IN THE UPPER TRIBUNAL **Appeal No.** CCS/1406/2020
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Mr R.R.

Appellant

- v –

Secretary of State for Work and Pensions

1st Respondent

and

Mrs P.R.

2nd Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 10 January 2022
Decided on consideration of the papers

Representation:

Appellant: In person
1st Respondent: Ms J Mdumulla, DMA, Department for Work and Pensions
2nd Respondent: In person

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 20 March 2020 under number SC188/19/00047 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and re-make the First-tier Tribunal's decision as follows.

DECISION NOTICE

1. ***The mother's appeal is dismissed.***
2. ***The decision made on 12.03.2018 and revised on 28.06.2018 is confirmed.***
3. ***With effect from 11.03.2018, the father's liability for child support maintenance is £85.24 per week in respect of his daughter C.***
4. ***This liability is based on the flat rate liability of £7 p.w. and £78.24 p.w. based on additional income of £33,996 p.a. from his occupational pension. It is not just and equitable to include in that variation the two 2016/17 drawdowns of £16,000 (11.05.2016) and £58,333 (01.11.2016).***

REASONS FOR DECISION

Introduction

1. This is the father's appeal to the Upper Tribunal so he is the Appellant in the present proceedings. The Secretary of State is the First Respondent and the mother is now the Second Respondent. The parents are subject to the latest 2012 child support scheme. I refer to their daughter as "C", to protect her privacy and anonymity.

2. This appeal has been transferred from Upper Tribunal Judge Poynter to me for decision. I have considered the whole appeal file including all parties' various written submissions in addition to Judge Poynter's earlier observations. My conclusion is that the Appellant's appeal to the Upper Tribunal succeeds. This is because the decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision. However, in my view (and echoing what I think is implicit in Judge Poynter's observations) the last thing these parents need is a re-hearing of the original appeal before the First-tier Tribunal. I therefore re-decide the appeal, substituting my decision for that of the First-tier Tribunal. My reasons follow.

The mother's request for an oral hearing of the Upper Tribunal appeal

3. The Second Respondent has requested an oral hearing of the appeal (p.171) but has not actually given any reason for that request. Neither the Appellant nor the First Respondent has asked for an oral hearing. I have considered all parties' views as I am required to do under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). I refuse the application for an oral hearing of the appeal before the Upper Tribunal for the following main reasons.

4. First, it is important to realise that the Upper Tribunal's role is confined to correcting the tribunal below on issues of law. It is not the job of the Upper Tribunal to embark on a further detailed factual investigation of the case. Second, an oral hearing before the Upper Tribunal is both unnecessary and disproportionate in the present circumstances. It would actually cause further delay and inconvenience to the parties, in a case which has certainly suffered more than its fair share of delays. For both these reasons, and applying the overriding objective of seeking to ensure a fair and just procedure, I refuse the request for an Upper Tribunal oral hearing of the appeal.

The background

5. There is a lengthy back-story to this appeal. For present purposes this abbreviated account will suffice. On 13 March 2017 the Secretary of State's CMS (Child Maintenance Service) decision-maker assessed the Appellant's child support liability at £7 a week (as the father was a pensioner). On 27 November 2017 a decision maker allowed the mother's variation application and determined the child maintenance due to be £85.24 p.w. On 12 March 2018 a further (annual review) decision was made, based on the Appellant's state pension and other income from 2016/17 (in total £108,329.00). This resulted in a liability of £217.98 a week as from 11 March 2018.

6. However, on 28 June 2018 a decision-maker decided that the Appellant was liable to pay only £85.24 p.w. in child maintenance for C with effect from 11 March 2018. This figure was again based on income for the 2016/17 tax year. This figure was obviously substantially less than the previous decision. The mother disputed this decision, which in due course became the subject of the initial appeal to the First-tier Tribunal (FTT). The decision was reviewed within the CMS but not changed. In doing so, the

CMS was working on the basis that the father had an additional income as a result of a variation amounting to £33,996.00 a year. The difference (between £108,329.00 and £33,996.00) was accounted for by the fact that in the relevant tax year the father had made two lump sum withdrawals from his pension fund (£16,000 on 11 May 2016 and £58,333 on 1 November 2016). In short, the 12 March 2018 CMS decision included these lump sums in the income assessment. The subsequent CMS revised decision of 28 June 2018 did not do so.

