IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CCS/1901/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (14th April 2015, file reference SC *946/14/02673*) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and under section 12(2)(b) the case is **REMITTED** to the First-tier Tribunal for rehearing. Directions for the rehearing are at the end of this decision.

REASONS FOR DECISION

Introduction

1. This appeal raises the issue of how the First-tier Tribunal should exercise its case management powers to ensure that, in a child support case, a parent is not prevented from attending a hearing due to fear of intimidation.

Background

2. Mr P appealed to the First-tier Tribunal (FtT) against the Secretary of State's determination of his child support maintenance liability under the Child Support Act 1991. Using the Act's terminology, Mr P was the non-resident parent and Ms A was the parent with care of the three children concerned. The Secretary of State made his decision on 14th August 2014.

3. The dispute concerned the parents' proportionate responsibilities for their three children. The relevant child support legislation in Mr P's case provided for reductions in his child maintenance liability in the event that he had overnight care of a child for at least 52 nights per year (paragraph 7 of Schedule 1 to the Child Support Act 1991; regulation 7 of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000).

4. Mr P relied on a 2011 contact order to support his case. It is within the appeal papers and its terms provide for the two younger children to spend approximately 100 nights with Mr P annually. The order also records that Mr P was subject to a harassment order, due to expire in November 2012. While not expressed, the implication is that the order related to Ms A. The order also provides that liaison between the parties over contact is to be through the eldest child who was, at that time, aged 16.

5. In a letter to the FtT, Ms A disputed that actual childcare arrangements matched those provided for in the order. She claimed the children in fact stayed to some extent in their paternal grandmother's home, rather than being cared for by Mr P, "despite [Mr P] having the

discount applied to his payments". Ms A supplied a November 2012 letter in which her solicitor had put this allegation to Mr P.

6. On 25th March 2015, Ms A wrote to the FtT that:

> "I am unable to attend the appeal due to the volatile nature of my previous relationship with [Mr P] which involved threats to my life and a harassment order being issued to him by the police".

7. Ms A also made these allegations:

> "Contact order states children are to be collected and dropped off at specified point. [Mr P] is constantly parking closer and closer to the house which makes me extremely uncomfortable given his aggressive and unpleasant behaviour",
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> "[Child A] had witnessed a conversation between [Child B] and [Mr P] where he threatened to come to the house and hit [Child B]. The following day I received a call from [Child A's] school advising that she had been taken out of a test as she had become upset and informed the teacher that she was scared her father was going to hurt [Child B]".

8. In the 25th March 2015 letter, Ms A also invited the FtT to write to Mr P's employer "who will confirm he currently works nights and prior to that was working shifts that would not enable him to adhere to the contact order". And she supplied a diary of recent occasions on which she said the children were looked after by their paternal grandmother rather than Mr P.

The First-tier Tribunal hearing and decision

9. The FtT, comprised of a single First-tier Tribunal Judge, heard the appeal on 18th March 2015. Mr P and his current wife attended, as did a Presenting Officer from the Child Support Agency. Ms A did not.

10. The FtT's record of proceedings does not state, as it should have done, the hearing's start and finish times. However, the brevity of the record (less than a single A4 page) suggests it did not last long. The record does not indicate that the Presenting Officer made submissions, nor does it record Mr P swearing an oath before giving evidence, as the FtT's statement of reasons subsequently said he did. It is obvious that as important an event as administering the oath has to be recorded in the record of proceedings.

11. The record indicates Mr P gave the following evidence:

- he started working nights in June 2014 and "before that I had the children regularly one night per week, I had a 9 to 5 job";

- he lived with his mother until December 2014;
- "the harassment order was not proved"
- "there was no domestic violence – just usual chats by both"

12. The FtT's decision notice states the appeal was allowed and "the Appellant shall have shared care at the rate of one night from effective date 28/01/2014 for all three children".

13. The FtT's statement of reasons does not explain why it proceeded with the appeal in Ms A's absence. The Tribunal accepted all of Mr P's evidence relating to the parties' respective responsibilities for the children. So far as Ms A's written case was concerned, the statement simply says "it did not provide sufficient evidence to cancel shared care, particularly in the light of [Mr P's] evidence on oath".

14. Ms A applied to the First-tier Tribunal for permission to appeal. She alleged Mr P had lied on oath and asserted "I feel my evidence was given very little attention and I was discriminated against purely because I wasn't present". The Tribunal refused permission to appeal. Ms A relied on those grounds when she renewed her application before the Upper Tribunal and added:

> "I feel I have been discriminated against because I don't want to be in the same room with a man who threatened my life, harassed me, was ordered by police to stay away from me and my home".

