IN THE UPPER TRIBUNAL **Appeal No: CCS/4752/2014**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant father.

The decision of the First-tier Tribunal sitting at Liverpool on 22 July 2014 under reference SC900/14/00018 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) If any party has any further evidence that they wish to put before the tribunal that is relevant to the issues under consideration, this should be sent to the First-tier Tribunal's office in Liverpo0l within one month of this decision being notified to them.

(3) The Secretary of State must supply the First-tier Tribunal and the other parties to the appeal with a new submission on the appeal as described in paragraph 38 below within one month of the date of issue of this decision.

(4) The First-tier Tribunal should have regard to the points made below.

REASONS FOR DECISION

Preliminary – parties

1. In this appeal I have identified the father, who in the statutory child support language is the "parent with care" of Ryan and was the second respondent in the appeal below, as the appellant. I will refer to him simply as "the father". The first respondent is the Secretary of State, and I shall refer to him as that. The second respondent here is the mother. She was the appellant in the appeal below. In the statutory child support language she is the "absent parent" of Ryan, the child concerned. I will refer to her simply as "the mother".

2. I have identified the parties as above because although the mother was the first to make an application to the Upper Tribunal for permission to appeal against the decision of the First-tier Tribunal dated 22 July 2014 ("the tribunal"), she was not granted permission to appeal on the grounds she advanced. As the history of this case at the Upper Tribunal shows, Upper Tribunal Judge Bano directed that the mother's application for permission to appeal was to be considered at an oral hearing, on notice to the father and the Secretary of State. That then led the father to file what he termed his "Response to Application for Permission to Appeal". Having had sight of that document and the arguments made in it, Upper Tribunal Judge Knowles QC treated those arguments as an application for permission to appeal by the father, and she gave permission to appeal to the father on the basis of his arguments. Although Judge Knowles did not limit permission to appeal to those arguments and did not refuse the mother permission to appeal on her arguments, it seems to me that the father should be treated as the appellant on this appeal to the Upper Tribunal and the mother as the second respondent.

3. Nothing, however, in substance turns on this ordering or identification of the parties as all arguments by all parties have been considered, and indeed the mother opened the appeal before me through her barrister (she understandably having assumed up until my opening remarks at the hearing of appeal that she was the appellant), with the Secretary of State and father then responding.

Introduction

4. The appeal falls to be decided on a quite straightforward point, despite the breadth and variety of the legal arguments made on behalf of the mother. The point on which the appeal succeeds is that the tribunal erred materially in law in failing to have regard to relevant evidence in the appeal bundle which at the very least arguably shows that a maintenance enquiry form had been issued by the Secretary of State (then as the Child Support Agency ("CSA")) to the mother in 2001.

5. It is not, however, an appeal that provides a good advert for the workings or administration of the CSA, as the history below shows.

Background

6. The Secretary of State's decision under appeal to the tribunal was made on 25 October 2013 and found the mother to be liable to pay child support maintenance at a variety of rates (sometimes a nil rate) from 9 July 2001 until 3 September 2012, when the case was 'closed. (The phrase "closed the case" is language used here to describe the ending of the need for child support maintenance. It is accepted in this case that the case was properly closed from the effective date of 3 September 2012 as Ryan had by then reached the age of 16 and by virtue of this had ceased to be a "qualifying child".

7. The mother's appeal against this decision to the tribunal was on two grounds. First, she argued that the case had been closed since 2007.

Second, although she had no proof in writing, she said that she had given money regularly to the father to support their son.

8. The Secretary of State's written appeal response to the tribunal admitted candidly, though wrongly (as we shall see), that there was a "paucity of information in this case which has been clerical since 2010". Drawing on the "clerical database", the appeal response said that following an application for child support maintenance by the father in respect of Ryan on 9 January 2001 a maintenance enquiry form had been sent to the mother on 9 July 2001. This had not been returned. No further action was then taken by the Secretary of State (i.e. the CSA[1]) until 1 August 2008 when "a decision was made to cancel the case from 01/06/07". The appeal response could not identify why this decision had been made. It was, it was said, unclear from the records whether the father had been notified of this decision.

9. The father next made enquiries, according to the appeal response, about his maintenance application in September 2012. He was told the case had been closed and he would need to reapply under the "2003 Scheme" (the then current scheme governing child support maintenance, which came into effect from 3 March 2003 under the Child Support, Pensions and Social Security Act 2000). The father insisted he had not sought to have his case closed. Following an investigation the Secretary of State concluded that the case had been closed in error and was to be reopened under the original, 1993 scheme. This led to the mother being contacted by the Secretary of State to supply evidence of her circumstances, earnings and housing costs from 2001. On receipt of that evidence the Secretary of State made the decision referred to above and the mother appealed it to the tribunal.

[1] For ease of reference, save where the context requires, I will refer to the first respondent from now on as the Secretary of State, even though for much of the history relevant to this appeal he will have been acting through the CSA.

10. As to the mother's grounds of appeal, the Secretary of State argued in his appeal response: (i) a valid claim had been made by the father in 2001, this had been notified to the mother by the issuing of the maintenance enquiry form and this provided a lawful basis for decision awarding child support maintenance to the father from 9 July 2001 until September 2012; and (ii) any payments made by the mother direct to the father on behalf of her son fell outside the jurisdiction of the First-tier Tribunal on the appeal.

11. This was the sparse basis upon which the appeal first came before the tribunal which was to eventually decide the appeal. At and subsequent to that first hearing of the appeal, the mother and father (not, it should be noted, the Secretary of State) both produced a considerable amount of written evidence including CSA computer record print outs and its clerical file relevant to the father's application for child support maintenance and the mother's involvement in the same. The appeal then came back before the tribunal at a hearing on 22 July 2014 when it decided the appeal. Both parents attended the hearing but neither of them was represented at the hearing.

12. The tribunal allowed the mother's appeal in part and set aside the Secretary of State's decision under appeal. Ignoring the *level* of child support maintenance found due from various effective dates (the level of child support maintenance awarded not being in issue before me), the tribunal's decision had two fundamental bases. As set out in its *Decision Notice* these were:

    (i) in the first place, that there were "no grounds to revise the decision to an effective date of 9 July 2001". This was because the claim had been closed by a decision made on 19 June 2007 and the tribunal considered it was entitled to assume that the act of closing the claim in June 2007 had been properly done by the Secretary of State "in the absence of any explanation or the production of any documents to explain why the case was closed"; and

(ii) in the second place, however, there were grounds to supersede the decision to close the case effective from 22 February 2010. This was because information had been provided to the tribunal which confirmed that the father had contacted the CSA on 15 February 2010 to notify them that his claim had been closed and that he remained a parent with care responsible for a qualifying child.

