DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant ("the father").

The decision of the Chesterfield First-tier Tribunal (Social Entitlement Chamber) dated 14 February 2012 under file reference 031/07/01859 involves an error on a point of law. The tribunal's decision is therefore set aside.

The Upper Tribunal is not in a position to re-make the decision on the appeal by the father against the decision of the Secretary of State (formerly the Child Maintenance and Enforcement Commission and the Child Support Agency) dated 2 March 2004 and as revised on 27 June 2007. The case is accordingly remitted to the First-tier Tribunal (Social Entitlement Chamber) for re-hearing subject to the directions set out at paragraph 44 below.

This decision is given under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This case has a long and sorry history, even by the standards of the child support system.

2. It is difficult to know where to start, other than by saying the appeal relates to a Child Support Agency (CSA) decision originally taken in March 2004 and then revised in June and August 2007 on the father's child support liability which had effect from 16 August 2002. The 'child' in question is now aged 26 and, according to her mother, no child maintenance has been paid since 2002. A very brief summary of the timeline of tribunal and other appellate decisions on the case follows.

A brief summary of the timeline

3. In summary, and shorn of some detail, the CSA's original decision on 2 March 2004 was that the father's child support liability from August 2002 was nil. This was on the basis that his only income at that time was jobseeker's allowance (JSA). On 27 June 2007 that earlier decision was revised by the CSA to fix the father with an assessment of £136.89 a week with effect from August 2002. This was on the basis that the father's gross annual income was £80,000.

The first First-tier Tribunal (FTT1)

4. On 26 October 2009 the First-tier Tribunal (FTT1) heard the father's appeal against the CSA's decision of 27 June 2007. The tribunal allowed the father's appeal "with considerable reluctance". FTT1 found that the Agency had lost the relevant paperwork and could not now prove its case, even though "there is very good evidence that [the father] enjoyed a substantial income between 2002 and 2007". The mother appealed to the Upper Tribunal against the decision of FTT1.

The first Upper Tribunal decision (*CCS/3054/2009*)

5. On 21 August 2010 UT Judge Jacobs in the Upper Tribunal allowed the mother's appeal (under file reference CCS/3054/2009), deciding that FTT1 had failed to consider the possibility of a revision for official error. Judge Jacobs also held that FTT1 should have considered the possibility of a supersession as an alternative to revision. He directed a re-hearing of the appeal before the FTT. The father sought to challenge UT Judge Jacobs's decision in the Court of Appeal.

The first Court of Appeal ruling

6. On 12 May 2011 Sullivan LJ refused the father permission to appeal to the Court of Appeal (application C3/2010/2880).

The second First-tier Tribunal (FTT2)

7. On 14 February 2012 FTT2 (composed of the same District Tribunal Judge and financial member as FTT1) held a re-hearing. FTT2's decision was (nominally at least) to allow the father's appeal, revising the Agency's 2007 revision decision. However, FTT2 decided that the Agency should recalculate the father's child support liability as from the effective date (i.e. 16 August 2002) on the basis that his net income (including rental income) was £80,000 a year, with no deduction for income tax or national insurance contributions (NICs). The father applied for permission to appeal to the Upper Tribunal.

8. On 6 December 2012, following an oral hearing, UT Judge Mesher gave the father permission to appeal to the Upper Tribunal and issued detailed directions. The case was subsequently transferred to me.

The second Upper Tribunal decision (*CCS/1626/2012*)

9. On 13 September 2013 I signed off my decision on the appeal (under reference CCS/1626/2012, also known as *SG v Secretary of State for Work & Pensions and CL (CSM)* [2013] UKUT 0455 (AAC)). In short, I concluded that FTT2 had erred in law in two respects.

10. The first respect was that FTT2 had failed to deduct income tax and national insurance from the father's annual income of £80,000 as assessed for 2002.

