter favours the decision made by the learned judge rather than the grant of permission to appeal against that decision.

42. Finally, the Family Court could not have dismissed the Mother's claims under Part III unless it was seised of an application from her under that Part, or otherwise than by exercising its powers under that Part.

43. The Mother draws attention to the fact that she undertook to the Hong Kong court that:

> "she will not make any claims in England and Wales pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 and/or Section 15 of the Children Act 1989 together with schedule 1 of the Act, or make any ancillary financial relief claims in any jurisdiction",

the implication being that the application could not have been under Part III because, otherwise, that would have led to her being in breach of her undertaking.

44. The suggestion is mischievous. As the Mother well knows, the Mirror Order contained a recital that both parties had agreed that the application to the Family Court did not breach that undertaking.

45. That may have been on the basis that the HK Order was internally inconsistent. The Mother undertook both to apply for a mirror order that could only be obtained under Part III, and—at the same time—not to make any applications under Part III. On the face of it, she could not keep both those undertakings.

46. The inconsistency could only be resolved by reading the general undertaking as being subject to the specific one. In other words, in the context of the HK Order as a whole, the undertaking quoted above must be interpreted as meaning that the Mother would not make any claims in England and Wales pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 *other than to apply for the Mirror Order*.

47. Be that as it may, the incontrovertible fact is that the Mother *did* make an application under Part III. If that places her in breach of her undertaking to the Hong Kong court, then she is in breach of that undertaking. That circumstance cannot affect the nature of the application she made, or the powers under which the Family Court made the Mirror Order.

48. Finally the Mother relies on the judgment of Thorpe LJ in *W v W* (which, it will be remembered, was a "custody, care and control" case) in support of the view that the jurisdiction of the court making the mirror order is transient with the main jurisdiction remaining with the court that made the order being mirrored.

49. What Thorpe LJ said was as follows:

> "47. Another realistic aim is to provide protective measures to safeguard children in transit from one jurisdiction to another or to ensure their return at the conclusion of a planned visit.
>
> 48. Protective measures take the form of undertakings, mirror orders and safe harbour orders. As yet there is no accepted international, let alone universal, mechanism to achieve protective measures. Even amongst common law jurisdictions there is no common coin.
>
> 49. In many ways the power to make mirror orders is the most effective way of achieving protective measures. What the court in the jurisdiction of the child's habitual residence has ordered is replicated in the jurisdiction transiently involved in order to ensure that the parents are equally bound in each State.

> 50. The mirror order is precisely what it suggests, an order that precisely reflects the protection ordered in the primary jurisdiction. The order in the jurisdiction transiently involved is ancillary or auxiliary in character."

50. There are two answers to the point.

51. The first is that even if the relief granted by the Family Court had been transient in nature, it would not follow that it was not acting under Part III.

52. The Family Court does not have jurisdiction to make a mirror order merely because a party has undertaken to a foreign court that she will use her best endeavours to obtain such an order. Some basis for the court's jurisdiction must be found in the law of England and Wales. And where a mirror order provides for financial relief following a foreign divorce that basis is found in Part III.

53. In short, even if the Mirror Order had only required the Father to provide transient financial support (*e.g.*, during a two-week holiday in England and Wales), the court's jurisdiction would still have been founded on Part III.

54. The second is that this is not a "transient protection" case.

55. The HK Order records that the Father intended to relocate to England and, on the facts found by the judge, the Mother and children now live in the United Kingdom as well. The Secretary of State would not have had power to make a maintenance calculation unless all parties were habitually resident here. In other words, the Family Court, not the Hong Kong court is now "the court in the jurisdiction of the child's habitual residence".

56. For all those reasons, I am satisfied that the Mirror Order was made under Part III and is therefore a "maintenance order" as defined by section 8(11) of the Child Support Act 1991 for the purposes of section 4. It follows that the judge's decision was correct.

