DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision of the Leeds First-tier Tribunal dated 28 March 2017 under file reference SC147/16/00733 involves an error on a point of law. The Tribunal's decision is accordingly set aside.

The Upper Tribunal is in a position to re-make the decision on the original appeal to the First-tier Tribunal by the Second Respondent ("the mother") against the decision of the Secretary of State dated 6 February 2015. The decision that the First-tier Tribunal should have made is as follows. The Upper Tribunal re-makes the decision accordingly.

> ***"****The mother's appeal is allowed. The Secretary of State's decision made on 6 February 2015 is set aside. The case is remitted to the CMS to recalculate the child support liability in accordance with the following directions:*
> *(i) the effective date is 29 January 2015;*
> *(ii) the father's income is to be assessed by reference to the 2013/14 tax year, namely £47,251.26."*

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

REASONS FOR DECISION

Introduction

1. This case concerns the proper basis for calculating a non-resident parent's income and hence assessing the child support liability under the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677; "the 2012 Regulations"), sometimes known as "the third scheme".

The Upper Tribunal's decision on this appeal in summary

2. In summary, the father's appeal to the Upper Tribunal is allowed. The decision of the Leeds First-tier Tribunal on 28 March 2017 involves an error on a point of law. The First-tier Tribunal's decision is set aside. None of the parties has requested an oral hearing before the Upper Tribunal. I am also satisfied that it is fair and just to determine the case on the papers. Rather than send the case back for re-hearing, I also proceed to re-make the original decision under appeal. My final decision is as set out above and below at paragraph 27.

The background to this appeal

3. The parties to this appeal are the Secretary of State for Work and Pensions (from now on the Child Maintenance Service, or 'the CMS') and the separated parents of two boys now aged 14 and 11.

4. On 9 January 2015 the CMS decided that the father was liable to pay child support maintenance of £121.19 a week with effect from 29 January 2015. This was based on an income figure of £59,820 (based on the 2011/12 tax year). The father objected, saying that his income had changed since then. He provided various details.

5. On 6 February 2015 the CMS made a fresh decision, this time deciding that the father was liable to pay child support maintenance of £64.34 a week with effect from 29 January 2015. This was based on an income figure of £29,355.00 (based only on his current income for the two calendar months of December 2014 and January 2015). The reason given by the CMS for the adjustment was that the father's current income had breached the 25% tolerance rule (see further below). This time, understandably enough, the mother objected and lodged an appeal.

6. On 28 March 2017 the First-tier Tribunal ('the FTT') decided the mother's appeal on the papers. The FTT allowed the mother's appeal and set aside the CMS decision of 6 February 2015, remitting the case for recalculation. In essence, the FTT's reasoning, as helpfully set out in summary on its Decision Notice, ran as follows:

(i) the father's "historic income" as provided by HMRC for 2011/12 was £59,820.00;
(ii) the January 2015 payslip itemised his gross pay to date as being £40,276.10, which annualised to a total of £48,331.00 p.a.;
(iii) comparing "historic income" with "current income" on that basis did not produce a 25% differential;
(iv) accordingly the original £59,820.00 income figure was the correct figure to use in the child support maintenance calculation, applying regulation 34(1) of the 2012 Regulations.

7. The FTT later issued a full Statement of Reasons. However, in reality this said little more than the comprehensive Decision Notice. The father applied for permission to appeal, writing that "You've used my income from 2011, to calculate my Child Maintenance Payments in 2015 – four years later! This is not an accurate reflection of my financial liability to pay 4 years later."

8. Following a direction by Upper Tribunal Judge Ward, I held an oral hearing of this application for permission to appeal to the Upper Tribunal in Leeds on 15 November 2017. The father attended with his representative, Mr Mike Smith of Durham Legal Services. The mother also attended with a friend. I later gave the father permission to appeal; the grant of permission read in part as follows:

> *"This case and the Appellant's application for permission to appeal*
> 5. This is the father's application for permission to appeal. Mr Smith did not seek to take any point on the way that the FTT had dealt with commission or bonus payments. Rather, Mr Smith's proposed ground of appeal related to the way the FTT had handled the issue of 'historic income' referring to regulations 4(2), 35 and 36. Mr Smith pointed out that the appeal file included a P60 from 2013/14. On the face of it, he argued, this meant that HMRC must have had the father's 2013/14 tax information at the point when the CMS made the information request in December 2014 (see foot of p.2). Indeed, Mr Smith's understanding was that HMRC had that information by 17 July 2014. All this, Mr Smith argued, suggested that the FTT was wrong to rely on the 2010/11 income data supplied by HMRC. He argued the FTT should have directed the CMS to go back to HMRC for more up to date historic income in its possession.
>
> 6. I heard the mother's objections to granting permission. She explained how the CMS always promised that there would be a 'catch-up' in the child support assessment. In practice, however, this never happened, because of further payslips that the father sent to the CMS. The mother argued that these payslips omitted any bonuses and were not a proper and true reflection of his annual

earnings. I can understand the mother's frustration, but her arguments do not bear directly on the point that Mr Smith has raised.