11. The second respect was that FTT2, by looking at events after the date of the original decision under appeal (which had been in March 2004), had contravened section 20(7)(b) of the Child Support Act 1991 Act. As I put it, "I can only assume that the complexity of the case was such that the judicial eye had been taken off the jurisdictional ball for a moment. As Judge Jacobs had previously directed, as a matter of law the tribunal could not take into account 'circumstances not obtaining' as at the date of the original decision in March 2004" (CCS/1626/2012 at [24]).

12. Accordingly I allowed the father's appeal and set aside the decision of FTT2 (CCS/1626/2012 at [25]). I then considered whether to re-make the decision under appeal myself or remit (i.e. send back) the case for re-hearing by another First-tier Tribunal. Having had regard to the arguments for and against each course of action, I adopted the former approach (CCS/1626/2012 at [26]-[30]). I acknowledge that what had seemed a good idea at the time has not looked so good with the benefit of hindsight.

13. I re-made FTT2's decision in terms that for the most part had almost exactly the same effect as the First-tier Tribunal's decision. The main difference was that I

directed that income tax and national insurance had to be deducted by the CSA when doing the necessary child support liability re-calculations.

The second Court of Appeal ruling (*Consent Order in C3/2014/0411*)

14. The father appealed my decision in *SG v Secretary of State for Work & Pensions and CL (CSM)* to the Court of Appeal. On 25 April 2014 Pitchford LJ granted the father permission to appeal, principally on the question of the proper treatment of the father's receipts (by way of re-mortgaging) from his property business and whether this could be treated as income for the purpose of a CSA assessment. The father had actually advanced three grounds of appeal in his application to the Court of Appeal.

15. The first (ground (a)) was that the facts as found by the Upper Tribunal in relation to the father's conversations with the CSA in June 2002 and as to his income in or around March 2004 did not logically support the conclusion that there was a misrepresentation of a material fact in 2002 which would provide a valid basis for a revision in June 2007.

16. The second (ground (b)) was that in the event it was permissible to revise the decision of 2 March 2004 (which, of course, had been to make a nil assessment), the facts as found did not support a conclusion that the father should have been treated as having an income of £80,000 as at the effective date of 16 August 2002.

17. The third (ground (c)) was that in any event the inclusion of capital receipts from re-mortgaging within the calculation of the father's self-employed income amounted to an error of law.

18. On 30 April 2015 Underhill LJ issued a Consent Order allowing the father's appeal against my decision. The recital to the Consent Order *C3/2014/0411* includes the following provision:

> "*AND UPON the parties agreeing that the appeal should be allowed on ground (c) only, and, subject to the terms of this Order, the remainder of the reasoning contained in the decision of the Upper Tribunal of 12 September 2013 remains valid*."

19. The key operative clauses of the Consent Order itself were as follows:

> "*IT IS ORDERED that:*
>
> *1. The appeal be allowed on ground (c);*
>
> *2. The orders of the Upper Tribunal dated 12 September 2013:*
>
> *(a) finding that the Appellant's income was £80,000 pa as at 16 August 2002;*
>
> *(b) re-making a decision on the appeal against the decision of the Secretary of State dated 2 March 2004 as revised on 27 June 2007*
>
> *are hereby set aside*."

20. The remaining clauses dealt with the onward conduct of the appeal and costs. In summary the appeal was remitted to the Upper Tribunal "for fresh consideration … before Tribunal Judge Wikeley if possible". I regret the further delay that has ensued before this decision has been finalised and am grateful for the parties' patience. This delay has been due to a number of factors, predominantly the need to obtain the

parties' submissions on various procedural issues and also the impact of my assignment to other judicial duties for most of the past 9 months.

So where do we go from here?

21. I note the terms of the Court of Appeal's Consent Order. The father's appeal there succeeded by consent solely on ground (c). There has been no challenge by any party to my original decision that FTT2's decision involved an error of law in two respects, as identified in paragraphs 9 to 11 above. For the avoidance of any doubt, and if it is indeed necessary, I now reiterate the same conclusion for precisely the same reasons and likewise set aside the decision of FTT2 made on 14 February 2012 (see CCS/1626/2012 at [17]-[25]).