57. I have not lost sight of the fact that this is an application for permission to appeal, rather than a decision on the appeal itself. The test is therefore whether the proposed appeal would have a realistic prospect of success rather than whether it would inevitably succeed.

58. I have nevertheless decided to refuse permission to appeal for two reasons.

59. The first is that, having held an oral hearing, I am satisfied for the reasons given above that the proposed appeal does not have a realistic prospect of success.

60. The second is that, even if I had agreed with the Mother that the learned judge's reasoning was incorrect and the Mirror Order was not at a "maintenance order", the judge's decision to refuse the appeal and confirm the Maintenance Calculation would still have been correct.

61. That is so for the following reasons.

62. These proceedings (including for the present purposes the proceedings before the First-tier Tribunal) are ultimately only concerned with whether the Maintenance Calculation was correct.

63. It is a commonplace that appeals are against decisions, not the reasons for decisions. That means that this appeal is ultimately against the Secretary of State's outcome decision that Father was liable pay £105.05 per week in child support maintenance from the effective date of 8 December 2017.

64. It follows that the appeal to the First-tier Tribunal was about:

(a) whether the Father's application for child support maintenance was validly made (see paragraphs 77-78 below); and, if it was

(b) what was the correct level of the Father's weekly liability to pay child support maintenance and from which effective date was it payable (as to which see paragraphs 18-21 above)?

65. The appeal was not, however, about how the Maintenance Calculation affects either the HK Order or the Mirror Order. That is a matter for—and only for—the Hong Kong court and the Family Court.

66. For example, it may be that, if asked, the Family Court would agree with the Mother that the Mirror Order continued to have effect subject to the deduction of the weekly sum of £105.05 for which the Father is liable under the maintenance calculation from the monthly sum of £1,750.00 for which he is liable under the Mirror Order.

67. Alternatively, the Family Court might agree with me that the Mirror Order ceased to have effect on the effective date of the Maintenance Calculation (see paragraph 14 above).

68. Either way, however, that would be a question for the Family Court and for the purpose of these proceedings, neither of those possible decisions of the Family Court (nor any possible decision of the Hong Kong court) would in any way call into question the validity or content of the Maintenance Calculation. They could not do so because it is

not for the Family Court but for the First-tier Tribunal and, on further appeal, the Upper Tribunal to decide the latter issues. Whatever the Hong Kong court or the Family Court might decide about the effect of the Maintenance Calculation on its own order, the Father remains liable under that Maintenance Calculation if it has been validly made.

Was the Maintenance Calculation validly made?

69. The answer to that question lies in section 11 of the Child Support Act 1991 the relevant paragraphs of which state:

> "**Maintenance calculations.**
>
> **11**.—(1) An application for a maintenance calculation made to the Secretary of State shall be dealt with by the Secretary of State in accordance with the provision made by or under this Act.
>
> (2) The Secretary of State shall (unless the Secretary of State decides not to make a maintenance calculation in response to the application, or makes a decision under section 12) determine the application by making a decision under this section about whether any child support maintenance is payable and, if so, how much.
>
> (3)-(5) [*Repealed*]
>
> (6) The amount of child support maintenance to be fixed by a maintenance calculation shall be determined in accordance with Part I of Schedule 1 unless an application for a variation has been made and agreed.
>
> (7)-(8) [*Omitted*]."

70. Section 12 empowers the Secretary of State to make either a "default maintenance decision" or an "interim maintenance decision".

71. The former power arises if the Secretary of State does not have sufficient information to make a maintenance calculation under section 11.

72. The latter power arises if an application for a maintenance calculation and an application for a variation are made at the same time. In those circumstances, the Secretary of State can make an interim maintenance calculation[2] while gathering evidence and considering whether to agree the variation.

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2 The interim maintenance calculation is made at the same rate as an unvaried maintenance calculation under section 11.

73. Neither of those powers arises in this case so, the only options available to the Secretary of State on receipt of the Father's application were either not to make a maintenance calculation or to make one.