I should add that at the end of its *Decision Notice* the tribunal said that in arriving at the above conclusions the tribunal had:

> "relied on information provided by [the mother] and [the father] which has been accepted" (my underlining added for emphasis)

13. The tribunal then explained its basis for these conclusions in its statement of reasons. For the purposes material to this appeal, I need only refer to some parts of the statement of reasons.

14. In paragraph 4 of the statement of reasons the tribunal referred to uncertainty about when an application had first been made to the CSA. It recounted the father's belief that an application had been made (by him) before July 2001 and the mother's evidence that she did not receive a maintenance enquiry form. This part of the tribunal's reasons then says "The [CSA] has not produced a maintenance enquiry form and is unable to provide the address to which it was sent…".

15. The reasoning then, in the same paragraph, highlights one piece of evidence in the information that had been provided by the father and the mother. This was on page 336. In order to put what is said in that page in the correct context and to aid understanding it is necessary to note that the father at the relevant time was also a parent for another child whose mother is not the mother in this case and in which an application for child support maintenance had also been made. The evidence on page 336 is from the CSA files and appears to be the first of three pages of attendance notes from an interview the father attended

with the CSA on either 13 or 20 October 2004. Page 336 starts with an entry referring to the other case but then says "The other case [that is, this case] where [the father] is a parent with care.....looks as though a MEF has not been issued yet". ("MEF" is shorthand for "maintenance enquiry form".) It is this entry that the tribunal described in paragraph 4 of its statement of reasons as being "[o]f particular note".

16. The tribunal goes on in its reasoning to: refer to the mother's evidence that she had lived at various addresses and did not receive, or complete, a maintenance enquiry form; raise a question about whether the address to which the enquiry form was issued was a "confident" address and says that this was doubted until 20 October 2004; note a further entry in the CSA records dated 19 June 2007 (on page 88) stating "MEF not issued"; and records that the next event of which the tribunal could be certain (by which I think the tribunal judge meant 'clear') was that a letter was sent to the mother in 2008, and probably on 1 August 2008, indicating that the case had been closed with effect from 1 June 2007.

17. The tribunal then set out what it described as **The Facts of the Case**. Stripped to the relevant essentials, these were that: (i) the case had been properly closed in 2007; (ii) the first contact the father had had with the CSA in respect of the current assessment was on 15 February 2010 when he alerted the CSA to the fact that he was a parent with care and had not had received any payments of child support following his initial contact with the CSA in or about July 2001; (iii) the contact made by the father in February 2010 was not acted upon by the Secretary of State until 13 September 2013; (iv) that contact provided the Secretary of State with grounds to supersede the 2007 decision closing the case and to allow it to be reopened from the effective date of 22 February 2010; (v) as the effect of the supersession was to reopen a case which had been decided under the old, 1993, child support rules, those old rules continued to apply; (vi) the 22 February 201o date was not affected by the fact that a maintenance enquiry form was not issued to the mother until 2013; and (most importantly for the purposes of

this appeal) (vii) the case could not be "reopened" from July 2001 "because it is clear that that no MEF was issued in 2001 that could be related to 8th July 2001 because, before any enquiries were raised, the case was closed….[and] the [CSA] has accepted that it could not be confident about the address that was held for the [mother]".

18. Turning to whether the case had been properly closed in 2007 – the Secretary of State's argument before the tribunal being that it had been closed in error – the tribunal said:

> "They have not explained why it was closed; none of the paperwork reveals any reason for the case to be closed; I accept that [the mother] was notified that it had been properly closed; …records show that it was properly closed….Applying common law principles and relying on caselaw relating to decisions that have been made when no explanation for the decision can be provided, I draw the conclusion that I must accept that the action which was done by the [CSA], effective from 1st June 2007, was properly done."

19. The tribunal concluded therefore that there were no grounds to reopen the case from effective dates of either 9 July 2001 or 1 June 2007 because "there was no event that could trigger a supersession". The earliest date from which the case could be reopened, and the decision to close the case superseded, was 22 February 2010, which was the first effective date following the father's contact with the CSA on 15 February 2010.

20. Despite having at least from one perspective been the beneficiary of the tribunal's decision not to take any awards of child support back to 2001, it was the mother who, as I have explained above, initially sought to appeal the tribunal's decision. The essence of her complaints concerned why the effective date had been fixed back to February 2010 when she had had no contact from the Secretary of State until 2013 and why her liability to pay child support maintenance stood to be assessed under the old, 1993 rules for child support if (as she argued) no case had ever been opened in 2001. It was these grounds that led Judge Bano to direct an oral hearing of the application.

21. As already noted, the mother's grounds did not lead Judge Knowles to give permission to appeal. Permission was granted on the father's grounds (in response), provided on his behalf by the National Association for Child Support Action ("NACSA"). As in the end it is the core of those grounds put forward on behalf of the father by NACSA which has led me to allow the appeal, it is worth summarising them at this stage.

22. The essential ground was that the tribunal had failed to have regard to material evidence before it (or if it had had regard to that evidence it had not explained why it was not relevant to the material issues before it), namely evidence in the appeal bundle that a maintenance enquiry form had been issued by the CSA to the mother at a 'confident' address in July 2001. This evidence consisted of the following:

(i) page 62, which is an entry from the CSA's computer system, provided to the mother as part of her data request, in which an entry records "09/07/2001 MEF ISSUED TO [I will not set out the address here] THIS IS A CONFIDENT ADDRESS AS THIS WAS GIVEN ON 720 154[2] AND HELD ON DCI FROM MARCH 2001"; and

(ii) page 101, which is a page from the CSA's clerical file, signed and dated by a CSA officer on 1 December 2004, which said (I have translated some of the obvious shorthand references):

> "Face to face referral [received]. MEF issue 09/07/01 which will be a confident MEF issue as [telephone] call to CRT shows NRP [i.e. the mother] lived at this address 28/03/01 to 10/02/03. [Effective] date will be 09/07/01. [Mother] not [in receipt of] any [benefit] at MEF issue date 09/07/01 (Monday). [Mother] not exempt from minimum amount."

The six pages that follow on immediately from page 101 all appear to show the same CSA officer on 1 December 2004 recording the

[2] The Secretary of State has explained in these Upper Tribunal proceedings that this number coding means that the address had been provided by HMRC on a request from the CSA. This has not been contested by any of the other parties, at least so far.

steps she took on that day to try and ascertain what the mother's income had been from July 2001.