22. This leads inexorably to the question of the mode of disposal of this appeal. The Court of Appeal's Consent Order canvassed a number of options, including a hearing of the appeal before myself or another Upper Tribunal Judge or remittal to the FTT either with directions for further limited fact-finding or for a full re-hearing of the facts. I have considered all the parties' various submissions. I will not rehearse them all here. Suffice to say that I do not consider a hearing before the Upper Tribunal at this stage will be helpful, not least as the Upper Tribunal has no power to sit with a financially qualified panel member. It is for that reason also that I cannot agree with the mother that I should go ahead and determine the original appeal on its merits myself.

23. I have therefore now decided (in contrast to the manner of disposal in my original decision) to remit the case for re-hearing by the First-tier Tribunal. Although I do so with something of a heavy heart – given the tortuous history of this case over a period of many years – I consider this to be necessary in the interests of fairness and justice to all concerned. This raises two further questions.

24. The first question is whether the FTT re-hearing should be before the same panel as FTT1 and FTT2 or a different panel. It is not necessary for me to express a view on the various points that the father's solicitor seeks to make about the presiding FTT judge. I simply take the view that as a matter of fairness the remitted appeal should go before a fresh FTT panel and direct accordingly. There is also a more practical consideration – I know as a fact that the presiding FTT judge has transferred to a different FTT region and I have no idea if the same financially qualified panel member is still serving.

25. The second question is whether this remittal to a fresh tribunal should be a complete re-hearing of all the facts or should be limited to one or more discrete issues. Given the limited basis on which the father's appeal to the Court of Appeal succeeded by consent, and given the elapse of time since the period under appeal, I consider that it would not be fair and just to have a complete re-hearing of the whole appeal.

26. So, for example, the new FTT must proceed on the basis that on 27 June 2007 the Secretary of State's decision-maker in the CSA had a valid ground for revising the earlier nil assessment of 2 March 2004. The relevant ground was that the father had misrepresented his income by informing the CSA in June 2002 that he had no income other than JSA; see further CCS/1626/2012 at [43]-[51].

27. Rather, the sole issue that is remitted to the new FTT for decision is the correct calculation of the father's income for child support purposes as at the effective date

of 16 August 2002 and up to and including the date of the original (albeit subsequently revised) decision on 2 March 2004. In reaching a decision on that issue the new FTT must have regard to all sources of income that may properly be taken into account under the 'old scheme' legislation as then in force.

Guidance on issues before the new First-tier Tribunal

28. Putting to one side the father's receipt of JSA in the course of 2002 (see further CCS/1626/2012 at [41]-[42]), the father appears to have had three main sources of funds over the period in question.

29. The first arose from payments the father may have received as a result of his involvement in various haulage companies. Despite the considerable volume of the bundle, there is actually precious little documentary evidence about this source of income currently held on file. I simply observe that the father's income tax return for the year 2003/04 indicated that he was neither an employee, office holder or director in any form of enterprise (p.163). The same claim is made in the 2004/05 tax return. It is not immediately obvious to me how that is consistent with the statement on the Woolwich mortgage application form from May 2004 that the father is a company director with a haulage firm on a salary of £80,000 gross (p.585). I also note that the father's partner was stated to be the proprietor of one haulage company (p.103), and the business accounts for that haulage company were filed in her tax return for the same year (pp.246 and 258-261).

30. The second source was rental income. As this is an 'old scheme' CSA case, such income falls to be taken into account as "other" periodical income under paragraph 15 of Part III of Schedule 1 to the Child Support (Maintenance Assessment and Special Cases) Regulations 1992 (SI 19921815; or "the MASC Regulations"). The relevant income is the gross income, subject to very limited deductions, and not the net rental income after the deductions which apply for income tax purposes (see paragraph 23 of Schedule 2 and R(CS) 3/00 at paragraph [23]).