A summary of the First-tier Tribunal's decision

7. The First-tier Tribunal held a 'hybrid' hearing on 2 March 2020. The District Tribunal Judge, the mother and the CMS presenting officer were present at the venue in Wales while the father participated by telephone from a tribunal venue in the North West. The FTT allowed the mother's appeal (see the corrected decision notice at p.94), and so set aside the CMS decision of 12 March 2018 as revised on 28 June 2018. The FTT's summary reasons in essence were that the maintenance calculation was governed by the HMRC data for 2016/17 and there was no provision to disregard the two taxable lump sum withdrawals, although the Judge accepted these were "to pay his legal costs arising out of his divorce and to pay [the mother] as settlement of their ancillary relief proceedings" (p.94, summary of reasons, paragraph 2). The decision notice made no mention of there being a variation or the just and equitable test. The Judge later provided a statement of reasons expanding on these reasons (pp.96-99), which did (briefly) mention the variation.

8. The father subsequently made a lengthy application for permission to appeal (pp.102-117), which was refused by the Judge (p.118). The father then made a more streamlined application for permission to appeal direct to the Upper Tribunal (pp.121-123 This set out four grounds of appeal under the following headings: family-based arrangement, disregard of the 25% rule, the just and equitable requirement and the public sector equality duty.

The grant of permission to appeal to the Upper Tribunal

9. Judge Poynter gave the father permission to appeal in his detailed ruling dated 13 November 2020. Having stated at the outset that he was not persuaded by most of the Appellant's own grounds of appeal, Judge Poynter further explained as follows. I make no apology for repeating Judge Poynter's observations at length as they helpfully define the legal issues arising on the appeal (I should mention I have both anonymised Judge Poynter's text and added some sub-headings for convenience):

> 2. However, I have given permission to appeal because it is arguable with either realistic, or strong, prospects of success that the First-tier Tribunal may have made the following legal errors.
>
> **Ground 1**
>
> 3. First, I am unsure that the Tribunal (acting as a whole) had adequate regard to the Practice Direction: *First Tier and Upper Tribunal – Child, Vulnerable Adult and Sensitive Witnesses*, when listing the appeal. As a person who is hard of hearing, [the father] is a "vulnerable adult" and the effect of hearing the appeal in [Wales] with [the father] attending by telephone from the tribunal venue in [the North West] would have been to deprive him of any help he might have derived from visual clues when trying to understand what was being said. My decision in *RT v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 207 (AAC) may be relevant.

Ground 2

4. Second, I note that [the District Tribunal Judge] originally made what I would regard as the correct decision (namely a hearing in [the North West] with [the mother] attending by video link from [Wales]) but was subsequently overruled by Regional Tribunal Judge/Acting Chamber President Clarke and Regional Tribunal Judge Maddox. As presently advised I cannot understand the legal basis on which they had power to do so.

5. Although their status as Regional Judges and, in the case of Judge Clarke, Acting Chamber President reflect their administrative responsibilities, judicially, they are both Judges of the First-tier Tribunal; as is [the District Tribunal Judge]. [She] had made her decision and judicial decisions are normally to be regarded as final. Unless I have overlooked something, there had been no application to reconsider the ruling and no change in the underlying circumstances that might have justified re-opening the issue. What power had Judge Clarke and Judge Maddox to overrule her?

Ground 3

6. Third, the Tribunal appears to have been wide of the mark in its reliance on regulation 36 of the Child Support Maintenance Calculations 2012 (the Regulations) and in its consideration of the 25% rule. In my provisional judgment, whether the calculation should have been based on current or historic income is an issue that only applies when what is being considered is the "formula" calculation.