7. It seems to me the point Mr Smith has made about what was the 'right' historic income for these purposes is arguable. It has some prospect of success (at this stage I do not need to be sure it *will* succeed). Mr Smith referred me to previous Upper Tribunal decisions by Judge Mitchell (*SB v SSWP and TB (CSM)* [2016] UKUT 84 (AAC) and by Judge Gray (*IW v SSWP (CSM)* [2016] UKUT 312 (AAC)). The same point arose in my previous decision in *AR v SSWP and LR (CSM)* [2017] UKUT 69 (AAC) and [2017] AACR 23 at paras 14-18."

The relevant legal provisions

9. As noted above, this appeal concerns the proper application of the rules under the third child support scheme as contained in the 2012 Regulations. Regulation 2 defines "historic income", "the HMRC figure" and "current income" by reference to regulations 35, 36 and 37 respectively. In addition, regulation 4 provides as follows:

> **"Meaning of 'latest available tax year'**
> **4.**—(1) In these Regulations "latest available tax year" means the tax year which, on the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income) or regulation 69 (non-resident parent with unearned income), is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return.
> (2) In this regulation a "relevant tax year" is any one of the 6 tax years immediately preceding the date of the request for information referred to in paragraph (1)."

10. The critical provisions are then regulations 34 through to 37 of the 2012 Regulations, which provide as follows:

> **"The general rule for determining gross weekly income**
> **34.**—(1) The gross weekly income of a non-resident parent for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter.
> (2) The non-resident parent's gross weekly income is to be based on historic income unless–
> (a) current income differs from historic income by an amount that is at least 25% of historic income; or
> (b) no historic income is available; or
> (c) the Secretary of State is unable, for whatever reason to request or obtain the required information from HMRC
> (2A) For the purposes of paragraph (2)(a), current income is to be treated as differing from historic income by an amount that is at least 25% of historic income where–
> (a) the amount of historic income is nil; and
> (b) the amount of current income is greater than nil.
> (3) For the purposes of paragraph (2)(b) no historic income is available if HMRC did not, when a request was last made by the Secretary of State for the purposes of regulation 35, have the required information in relation to a relevant tax year.
> (4) "Relevant tax year" has the meaning given in regulation 4(2).

(5) This regulation is subject to regulation 23(4) (change to current income outside the annual review or periodic current income check).

Historic income - general

35.—(1) Historic income is determined by–

(a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent;

(b) adjusting that figure where required in accordance with paragraph (3); and

(c) dividing by 365 and multiplying by 7.

(2) A request for the HMRC figure is to be made by the Secretary of State–

(a) for the purposes of a decision under section 11 of the 1991 Act (the initial maintenance calculation) no more than 30 days before the initial effective date; and

(b) for the purposes of updating that figure, no more than 30 days before the review date.

(3) Where the non-resident parent has made relievable pension contributions during the tax year to which the HMRC figure relates and those contributions have not been deducted under net pay arrangements, the HMRC figure is, if the non-resident parent so requests and provides such information as the Secretary of State requires, to be adjusted by deducting the amount of those contributions.

Historic income - the HMRC figure

36.—(1) The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year–

(a) under Part 2 of ITEPA (employment income);

(b) under Part 9 of ITEPA (pension income);

(c) under Part 10 of ITEPA (social security income) but only in so far as that income comprises the following taxable UK benefits listed in Table A in Chapter 3 of that Part–

(i) incapacity benefit;

(ii) contributory employment and support allowance;

(iii) jobseeker's allowance; and

(iv) income support; and

(d) under Part 2 of ITTOIA (trading income).

(2) The amount identified as income for the purposes of paragraph (1)(a) is to be taken–

(a) after any deduction for relievable pension contributions made by the non-resident parent's employer in accordance with net pay arrangements; and

(b) before any deductions under Part 5 of ITEPA (deductions allowed from earnings).

(3) The amount identified as income for the purposes of paragraph (1)(b) is not to include a UK social security pension.

(4) The amount identified as income for the purposes of paragraph (1)(d) is to be taken after deduction of any relief under section 83 of the Income Tax Act 2007 (carry forward trade loss relief against trade profits).

(5) Where, for the latest available tax year, HMRC has both information provided in a self-assessment return and information provided under the PAYE Regulations, the amount identified for the purposes of paragraph (1) is to be taken from the former.