The appeal to the Upper Tribunal

15. I granted Ms A permission to appeal to the Upper Tribunal and, in doing so, observed as follows:

> "The First-tier Tribunal held a hearing in Ms A's absence. She had previously informed the Tribunal that she felt unable to attend the hearing "due to the volatile nature of my previous relationship with Mr P which involved threats to my life and a harassment order being issued to him by the police" (p.53 of the First-tier papers). I point out that I do not know whether some or all of those allegations are true…
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> Since the Tribunal held a hearing in Ms A's absence, it was bound by rule 31 of the First-tier Tribunal's procedural rules:
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> > "If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal-
> >
> > (a) is satisfied that the party has been notified of the hearing …; and
> >
> > (b) considers that it is in the interests of justice to proceed with the hearing."

> The First-tier Tribunal's statement of reasons does not explain why, despite Ms A's reasons for her absence, it was in the interests of justice to proceed with the hearing. Arguably, that was an error of law.
>
> Steps could have been taken to facilitate Ms A's participation in a hearing. Matters such as the format of a hearing, type of venue, layout of hearing room are all capable of being altered to accommodate a party's needs. And there is also the possibility of simply explaining to a reluctant party the Tribunal's powers, and obligation, to ensure an orderly hearing. The Tribunal seems not to have turned its mind to whether it needed to, or could, facilitate Ms A's participation in the hearing. Arguably, that shows it failed to comply with its obligations under rule 31".

16. In response, the Secretary of State's representative indicated that he "strongly supported" the appeal, adding "so far as I am aware, there is little case law addressing these circumstances, and it may be that a decision in this case will be of assistance to future tribunals". The representative concluded:

> "had the tribunal had proper regard to what [Ms A] had written, it should surely have followed the courses of action suggested by the [Upper Tribunal] Judge…Indeed, in a venue the size of Manchester, I wonder if the tribunal could actually have offered that a security guard, or other appropriate member of staff, would accompany the mother throughout the hearing. I suggest that such a use of resources would be more than reasonable in the circumstances".

17. Mr P has not responded to this appeal. No party requested that I hold a hearing before deciding this appeal.

Legal framework

18. The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 govern the conduct of child support appeal proceedings in the First-tier Tribunal. They are a flexible set of procedure rules that allow the tribunal to tailor its procedure to ensure justice is done.

19. Rule 2(1) contains the overriding objective of dealing with cases "fairly and justly". Examples are given of what this includes in rule 2(2) including "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". All case management decisions should serve the purpose of the overriding objective given that the tribunal must seek to give effect to it when exercising any of its powers under the rules (rule 2(3)).

20. Rule 5(1) confers on the tribunal a general power to "regulate its own procedure" which must include procedure at a hearing. Rule 5(3) also expressly provides that the tribunal may "decide the form of any hearing". A hearing does not have to involve all the relevant actors being present in the same room. This is because the definition of "hearing" in rule 1(3) includes "a hearing conducted in whole or in part by video link, telephone or other means of

instantaneous two-way electronic communication". This would permit one party, for example, to participate by speaker telephone.

21. Rule 28 provides that, subject to exceptions that are not relevant for present purposes, every party to proceedings is entitled to attend a hearing. That has to be read as an entitlement to attend a hearing without intimidation, otherwise the intimidated party, for no good reason, would not have been enabled to participate in the hearing to the extent called for by the overriding objective.

22. Rule 31 is important. It provides:

> "If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
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> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
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> (b) considers that it is in the interests of justice to proceed with the hearing".

23. This rule is constructed so that the Tribunal only has power to proceed in the absence of a party if it considers it is in the interests of justice to do so. Making that determination must take account of the overriding objective since rule 2(3)(b) requires the tribunal to "seek to give effect to the overriding objective when it…interprets any rule…".

24. In a child support case, the Tribunal determines "civil rights" so that section 6(1) of the Human Rights Act 1998 requires the First-tier Tribunal to act compatibly with the parents' convention rights (their rights under the provisions of the European Convention on Human Rights scheduled to the 1998 Act). A parent has the obligation to pay, and right to receive, only such amount of child support maintenance as is correctly calculated under the child support legislation. Determining the correct amount must amount to the determination of a "civil right" for the purposes of Article 6(1) of the Convention. Article 6(1) has an 'equality of arms' aspect, correctly described as follows, in my view, in the current edition of *Human Rights Practice* (Simon & Emmerson, published by Sweet & Maxwell):

> "the principle of "equality of arms" involves striking a "fair balance" between the parties, in order that each party has a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."

25. Asking whether a party has had a reasonable opportunity to present his/her case may be a useful exercise for First-tier Tribunal judges dealing with acrimonious child support cases.