7. In this case the "formula" gives a liability at the flat rate of £7.00 because [the father] is in receipt of a state pension (see regulation 44 of the Regulations and paragraph 4(1)(b) of Schedule 1 to the Child Support Act 1991 (the Act)).

8. The only way in which (on the facts of this case) [the father] could be made liable at a higher rate would be by the Secretary of State—or, on appeal, the Tribunal—agreeing that the "formula" rules should be varied under paragraph 4(1) of Schedule 4B to the Act and regulation 70 of the Regulations, *i.e.*, on the basis that the non-resident parent is on a flat rate but has a gross weekly income.

9. In those circumstances, is the amount of such income not to be calculated under the provisions of regulation 70 itself rather than by reference to the formula rules in regulations 31-42?

Ground 4

10. Fourth, and in my provisional view, most importantly, it is arguable with strong prospects of success that the Tribunal failed to deal properly with the issue whether it was just and equitable to continue the variation.

11. At paragraph 14 of the written statement of reasons, [the Judge] stated:

> "14. There was a variation in place, not challenged by either party in this appeal. That was so that [the father]'s private pension was counted as income rather than his maintenance being restricted to £7 a week. Regulation 70 applied because [the father]'s gross weekly income exceeded £100. I was satisfied that it was just and equitable for such a variation to be in place. Without it,

> [the father] would pay only a fraction of his income, to the detriment of his daughter."
>
> 12. In my provisional judgment, however, before [the District Tribunal Judge] could lawfully agree the variation she did, she needed to be satisfied that it was just and equitable not merely that they should be some variation in place, but that it was just and equitable to agree a variation *at the specific rate* that would otherwise be applicable.
>
> 13. In other words, treating [the father] as having an income of £108,329 per annum was the maximum variation to which [the Judge] could agree on the facts as she found them to be. The requirement that any variation be just and equitable gave her power to reduce the rate of the variation by any amount.
>
> 14. It does not appear from the written statement of reasons that the "just and equitable" discretion was exercised at that level. From the paragraph quoted above, it appears that [the Judge] decided that it was just and equitable for there to be *a variation* and then followed that decision where the evidence led her without giving further consideration to whether *the particular variation* she was agreeing was just and equitable.
>
> 15. This is a case in which, if I decide to set the First-tier Tribunal's decision aside, I may also decide to re-make that decision, rather than remit it to the Tribunal. The responses and reply directed below must therefore state what the respective parties consider the re-made decision should be and explain why.
>
> 16. It may help if I say that, again in my provisional view, if [the father] withdrew atypical amounts of income from his pension in order to pay specific sums which he could not reasonably avoid paying and could not pay by other means, then, to that extent, his income was not available to support [C] and I would not regard it as just and equitable to agree a variation by reference to that income.

The parties' submissions on the Upper Tribunal appeal

8. The parties have each been given, and have taken up, the opportunity to make written submissions on the appeal to the Upper Tribunal.

9. Ms Mdumulla, for the Secretary of State (and First Respondent), supports the appeal on the basis that the FTT should have used current income, rather than historic income, as the 25% tolerance had been breached. She invites me to allow the appeal and to set aside the FTT's decision. She suggests that I re-make the decision that the FTT should have made, namely that the lump sums drawn on two separate occasions did not amount to the Appellant's regular income. She does not address the just and equitable requirement in variations.

10. The Second Respondent makes a number of observations on the issue of what is just and equitable in the context of the Appellant's pension drawdowns. She also refers to the March 2021 annual review, although of course that is not strictly at issue in the present proceedings.

11. The Appellant has also made a number of further observations in reply.

The Upper Tribunal's analysis

Introduction

12. It seems to me most helpful to address this appeal in terms of the various issues (and, in particular, the four grounds of appeal) raised by Judge Poynter's grant of permission to appeal (see paragraph 7 above).

