WK v SSWP and AK (CSM)
[2024] UKUT 7 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000016-CSM**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

W.K.

Applicant

- v -

The Secretary of State for Work and Pensions

1st Respondent

and

A.K.

2nd Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 15 December 2023

Representation:

Applicant:	In person
1st Respondent:	Ms Danielle Vind, 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 28 June 2022 under file number SC30421/00285 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

The following directions apply to the re-hearing:

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

(2) The new tribunal should not involve the tribunal judge who sat on the previous tribunal on 28 June 2022.

(3) If either parent has any further written evidence to put before the tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of the date of issue of this decision.

(4) The Secretary of State should prepare a supplementary submission, covering the matters identified in paragraphs 15-19 of the reasons below, and which should be sent to the relevant HMCTS regional tribunal office within one month of the date of issue of this decision.

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

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

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

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds and the case is remitted to the First-tier Tribunal for reconsideration and a new decision.

The background to this appeal

2. This appeal concerns the distinction between 'relevant other children' (ROCs) and 'children in a family based arrangement' (CIFBAs) in the child support scheme. In particular, it also concerns how a decision as to the status of children as ROCs or CIFBAs in maintenance calculations can be corrected by the processes of revision or supersession when new information comes to light. For convenience I set out again below my grant of permission to appeal, dated 6 July 2023, which includes the background to this appeal.

The grant of permission to appeal

The outcome of this application to the Upper Tribunal in a sentence

1. I grant this application for permission to appeal.

The parties

2. The Applicant in this case was the appellant before the First-tier Tribunal (FTT). In this ruling I refer to him as simply the Appellant. The 1st Respondent is the Secretary of State for Work and Pensions, who has overall responsibility for the workings of the Child Maintenance Service (CMS). The 2nd Respondent is the Appellant's former partner. The case concerns the child maintenance due in respect of their daughter S (I use her initial simply to protect her privacy).

The subject matter of this application for permission to appeal

3. This application concerns the FTT's decision by the District Tribunal Judge dated 28 June 2022, following a telephone hearing. The FTT dismissed the Appellant's appeal and confirmed the CMS decisions of 9 February 2021 and 18 February 2021. The effect was that the Appellant was found liable to pay child support for S in the weekly sum of £98.34 (from 11/08/2016), £136.77 (from 11/08/2017) and £44.20 (from 21/12/2020).

4. The central issue in the case deals with the treatment of the Appellant's four other children (not S) in those maintenance calculations. At the outset of the case, on 11 August 2016, these four children were recorded as being "relevant other children" (or ROCs) in the language of the child support scheme (p.25). In effect this meant they were children living with the non-resident parent and for whom he or his partner were getting child benefit. In fact, the children in question were not living with the Appellant at the material time.

5. On 21 December 2020 the Appellant informed the CMS that the four children were in fact living with their mother, a third party, but he was

supporting them financially (p.28). As such they were not ROCs, but rather "children in a family based arrangement" (CIFBAs). In a nutshell, the CMS then modified its previous decisions about the level of child maintenance for S. The effect was that the four children in question were (1) included in child maintenance assessments as CIFBAs from 21 December 2020; and (2) removed as ROCs from the previous years' assessments. However, the children's status as CIFBAs was not likewise backdated.

The reasoning in the First-tier Tribunal's decision

6. The FTT's decision notice summed up its reasoning as follows (p.112 at para 5):

> "It is not in dispute that the children are subject to a Family-based Agreement, but the Appellant did not notify the Respondent of the existence of this agreement until 21/12/2020. Accordingly, as he did not notify the 1st Respondent of the existence of this agreement until that date, his liability may only be superseded to take account of the agreement from that date. However, as it was the case that the decision to make an allowance in respect of relevant other children was based upon a misrepresentation by the Appellant, the 1st Respondent was correct to revise his liability from the initial effective date of 11/08/16 to exclude the relevant other children."