74. To a person unfamiliar with public and administrative law, the Secretary of State's option not to make a maintenance calculation might seem to leave her with a great deal of discretion. But that is not the case. Powers conferred by statutes must be exercised so as to further the purposes of the statute (see, generally, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997).

75. The purposes of the Child Support Act 1991 could not be clearer. Section 1 provides:

> "**The duty to maintain.**
>
> **1**.—(1) For the purposes of this Act, each parent of a qualifying child is responsible for maintaining him.
>
> (2) For the purposes of this Act, a non-resident parent shall be taken to have met his responsibility to maintain any qualifying child of his by making periodical payments of maintenance with respect to the child of such amount, and at such intervals, as may be determined in accordance with the provisions of this Act.
>
> (3) Where a maintenance calculation made under this Act requires the making of periodical payments, it shall be the duty of the non-resident parent with respect to whom the calculation was made to make those payments."

The purpose of the Act is that a non-resident parent should meet his responsibility to maintain the qualifying child by making periodical payments of child support maintenance. If the Secretary of State were to decide not to make a maintenance calculation in circumstances where she had power to do so, the effect would be to thwart that purpose rather than further it.

76. I therefore judge that the Secretary of State's power not to make a maintenance calculation is only exercisable in circumstances in which she has no jurisdiction to do so (*e.g.*, where the parties are not habitually resident, or because the person with respect to whom the application is made is not, in fact, a non-resident parent). In all other cases, when she receives an application for child support maintenance, the Secretary of State *must* make a maintenance calculation: see also the reported decision of Mr Commissioner Rowland (as he then was) in *R(CS) 2/98*, which—albeit in a different context—is to similar effect.

77. It follows that, as I foreshadowed in paragraph 64(a) above the Maintenance Calculation was validly made unless either:

(a) (which is not suggested) the Secretary of State had no jurisdiction[3]in the matter; or

(b) the Father's application for child support maintenance was invalid and hence not legally an application at all.

Why the Mother cannot succeed

78. In those circumstances, the Mother's case faces an insuperable problem.

79. As the learned judge explained in paragraph 20 of her written statement of reasons (see paragraph 7 above), under section 4(1) of the Child Support Act 1991 a non-resident parent, such as the Father has a right to apply for a maintenance calculation. The only limits on that right are those set out in section 4(10) (which are also set out in that paragraph).

80. The problem facing the Mother is that *under section 4(10) the only court orders that restrict the right of a non-resident parent to apply for a maintenance calculation are "maintenance orders"*: court orders that are not "maintenance orders" do not restrict that right in any way

81. It follows that if, as the Mother submits, the Mirror Order was not a maintenance order, then there is no statutory provision that gives it the effect of limiting the Father's right to apply for a maintenance calculation.

82. If, on the other hand, the view that the Secretary of State, the learned judge, and I myself take is correct and the Mirror Order was a maintenance order, then it prevented the Father from making such an application for a year, which period had expired before the earliest date that the learned judge had to consider.

83. For those reasons, however one characterises the Mirror Order, it did not invalidate the Father's application for child support maintenance and, on receipt of that application, the Secretary of State was both empowered and required to make the Maintenance Calculation. The proposed appeal therefore stands no prospect of success even if the Upper Tribunal were ultimately to accept that no maintenance order has been made in this case.

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[3] *e.g.*, in the sense that one or more of the parties was not habitually resident, or L and K were not, in fact qualifying children.

Coda

84. Judgments given on applications for permission to appeal do not create binding precedents (see *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at [43] and the authorities referred to in that paragraph). However, they may be of persuasive authority and, as I know of no other decisions of the Upper Tribunal in which the issues in this application have been considered, I will arrange for this decision to be published on the website of the Administrative Appeals Chamber. I hope that the First-tier Tribunal will find it helpful if similar issues arise in the future.

Authorised for issue
on 17 May 2022

Richard Poynter
Judge of the Upper Tribunal