23. The father's representative argued in his grounds that the tribunal had erred in law in not having regard to this evidence and weighing it against the evidence it did have regard to found on page 336 of the appeal bundle. It was argued further that reliance on this page 336 evidence (see paragraph 15 above) alone was inappropriate as the CSA officer who made the statement on page 336 was completing an investigation against a separate application and would not have had full sight of the details for this case for such a comment to be verified, and there was no suggestion that the officer had in fact thoroughly investigated whether or not a maintenance enquiry form had been issued.

24. Those acting for the father argued further, in general but particularly in relation to what the tribunal had said about the case being "closed", that the tribunal's reasoning did not adequately address the legislative basis for closing a case. It was argued that there was no assessment in force until 10 October 2013 and that at all times prior to this there was only an "unprocessed effective application". If, as the father argued, an application for child support maintenance had been made by him in 2001, the CSA (as was) and the Secretary of State could only withdraw or cancel the application *before* an assessment was made if either: (i) the father had failed to provide information required to complete the application; or (ii) the qualifying child had died; or (iii) the father had ceased to be paid income support or jobseeker's allowance. None of these was the case, so it was argued. The only other circumstance in which the CSA could have ceased to act on the father's application would have been if he had requested them to do so (per section 4(5) of the Child Support Act 1991), but there was no evidence of the father having done this.

25. NACSA finally argued for the father that if, contrary to the arguments set out above, the tribunal's decision was correct in deciding that the father's application for child support maintenance could only apply from an effective date of 22 February 2010, it was accepted that any calculation would fall to be made under the 2003 child support scheme and the tribunal had erred in law in holding the contrary to be the case.

26. The Secretary of State filed a detailed and helpful written submission on the appeal to the Upper Tribunal. In essence, it agreed with the argument made by NACSA for the father about the evidence showing that a maintenance enquiry form had been issued to the correct address for the mother on 9 July 2001. That set the effective date for when the child support liability began. No decision had been made on the application, however, until 10 October 2013, and it was thus that decision on the 2001 application that had been before the tribunal, and not any revision or supersession of any earlier decision on *that* application.

27. The Secretary of States' submission also provided an explanation about why the CSA had said the case had been closed. It suggested that the reference on page 63 to the case being closed on 2 May 2003 was because of "an operational accounting scan and appears to be a workaround for migration onto the 2003 scheme computer system as there was more [than] one application for child support maintenance in respect of the [father and mother]", and reference was made in this respect to what is now page 448 of the appeal bundle. Perhaps more importantly for the purposes of this appeal and the tribunal's adjudication upon it, the Secretary of State said in terms of the case being closed from 1 June 2007 that this was in respect of an application for child support maintenance *made by the mother*, and reference was made in this respect to letters dated 1 August 2008 issued by the CSA to the father (pages 460-462) and the mother (pages 463-464).

28. Although these letters were not before the tribunal when it decided the appeal (and so it could not have erred in law in not having had regard to them), as the appeal is being remitted to another First-tier Tribunal to decide it is in my judgment worth highlighting material parts of both letters. The material parts of the one to the father reads: "the application for child maintenance is no longer in force, for RYAN....[t]his application for child maintenance ended on 1 June 2007....[t]he reason why the application made by [THE MOTHER] is no longer in force is as follows: you also applied". The relevant parts of the CSA's letter of 1 August 2008 to the mother read: "I'm writing to tell that the application for child maintenance is no longer in force, for RYAN.....This application....ended on 01-06-2007. ....[t]he reason why the application is no longer in force is as follows: the parent or person looking after the child or children also applied. According to child support law, their application must come first".

29. Although it will be for the next First-tier Tribunal to address these letters as evidence and make findings of fact upon them if needed on this appeal as it is argued before it, *prima facie* these letters would seem to show that it was the mother's application for child support that was closed in 2008 with effect from 1 June 2007 and not the father's application. The Secretary of State says based on these letters that the mother's application (or 'case') was terminated in accordance with paragraph 16(4) of Schedule 1 to the Child Support Act 1991 as she was no longer the "parent with care", and reference was made to what is now page 465 of the appeal bundle[3].

30. The letters also show that one of the complicating aspects of the history relevant to this appeal is that that the mother and father made different applications to the CSA for child support for Ryan over the years, and some of these may even having been competing applications. That does not excuse the poor state of the record-keeping or the paucity of information put before the tribunal by the Secretary of State on 22 July

[3] It should be noted that the appendix on page 394 has not been accurately transposed in terms of where some of the documents in that appendix appear on pages 395-465.

2014 (an omission not repeated in his delegate's submissions to the Upper Tribunal), but it may partly explain it.

31. Save for the very detailed and extensive grounds submitted in the skeleton argument of counsel – Mr Tabori acting through the Free Representation Unit – on behalf of the mother, which I will address below, the above accounts for the substance of the arguments made before and at the oral hearing before me.

32. I should, however, refer to one other matter. It is evidence submitted after the tribunal's decision and so cannot fall to be taken into account in determining whether the tribunal erred in law on the evidence before it, but it is nonetheless important evidence which the new First-tier Tribunal no doubt will wish to have regard to when the mother's appeal comes back before it. The evidence is on pages 386-387 of the appeal and consist of a letter, and corroborating evidence, from the mother in which she sets out that she **was** living at the address to which the CSA said on page 62 that it sent the maintenance enquiry form on 9 July 2001.

Discussion

33. Despite the arguments made to the contrary by Mr Tabori for the mother, I have no hesitation in concluding that the tribunal erred materially in law in its decision of 22 July 2014 and that decision must be set aside. The error was its failure to have regard to the evidence on pages 62 and 100 (evidence which was before it) in its reasoning. On its face this was relevant evidence going to one of the key issues (if not the key issue) before it, namely whether a maintenance enquiry form had in fact been issued by the CSA to the mother on 9 July 2001. In the Upper Tribunal's error of law jurisdiction it is not for me to express any concluded view on this evidence, especially where I am not being asked by any of the parties to re-decide the case and where other factual issues (such as shared care – see paragraph 16 on page 393 and page 17), may still be in issue. However taken with the evidence of the mother herself on pages 386-387 and the views of the Mr

Commissioner Angus in paragraph 12 of *CCS/3136/2005* (page 445), it may be that it will now be for the mother to present to the new First-tier Tribunal cogent evidence as to why as a matter of fact the CSA did not "send" her the maintenance enquiry form on 9 July 2001.