7. The FTT elaborated on its reasoning in its more detailed statement of reasons (p.115), in particular at paras 12-19. The FTT found as a fact – and indeed it was not disputed as such – that the Appellant had not lived with the four other children since 2015. It was accepted that those children were CIFBAs and were correctly added back into the assessment – but the point of dispute concerned the date from which they were added back in to the maintenance calculations. The crux of the FTT's reasoning is at para 17 of the statement of reasons (underlining added for a reason that will become apparent):

> "17. In finding that the Appellant did initially advise the 1st Respondent that his four children were relevant other children, the Tribunal found it to be unlikely that the 1st Respondent would incorrectly note what the Appellant was saying. It found the Appellant's evidence that he had not either informed the 1st Respondent that they were relevant other children, or given her evidence to lead her to form that view, to be lacking in credibility. The Tribunal found the Appellant's evidence to be self-serving and lacking in credibility. He was aware when he reported what he asserted was an error, that if the children were categorized as <u>children in a family based arrangement</u> from the outset, that this would be financially more beneficial to him than categorizing them as children in a family based arrangement."

8. I note there is an obvious typo in the final sentence, which I think can only make sense if the first mention of "children in a family based arrangement" (as underlined) in that sentence is deleted and the phrase "relevant other children" substituted.

Applications for permission to appeal: the general principles

9. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" of the FTT (see section 11(1) of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal will give permission to appeal only if there is a realistic prospect of an appeal succeeding, unless there is exceptionally some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

10. The error of law must also be material, i.e. one that affected the outcome of the case in some relevant way. The Court of Appeal has set out a summary of the main errors of law in its decision in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at paragraph 9 (sometimes known as the *Iran* criteria). The main examples of where the FTT may go wrong in law include (in plain English):

- the tribunal did not apply the correct law or wrongly interpreted the law;
- the tribunal made a procedural error;
- the tribunal had no evidence, or not enough evidence, to support its decision;
- the tribunal failed to find sufficient facts;
- the tribunal did not give adequate reasons.

The oral permission hearing

11. In earlier observations I expressed the following initial view:

> "At the request of the Applicant I am granting the request for an oral hearing of this application. If I had been able to give permission on reviewing the papers, I would have done so. However, it seems to me, on a preliminary and very provisional view, that the Applicant is really seeking to re-argue the factual merits of the underlying appeal and to dispute the weight to be attached to the evidence, which is a matter for the First-tier Tribunal. An oral hearing will provide an opportunity to explore if that is indeed the case or whether there is an arguable error of law in the First-tier Tribunal's decision."

12. I accordingly held an oral hearing of the application for permission to appeal at Field House in London on 6 July 2023. The Applicant attended in person, ably representing himself. He elaborated on his grounds of appeal (pp.121-125) by reference to various of the documents on the appeal file. The Secretary of State did not attend and was not represented, but had not been directed to do so. However, the Secretary of State's representative (Ms Vind) had made a written submission resisting the application for permission to

appeal (although that submission wrongly stated at para 2 that permission to appeal had been granted – but at that stage it had not). The Second Respondent did not attend but likewise was not required to do so. Both respondents will now get the opportunity to 'have their say' in turn and in accordance with the case management directions that follow.

13. Contrary to my initial view, I am now persuaded that the grounds of appeal are arguable.

Preliminary analysis

14. That said, the Appellant made several points which do not merit giving permission to appeal. To take just one example, the Appellant complains that at the FTT hearing the Second Respondent was allowed to make adverse comments unhindered about the parentage dispute. I rather suspect the Judge thought it simplest to let her 'have her say', even though the issue was outside the FTT's jurisdiction. This ground (para 2 on p.121) is not arguable.