31. The third source of funds (and I use the term 'funds' advisedly, rather than income) was from the father's property business. As regards this third source, the Secretary of State's position now is that those monies derived from taking out loans on properties held in a property portfolio cannot be described as profits or gains of that business. Rather, they are simply borrowings against the security of business assets. The Secretary of State thus accepts that capital receipts generated by re-mortgaging cannot properly be included within the calculation of an appellant's self-employed income (see further Mr K O'Kane's submission dated 2 December 2015 at [3]-[32]). Given the terms of the Court of Appeal's Consent Order, the new Tribunal should proceed on that basis.

32. There may, of course, be other sources of income not covered above (e.g. investment income). It follows that the new Tribunal now has the unenviable task of seeking to establish the father's true income over the period in question between 2002 and 2004.

33. In that context it may be helpful to start with UT Judge Jacobs's observation about the decision by FTT1 (in CCS/3054/2009 at paragraph 16):

> "16. The tribunal drew attention to the evidence that the absent parent had £80,000 a year income in 2004. That is both what he put on his mortgage application form (page 585) and what the bank manager stated and certified as

his income (page 579). In view of its evident concern about the absent parent's income, it should not have left the case where it did. What it should have done was to decide as a matter of fact what income the absent parent had in 2004…"

34. However, as I noted in my own earlier decision (see further CCS/1626/2012 at [36]-[40]):

"36. The first question that has to be addressed, in line with Judge Jacobs's directions, is the true level of the father's income in March 2004. This inquiry is not helped by the fact that the Agency has mislaid a substantial amount (if not all) of the pre-2007 paperwork relating to the mother's application for child support. I simply note that it is entirely possible that the lost documentation contains little evidence of value in this regard. I say that as the appeal file shows the father has not always fully or promptly complied with the FTT's directions for filing evidence and there is little reason to suppose that he had been any more forthcoming when dealing with the Agency. It follows that this first question has to be answered on the best evidence now available, bearing in mind the balance of probabilities.

37. So what does the documentary evidence available to FTT2 suggest? First, the file includes a Barclays mortgage application form from June 2000 in which the father stated that his basic income was £60,000 a year, with an additional £10,000 a year in rental income from investment properties (pp.24 and 31). Second, on a Woolwich mortgage application form dated 14 May 2004 he declared his income as company director in a haulage business to be £80,000 a year. Third, the father's income tax return for the year to 5 April 2004 does not include any extra pages for employment (as an employee or director), ticking only the "Land & Property" and "Capital Gains" supplementary pages. In fact the relevant "Land & Property" page is not included for that year, but on his tax returns the declared gross rental income for the year before was £9,556 (p.328) and £24,611 (p.295) for the year after. Fourth, the figures on these tax returns correspond to exactly 50% of the gross rents recorded in the rental income accounts prepared for the father and his wife; on that basis, his share of rental income (again, before expenses) in the year to April 2004 was £20,446 (p.84).

38. What then of the oral evidence before FTT2? In the record of proceedings, the father is noted as agreeing that, in addition to his rental income, he had realised a total of £566,446.62 from loans between November 2000 and April 2008, confirming figures that he had belatedly provided in writing shortly before the hearing. Later in the hearing he conceded that he was dealing in properties and buying and selling houses. He said that he had been advised that the receipts were not income but "I used it as explanation for £80k income" (p.1248); at another point he stated that "I said I earned £80k as carried forward from previous mortgage applications; I know I signed it but it was wrong info" (pp.1242-1243).