34. It is the provisions of regulation 30(2)(a) of the Child Support (Maintenance Assessment Procedures) Regulations 1992 which govern and reveal the importance of the date any maintenance enquiry form was sent. This regulation provides relevantly that:

> "(2) Where no maintenance assessment made in accordance with Part I of Schedule 1 to the Act is in force with respect to the person with care and absent parent, the effective date of a new assessment shall be–
> (a) in a case where the application for a maintenance assessment is made by a person with care or by a child under section 7 of the Act–
> (i) eight weeks from the date on which a maintenance enquiry form has been given or sent to an absent parent, where such date is on or after 18th April 1995 and where within four weeks of the date that form was given or sent, it has been returned by the absent parent to the Secretary of State and it contains his name, address and written confirmation that he is the parent of the child or children in respect of whom the application for a maintenance assessment was made;
> (ii) in all other circumstances, the date a maintenance enquiry form is given or sent to an absent parent."

This has to be read with regulation 1(6) of the same regulations, which provides

> "(6) Except where express provision is made to the contrary, where, by any provision of the Act or of these Regulations-
> (a) any document is given or sent to the Secretary of State, that document shall, subject to paragraph (7), be treated as having been so given or sent on the day it is received by the Secretary of State; and
> (b) any document is given or sent to any other person, that document shall, if sent by post to that person's last known or notified address, ... be treated as having been given or sent on the second day after the day of posting, excluding any Sunday or any day which is a bank holiday in England, Wales, Scotland or Northern Ireland under the Banking and Financial Dealings Act 1971".

35. If, therefore, the CSA did in fact send the maintenance enquiry form by post to the mother at her then address on 9 July 2001 (as the evidence above would appear to suggest) then that on the face of it would act to

fix the effective date for the maintenance assessment with reference to the 9 July 2001 date.

36. Turning back to the tribunal's findings of fact and reasoning, in my judgment both simply fail to grapple with, indeed ignore, this evidence. Pages 62 and 100 appear in the evidence the tribunal expressly "accepted" and "relied" on, and yet on that evidence the tribunal concluded, and found as fact, that "it is clear that no MEF was issued in 2001 that could be related to 8th July 2001 because, before any enquiries were raised, the case was closed". I simply do not see how that finding could rationally be made if the tribunal had had regard to pages 62 and 100. Or put another way, given that evidence, if the tribunal had regard to it then it erred in law in failing to explain how that evidence sat with the tribunal's finding.

37. I should add that although the above evidence might lead the new First-tier Tribunal to conclude that an effective application for child support maintenance made by the father in respect of Ryan was in place in July 2001 and remained undetermined until October 2013, careful investigation may still be required as to whether that application remained effective throughout that 12 year period. I have in mind here the evidence referred to above about the mother's application in respect of Ryan *no longer* being in force by 1 June 2007 because the father had applied. This language might suggest that a decision awarding child support maintenance to the mother as the parent with care for Ryan was made sometime before 1 June 2007 and the father then *re*applied as the parent with care for Ryan from on or about that date. If that is the case then it might suggest that a maintenance application by the father which was effective from July 2001 had ceased before the final end date of 3 September 2012. On the other hand, all the letters of 1 June 2008 may evidence is that the mother's application in respect of Ryan did not proceed and was not decided once it was discovered that the father's application of July 2001 remained in place and still to be determined. This may be the less likely

of the two scenarios posited given the wording of the letter to the mother (i.e. the "in force" part), but whatever the correct history is needs to be made plain.

38. Given the matters raised immediately above, the history of this case and the Secretary of State's failure to provide the First-tier Tribunal with the evidence and legal submissions on this appeal commensurate with its complexity, I direct that the Secretary of State is to provide the First-tier Tribunal with a detailed and comprehensive chronology, backed up with all relevant supporting evidence still held in his offices, about the history of all applications for child support maintenance made by the father and the mother between July 2001 and September 2012 in respect of Ryan, whether they were effective under child support law or not, and the legal basis of how each of those applications came to an end. The use of the word 'closed' should be avoided unless it has a basis as a term under the statutory legislation governing child support at the relevant time. If the submission asserts that any applications were rendered ineffective *before* they were decided then the factual and legislative basis for that occurring must be stated. If instead an application was effective and decided, then the terms of each such decision must be set out and the legal grounds (revision or supersession) and factual grounds for any later changing decisions.

39. The First-tier Tribunal to which this complex appeal is being submitted will then need to make detailed findings of fact (with reasons to support the same) on the history relevant to the application made by the father in respect of Ryan in 2001, the maintenance enquiry form which may have been issued to the mother in July 2001 and all and any supervening events relevant to that application between 2001 and September 2012. The First-tier Tribunal should also avoid the use of the term 'closed' unless it is justified under the applicable law.

The arguments of the mother

40. Mr Tabori for the mother sought to range a number of arguments against the 2001 application by the father being effective or the tribunal having erred in law in not properly addressing the evidence on pages 62 and 100. (He also sought to argue that tribunal had erred in law in holding, in effect, that the father had made an application with an effective date of 22 February 2010. However that issue is now overset by the above error of law and will subsumed in the issues the new First-tier Tribunal may need to consider (perhaps especially, if any effective application made by the father in 2001 did not remain effective throughout the period from July 2001 to September 2012).) I will address each of the arguments in turn

Presumption of regularity

41. This argument, if I understood it correctly, was that the tribunal was right to apply the 'presumption of regularity' to the evidence and, so doing, concluded correctly that the case had been closed properly in 2007. (For the purposes of this argument evidence supplied by the Secretary of State after the tribunal's decision showing arguably that it was the mother's application in respect of Ryan that ended with effect from 1 June 2007 needs to be ignored.)

42. For present purposes this presumption is best described by Mr Commissioner Angus in the first sentence in paragraph 12 of *CCS/3136/2005*:

> "There is a presumption in law that in any particular case public officials have carried out their functions properly unless the contrary is proved. [Morris –v Canssen [1946] AC 459, Cruse –v- Johnson [1898] 2QB 91 and TC Coombs (a firm) –v- IRC [1991] 2 AC 283)."

43. I fail to see, however, how this presumption renders safe the tribunal's conclusion on what occurred in 2007 as that conclusion was based in large part on the tribunal's failure to have regard to the evidence

showing that an effective application may well have been made by the father in 2001. Had it been aware of this evidence or had regard to it then it may well have taken a different view as to whether the CSA *properly* 'closed' the case in 2008 with effect from 1 June 2007. Indeed, as the Secretary of State argues, applying the same presumption to the evidence on pages 62 and 100 might well have led the tribunal to the starting point that the maintenance enquiry form was posted by the CSA to the mother at the correct address for her in July 2001 and so she became liable for child support maintenance from that date. That changed starting point ought to then have led to an enquiry as to what it was that the CSA could properly 'close' in 2007.