15. However, the crux of the case concerns the way in which the CMS and in turn the FTT have recalculated the relevant child maintenance liabilities, having made the changes pursuant to the other four children's status as CIFBAs rather than ROCs. Crucial to that issue was the effective date for the changes to be implemented. This is a theme that runs through several of the Appellant's grounds of appeal. The analysis that follows represents a provisional view only on my part and is designed to help the parties focus their own submissions. This is because the Upper Tribunal operates an inquisitorial jurisdiction, meaning that some potential errors of law may be identified by the judge even if they are not picked up by one or more parties. I pose a series of four questions (highlighted in bold) on which I would welcome the parties' views.

16. The starting point is to understand that CMS decisions on child maintenance calculations are final unless they are changed by any one of three processes, known as *revision, supersession* and *appeals*. The principle of finality is contained in section 46A of the Child Support Act (CSA) 1991 as amended. Broadly speaking a 'revision' is where a decision is changed and indeed replaced from its original effective date, while a 'supersession' is where a decision is changed e.g. because of a change in circumstances that occurs at some later date. An 'appeal', of course, is where the FTT or Upper Tribunal may change a decision.

17. Therefore, and using the language of the child support scheme, the Appellant's primary grievance is that his CMS decisions back to 2016 were *revised* to remove the four children as ROCs while a decision was only *superseded* in 2020 to add them back in as CIFBAs.

18. The next step is to consider the scope of the appeal before the FTT. Section 20 of CSA 1991 provides for a right of appeal against a CMS decision on a maintenance calculation to the FTT, so a specific decision must be identified which is being challenged.

19. The CMS response to the appeal stated that the Appellant was appealing against the decision of 18 February 2021 (see pp.1 & 6-7). The CMS response described that decision as being a supersession decision under section 16 CSA 1991, namely that the Appellant had CIFBAs and was liable to pay £44.20 p.w. as from 21 December 2020 (see p.6). However, that is not what the letter of 18 February 2021 itself actually says. It states that the Appellant is liable to pay £53.04 with effect from 11 August 2016 (p.20 – the first page of this letter is also at p.71). That letter also accepted that the Appellant had 4 children in CIFBAs (p.22).

    Q1: did the FTT err in law by not investigating the apparent contradiction between the terms of the decision of 18.02.2021 as set out in the CMS Response and the terms of the CMS letter of that very same date?

20. The CMS response to the appeal also referred to several other decisions which were expressly stated to be "**not the decision subject to appeal**", and which were therefore not the subject of any further clarification. One of these decisions was that dated 9 February 2021 (see p.6). According to the CMS response, the Appellant was found liable by that decision to pay child support for S in the weekly sum of £98.34 (from 11/08/2016), £136.77 (from 11/08/2017) and £137.40 (from 11/08/2018). There seems to be no copy of that decision in the appeal bundle (perhaps not surprisingly so, as it was stated to be not subject to appeal). However, the Appellant himself provided a copy of a CMS letter dated 10 February 2021, just a day later, which confusingly stated the liability was £164.88 with effect from 11 August 2016 (and that there were no CIFBAs) (p.100).

    Q2: once it had decided the appeal against this further decision was in scope (see below), did the FTT err in law by not investigating the apparent contradiction between the terms of the decision of 09.02.2021 as set out in the CMS Response and the terms of the CMS letter dated 10.02.2021?

21. The FTT decided it had jurisdiction to consider appeals against the decisions of 9 February and 18 February 2021 respectively. On the face of it, its explanation for taking that view is understandable (see pp.117-118 para 11).

    Q3: however, did the FTT err in law by doing so without (i) clarifying the issues identified by Q1 and Q2 above; (ii) not adjourning for sight of a copy of the decision of 09.02.2021; and (iii) not adjourning for a CMS response to the Appellant's appeal against the decision of 09.02.2021 (or 10.02.2021)?

22. This leads on to my concern that the Appellant may not have been made properly aware of the case that he had to meet. In particular, was he aware of the criteria that were relevant to each of the

decisions he was seeking to challenge? The FTT's decision to take on board his challenge to the decision of 9 February 2021 without having an explanation of the basis for that decision (or indeed a copy of that decision letter) may accordingly have been a material error of law.

