Upper Tribunal Case No: CCS/3337/2016

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC142/14/01131, made on 17 March 2016 at Norwich, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. Introduction

1. This case concerns the child support maintenance properly payable in respect of Isabel. In the language of the child support legislation, her mother is her parent with care and her father is her non-resident parent. They are both parties to this appeal. The other party is the Secretary of State, who is the decision-making authority under the legislation.

2. The case came before the First-tier Tribunal on appeal by the parent with care, who challenged the Secretary of State's decision that the non-resident parent was liable to pay £145.71 a week from the effective date of 18 August 2014. The tribunal allowed the appeal. It increased the non-resident parent's liability to £160.29, rising to £237.43 from and including 6 October 2014.

3. The parent with care was not satisfied with that decision and applied for permission to appeal to the Upper Tribunal. The First-tier Tribunal gave permission to appeal on some of her grounds and, when the case reached the Upper Tribunal, Upper Tribunal Judge Turnbull extended the permission to the remaining grounds. The parties have now made their submissions and the case has been referred to me in view of Judge Turnbull's retirement.

4. I have not set out any more of the complex financial arrangements relating to the non-resident parent's practice as a GP than is necessary to show that the First-tier Tribunal did not make an error of law. Doing so would have added considerably to the length of this decision without any increase in its value.

B. Consent orders

5. The parent with care has criticised the tribunal for failing to accept the agreement she reached with the non-resident parent during a break in proceedings and make a consent order. As she succinctly put it in her reply to this appeal:

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> … the FtT concerns were misdirected. The concern should be that Isabel receives the legally required amount of maintenance based on the NRP's earnings.

I find no error of law on this ground.

The rule

6. Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI No 2685) provides for the tribunal to make a consent order:

> **32 Consent orders**
>
> (1) The Tribunal may, at the request of the parties but only if it considers it appropriate, make a consent order disposing of the proceedings and making such other appropriate provision as the parties have agreed.
>
> (2) Notwithstanding any other provision of these Rules, the Tribunal need not hold a hearing before making an order under paragraph (1), or provide reasons for the order.

What happened at the tribunal

7. During a short adjournment, the parent with care and the non-resident parent came to an agreement that, as the judge recorded, the non-resident parent 'was prepared, for the purposes of the maintenance assessment, to accept that his earnings were £2,000 per week net, the maximum that may be taken into account.' In his response to the appeal in the Upper Tribunal, the non-resident parent has said that this is not accurate and that he did not agree. Whatever the truth, that is how the tribunal understood the matter and I will deal with this appeal on that basis.

8. The tribunal had concerns about the agreement that it understood the parties had reached. As the judge explained:

> Briefly, the Tribunal was concerned that the parties were attending the hearing in person and did not have the benefit of professional or experienced legal or financial advice in reaching this agreement, and it was concerned that the [non-resident parent] may have been entering into such an agreement, which may have been to his disadvantage, merely with a view to avoiding the need for the hearing without any proper consideration as to the appropriateness of the agreement. Further, the Tribunal was not satisfied that the [non-resident parent] fully appreciated that even if he were to reach such an agreement, this would not necessarily conclude this matter as the [parent with care] would be entitled to apply to the Courts for further maintenance on the basis of income which she might assert that he held in excess of £2,000 per week. The Tribunal was also concerned that the evidence before it raised serious issues about whether it was correct that the [non-resident parent's] income was £2,000 per week.

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The tribunal accordingly declined the make the order. It considered whether to adjourn for the parents to take advice, but decided not to do so.

The arguments before the Upper Tribunal

9. The Secretary of State's representative has argued that the application of rule 32 is discretionary and the tribunal's reasons show that it exercised it discretion properly.

10. As I have said, the non-resident parent has denied that the tribunal correctly recorded what he intended.

11. In reply, the parent with care has pointed out that the non-resident parent is educated and successful in running a number of companies.

Analysis

12. The power conferred by rule 32 may only be exercised if it is appropriate to do so. There may be scope for argument whether it is a power to be exercised if appropriate or a discretionary power subject to the qualification that it must not be exercised unless it is appropriate. Such an analysis is unlikely to help anyone who has to apply it. Could there really be scope for a discretion to refuse to make an order when it was appropriate to do so? Rather than engage in a debate that is probably a matter of definition rather than substance, I prefer to stick with the statutory language rather than try to force it into some preordained category. That is always the safest course for a tribunal.

13. The order must be one that is within the tribunal's jurisdiction to make. The rules of procedure are authorised by section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007. Jurisdiction is not a matter of procedure, so the rules cannot confer or extend jurisdiction.

