IN THE UPPER TRIBUNAL **Appeal No. CCS/5510/2014**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Gray

This appeal is dismissed. The decision of the First-tier Tribunal sitting at Birmingham and made on 19 August 2014 under number SC024/14/01743 did not involve a material error of law and the decision stands.

REASONS FOR DECISION

1. In this child support case the appellant is the father of three qualifying children who live with their mother. He is, in the terms of the applicable legislation, a non-resident parent who is liable to be assessed for child support maintenance as his contribution towards the upkeep of the children. The mother is the second respondent. I will refer to the parents as the mother and the father in this decision.
2. The Secretary of State for Work and Pensions is the first respondent, the functions of CMG (formerly CMEC and the CSA) having been transferred to the DWP under a transfer of functions order effective from 1/8/12. I will refer to the body that has from time to time been administering child support maintenance as the agency.
3. Child support maintenance in this case is based on the new child support scheme, the 2012 scheme put into operation by the Child Support Act 1991 as amended by the Child Maintenance and Other Payments Act 2008 which must be read together with the Child Support Maintenance Calculation Regulations 2012.
4. The background is as I set out in my grant of permission to appeal, but I will rehearse it here.

The background

5. The appeal to the FTT was by the parent with care, the mother, against a decision of the agency made on 14 October 2013. That decision was that the father was liable to pay £128.98 per week, in respect of the three qualifying children from the effective date of 6 September 2013.
6. The father provided information regarding his current income to the agency on 28 October 2013.

Proceedings before the FTT

7. The FTT allowed the appeal, directing the agency to recalculate the child-support liability from the same effective date, but using a higher gross weekly income on the basis of figures produced by the mother.

8. The Secretary of State sought a statement of reasons from the FTT judge, but it was the father who made the application for permission to appeal, both in the FTT, where permission was refused and before me.

Proceedings before the Upper Tribunal

9. I made directions asking for the views of the parties prior to my considering that application. Amongst other things I said

The points made by the father in his grounds of appeal should be considered, but in addition I would ask for the Secretary of State's representations as to the issue of the obtaining of information from HMRC and whether the judge erred in using the more recent figure obtained, not directly from HMRC but from the mother or other source. An overview is sought on the basis that the legislation is new and untested on appeal.

The position of the Secretary of State

10. The Secretary of State did not support a grant of the application. He argued that the appeal was unlikely to be successful on one of two bases.
11. The first is that the FTT was entitled to use the information provided by the mother on the basis that it must have been before HMRC at the time that the request was made of them to produce historic income details (the concept of historic income appearing in the regulations, and in most cases governing the calculation of gross income for the purposes of the maintenance assessment) and that they must have mistakenly provided the 2011/12 tax details, rather than the 2012/13 details later provided by the mother.
12. The second was that, even if the FTT were not entitled to use that information, there was no disadvantage to the father because on the current income details that he provided his income was in excess of that figure, and was comfortably more than the 25% required to enable use of current income figures between the historic income and the current income.

My grant of permission

13. I felt that there were two arguable issues that arose. The first was whether the FTT was in fact entitled to use information that came to it from the mother and not directly from HMRC. As the regulations were yet to be interpreted as a matter of law that was of potential importance. The second was the position if the FTT was not entitled to use that information but there was current income information available to it that satisfied the 25% plus rule the use of which would result in a higher gross income. I felt that it was appropriate for this to be examined by the Upper Tribunal on the Kerr principle of co-operation *(Kerr-v- Department for Social Development [2004] 1 WLR 1372)* that the public interest aim is to produce the correct amount payable, in Kerr by way of benefit entitlement but by analogy also in respect of child support where there is a clear public policy in relation to the welfare of children in their maintenance being at a level which is correct in law.

The position of the parties before me
The Secretary of State

14. The Secretary of State does not support the appeal, although he has resiled somewhat from the position earlier adopted. In a helpful submission on his behalf by Mr O'Kane, the tenor of which I accept, it is said that on a proper analysis of regulation 35 and 36 the information as to historic income must come from HMRC. That differs as to the provisions regarding current income, which may be from another source.

The father

15. The father did not add to his grounds of appeal. He did not seek an oral hearing.

The mother

16. The mother understandably seeks to preserve the decision of the FTT. She evinced a wish to attend an oral hearing, perhaps by video link, but in view of the fact that I am able to dismiss the appeal on the basis of the legal issues on the papers before me an oral hearing has not been necessary.

The relevant legal provisions

17. These are as to the meaning of the rules relating to the use of historic and current income set out in regulations 35 to 38 of the Child Support Maintenance Calculation Regulations 2012, and in particular regulation 35 (1)(a) and 35 (2) (a) and regulation 36 (1). I set out the relevant parts of those regulations below

35 (1), historic income is determined by-
(a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent……

35 (2) a request for the HMRC figure is to be made by the Secretary of State –
(a) for the purposes of the decision under section 11 of the 1991 Act……

36 (1), the HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations…..

18. It is the interplay between these regulations that seemed to me to require determination in respect of the position of the mother or other person providing information which may or may not be under the PAYE regulations, and the status of that information in respect of calculation of the income of the non-resident parent.

The income calculation

19. Here, on the basis of what was accepted by the FTT the father's income had increased following the period for which the historic income figures were provided by HMRC.
20. I agree with the Secretary of State that the regulations properly read mandate that the HMRC figures, where they are available, shall be used to calculate historic income. Should that result in unfairness, as may have been the case here in that HMRC appeared to provide figures for the 2011/12 tax year when, at the date of the request, they

would have had figures for the 2012/12 figures, the current income provisions may be used.

21. The source of the current income figure is not limited in the regulations to HMRC, as the historic income figure is; any source considered to be reliable by the decision maker, which includes the FTT which looks afresh at the calculations in the decision under appeal, may be used.
22. It seems to me that the FTT, standing in the shoes of the decision maker, could have directed HMRC to produce the appropriate tax year figures if they were in their hands (which the information from the mother suggested that they were), but in general the provisions as to the use of current income may ameliorate the hardship that the provision of a lower figure creates.
23. It will be important for tribunals to be aware of the power to seek information, and of the role of the current income figures as an alternative where the 25% increase is reached. If, here, the current figures had been higher but not 25% higher than the historic figure thought would have to have been given to approaching HMRC. Whilst the supersession power will allow the CMG to recalculate there are restrictions as to the date from which such a recalculation will be effective, and where arguably wrongly dated figures have been provided by HMRC to rely on an application to supersede by the parent with care may result in unfairness.
24. Whether or not to seek that information from HMRC is a discretionary decision in which the welfare of any children affected must be considered under section 2 Child Support Act 1991, and it would be an unusual circumstance where the welfare, at least of the qualifying children, did not militate towards the conclusion of their maintenance being calculated on figures that were appropriately up to date where there were not reliable current income figures to use.

My conclusions

25. It is not easy for a First-Tier Tribunal to deal with complex new legislation in the absence of guidance. It is possible, bearing in mind the phraseology of the statement of reasons, that the tribunal accepted the evidence of the mother in place of the evidence from HMRC, but as the Secretary of State has pointed out, if they did that made no practical difference because, given the mother's contentions as to the level of income the FTT was entitled to consider her evidence of the father's current income and, if reliable, use that as the basis of the calculation if it differed from the historic income supplied by HMRC by more than 25%, which it did.
26. Accordingly, if there was an error of law it was not material, that is to say it did not make a difference at the end of the day, and the decision stands.
27. I apologise for the delay in the issuing of this decision.

Upper Tribunal Judge Gray
Signed on the original on 5 May 2016