23. Insofar as there is an explanation of the case he had to meet, the CMS response (understandably enough, given what it understood as being the decision under appeal) focuses on the supersession decision of 18 February 2021. This was a decision made under CSA 1991 section 17. The effective date for such a supersession decision of a maintenance calculation is governed by regulation 18 of the Child Support Maintenance Calculation Regulations (SI 2012/2677). Regulation 18(6)(a) provides that "if the supersession decision is made on an application by one of the parties, the decision takes effect from the date of the application". Taken by itself, that explains why the decision of 18 February 2021 was effective from 21 December 2020, being the date of notification (pp.9-10 at heading (iii) and p.28).

24. However, I do not understand the Appellant as being particularly concerned about the decision of 18 February 2021. His real grievance was and is with the decision of 9 (or 10) February 2021 which reassessed his liability back to the start date in 2016, removed the four children as ROCs and failed retrospectively to include those same four children as CIFBAs. That decision must have been a revision decision, revising and replacing the decisions made at each annual review between 2016 and 2018.

25. This takes us back to the principle of finality. Those annual review decisions were final in principle. But they could be open to change from the outset (i.e. revised under CSA 1991 section 16) if grounds for a revision were shown. Those potential grounds are set out in regulation 14 of the Child Support Maintenance Calculation Regulations 2012. There is no mention of what these grounds are in the CMS response (as the appeals officer writing the response did not think the revision decision of 9 February 2021 was the subject matter of the appeal). There is no reason, it seems to me, why the Appellant should know what the possible grounds are if they are not flagged for him.

26. As it is, there are 7 possible grounds for revision as listed in regulation 14(1)(a)-(g). There seem to me to be only two that were possibly in play in this case.

27. The first is where the original decision arose from "official error" (reg 14(1)(e), as defined by reg.14(4)). There is an elliptical reference to this possibility in the system note at p.34 of the bundle.

28. The second is where there has been a misrepresentation or failure to disclose within reg.14(1)(b):

> (b) if the Secretary of State is satisfied that the decision was wrong due to a misrepresentation of, or failure to disclose, a

material fact and that decision was more advantageous to the person who misrepresented or failed to disclose that fact than it would have been but for the wrongness of the decision.

29. The FTT was presumably relying on this provision in dismissing the appeal (see para 5 of the decision notice and para 17 of the statement of reasons). However, the question remains – was the Appellant properly put on notice as to the case he had to meet? And had the Secretary of State discharged the burden on him of showing that grounds for revision had been made out in circumstances where it appears that the presenting officer conceded he would not have known the difference between a ROC and a CIFBA unless it had been explained to him?

Q4: did the FTT err in law by not putting the Appellant properly on notice as to the case he had to meet?

30. There may be other difficulties with the FTT's decision. For example, while recognising that credibility is a matter for the FTT to assess, it is not immediately clear to me as to the basis for the finding that the Appellant knew from the outset that it would be financially more advantageous for children to be categorised as ROCs than as CIFBAs.

31. **Conclusion**

In conclusion, I am satisfied in this case that the proposed appeal has a realistic prospect of success on a point of law. It may succeed, or it may not succeed, but it gets over the threshold at the permission stage of arguability. I therefore grant this application for permission to appeal.

The further proceedings in the Upper Tribunal

3. Having originally opposed the application for permission to appeal, Ms Vind, the Secretary of State's representative, has now filed a further written response to the appeal, supporting the appeal on all four grounds on which permission was granted.

4. The mother has taken the opportunity of making a response to the appeal. However, her comments relate to other aspects of the difficult relationship between her and the Appellant. They do not bear directly on the grounds of appeal as they relate to this specific case.

5. None of the parties has requested an oral hearing of the Upper Tribunal appeal. I am satisfied that it is fair and just and in keeping with the overriding objective to determine this appeal 'on the papers'.

6. I take each of the father's successful four grounds of appeal (as identified as the four questions posed in the grant of permission to appeal) briefly in turn.