14. Like all powers under the rules of procedure, the tribunal must exercise rule 32 judicially and in accordance with the overriding objective, which requires that the tribunal deal with cases fairly and justly. That presents a particular difficulty in child support cases, where the interests of the parents will often be opposed. I accept the parent with care's point that the proper focus for the tribunal has to be on the correct maintenance payable in respect of the qualifying child. That does not mean that the balance of fairness and justice should be rigged against the non-resident parent. It is in no one's interests for that to happen. There is no place in the child support legislation for making a non-resident parent liable for more than the law requires.

15. This does not mean that it will only be appropriate to make a consent order if it makes the correct provision for maintenance. There are other factors that may legitimately be taken into account. A degree of certainty and finality is a proper consideration for a tribunal to take into account, as is an approach that helps reduce the acrimony that so often pervades the relationship between the parents and their conduct in tribunal proceedings. Those, and no doubt other factors, may justify a tribunal in not exploring behind the parents' agreement or,

at least, not investigating the issues with the thoroughness and persistence that would be justified before reaching a final decision on the merits.

16. On matters within its jurisdiction, the extent to which a tribunal should allow its concerns to override an agreement must depend on the circumstances of the case. Those concerns may relate to the extent to which the terms of agreement accurately reflect reality. That was a factor that influenced the tribunal. It had not heard the whole of the evidence and all the parties' submissions, but it had previewed the case and got some way into the hearing. It had sufficient knowledge of the case to have doubts and it was proper to take them into account in deciding what was appropriate under rule 32. A tribunal's concerns may also may relate to the wisdom of the agreement for one or both of the parents. That was another factor that troubled the tribunal in this case. It was entitled to be concerned that the parties and the non-resident parent in particular might not have understood the significance of what they were agreeing to. In short, the tribunal was concerned that the non-resident parent, without representation, was thinking only in terms of the child support scheme without taking account of possible liability under other legislation. That was a proper consideration under the overriding objective. Dealing with cases fairly and justly means dealing with them fairly and justly after taking account of the interests of all concerned.

17. I am not aware of any relevant caselaw on rule 32. The circumstances in which it is permissible to make a consent order were, though, considered by Walker J in *R (G) v the Upper Tribunal* [2016] 1 WLR 3417. He was speaking in the context of the judicial review jurisdiction, but his reasoning is equally applicable to consent orders by tribunals under their rules of procedure and it is particularly pertinent to this case. He refused to make the consent order proposed in that case, deciding that it would not be proper to use the court's power to make an order just because it was the most practical solution or for convenience only: see [208] and [212]. The tribunal in this case did not express itself in those terms, but its reasons show that it was concerned that the agreement might have been entered into on that basis, at least from the non-resident parent's point of view. For the reasons given by Walker J, that was the correct approach.

C. Life-style inconsistent variation

18. The parent with care has criticised the tribunal for not dealing with this issue. She says that the tribunal seems to have forgotten about it. I find no error of law on this ground.

The tribunal's reasons

19. The tribunal did not forget about this and dealt with it in paragraph 22:

> Finally, the Tribunal considered the issue of whether the [non-resident parent's] lifestyle was inconsistent with this declared income. The [parent with care] suggested that [he] lived in luxury accommodation and enjoyed a lavish lifestyle. She was suggesting that he was paying for his family to

> enjoy all expenses paid holidays abroad. Whilst the Tribunal recognised that the [non-resident parent] did enjoy holidays abroad, these were not the all expenses paid affairs suggested. He lived in fairly modest rented accommodation on the K… estate. He did enjoy occasional meals out and generally lived the life of someone with a declared income of around £130,000. The Tribunal was not satisfied that [his] lifestyle was inconsistent with his declared income.

The arguments to the Upper Tribunal

20. The Secretary of State has submitted that this reasoning was inadequate, relying on the decision of Mr Commissioner Howell in *CCS/2152/2004* at [2], where he said that 'there has to be at least some breakdown of expenditure to show what has been taken into account in arriving at the figure the tribunal are attributing to the parent concerned.'

21. The non-resident parent's response was that the tribunal accurately summarised his evidence, which was supported by production of the numerous documents required by the tribunal, a ten page life-style questionnaire, and oral evidence.

22. In reply, the parent with care has said that the non-resident parent did not make full disclosure and has further income and assets.

Analysis

23. The parent with care is wrong to say that the tribunal did not deal with the issue of a variation on the ground of life-style inconsistent. It gave directions, received written evidence, questioned the non-resident parent at the hearing, and gave reasons for rejecting the parent with care's arguments.

24. The parent with care's argument, in particular as set out in her reply to this appeal, overlooks section 20(7)(b) of the Child Support Act 1991, which prohibits the tribunal from taking account of any change of circumstances after the date of decision under appeal. That decision was made on 26 November 2014. In those circumstances, the tribunal could not, to take an example from the parent with care's reply, take account of expenditure on premium bonds in August 2015. Nor, to take another example, could it take account of future expenditure that will be required on the non-resident parent's house that he only bought in July 2016.