26. The Senior President of Tribunals has issued a Practice Direction entitled "Child, Vulnerable Adult and Sensitive Witnesses". Only the "sensitive witness" aspect of the Direction is relevant for present purposes. It defines a sensitive witness as "an adult witness where the quality of evidence given by the witness is likely to be diminished by reason of fear

or distress on the part of the witness in connection with giving evidence in the case". The Direction imposes the following requirements on the First-tier Tribunal:

"6. The Tribunal must consider how to facilitate the giving of any evidence by a…sensitive witness.

7. It may be appropriate for the Tribunal to direct that the evidence should be given by telephone, video link or other means directed by the Tribunal, or to direct that a person be appointed for the purpose of the hearing who has the appropriate skills or experience in facilitating the giving of evidence by a…sensitive witness."

Why this Tribunal erred in law

27. The FtT's case management, including hearing management, on this appeal was clearly flawed. As a result, its final decision involved the making of an error on a point of law for which I set it aside. I remit the appeal to a differently-constituted First-tier Tribunal for re-hearing.

28. The FtT failed to give express consideration to rule 31. It has not explained why it was in the interests of justice to proceed in Ms A's absence. The circumstances of the case do not supply an obvious answer to that question. There was clear evidence that Ms A might not have attended the hearing due to fear of intimidation. That needed to be factored into the tribunal's assessment of whether it was in the interests of justice to proceed in her absence. As it was, rule 31 was not even mentioned in the tribunal's statement of reasons despite Mr P's attendance appearing to have been a key factor in the FtT finding that his evidence was reliable.

29. The appeal papers show that the FtT did not seek a case management solution that would have given both parties a reasonable opportunity to attend a hearing. Since Ms A's claim of likely intimidation was clearly raised in correspondence, the FtT had to address it in its statement of reasons. It needed to explain why the approach it took generally to case management, and to the hearing in particular, was in accordance with the overriding objective of dealing with cases fairly and justly. In the circumstances, the FtT should also have considered whether this was a case falling within the sensitive witnesses practice direction.

30. I do not know if Ms A's allegations against Mr P are both well-founded and genuinely prevented her from participating in a typical oral hearing before the FtT. But, if they were, she was prevented from participating in vitally important legal proceedings because she reasonably thought she would be intimated. That the issue was simply ignored by the FtT was profoundly wrong.

Managing child support cases where a parent does or may fail to attend a hearing due to expressed fear of intimidation

31. The Secretary of State asks that I give guidance about how the First-tier Tribunal should tackle child support cases where one party appears unwilling to attend a hearing because s/he is scared of being intimidated. At the outset, I should point out that I cannot provide a blueprint because each case is different with its own set of relevant factors.

32. The first point to make is that the Tribunal is not required to conduct a mini-trial of the question whether a parent's expressed concerns about attending a hearing are genuine. However, it must address the issue if it arises and if the Tribunal duly considers the assertions not to be fanciful it must consider what case management and/or hearing management steps should be taken to give all parties a reasonable opportunity to put forward their cases.

33. There are many steps that the Tribunal could take. But a sensible first step, where the issue is raised in advance of the hearing, would simply be to write to both parties to stress that everyone has the right to attend a hearing without fear of intimidation and that the tribunal will not tolerate any attempt by one party to intimidate the other. While this may not be necessary in every case, it is also open to the Tribunal to set out in writing the steps that can be taken to assist a party to participate and invite them to request that a particular step is taken and why. Any such communication should record that it is given on a neutral basis; that is without making a finding as to whether any allegations made are accepted. I do not discount the possibility that in some cases it may be necessary to seek the views of one parent before writing to the other.

34. In terms of what can be done, some examples have been given above. To recap, these include presence of a security guard in the hearing room, attendance by telephone link, laying out the hearing room in a particular way to create physical separation or possibly use of screens if available, staging the parties' entrance and departure from the room, and their waiting arrangements, to minimise proximity. I am sure there are many other steps that can be taken and are taken by the First-tier Tribunal.

35. How to choose the appropriate step? This is a case management issue for the tribunal judge/s involved in the case. However, I should point out that it should not be left solely to the tribunal judge allocated the hearing (who may not have been involved at an earlier stage) to deal with an issue that could have been addressed earlier. I say no more than that because the administrative arrangements of the First-tier Tribunal, including arrangements to screen appeals for higher risk cases so that it may properly comply with its obligations under the sensitive witnesses practice direction, are a matter for it.

Directions

I direct as follows:

(1) An oral rehearing of this appeal must be held by the First-tier Tribunal. The Tribunal must not include the First-tier Tribunal judge who decided the present appeal.

(2) Within one month of the date on which this decision is issued, Ms A must write to the First-tier Tribunal explaining what steps would enable her to attend the re-hearing and why.

(3) I would suggest that the Secretary of State sends a Presenting Officer to the re-hearing but I shall leave it to the First-tier Tribunal to decide whether a direction to attend is required.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
14th January 2016