44. This leads on to a separate but related point concerning the use of word "closed". As I have touched on in paragraph 39 above, I have struggled to understand in what sense the tribunal used the word 'closed' when it found that "the case had been properly closed in 2007". It is not readily apparent where in the legislation 'closing' is provided for nor did the tribunal explain the legislative basis which would enable a case to be closed. A presumption that the CSA acted properly seems all the weaker if the statutory scheme did not enable such a result. Further, there is also an (at least unexplained) inconsistency in the tribunal's reason here because if, as it seemed to find, there had been no maintenance enquiry form issued by the CSA to the mother in July 2001 then it is difficult to see what of that application remained to be closed six years later.

45. In my judgment, given all of the above, the argument based on the presumption of regularity must fail on the bases (a) that the tribunal failed to investigate properly all the surrounding evidence in order to ascertain whether the presumption was justified and not rebutted; and (b) failed to explain even on its own terms how the 'closure' of the case from 1 June 2007 had been properly made under the relevant child support law.

46. I should add that, although not necessarily part of this argument, I have had trouble in understanding what decision the tribunal considered had been revised by the decision of 25 October 2013. It would seem that the tribunal considered it to be the 'closure' decision effective from 1 June 2007. However if the father's application of 2001 had never been made effective (because, as the tribunal found (arguably wrongly), no maintenance enquiry form had been issued to the mother pursuant to that application), it is difficult to see what decision could have been made, or indeed needed to be made, under the Child Support Act 1991 on what in effect was no more (on the tribunal's findings) than an incomplete application for child support maintenance.

Legitimate expectation

47. The argument made here for the mother by Mr Tabori is that the mother had a legitimate expectation that the case had been closed with effect from 1 June 2007, she had relied on this representation or 'promise' to her detriment and it would therefore be unlawful for the Secretary of State to resile from this 'promise' by finding her liable for child support maintenance in respect of Ryan for any period covered by that 'case closed' representation. This argument fails for at least five reasons.

48. First, insofar as it relates to enforcement of payment, it is an argument over which neither the tribunal nor the Upper Tribunal has, or had, any jurisdiction.

49. Second, and more substantively, it fails on the facts because it is plain in my view that what was represented to the mother in the letter of 1 August 2008 was that *her* application had been 'closed' because the father had made an application. I consider I am entitled to take account of this evidence even though it was not before the tribunal when it decided the appeal because, as I understand it, this argument is being deployed as a reason for my not allowing the father's appeal and the basis of the expectation has, therefore, to be established. Given the nature of the representation, I can see no basis on which it can sensibly

be argued that this provided the mother with a clear and unequivocal promise that she would not be liable to pay child support maintenance to the father for Ryan. If anything, it said the exact opposite, namely she might now be liable because her claim for child support maintenance had come to an end.

50. Third, even had such a representation to the effect argued for by the mother been made to her by a CSA official acting as such, if made properly and lawfully (needed to found it as a legitimate expectation – see point five below), it could not have provided that regardless of revision or supersession or appeal against any adverse decision by the father, the mother could never thereafter be fixed with any liability for child support maintenance in respect of Ryan. To make such a 'promise' would be to run wholly contrary to the statutory scheme for determining liability for child support maintenance.

51. Fourth, and in a sense another way of making the third point, such representations can only be legitimate if made lawfully by the person making the representation or promise, and the nature of the representation relied on by the mother in her argument would be one given without lawful authority as it would elevate the closure decision to one over which the statutory machinery governing child support could have no effect: see *R(LB Newham) –v- Bibi* [2001] EWCA Civ 607; [2002] 1 WLR 237 at paragraph 21.

52. Fifth, following on from the third and fourth points, the underpinning principle derived from the caselaw is that an expectation will not be *legitimate* if the effect of it, or its fulfilment, would be to prevent the lawful operation of a statutory scheme. As Wade and Forsyth put it in *Administrative Law* (11th edition) at pages 454-455:

> "An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation.....the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."

53. See further on this paragraphs 49 and 67-68 of *Nadarajah and Abdi – v- SSHD* [2005] EWCA Civ 1363, the former of which quotes illuminatingly from Lord Birkenhead in *Birkdale District Electric Supply Co. Ltd* [1926] AC 355 (at 364) to the effect that it is:

> "a well-established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties."

54. To similar effect are the views of Lord Justices Peter Gibson and Laws in *R-v- Secretary of State for Education ex parte Begbie* [200] 1 WLR 1115 , where they said, respectively (at paragraphs 53 and 75):

> "It is common ground that any expectation must yield to the terms of the statute under which the Secretary of State is required to act";
>
> and
>
> "I agree that this appeal should be dismissed on the short ground that to give effect to Mr Beloff's argument would entail our requiring the Secretary of State to act inconsistently with section 2 of the Education (Schools) Act 1997."

55. Applying this principle, which the mother's argument does not in any real sense grapple with, means in my judgment that the representation on which she seeks to rely even if made could not found a legitimate expectation the effect of which would prevent proper and lawful adjudication of an application made by the father to the Secretary of State for child support maintenance in respect of Ryan.

56. The argument may be tested in this way. Suppose that it is found the CSA did in fact send the mother at her then correct address a maintenance enquiry form on 9 July 2001. That would then fix the effective date for maintenance liability: per regulation 30(2)(a) of the Child Support (Maintenance Assessment Procedures) Regulations

1992. That point having been reached, the Secretary of State/CSA fell under a legal duty to deal with that application under section 11(1) of the Child Support Act 1991. This provided at the material time, and still provides for cases such as this one, that "Any application for a maintenance assessment made to the [CSA] shall be dealt with by it in accordance with the provision made by or under this Act"(my underlining added for emphasis). In short, the Act required the Secretary of State to make a decision on the application as to the level of child support maintenance the mother as the 'absent parent' was liable to pay in respect of Ryan. On the face of the Act, the mother's legitimate expectation argument would have the result of requiring the Secretary of State to act contrary to the duty imposed on him under the Act, and as *Begbie* in particular shows that cannot be the result of anything called a *legitimate* expectation.