13. The first two grounds concern matters of tribunal procedure while the latter two grounds turn on issues of substantive child support law. I can take the two procedural grounds fairly shortly but the substantive grounds of appeal require rather more detailed consideration.

The two procedural grounds

14. As regards Ground 1, I do not consider that the FTT failed, when listing the appeal, to have adequate regard to the *Practice Direction: First Tier and Upper Tribunal – Child, Vulnerable Adult and Sensitive Witnesses*. The District Tribunal Judge (DTJ) took one view about the best solution to listing (p.74) while Regional Tribunal Judge (RTJ) Clarke and RTJ Maddox both took the same but different view (pp.75-78). All three judges were mindful of the Appellant's hearing problems and the need for reasonable adjustments when making listing directions. It is trite law, at the risk of reasonable repetition, that reasonable judges may reasonably differ as to what may constitute reasonable listing directions. Personally, I would have sided with the DTJ for the reasons she (and Judge Poynter) gave, but that is simply yet another judge's discretionary view and does not mean RTJ Clarke and RTJ Maddox erred in law. They simply elected to exercise their discretion in a different but reasonable way when making listing directions. It is clear from the detailed record of proceedings that the DTJ took appropriate steps during the hearing itself to accommodate the Appellant's needs. Judge Poynter's decision in *RT v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 207 (AAC) shows that in practice it may be relatively rare that an omission to consider fully the *Practice Direction: First Tier and Upper Tribunal – Child, Vulnerable Adult and Sensitive Witnesses* will amount to a material error of law. This is not such a case.

15. In respect of Ground 2, the question was put in the grant of permission to appeal as to whether RTJ Clarke and RTJ Maddox had jurisdiction to "overrule" the DTJ's listing directions. With the greatest respect to Judge Poynter, I do not consider this was a case of the two Regional Tribunal Judges "overruling" the DTJ in any meaningful way. In her ruling at p.74, the DTJ simply expressed a provisional view about the listing arrangements, invited representations from the parties (to be made within 14 days) and further directed the matter then be put back for consideration before "a Judge", and so not reserved to herself (within 21 days). Thereafter RTJ Clarke and RTJ Maddox simply picked up the reins of the active case management of this FTT appeal, albeit they came to a different shared view as to the appropriate listing arrangements. As such, they had jurisdiction to act and there was no procedural error of law on the part of the FTT.

16. It follows I would not have allowed this appeal on either of the two procedural grounds identified by Judge Poynter.

The first substantive ground: the calculation of the father's income

17. So far as Ground 3 is concerned, the FTT decided that the two lump sum pension payment withdrawals should have been included as part of the father's gross weekly

income. The key passage in the FTT's reasoning is at paragraphs 14-18 of the statement of reasons.

18. In paragraph 14, the FTT acknowledged the undisputed variation in place and recognised that as such the father's "private pension was counted as income rather than his maintenance being restricted to £7 a week." There was then a brief reference to the just and equitable test, a matter to which I return when considering Ground 4.

19. The statement of reasons then deals in some detail (at paragraphs 15-18) with regulations 34 and 36 of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677). The gist of that explanation was that (i) the 2016/17 historic income rule applied as the 25% tolerance rule was not breached (which would have permitted reliance on current income); and (ii) pension income was defined by reference to Part 9 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) which did not differentiate between regular and one-off lump sum pension payments.

20. The FTT's approach in the statement of reasons understandably involves some compressed reasoning. It may assist to take the issues that arise step by step.

21. First, the amount of child maintenance liability in any given case is "determined in accordance with Part I of Schedule 1 [to the Child Support Act 1991] unless an application for a variation has been made and agreed" (see Child Support Act 1991, section 11(6)). This indicates in one sense that there are two paths that might be followed: the formula way or the variation way. However, the latter is a variant, so to speak, on the former, given that a variation is a revision or supersession of the original maintenance calculation, and not a freestanding decision (as was the case under the former departures regime). Section 11(7) further provides that if a variation is agreed then the level of maintenance is fixed according to section 28F(4) of the Act.