39. So what then was the father's income in March 2004? In my assessment, on the best evidence available, and applying the balance of probabilities, the father's aggregate annual gross income from all sources (the haulage company, property dealings and rental income) was in the order of £80,000. The passage of time and the absence of some paperwork mean that a "rounded" figure such as this is inevitable. However, it is supported by the two mortgage applications. The figure of £10,000 for rental income on the first

> application in 2000 is broadly consistent with the levels included in both the tax returns and private accounts for other years. Although the second application in 2004 was dated a couple of months after the date of the decision, it can properly be regarded as persuasive evidence of the father's financial position as at the date of the decision itself (see by analogy R(DLA) 2/01 and R(DLA) 3/01). For fairly obvious reasons, the father's attempt to suggest that the statements on those forms were misleading is in itself deeply unattractive.
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> 40. Thus in reaching this decision I have, of course, had regard to section 20(7)(b) of the 1991 Act. I have therefore excluded from consideration the actual funds advanced on remortgaging in the period after March 2004. Those advances are, obviously, in themselves "circumstances not obtaining" at the time the decision was made. However, this does not mean that they are completely irrelevant. As R(DLA) 2/01 and R(DLA) 3/01 show, again by analogy, they at least provide evidential support for the inference that the father was in the business of property dealings before the relevant date (as he freely admitted to FTT2). The unchallenged findings by FTT2 (which I expressly adopt) that the father was actively involved in and benefiting from the haulage business, the property dealings and rental income all provide support for the figures stated on the mortgage application form."

35. The new Tribunal should bear in mind two very important qualifications when reading that passage. The first is that any findings of fact therein as to the father's true income (or any element of that income) over the relevant period are not binding on the new Tribunal, which must decide for itself the issue of the father's income afresh on the basis of all the evidence before it. The second is that, as already mentioned, the new Tribunal must proceed on the basis that capital receipts generated by re-mortgaging cannot properly be included within the calculation of the father's self-employed income for child support purposes.

36. I also note that in further submissions before the Upper Tribunal Mrs S A Powell, for the Secretary of State, expressed her concern that "further investigation may be needed with regard to … whether any income from investments should be taken into account and whether deprivation of income has occurred" (response dated 31 July 2015). The same point was made by Mr K O'Kane for the Secretary of State in his submission dated 2 December 2015 (at para [33]).

37. In the directions below I make provision for a fresh submission to be prepared on this appeal. The Secretary of State's new submission should set out what the Secretary of State now considers to be the father's true income at the relevant time, given the evidence now available. If the Secretary of State's position is that there has indeed been, or may have been, deprivation of income, the submission should explain how either paragraph 26 or 27 of Schedule 1 to the MASC Regulations is said to apply, not least so that the father is aware of the actual or potential case against him in this regard. For example, is the Secretary of State suggesting that the father had deprived himself of income by way of the particular arrangements in place for the haulage companies in which he was involved?

38. In that context I also refer back to the discussion at paragraph 29 above. In the exercise of its inquisitorial jurisdiction, the new Tribunal will doubtless be concerned to identify the precise role played by the father's partner in the various haulage businesses. On a Barclays mortgage application form in 2000 she was described as a schoolteacher, on what appears to be a full-time salary (pp.23-24). Her 2003/04 income tax return reported that she had left that employment on 5 April 2004 (p.256),

although puzzlingly no earnings are reported. Certainly there is no mention of a teaching job on her 2004/05 tax return (p.230). Yet in the Woolwich mortgage application form in May 2004 she is described as being a permanent supply teacher on what again seems to be a full-time salary. It is, of course, entirely possible that the father's partner helped in the haulage business while working as a teacher (but given teachers' workloads there may be issues around the level of that involvement). Equally it is possible she gave up teaching to run or help run the haulage business.

