UPPER TRIBUNAL CASE NO: CCS/2776/2015

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 20 May 2015 at Enfield under reference SC921/14/01420 and 01513) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 20(7)(a) of the Child Support Act 1991, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 0417 (AAC).

REASONS FOR DECISION

A. The appeal

1. The Social Security Commissioners warned almost 30 years ago of the dangers of one member of a tribunal having knowledge of evidence that was not shared by all the members. The danger is particularly acute for the First-tier Tribunal as it is the primary fact-finding tribunal. Knowledge of the whole of the evidence is essential for sound fact-finding. As the Commissioners said in *R(U) 3/88*:

> 7. ... The members are judges of fact at the hearing and it seems to us undesirable for a member to have a residual knowledge of evidence given at an earlier hearing that is not shared by the other members – knowledge of what was said as distinct from what was written down. There is, also, the danger of the member becoming judge and witness if a conflict arises as to what was said at the earlier hearing. ...

That practice is precautionary and based on the risk involved; later in the paragraph the Commissioners described this (and other procedures they discussed) as 'safeguards'. It does not involve an investigation whether any member of the tribunal possessed residual knowledge or, if so, whether it would have affected the outcome. The mere possibility is sufficient.

2. Despite the Commissioners' warning against overlapping panels hearing different parts of the proceedings, that is what happened in this case. Paragraph 10 of the tribunal's reasons explained:

> There was a previous hearing on 12 02 2015. The Tribunal was constituted on that day by District Tribunal Judge B and the current FQPM [financially

> qualified panel member]. Since that date, DTJ B transferred to another region of HMCTS and was unavailable to sit in a judicial capacity for the appeal. The tribunal made it clear to all parties at the start of the oral hearing that it did not seek to rely on evidence taken on 12 02 2015 and would start afresh unless it found inconsistencies between what was said by or on behalf of any party on that occasion and what was said today.

3. Tribunal Judge Poynter gave permission to appeal to the Upper Tribunal. He drew attention to the decision of Upper Tribunal Judge Wright in *GO and HO v Barnsley Metropolitan Borough Council* [2015] UKUT 0814 (AAC), who relied on the analysis of the majority of the three-judge panel in *MB v Secretary of State for Work and Pensions* [2013] UKUT 111 (AAC), reported as [2014] AACR 1. Judge Wright held the First-tier Tribunal to be in error of law by reason of being improperly constituted in that there had been overlapping members of the panels involved in evidence gathering during the proceedings. He relied on the reasoning in *MB* that the tribunal must be constituted in accordance with the Senior President's practice statement on composition throughout the proceedings. That statement authorised three members to decide a case. In *GO and HO*, four had been involved, albeit not all at the same time.

4. Judge Poynter helpfully explained the practice of the Social Entitlement Chamber of the First-tier Tribunal in child support cases. The case might begin before a judge who then decided that a financially qualified panel member was required. The tribunal would adjourn and resume with the same judge sitting with the panel member. He explained that 'That exception to the normal practice was necessary because there is only a limited number of salaried judges in the chamber who are sufficiently experienced to undertake complex child support work and the number of FQPMs is smaller still.'

5. With respect to Judge Wright, I do not consider that it is necessary to analyse the terms of the practice statement or the provisions of the legislation under which it is made. The statement must be read as subject to the rules of natural justice and the Convention right to a fair hearing. A simple, if perhaps not very realistic, example shows why that must be so. Suppose a judge hears a child support case involving a parent who runs a business. The hearing has to be adjourned and the judge decides to buy shares in the parent's company. That would give the judge a direct financial interest in the outcome of the appeal such that it would not be proper for that judge to sit on the resumed hearing. That could not be right, regardless of whatever a practice statement might say or the convenience of the listings arrangements might seem to require. Legislation must always be read in a way that complies with the procedural safeguards of a fair hearing: see *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 at 1263 and section 3 of the Human Rights Act 1998. And that limitation would carry through to the practice statement. It must comply with natural justice and the Convention right to a fair hearing, a point I made in *Wheeler v Information Commissioner* [2016] UKUT 0052 (AAC) at [8].

6. The position is the same here. I appreciate the care with which the tribunal attempted to ensure that the hearing was fair, but the dangers identified by the Commissioners remain and the tribunal's reasons only serve to emphasise that fact. The tribunal decided not to rely on the evidence previously given unless there were inconsistencies. But how would they know there were inconsistencies? They might be apparent on the face of the record of proceedings from the earlier hearing. But those records do not have to be verbatim and that would leave the financial member in the position of giving evidence of what was said previously if the parties or their representatives did not accept the member's recollection. There is also the assessment of the evidence to consider. The member might be influenced by impressions formed at the earlier hearing, without necessarily being aware that these were operating at the resumed hearing. For that reason, I set aside the tribunal's decision.

7. I understand the impact that this may have on the listing of complex child support appeals. But that impact arises from limited judicial availability. It would not be right to override safeguards that exist to ensure a fair hearing for the convenience of listing. Those difficulties could be reduced, if not entirely avoided, by earlier and detailed case management of complex cases.

8. As to the other grounds of appeal, the Secretary of State does not support them and the other parent has not responded to the appeal. In those circumstances, I prefer to make no comment other than to say that any errors that occurred will be subsumed by the rehearing.

B. The rehearing

9. For the convenience of the parties, I will set out what a rehearing in accordance with *KK* means (see direction B). The tribunal will consider all aspects of the case, both fact and law, entirely afresh. It will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of the relevant evidence and submissions made at the rehearing. It must come to its own conclusions on issues of both fact and law that it considers without being bound by any conclusions of fact or law reached by the tribunal in the decision that I have set aside.

Signed on original
on 12 July 2016

Edward Jacobs
Upper Tribunal Judge