22. Second, Part 1 of Schedule 1 sets out the general and more specific rules relating to the formula assessment of child support liabilities. The general rule is that the basic rate applies (see paragraph 2) unless either the reduced rate, flat rate or nil rate applies (see paragraph 1(1)). So far as the Appellant in the present case is concerned, the relevant provision is paragraph 4(1) of the Schedule (sub-paragraph (2) of which is not relevant for present purposes):

> 4.(1) Except in a case falling within sub-paragraph (2), a flat rate of £7 is payable if the nil rate does not apply and—
>
> (a) the non-resident parent's gross net weekly income is £100 or less; or
>
> (b) he receives any benefit, pension or allowance prescribed for the purposes of this paragraph of this sub-paragraph; or
>
> (c) he or his partner (if any) receives any benefit prescribed for the purposes of this paragraph of this sub-paragraph.

23. The Appellant is a state pensioner, and the standard retirement pension is prescribed for the purpose of paragraph 4(1)(b) of Schedule 1 – see regulation 44(1)(a)(ii) of the Child Support Maintenance Calculation Regulations 2012. It follows the default position is that the Appellant was subject to the flat rate child support liability of £7 a week.

24. Third, one must look beyond Schedule 1 to the Child Support Act 1991 and Part 4 of the Child Support Maintenance Calculation Regulations 2012 to see how the father's

income is to be assessed. The starting point, as indicated by section 11(7), is section 28F of the Child Support Act 1991. Section 28F(1) allows the Secretary of State to agree a variation where (a) the circumstances fall within one of the cases in Part I of Schedule 4B to the Act; and (b) it is just and equitable to do so. Section 28F(4) then requires the Secretary of State to "determine the basis on which the amount of child support maintenance is to be calculated" and to make a section 11 calculation accordingly. In the present instance, the relevant case for a variation was derived from paragraph 4(2)(c) of Schedule 4B to the Act (emphasis added):

> 4.(1) The Secretary of State may by regulations prescribe other cases in which a variation may be agreed.
>
> (2) Regulations under this paragraph may, for example, make provision with respect to cases where—
>
> (a) the non-resident parent has assets which exceed a prescribed value;
>
> (b) a person's lifestyle is inconsistent with his income for the purposes of a calculation made under Part I of Schedule 1;
>
> (c) a person has income which is not taken into account in such a calculation;
>
> (d) a person has unreasonably reduced the income which is taken into account in such a calculation.

25. Fourth, paragraph 4(2)(c) of Schedule 4B to the Act as cited above therefore provides the statutory authority for regulation 70 of the Child Support Maintenance Regulations 2012, the relevant provisions of which read as follows:

> **Non-resident parent on a flat rate or nil rate with gross weekly income**
>
> **70.**—(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's liability to pay child support maintenance under a maintenance calculation which is in force or has been applied for is or would be—
>
> (i) the nil rate by virtue of the non-resident parent being one of the persons referred to in paragraph (3); or
>
> (ii) the flat rate by virtue of the non-resident parent receiving a benefit, pension or allowance mentioned in regulation 44(1) (flat rate);
>
> (b) the Secretary of State is satisfied that the non-resident parent has an amount of income that would be taken into account in the maintenance calculation as gross weekly income if sub-paragraph (a) did not apply; and
>
> (c) that income is ... more than £100 per week.
>
> (2) Where a variation is agreed to under this regulation, the non-resident parent is treated as having additional income of the amount referred to in paragraph (1)(b).

26. The Appellant, as a pensioner in receipt of the state retirement pension, was evidently a person to whom regulation 70(1)(a)(ii) applied. The question then was whether he had "an amount of income [in excess of £100 a week] that would be taken into account in the maintenance calculation as gross weekly income if [that

exclusion] did not apply". The term "gross weekly income" is defined by regulation 2 as meaning "income calculated under Chapter 1 of Part 4" (i.e. regulations 34-42). Where a variation is agreed, that amount is then treated as the father's additional income (see regulation 70(2)).