Grounds 1 and 2

7. The first two grounds may conveniently be taken together:

i. The FtT may have erred in law by not investigating the apparent contradiction between the terms of the decision of 18/02/2021 as set out

in the CMS response and the terms of the CMS letter of that very same date.

ii. The FtT may have erred in law, when it decided the appeal against the further decision was in scope, by not investigating the apparent contradiction between the terms of the decision of 09/02/2021 as set out in the CMS response and the terms of the CMS letter dated 10/02/2021.

8. Ms Vind, for the Secretary of State, agrees that the FTT erred in law in these respects, as it failed to identify and resolve the conflicting evidence provided by the CMS. I can see no satisfactory counter-arguments and it follows that these grounds of appeal both succeed.

Ground 3

9. The third ground of appeal is as follows:

iii. The FtT may have erred in law when it decided the appeal against the 09/02/2021 decision was in scope, by doing so without clarifying the issues in grounds 1 & 2, not adjourning for sight of a copy of the decision of 09/02/2021 and not adjourning for a CMS response to the Appellant's appeal against the 09/02/2021 decision.

10. Ms Vind further supports this ground of appeal, arguing that the FTT should at least have considered an adjournment, given the absence of both the letter of 09/02/2021 and any CMS submission on that decision. I agree with that analysis.

Ground 4

11. The fourth and final ground of appeal is as follows:

iv. That the FtT may have erred in law by not putting the Appellant properly on notice as to the case he had to meet.

12. Ms Vind also agrees that this ground of appeal is made out (at paragraph 22 of her written submission):

> … the Tribunal's decision to allow the appeal [to proceed] on the 09/02/2021 decision without a CMS submission on the regulatory basis of this decision, or sight of the decision letter, was arguably an error of law. This further impacted the Appellant, as without the basis and regulatory framework for the decision he was appealing against, how can he be aware of the case he had to meet? As such, I would argue that the Appellant was disadvantaged by this and was not given the fair opportunity to participate fully in the proceedings.

13. There is no adequate answer to that submission. Ground 4 accordingly succeeds as well.

Summary of the Upper Tribunal's decision

14. I therefore allow the Appellant's appeal to the Upper Tribunal, set aside the FTT decision and direct a re-hearing. The fact that this appeal has succeeded on a point of law is no indication of the likely outcome of the re-hearing on the facts.

Direction for a supplementary submission by the Secretary of State to the FTT

15. In order that all parties are properly prepared for the re-hearing of the Appellant's appeal, I direct that the Secretary of State's representative should prepare a fresh supplementary submission for the new FTT. The supplementary submission should cover the following four points (along with any other relevant matters).

16. First, the supplementary submission should address the apparent contradiction between the terms of the decision of 18/02/2021 as set out in the CMS response (p.6 of the FTT bundle) and the terms of the CMS letter of that very same date (p.20 of the bundle).

17. Second, the supplementary submission should address the apparent contradiction between the terms of the decision of 09/02/2021 as set out in the CMS response (p.6 of the bundle) and the terms of the CMS letter dated 10/02/2021 (p.100 of the bundle).

18. Third, the supplementary submission should provide a copy of the decision of 09/02/2021 (assuming it is materially different to the decision dated 10/02/2021).

19. Fourth, the supplementary submission should provide a response to the Appellant's appeal against the decision of 09/02/2021 / 10/02/2021. In doing so, the further submission should explain, in the light of the regulations governing revisions and supersessions, why it is that the decision reassessed his liability back to the start date in 2016 by removing the four children in question as ROCs but did not retrospectively include those same four children as CIFBAs from 2016 (rather than from 2020).

Conclusion

20. The appeal to the Upper Tribunal succeeds. The decision of the First-tier Tribunal following the hearing on 13 April 2021 is set aside. The case is remitted to the First-tier Tribunal subject to the Directions above (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b(i)).

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on 15 December 2023