57. And the same must be true, in my judgment, once the application has been decided. Such a decision will be final under section 46A of the Child Support Act 1991, "[s]ubject to the provisions of this Act" (per section 46A(1)). Those provisions mean revision (section 16 of the same Act), supersession (section 17) or appeal (section 20). The effect of the mother's argument, however, would be to render this statutory adjudicatory machinery wholly ineffective as it would be overridden by a non-statutory test of a binding promise that a decision made could not be revised, superseded or appealed, which again would run contrary to *Begbie*.

58. There is, moreover, in my judgment nothing surprising about this conclusion. It has its correlate in the numerous authorities holding similarly that estoppel cannot prevent a statutory duty from being carried out: see R(CS)2/97, R(P)1/80, R(SB)1/83, R(SB) 4/91 and R(JSA)4/04). Both estoppel and legitimate expectation are based fundamentally on fairness (in the latter as a counter to abuse of power), whether that is procedural fairness or substantive fairness. But neither legal test can, in my judgment, enable fairness to require the Secretary

of State to act contrary to duties entrusted to him under an Act of Parliament.

Incompatibility with Article 1 Protocol 1 of ECHR

59. The argument made here is that the decision of 25 October 2013 deprived the mother of her property or possessions (in the sense of her having to pay money out of her income to meet the child support maintenance found due from her from 2001) and thus was contrary to Article 1, Protocol 1 of the European Convention on Human Rights ("ECHR") as enacted in the UK under the Human Rights Act 1998.

60. The short and conclusive answer to this argument is that I am bound by the House of Lord's decision in *SSWP –v- M* [2006] UKHL 11, [2006] 2 AC 91, to hold that the calculation of child support liability under the Child Support Act 1991 (and the collection of the same), does not even fall within the ambit of Article 1, Protocol 1, and therefore the argument that the mother's rights under Article 1, Protocol 1 were breached by the Secretary of State's decision of 25 October 2013 (or even the different liability decision made by the tribunal on appeal from that decision), cannot even get off the ground.

Unlawful delay and breach of Article 6(1) of the ECHR

61. The mother's argument under this head is that the delay in deciding her liability for child support maintenance from the father's application in 2001 to the decision in 2013 breached the reasonable time criterion in Article 6(1) of the ECHR and therefore was unlawful as it prevented the appeal proceedings from being fairly concluded.

62. Reliance is placed on the High Court's decision in *R(Ms C and MrW) –v- SSWP and Zacchaeus 2000 Trust* [2015] EWHC 1607 (Admin) ("the *Zacchaeus* case"), and paragraph 106 of that decision in particular. That case, of course, concerned delays in first instance adjudication by the Secretary of States' decision makers and was not concerned with delay in having an appeal against such a decision determined.

63. The reliance on the *Zacchaeus* case is simply wrong, however, because it is not correct to say the High Court decided in paragraph 106 of its judgment that the protection of Article 6(1) – and its wording "In the determination of his civil rights…, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in particular – extends to delays caused in the Secretary of State's initial determination of applications for child support maintenance and is not limited to delays in the course of appealing such decision to an independent and impartial tribunal. Reading this part of the judgment as a whole it is clear that paragraph 106 is simply setting out the argument of the claimants. That can be the only correct reading of this paragraph as it fits with the arguments that follow it, in particular the Secretary of State's argument in paragraph 107 of the judgment to the effect that Article 6 is not engaged until there is an appeal, and Mrs Justice Patterson's conclusion on this argument in paragraph 114 that "[Article 6] is <u>not</u> engaged in the circumstances here" (my underlining added as emphasis).

64. Moreover, if the High Court's reasoning was as set out in paragraph 106 of its judgment, then it would fall contrary to the what was said, albeit it was *obiter*, by Mr Commissioner Mesher (as he then was) in paragraph 20 of R(IS)1/04 to the effect that, in the case of a decision made on an initial claim for benefit, time only begins to run for the purposes of calculating the reasonable time under Article 6(1) from the date an appeal is made against that decision. The relevant part of paragraph 20 in R(IS)1/04 reads:

> "The present case is not one, like *Feldbrugge* and many other cases, where an applicant appeals against the initial determination of a claim. In those cases, the general rule that the time to be considered under Article 6(1) runs from the date on which the appeal proceedings are started plainly holds good (see, for example, *Massa v. Italy* (1993) 18 EHRR 266, paragraph 28 of the judgment)."

65. In this case, the decision on the application was made on 25 October 2013, the appeal was submitted on 23 January 2014 and the appeal

decided some 6 month later. That period of time did not amount to unreasonable delay under Article 6(1) of the ECHR (nor, in fairness, was it argued so to do; the mother's argument was founded on the delay in the time it took for the Secretary of State to make his decision on 25 October 2013 on the application made by the father in 2001).

66. I am mindful, however, that both the decision in R(IS)1/04 and other reported decisions of social security commissioners in R(IS)2/04 and R(IS)15/04 (the latter a decision of a Tribunal of Commissioner) in fact decided, admittedly in respect of different types of decisions than a decision made on a claim or initial application, that the "determination" for the purposes of Article 6(1) may apply before an appeal is made against the Secretary of State's decision. However, all of those cases were not concerned with decisions on initial claims for benefit (the equivalent, in my view, to the application for child support maintenance here in issue), but revision or supersession of existing awarding decisions; and in R(IS)15/04 the focus was on whether a revision for official error of an existing awarding decision was sufficiently part of the process of determining or contesting entitlement so as to bring the dispute within the ambit of Article 6(1) for the purposes of a discrimination argument under Article 14 of the ECHR[4].

67. I note further that in paragraphs 47-48 of R(IS)15/04 the Tribunal of Commissioners referred to an unreported decision of Mr Commissioner Bano (as he then was) in *CG/2119/2001*, where he held that there was no determination of a civil right under Article 6(1) "until the claimant challenged the recoverability decision by appealing to the tribunal". The language there used was consistent only with there having been a revision or supersession of the awarding decision so as to create the

[4] These decisions may derive further support from the view that "Time usually begins to run in civil cases for the purposes of article 6(1) from the date when the proceedings in question are initiated: *Ausiello v Italy* (1996) 24 EHRR 568, 571, para 18": per Lord Hope at paragraph 107 of *Magill –v- Weeks* [2001] UKHL 67, [2002] 2 AC 357. It may be arguable that "proceedings" here can encompass a supersession decision by the Secretary of State removing a prior award of benefit which is then challenged on appeal, with the Article 6(1) reasonable time running from the date of such a supersession decision. However the decision in *CDLA/3908/2001* may be argued to stand contrary to this reading of "proceedings".

overpayment (see section 71(5A) of the Social Security Administration Act 1992), but Commissioner Bano held that time for Article 6(1) purposes did not run from the date of the revision or supersession decision date. Even though this perspective appears to run contrary to R(IS)1/04 and R(IS)2/04, the Tribunal of Commissioners in R(IS)15/04 simply said "We express no opinion on the correctness of the actual decision in that case".