27. The effect of the various additional income grounds on the maintenance calculation is then provided for by regulation 73 (made under paragraph 5(3) of Schedule 4B to the Act). This states as follows:

> **Effect on the maintenance calculation – additional income grounds**
>
> **73.**—(1) Subject to paragraph (2) and regulation 74 (effect on maintenance calculation – general), where the variation agreed to is one falling within Chapter 3 (grounds for variation: additional income) effect is to be given to the variation by increasing the gross weekly income of the non-resident parent which would otherwise be taken into account by the weekly amount of the additional income except that, where the amount of gross weekly income calculated in this way would exceed the capped amount, the amount of the gross weekly income taken into account is to be the capped amount.
>
> (2) Where a variation is agreed to under this Chapter and the non-resident parent's liability would, apart from the variation, be the flat rate (or an amount equivalent to the flat rate), the amount of child support maintenance which the non-resident parent is liable to pay is a weekly amount calculated by adding an amount equivalent to the flat rate to the amount calculated by applying Schedule 1 to the 1991 Act to the additional income arising under the variation.

28. The Appellant's position is governed by regulation 73(2) as he is a non-resident parent who would otherwise be liable to the flat rate. It follows that his child support liability is (i) the flat rate weekly amount (£7) plus (ii) "the amount calculated by applying Schedule 1 to the 1991 Act to the additional income arising under the variation". In plain English, the Appellant has to be assessed as if he did not have the state retirement pension and by then adding the flat rate amount to a liability figure generated from the additional income.

29. The FTT's decision did not follow this legislative paperchase in every detail but nor did it need to in my view. Judge Poynter asked, when giving permission to appeal, whether the amount of additional income "is to be calculated under the provisions of regulation 70 itself rather than by reference to the formula rules in regulations 31-42". However, the discussion above demonstrates that the calculation required for the purposes of regulations 70 and 73(2) refers back to the formula assessment in Schedule 1 to the Act (and hence indirectly to Chapter 1 of Part 4 of the Child Support Maintenance Calculation Regulations 2012). The FTT undoubtedly grasped the fundamental point that the father's child support liability was to be calculated on the basis of the flat rate amount to which was to be added a figure derived from his additional income (what would otherwise be his gross weekly income). To that extent the FTT's decision shows no material error of law.

30. However, that is not the end of the matter. The critical question, as Judge Poynter identified, was whether the FTT dealt properly with the just and equitable requirement in continuing the variation. This takes us to the second substantive ground, or Ground 4.

The second substantive ground: the "just and equitable" requirement

31. As regards Ground 4, it will be recalled that section 28F(1) of the Child Support Act 1991 permits the Secretary of State to agree a variation where (a) the circumstances fall within one of the cases in Part I of Schedule 4B to the Act; and (b) it is just and equitable to do so. The latter requirement connotes a broad discretion. As the Upper Tribunal observed in *RC v CMEC and WC* [2009] UKUT 62 (AAC): [2011] AACR 38 at paragraph 36:

> Section 28F(1)(b) provides that "The Secretary of State *may* agree to *a* variation if *it is his opinion* that, in all the circumstances of the case, it would be just and equitable to agree to a variation". Those terms, especially the words we have emphasised, indicate a broad discretion that is not limited to any particular form of variation.

32. Accordingly, the just and equitable condition "appears designed to enable the Secretary of State to arrive at a fair result on the facts of the case" (*RC v CMEC and WC* at paragraph 39). As such, the Upper Tribunal ruled in that decision that the just and equitable requirement allows the Secretary of State and tribunals to vary the amount that would otherwise be agreed to as a variation (the flexible approach) rather than allowing them only to agree, or refuse to agree, to a variation of the set amount identified in the potential variation (the all or nothing approach). As the Upper Tribunal explained, "the all or nothing approach changes a test of what is just and equitable into a crude instrument that is incapable of producing that effect and can cause the opposite" (at paragraph 42).