Current income - general

37.—(1) Current income is the sum of the non-resident parent's income–

(a) as an employee or office-holder;
(b) from self-employment; and
(c) from a pension,

calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42.

(2) Where payment is made in a currency other than sterling, an amount equal to any banking charge payable in converting that payment to sterling is to be disregarded in calculating the current income of a non-resident parent."

The parties' submissions in outline

11. Mr Smith's arguments on behalf of the father are summarised at paragraph 5 of the grant of permission (see paragraph 8 above) and need not be repeated here.

12. The mother has not made any written submissions on this appeal to the Upper Tribunal. She made her broader points very clearly at the oral hearing of the permission application and they are also summarised above. I understand her frustration at the way that (as she might put it) the father can "play the system" with repeated requests for recalculations of his maintenance liability. However, her arguments do not affect the issues I have to decide on this particular appeal, which is more narrowly focussed. In the event, the outcome of the present appeal is a better reflection of the father's earnings over a more prolonged period than the 'snapshot' view taken by the CMS in the decision she originally appealed against.

13. Mrs Beverley Massie, the Secretary of State's representative in these proceedings, supports the father's appeal to the Upper Tribunal. The gist of her submission is as follows, taking her arguments in three stages. First, in principle the FTT might be able to rely on the 2011/12 historic income figure as that was within 6 years of the relevant tax year (see regulation 4(2)). Secondly, however, Upper Tribunal case law shows that if HMRC has received information for the latest available tax year instead then this should be produced, even if it has not been obtained via the CMS-HMRC computer interface (see *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] UKUT 84 (AAC) at paragraphs 35-38). Thirdly, in the present case there was clear evidence that HMRC had available to it information relating to the father's income for the 2013/14 tax year, namely the P60 end of year certificate which appeared at p.22 of the appeal bundle (total gross annual income £47,251.26). On that basis Mrs Massie argued that the FTT had erred in law and so the father's appeal should be allowed and the FTT's decision set aside.

The Upper Tribunal's analysis

14. I agree with Mrs Massie's analysis. Even though a copy of the usual HMRC screen-print from the computer interface was inadvertently omitted by the CMS from the appeal bundle, it was plain from the papers before the FTT that the HMRC historic income figure related to the 2011/12 tax year. Indeed, the FTT recognised and stated as much in both its Decision Notice and the Statement of Reasons. Moreover, where a non-resident parent is paid by PAYE it is hard to see what difficulties HMRC would encounter in providing information about the last complete tax year at any date after the employer's deadline for submitting PAYE data to the HMRC for that year had passed. In this case, however, the FTT had actual sight of the P60 for 2013/14. If the employer had issued a P60 then as a matter of common sense the employer's annual PAYE return to HMRC would also have been made. The FTT's failure to stop at that point and question the use of data from 2011/12 was an error of law in the light of the Upper Tribunal case law referred to by both Mr Smith and Mrs Massie.

15. I therefore allow the father's appeal and set aside the FTT's decision. As the underlying facts relating to this particular child maintenance calculation are not in dispute, I can proceed to re-make the decision under appeal rather than waste everyone's time by remitting the case for a fresh hearing before a different FTT.

The mysteries of the CMS-HMRC computer interface

16. The CMS written response to the mother's appeal to the FTT – which cited the HMRC historic income figure for 2011/12 – included the following passage (emphasis and incorrect title of secondary legislation as in the original):

> "Historic income is the information provided via the HMRC computer based interface and it is the information that is available to the interface at the date the Secretary of State presses the button. This is clearly stipulated in legislation at **Regulation 4 of the Child Support (Child Maintenance Calculation) Calculation Regulations 2012**. The legislation states that the historic income is the information provided by HMRC at the date the Secretary of State requests that information. In this case, the information was requested from HMRC on 12/12/14."

17. So in December 2014 a CMS official on behalf of the Secretary of State 'pressed the button' and the computer said £59,820. Given how the PAYE system operates, I am happy to accept Mr Smith's understanding that HMRC in fact had the father's income data for 2013/14 by July 2014 at the very latest. In saying that I also take judicial notice of the fact that under the PAYE arrangements employers are required to issue a P60 to their employees for the previous tax year just ended by 31 May each year.

18. It is therefore something of a puzzle as to why the CMS 'pressing the button' on 12 December 2014 generated the gross annual historic income figure of £59,280 for 2011/12. In that context Mrs Massie has helpfully made enquiries of colleagues in the CMS and reports as follows:

> "Following these enquiries I understand that the reason that 2013/14 income would not 'pull through' via the HMRC interface was because the father was in self-assessment for the 2013/14 tax year. As the return was captured as a NIL return there was no liability and no self assessment criteria. It is assumed that this was because the father did not declare his PAYE income on his tax return."