68. Of more substance to the facts of this appeal, however, is arguably the view of Mr Commissioner Turnbull (as he then was) in paragraph 21 of R(IS)2/04 where he said, though clearly *obiter*:

> "Although this question is not before me, I think that, where the Secretary of State's decision is one on an initial claim for benefit, the claimant's rights require determination as from the time that the claim is made, and that time should therefore begin to run immediately."

69. If it was necessary for me to decide this point in this decision, in my judgment the view of Mr Commissioner Mesher should be preferred. I say this because it seems to me difficult to characterise a claimant as disputing or (to use a literal translation of the French text of Article 6(1) of the ECHR) "contesting" their benefit entitlement when they have only submitted a claim for the benefit. Until the claim is decided there is nothing (indeed there may be nothing, if full benefit is awarded) to contest or dispute. It seems arguable to me, further, that the *Schouten and Meldrum –v- The Netherlands* (1994) 19 EHRR 432 line of authority on the scope of Article 6(1) (relied on in both R(IS)1/04 and R(IS)2/04) may best be confined to cases where the decision that the claimant wishes to dispute has been made but cannot be appealed because of a further step the Secretary of State requires the claimant to take. In such a situation it is arguable that taking such a step is part of the appeal or a necessary part of the process of contesting the benefit decision.

70. There is, however, no need for me to arrive at a concluded view on this conflict in the *obiter* views stated in R(IS)1/04 and R(IS)2/04 because it is immaterial to whether the tribunal erred in law in deciding the appeal as it did. This is because even if the delay for the purposes of Article 6(1) runs from the date of the father's application for child support maintenance in 2001 and it was thus over 13 years before it was decided by an independent and impartial tribunal, and even assuming the mother, father and Ryan had a civil right[5] to be determined (in the form of deciding the child support maintenance due on the father's application made in 2001) which was breached by the delay between 2001 and 2014, the tribunal could not afford any of them any remedy for that breach. This follows from decisions such as R(IS)1/04 and the reported Upper Tribunal decision *AS –v SSWP* (CA) [2015] UKUT 592 (AAC); [2016] AACR 22. In order to make good this point I need only quote from the relevant parts of those two decisions.

71. In R(IS)1/04 Mr Commissioner Mesher said this about delay and remedy at paragraph 24 (the inserts in square brackets have been made by me in order relate what is said there to this case):

> "Even if I had accepted that there was inequality of arms or a breach of the right to a fair hearing by the appeal tribunal of 14 May 2001, there would be a difficulty in seeing what good it would do the claimant to assert such a breach of Article 6(1) or of the principles of natural justice. She cannot directly challenge the right of the Secretary of State to have made the decision of 14 October 2000 under legislation which imposes no time limit on how far back a superseding decision adverse to the claimant can go in income support cases or on the recoverability of any resulting overpayment [or on how long it may take the Secretary of State to decide an application for child support maintenance]. That decision therefore stands, subject to the appeal process. If it were accepted that the claimant could not have a fair hearing before the appeal tribunal because of the earlier delay, how could Article 6(1) or the principles of natural justice be complied with? Nothing that the appeal tribunal of 14 May 2001 or a Commissioner or a new appeal tribunal could do could change the past. The answer that the appeal tribunal ought therefore to have decided the appeal entirely in the claimant's favour cannot in my judgment be admitted. That would be an entirely disproportionate remedy, especially taking into account the interests of taxpayers in the integrity of the public funds

[5] This may be open to doubt given the European Commission's decision in *Logan –v- United Kingdom* (1996) 22 EHRR CD 178.

> devoted to income support [and the interests of Ryan and the father to be awarded any child support maintenance due (and unpaid) from 2001]. And it would allow a decision (that of 14 October 2000) which cannot be challenged directly under Article 6(1) to be overturned as an indirect side-effect of a defect in the appeal process. That could not be right. I conclude that a breach of Article 6(1) or of the principles of natural justice of the kind in question, which cannot in its nature be remedied by a rehearing, does not amount to an error of law which requires an appeal tribunal's decision to be set aside. Neither appeal tribunals nor Commissioners have the power to award compensation for a breach of the Human Rights Act."

72. I dealt with the same issue in paragraphs 51-54 of *AS*, where I said, relevantly, the following (again, I have added some comments in square brackets to render the quotes applicable to this appeal]:

> "Although perhaps a back-to-front approach, an immediate difficulty with the argument was what remedy the tribunal could have afforded the appellant in deciding the appeal. The tribunal's statutory function was to decide whether the overpayment of CA was recoverable from the appellant. It had no power to award the appellant compensation for the effects of any delay, nor does the Upper Tribunal. Both tribunals are creatures of statute and derive their powers from statute, and neither tribunal has any statutory power to award compensation. Section 8 of the Human Rights Act 1998 (the HRA), however, only allows compensation or damages to be awarded by a court or tribunal which has the power to make such awards in civil proceedings: see section 8(2) of the HRA.
>
> It is true that a tribunal is a "public authority" for the purposes of the HRA and by section 6(1) of the HRA it is unlawful for a tribunal to act (or fail to act) in a way which is incompatible with a right under the ECHR. Assuming therefore that there had been a breach of the "reasonable time" criterion, what would Article 6(1) require the tribunal to do? One conceptual difficulty is that by the time the tribunal hears the appeal the delay, and thus the breach, has already occurred. If the tribunal hears the appeal, is it acting incompatibly with an ECHR right? In my view, the answer to this question is no. This is for two different strands of reasoning.
>
> (i) First, as was pointed out in CSIS/460/2002, section 6(1) of the HRA is subject to section 6(2). The latter provides that section 6(1) does not apply if the public authority has to act in a certain way because of primary legislation. I am inclined to agree with Mrs Commissioner Parker (as she then was) in CSIS/460/2002 that when seized of a statutory appeal under section 12 of the Social Security Act 1998 [or section 20 of the Child Support Act 1991]....., the First-tier Tribunal is required by unambiguous primary legislation to determine the appeal. Section 12(2) of the Social Security Act 1998 says the claimant <u>shall</u> have a right of appeal and the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 set out the

> mechanisms to ensure this right of appeal is made effective. The issue the tribunal is then required to decide on an appeal in respect of….[section 11 of the Child Support Act 1991 is the "amount of child support maintenance to be fixed by any maintenance assessment" and it "shall be determined in accordance with the provisions of Part I of Schedule I" (and prior to this, if an issue, whether the maintenance enquiry form was issued to the mother so as to fix an effective date)].That language to my mind is inconsistent with the First-tier Tribunal not deciding an appeal because of unreasonable delay.