33. Thus, the just and equitable requirement requires the Secretary of State or tribunal to exercise a judgment taking into account all relevant considerations. This is subject to the qualification that under the legislation some matters must be considered (section 28E(2) and (3) and 28F(2) of the Child Support Act 1991) while others must not be considered (section 28E(4) of the Act and regulation 60 of the Child Support Maintenance Calculation Regulations 2012). That said, as Mr Commissioner Jacobs (as he then was) explained in CCS/3543/1998:

> 32. Having exercised that judgment, the tribunal must explain how and why it came to its conclusion. It is not necessary for a tribunal to deal with every consideration that might be relevant to the just and equitable requirement. It will only have evidence about some relevant matters and, obviously, does not have to deal with matters on which it has no evidence. As regards matters on which it does have evidence, it need only deal with those considerations which are particularly significant in the circumstances of the case. One factor which will always be significant is the impact of the direction on the amount of child support maintenance payable and, therefore, on the finances of the absent parent's family.

34. In the present case the FTT's explanation for the variation was as follows:

> 14. There was a variation in place, not challenged by either party in this appeal. That was so [the father's] private pension was counted as income rather than his maintenance being restricted to £7 a week. Regulation 70 applied because [the father's] gross weekly income exceeded £100. I was satisfied it was just and equitable for such a variation to be in place. Without it [the father] would pay only a fraction of his income, to the detriment of his daughter.

35. I agree with Judge Poynter's observations when giving permission to appeal that the FTT's statement is problematic (see paragraphs 12-14 of the grant of permission as cited at paragraph 7 above). The passage from the FTT's statement of reasons suggests that it failed to exercise at all the discretion required when applying the just and equitable test. Indeed, it comes perilously close to indicating that the FTT may have erred in law by adopting the all or nothing approach to a variation, rather than the flexible approach mandated by *RC v CMEC and WC*. Even if that were not the case, the reasoning is insufficient. The only reason given is that without the variation for the full amount, the Appellant "would pay only a fraction of his income, to the detriment of his daughter". With respect this is tautologous – by definition if the variation were not implemented in full, the assessment of the father's child support liability would be based on some fraction of his income. However, the FTT's reasons do not address the father's arguments as to why it was not just and equitable to include all the occupational pension payments made in the relevant year.

36. I therefore agree with Judge Poynter's provisional view that the First-tier Tribunal erred in law in this respect on Ground 4. This was plainly a material error of law such that I should set aside the FTT's decision.

The outcome of this Upper Tribunal appeal

37. I therefore conclude that the First-tier Tribunal's decision involves an error of law on the second of the two substantive grounds of appeal identified by Judge Poynter (but not on the other three grounds of appeal). For that reason I allow the father's appeal on Ground 4 and set aside the FTT's decision. In all the circumstances I do not consider it appropriate to remit the case to the FTT for re-hearing. Given the material already on file, I do not consider it necessary for further evidence as to the facts to be adduced. It is also fairest to all concerned to try and provide a degree of closure, at least as regards the specific CMS decision under appeal (I recognise there may well be further appeals in the FTT pipeline relating to subsequent annual reviews of the father's child support liability). The appeal is concerned with a child support liability with an effective date of nearly four years ago. I also note that C is the only qualifying child and she is already aged 19 years. In all those circumstances I therefore propose to re-make the decision under appeal (under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007).

38. The figures are not in dispute. The HMRC (and pension fund) data showed that the Appellant received a total of £108,329.00 in occupational pension payments in the relevant tax year (2016/17). This total was made up of three elements – the aggregate of £33,996 in 12 monthly pension payments together with the father's two lump sum withdrawals from his pension pot (being £16,000 on 11 May 2016 and £58,333 on 1 November 2016). The two drawdowns therefore amounted to £74,333. On the face of it, and subject to the just and equitable test, the Appellant's gross weekly income was therefore to be assessed on the basis of an annual occupational pension income of £108,329.00. There were similar drawdowns in the following tax year (2017/18).