19. There is no suggestion on the appeal file that the father was self-employed and so required on that basis to file a self-assessment return for 2013/14. He has certainly changed jobs, but all the evidence suggests he has been paid on a PAYE basis throughout. The mother's case was not that he has not been properly assessed on self-employed income, but rather that he has not been properly assessed on both his basic and commission-based PAYE income. However, it is of course the case that self-employment is not the only reason why an individual might be required to file a self-assessment return. Other such circumstances include receiving more than £2,500 a year in untaxed commission or earning over £50,000 and being in receipt (or one's partner being in receipt) of child benefit.

The Upper Tribunal's re-making of the decision under appeal

Introduction

20. It is not in dispute that the father's PAYE income for 2013/14 was £47,251.26. This is the figure which appeared on the relevant P60. It is also the earnings figure the father quoted in his notice of appeal to the Upper Tribunal.

21. So what then is the statutory basis for using an income figure of £47,251.26 (for 2013/14) when the computer says £59,820 (derived from 2011/12)?

22. Mrs Massie suggests there are two possible ways forward when construing the 2012 Regulations. For convenience I call them Option A and Option B.

Option A

23. Mrs Massie points out that by virtue of regulation 36(1) of the 2012 Regulations, "the HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year". She also notes that the PAYE information gives the figure of £47,251.26. As Mrs Massie identifies, there is a possible difficulty with this argument. Regulation 36(5) provides that "Where, for the latest available tax year, HMRC has both information provided in a self-assessment return and information provided under the PAYE Regulations, the amount identified for the purposes of paragraph (1) is to be taken from the former". The problem then is that if the father's self-assessment return for 2013/14 was indeed nil, as Mrs Massie's enquiries had revealed, then nil had to take precedence over the PAYE figure under regulation 36(5). Mrs Massie suggests that the way to square this circle is to hold that in effect HMRC only held PAYE information, and no self-assessment information, and so the appropriate figure was £47,251.26.

Option B

24. Mrs Massie's alternative approach was to rely on regulation 34. This provides that the default position is that the calculation should rely on historic income, but current income may be used in any of the circumstances set out in regulation 34(2). In the present case the HMRC interface could not provide the required information (the father's earned PAYE income). Accordingly this was a case in which "the Secretary of State is unable, for whatever reason, to … obtain the required information from HMRC" within regulation 34(2)(c). On that basis the current income figure of £47,251.26 could be used.

Conclusion

25. Accepting that the father was subject to self-assessment in 2013/14, I consider that Option B is the more appropriate route forward. I say that as Option A seems to involve stretching the statutory language beyond the point of breaking. After all, a figure of nil is still an "amount" or "information" for the purposes of regulation 36(5) that would, on the face of the plain words of the regulation, have to be prioritised over the PAYE figure. In contrast the circumstances of the present case seem to fit more neatly into the exception set out in regulation 34(2)(c), especially given the breadth of the statutory phraseology ("for whatever reason").

26. In *SB v Secretary of State for Work and Pensions and TB (CSM)* Upper Tribunal Judge Mitchell concluded on the facts that he could not rely on regulation 34(2)(c) to use the current income figure. Instead the Judge allowed the appeal and remitted the case to the Secretary of State for a fresh request to be made for the HMRC figure. On the facts of this case that approach is not necessary. No party has objected to Mrs Massie's proposal to adopt the figure of £47,251.26 as the father's income for 2013/14.

Conclusion

27. For the reasons explained above, the Upper Tribunal allows the father's appeal. The decision of the First-tier Tribunal is set aside. For the reasons set out above, I re-make the original decision under appeal. The decision the First-tier Tribunal should have made is as follows:

> *"The mother's appeal is allowed. The Secretary of State's decision made on 6 February 2015 is set aside. The case is remitted to the CMS to recalculate the child support liability in accordance with the following directions:*
>
> *(i) the effective date is 29 January 2015;*
>
> *(ii) the father's income is to be assessed by reference to the 2013/14 tax year, namely £47,251.26."*

28. It follows that the bottom line for this particular child support maintenance calculation is that the father's income is to be taken as £47,251.26, as per his P60 for 2013/14, and not £59,820 (the figure arrived at by the First-tier Tribunal in its decision, now set aside) or £29,355 (the figure arrived at by the CMS in its original decision under appeal, also now set aside).

Signed on the original
on 20 April 2018

Nicholas Wikeley
Judge of the Upper Tribunal

Corrected on 27 July 2018
under rule 42

Note

The correction made on 27 July 2018 simply takes the form of renumbering sub-para 27(iv) and (v) as 27(i) and (ii) and deleting what was sub-para 27(vi), reflecting the fact that the existing 2/7th shared care was not a matter raised on the appeal.