(ii) Second, the premise for the above argument mischaracterises the "reasonable time" right in Article 6(1) of the ECHR. As Lord Millett put it in *Attorney General's Reference No.2 of 2001* [2003] UKHL 68; [2004] 2 AC 72, at paragraphs 134–138 [and paragraph 136 in particular]:

> "…. Article 6(1)….confers a positive right to a hearing (being a hearing which is fair and held in public within a reasonable time), and a right not to be subjected to a hearing which is unfair or held in private; but no right not to be subjected to a late (but otherwise irreproachable) hearing."

This reasoning in my judgment is just as applicable in tribunal proceedings: see *Attorney General's Reference No.2 of 2001* [2003] UKHL 68; [2004] 2 AC 72, at paragraph 21.

The consequence of the above, as Upper Tribunal Judge Wikeley put it pithily in *AH v London Borough of Hackney (HB)* [2014] UKUT 47 (AAC), is that an appellant's remedies as regards delay must lie elsewhere. That approach, it seems to me, is entirely consistent with the approach of the Grand Chamber of the European Court of Human Rights in *Cocchiarella v Italy* (Application no. 64886/01) [[2006] ECHR 270], decided on 29 March 2006. That case concerned delays in the adjudication of Italian social security benefits and the Grand Chamber saw nothing wrong in principle with the "reasonable time" breach under Article 6(1) being remedied by way of a domestic compensation scheme. Nothing in *Cocchiarella* founds an argument that unreasonable delay leads to the remedy of appeals for that reason alone being decided in favour of the appellants.

Furthermore, the argument that the tribunal should remedy the Article 6 breach by simply allowing the appeal whatever its merits has been (rightly in my view) rejected in previous authority: see R(IS)1/04 at paragraph 24, CSIS/460/2002*, HJ v Secretary of State for Work and Pensions* [2009] UKUT 47 (AAC) at [36], *AH v London Borough of Hackney (HB*) [2014] UKUT 47 (AAC) at [12], and, to like effect, *Attorney General's Reference No.2 of 2001* [2003] UKHL 68; [2004] 2 AC 72, at [21]."

Contrary to purposes of Child Support Act 1991

73. The final argument made by the mother relied on the famous decision of the House of Lords in *Padfield –v- Minister of Agriculture, Fisheries and Food* [1968] AC 997, and argued that it was contrary to the policy and objects of the Child Support Act 1991, and section 2 of that Act in particular, for the Secretary of State to decide the father's 2001 application in 2013 and award child support maintenance to the father for Ryan covering the 11 year period from 2001 to 2012. It was argued that by so doing the Secretary of State failed to have regard to the mother's other son (i.e. not Ryan) contrary to section 2 of the Child Support Act 1991.

74. I cannot see how this argument can succeed. To start with, *Padfield* was about requiring the Minister to exercise a discretion vested in him by the relevant Act of Parliament when his refusal to do so was contrary to the policy and objects of that Act. Here, however, section 2 of the Child Support Act 1991, although important, is limited to a general principle that "[w]here, in any case which falls to be dealt with under this Act, the Secretary of State is considering the exercise of any discretionary power conferred by this Act, the Secretary of State shall have regard to the welfare of any child likely to be affected by the decision". I do not see either (i) on what basis this section 2 mandatory consideration to be exercised in the case of any discretionary power under the Act answers what the objects and purposes of the Child Support Act 1991 are, or (ii) more importantly, how it can affect the statutory <u>duties</u> found in sections 1 and 11 of that Act.

75. Section 1 of the Child Support Act 1991 provides that "each parent of a qualifying child is responsible for maintaining him [or her]" (subsection (1)); that responsibility is to be met by the "absent parent" making periodical payments of maintenance with respect to the child of "such amount, and at such intervals, as may be determined in accordance with the provisions of this Act" (subsection (2)); and confers a duty on the absent parent to make such periodical payments of child support maintenance as are required under the Act (subsection (3)). Two observations are

pertinent here. First, there is no identifiable discretionary power conferred on the Secretary of State by section 1 of the Act. The use of "may" in "as may be determined" in subsection (2) is not conferring a discretion on the Secretary of State whether or not to determine an amount of child support maintenance under the Act, but is dealing with the situation where the child support maintenance liability as determined under the Act may be nil and so too will be the amount of periodical payment of maintenance which *may* therefore be due. Second, it seems to me that section 1 better informs, or speaks to, the object and purposes of the Act (each parent being responsible for maintaining their child and the absent parent being under a duty to pay any child support maintenance found due under the Act) than does section 2; and the mother's argument would require the Secretary of State to act in a way contrary to the objects and purposes of the Act as expressed in section 1.

76. Section 11 of the Child Support Act 1991 does, as we have seen, confer a duty on the Secretary of State, but not a discretion, so again section 2 cannot bite here. The duty ("shall") is to deal with "[a]ny application for a maintenance assessment made to the [Secretary of State]….in accordance with the provision made by or under this Act". Subsection (2) then provides that "[t]he amount of child support maintenance to be fixed by any maintenance assessment shall be determined in accordance with the provisions of Part I of Schedule I". Again, there is no room for section 2 to apply here: R(CS)4/96 and R(CS)2/98.

77. Taken together it seems to me that sections 1 and 11 of the Child Support Act 1991 properly inform the Act's objects and purposes: both parents are responsible for maintaining their child(ren); the absent parent is under a duty pay the child support maintenance found due under the Act; and the Secretary of State is required to determine an application for such maintenance in accordance with the Act. All of these objects and purposes would be defeated by the mother's argument that the 2001 application should not have been determined.

Moreover, section 2 of the Act cannot as a matter of law lead to the result for which the mother contends as it simply has no application to the duties arising under section 1 and 11[6].

Conclusion

78. For the reasons set out above, the tribunal's decision dated 22 July 2014 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will therefore have to be re-decided entirely afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber) at an oral hearing, which I have directed above.

79. The father's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether the mother's appeal will succeed or fail on the **facts** before the new First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 5th October 2016

[6] Even if section 2 did somehow apply, the "welfare of the child" test would have to apply to Ryan as well as to his mother's other son, and it is not immediately apparent to me how Ryan's welfare interests would be served by denying him the maintenance found due from 2001 to 2012.