39. However, there remain questions to be answered. The father appears to have been in the haulage business as a sole trader. He had held an operator's licence since 1994 under a series of 'trading as' names (p.50). In February 2003 he applied to the Vehicle & Operator Services Agency (VOSA) to change the trading name of the business. The application was made in his sole name with no mention of his partner having any role to play (pp.52-60). Yet the Financial Statement for the same business (year ending 31 March 2003) lists the father's partner as the sole proprietor. Furthermore, as already noted, the haulage business income was entered on *her* income tax return (e.g. for 2003/04; see p.246). These are potentially murky waters. A person using goods vehicles for hire or reward or carrying on a road haulage trade or business must have an operator's licence (Goods Vehicles (Licensing of Operators) Act 1995, section 2(1)). My understanding of the regulatory regime is that it is the person controlling the haulage business who must have the operator's licence – yet in this case the avowed proprietor of the business seemingly had no operator's licence. This may well be pertinent to the issue of possible deprivation of income.

Conclusion

40. For the reasons explained above, I therefore allow the father's appeal on the two points identified at paragraphs 9 to 11 above. The decision of the First-tier Tribunal is set aside. The appeal must be remitted to the First-tier Tribunal subject to the Directions that follow below (and any further case management directions issued by a Judge of the First-tier Tribunal).

41. The father's solicitor makes the fair point that the existing appeal bundle has grown like Topsy and is now in effect unmanageable. The Secretary of State should prepare a fresh bundle directed to the issues arising on the re-hearing. I make particular Directions below in that regard, including provision for a draft contents list to be agreed between all the parties. Although I make no specific Direction in this regard, I make the following suggestion. It may be helpful to the new Tribunal and the parties if the bundle for the re-hearing is sub-divided into a series of separate Parts, and then arranged chronologically within each Part, e.g. (and the list here of the various Parts may not be exhaustive):

(A) All Tribunal directions, decision notices and statements of reasons relating to this appeal (before both FTT and Upper Tribunal);
(B) The Court of Appeal's Consent Order and the submission by Mr O'Kane on behalf of the Secretary of State dated 2 December 2015;
(C) All the relevant CSA correspondence, calculations, computer and telephone records, etc;
(D) All evidence and arguments advanced by the father;
(E) All evidence and arguments advanced by the mother.

42. I simply add that as regards Part B in this list, it seems to me that of the papers on file since the issue of my earlier decision, the only papers that are essential for the

re-hearing are the Court of Appeal's Consent Order itself and the submission made on behalf of the Secretary of State by Mr O'Kane.

43. In addition to preparing a fresh bundle, the Secretary of State should prepare a fresh submission for the re-hearing. The original submission prepared for the original appeal is hopelessly deficient. As noted above, this will need to deal with the issue of possible deprivation of income.

Directions for re-hearing

44. The new First-tier Tribunal is subject to the following Directions:

A. The case file should be referred to the Regional Tribunal Judge for consideration as to allocation for further case management directions.

B. The case must be heard by a freshly-constituted Tribunal comprising a judge and a financially qualified panel member; the members of the previous tribunal which sat on 26 October 2009 and 14 February 2012 are excluded;

C. The new Tribunal need only deal with the issue of the father's true income at the relevant time (see paragraph 27 above);

D. The new Tribunal must not take account of circumstances that were not obtaining at 2 March 2004 (see Child Support Act 1991, section 20(7)(b));

E. The First Respondent (the Secretary of State) should prepare a fresh appeal bundle for the re-hearing of the appeal. As a first step the Secretary of State should, within 1 month of the issue of this decision, send the other parties a proposed contents list for such a bundle. The draft contents list should describe (i) the nature of the document(s) in question; (ii) the date such document was produced; (iii) the page number (if included) of the document(s) in the current bundle;

F. The Appellant and Second Respondent will then each have 1 month in which to propose (with relevant details) to the Secretary of State any documents that they consider should be omitted or included in the new bundle;

G. The First Respondent (the Secretary of State), within 3 months of the issue of this decision, should prepare a fresh submission for the re-hearing of the appeal;

H. If the bundle cannot be agreed, a First-tier Tribunal Judge should be asked to rule on any outstanding issues.

Signed on the original
on 06 April 2016

Nicholas Wikeley
Judge of the Upper Tribunal