39. I note the FTT's finding of fact that the purpose of these drawdowns related to the couple's divorce. As the FTT found, "this resulted in significant legal bills and [the father] having to pay a lump sum to [the mother] in 2017-18 of £35,000" (FTT statement of reasons at paragraph 11, a finding confirmed at paragraph 20). I adopt the FTT's findings of fact. I also recognise that the father's legal expenses in 2016/17 were in excess of £33,000 (p.58). In January 2018 he referred to his legal expenses in connection with the divorce as amounting to some £64,000 over 2½ years (p.18,

independently confirmed at p.65). The drawdowns from his pension pot were also subject to the 40% income tax rate.

40. When considering whether it would be just and equitable to agree to a variation, I must have regard to the welfare of any child likely to be affected (see section 28F(2)(a) and see also section 2). I must also have regard to the general principles that parents should be responsible for maintaining their children whenever they can afford to do so and that the obligation to maintain any one child should be no less of an obligation to maintain any other child (section 28E(2)). In parenthesis I note that the CMS decision-maker also referred (at p.12) to the considerations set out in regulation 21(1) of the Child Support (Variations) Regulations 2000 (SI 2001/156). I have ignored those factors as regulation 21 only applies to cases under the 2003 scheme, not the 2012 scheme. In any event, as the Appellant has already retired the potential risk of giving up paid employment is irrelevant.

41. In deciding whether it is just and equitable to agree to a variation, there are also various factors which must not be taken into account (see regulation 60 of the Child Support Maintenance Calculation Regulations 2012). I have accordingly disregarded all those factors.

42. Taking all those considerations into account, it is self-evidently just and equitable that a variation should be applied in respect of the regular monthly occupational pension payments (£33,996 p.a.). The father is able to support his daughter C by reference to that regular monthly income. I do not understand the father to dispute that proposition.

43. The issue is whether the variation should also include some or all of the sums represented by the two drawdowns from the Appellant's pension pot. This is very much a fact specific assessment. If, for example, the father had withdrawn these lump sum payments to fund the purchase of a brand new motorhome to enjoy travelling across the country in his retirement, I would have little doubt but that the payments in question should be included. On any sensible reckoning it would be just and equitable to do so. But that is not this case. Indeed, I have seen nothing in the representations of either Respondent to dissuade me from the provisional view articulated by Judge Poynter, namely that the Appellant:

> withdrew atypical amounts of income from his pension in order to pay specific sums which he could not reasonably avoid paying and could not pay by other means, then, to that extent, his income was not available to support [C] and I would not regard it as just and equitable to agree a variation by reference to that income.

44. The couple's divorce proceedings were lengthy and bitterly contested. It is in the nature of family law cases that such litigation may well significantly reduce the amount available for ongoing child maintenance. The father had no option but to pay his legal fees and make the payment to the mother in settlement of the ancillary relief proceedings. The adverse income tax consequences of effecting such drawdowns are such that he would not have done so if he had any other realistic option of funding the costs in question. Whatever the niceties of ITEPA and HMRC rules, the two capital drawdowns amounting to just over £74,000 did not, in lay terms, constitute the father's income in any meaningful sense. It is not just and equitable to include those sums by way of the variation.

45. The decision that the First-tier Tribunal should have made is as follows:

1. The mother's appeal is dismissed.

2. The decision made on 12.03.2018 and revised on 28.06.2018 is confirmed.

3. With effect from 11.03.2018, the father's liability for child support maintenance is £85.24 per week in respect of his daughter C.

4. This liability is based on the flat rate liability of £7 p.w. and £78.24 p.w. based on additional income of £33,996 p.a. from his occupational pension. It is not just and equitable to include in that variation the two 2016/17 drawdowns of £16,000 (11.05.2016) and £58,333 (01.11.2016).

Conclusion

46. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). It is not appropriate to remit the case for re-hearing by the First-tier Tribunal. I therefore re-make the decision of the First-tier Tribunal (section 12(2)(b)(ii)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 10 January 2022