25. I do not accept the Secretary of State's argument. I agree with what Mr Commissioner Howell wrote in *CCS/2152/2004*, but he was dealing with a different issue. He was there dealing with the possibility that a tribunal found that a parent's life-style was inconsistent with their declared income. That requires some itemisation to justify the decision. In this case, the tribunal found that there was nothing inconsistent. Its reasons have to be read in the context of the evidence it received. Moreover, a tribunal is entitled to limit itself to issues raised by the appeal: see section 20(7)(a) of the Child Support Act 1991. The tribunal mentioned in its reasons the points made by the parent with care and explained why it rejected them. Its reasoning was adequate.

D. The rate of interest

26. The parent with care has criticised the tribunal for using 2% as the interest rate applicable under regulation 18 of the Child Support (Variations) Regulations 2000 rather than the statutory 8%. I find no error of law on this ground.

The tribunal's reasons

27. The tribunal explained why it used 2% rather than 8%:

> The Tribunal found that it was not just and equitable to apply an interest rate of 8%, but it did consider that 2% might be more appropriate and more reflective of the interest actually received, although the tribunal noted with some surprise that at one point the [non-resident parent] was reporting receiving a return which equated to approximately 4.5% in the recent market.

The arguments to the Upper Tribunal

28. The Secretary of State's representative has supported the appeal on this ground, relying on the decision of Upper Tribunal Judge Mesher in *PB v Secretary of State for Work and Pensions* [2013] UKUT (AAC) 149 (AAC) at [22], where he made the point that when the 8% figure was included in the legislation, the base rate was 6%, showing that the statutory figure 'must also have incorporated an intention to provide an incentive to non-resident parents to utilise substantial capital assets for the purpose of qualifying children'.

29. The non-resident parent has responded that the evidence he gave was that one of his accounts was earning 3%.

30. In reply, the parent with care has said that 8% would not have imposed a financial burden on the non-resident parent and that the balance of fairness in the child support scheme has tipped in favour of non-resident parents especially with the £2000 cap on income.

Analysis

31. The Secretary of State and a tribunal may only agree to a variation if it is just and equitable to do so: section 28F(1)(b) of the Child Support Act 1991. The 2000 Regulations provide for an interest rate of 8% to be applied to determine the amount payable in respect of a variation on the basis of assets: regulation 18(5) and (6). It is permissible to reduce that rate under section 28F(1)(b): *RC v CMEC and WC* [2011] AACR 38.

32. Applying that provision requires an analysis of and a decision on what is just and equitable in the circumstances of the particular case. I agree with what Judge Mesher said in *PB*, but that is just one of the factors that have to be taken into account. It is not decisive. Nor would it be proper to use the just and equitable analysis to subvert any statutory changes to the child support scheme.

33. The tribunal explained in detail how it applied regulation 18. It properly took into account that it was reasonable for the non-resident parent to retain capital sufficient to buy a home. It repeatedly referred to the just and equitable

requirement. It was aware that the non-resident parent was receiving a higher rate of return, even if it may have used a higher figure than he gave in evidence. It is impossible to say that the tribunal did not take that into account as factor that applied for part of the time. There will seldom be just one right answer to the rate of interest that should be applied and there is a limit to which it is possible to explain an exercise of judgment, such as a just and equitable assessment. Whatever the underlying policy considerations, it is wrong for the Upper Tribunal to second guess the precise figure fixed by a tribunal and difficult to criticise a tribunal for fixing a rate that was more in keeping with what was attainable. In the light of the evidence and in the circumstances of this case, the tribunal has come to a permissible conclusion and given an adequate explanation of why it did so.

E. Other grounds

34. The parent with care has raised two other issues. Both relate to the non-resident parent's income and assets relating to various companies set up in connection with his work as a GP. The short answer to these arguments, as the Secretary of State's representative has pointed out, is that they do not raise issue of law. They are criticisms of the tribunal's findings of fact. Those facts were made on the basis of documentary evidence in a bundle running to 766 pages, and on oral evidence given over three days, the typed record of which covers 21 pages. The questioning of the non-resident parent and the assessment of the evidence had the benefit of the knowledge and experience of a financially qualified panel member. The tribunal gave a clear and detailed explanation of how the tribunal assessed that evidence. In particular, the parent with care's criticisms do not take account of the nature of the non-resident parent's involvement as a nominee in most of the companies and the practicalities of realising funds given the purpose, structure and operation of the pharmacy company. I find no error of law in these grounds.

Signed on original
on 02 June 2017

Edward Jacobs
Upper Tribunal Judge