IN THE UPPER TRIBUNAL **Appeal No. CCS/94/2019**
(ADMINISTRATIVE APPEALS CHAMBER) **CCS/95/2019**

BEFORE JUDGE WEST

DECISION

The decision of the First-tier Tribunal dated 17 September 2018 under file reference SC228/13/00552 & SC228/13/02650 involves an error on a point of law. The appeal against that decision is allowed.

The matter is remitted to a differently constituted tribunal for a complete rehearing.

The new tribunal must consider and make relevant findings as to the correctness of the departure decision dated 27 March 2013 and the effective date of any such departure.

The new tribunal is not bound in any way by the decision of the previous Tribunal.

These directions may be supplemented as appropriate by later directions by a Tribunal Judge of the First-tier Tribunal (Social Entitlement Chamber).

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

REASONS

Introduction

1. The application by the Second Respondent for permission to appeal against the decision of the First-tier Tribunal sitting at Newcastle-Upon-Tyne on 17 September 2018 under file references SC228/13/00952 & SC228/13/02650 has already been granted by District Tribunal Judge Jacques on 9 November 2018.

2. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" (section 11(1) of the Tribunals, Courts and Enforcement Act 2007), not on the facts of the case. Permission to appeal will be granted if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in ***Smith v. Cosworth Casting Processes Ltd*** [1997] 1 WLR 1538). In the exercise of its discretion the First-tier Tribunal may take into account whether any arguable error of law was material to the Tribunal's decision.

3. The appeal against the departure decision of 27 March 2013 appeal was originally withdrawn by the Appellant with effect from 24 November 2015 and was then reinstated at the suit of the Second Respondent on 10 February 2017.

4. At the hearing on 17 September 2018 the Appellant indicated that she still wanted to withdraw the appeal. The Tribunal acceded to that request. The Second Respondent objected and sought permission to appeal.

5. In granting permission to appeal to the Second Respondent, the Tribunal considered that the following issues arose and needed to be clarified:

(1) where an appeal is reinstated, as here, who becomes the Appellant? The Tribunal considered that it could not convert the Second Respondent into the Appellant.

(2) where an appeal is reinstated, as here, can the appeal be withdrawn again? The Tribunal considered that there was nothing in the legislation to prevent that.

(3) if the appeal is correctly withdrawn, is there a right of appeal to the Upper Tribunal available to the other parties?

6. For the purposes of this decision, I have adopted the current nomenclature of the proceedings in which the Appellant is the Parent With Care ("PWC") and the Second Respondent is the Non-Resident Parent ("NRP"). That does not imply, and should not be taken to imply, any prejudgment concerning the first issue in the appeal, with which I deal below.

7. On 22 March 2019 I made directions for further sequential submissions by each of the parties to the appeal in turn, beginning with the First Respondent (the Secretary of State), then the Appellant and finally the Second Respondent. There was some delay in issuing the directions and they were not issued to the parties until 15 May 2019.

8. The Secretary of State replied on 5 June 2019 and supported the appeal (pages 1205 to 1208).

9. On 6 July 2019 the clerk to the Upper Tribunal sent those submissions to the other parties and asked for the submission of the Second Respondent. That letter should in fact have referred to the submission of the *Appellant*, in accordance with my earlier directions.

10. On 9 July 2019 the Appellant asked for clarification of the order in which the further submissions should in fact be made and asked for an extension of time for her own submission on the basis that her employment required overseas travel on a continual basis, for example being out of the country (in varying blocks) for about 16 days per month and 14 days at home. Due to the volume of the papers and the fear of losing them, she could not take the papers abroad with her. She was also representing herself since she could not afford a representative.

11. By way of clarification, I confirmed that it was indeed the *Appellant* who was to make the next submission.

12. In the interests of justice I also was satisfied that it was proper to extend the Appellant's time for making her submission and made a direction to that effect on 17 July 2019.

13. She duly made her submissions on 7 October 2019 (pages 1225 to 1231A with attachments to page 1248). The Second Respondent replied with his submissions on 26 November 2019 (pages 1250 to 1252). The matter has now been referred back to me for decision.

14. None of the parties sought an oral hearing and I am satisfied that it is not necessary to hold one in order to determine the matter. The Appellant indicated that she would attend an oral hearing if required to do so, but I do not consider that that is necessary in order to resolve the appeal before me.

The History of the Matter

15. The case has been a long-running and intractable one. The twins whose support is at the heart of the matter are now 23. The case has also been bedevilled by virtue of the fact that a number of papers have been destroyed and their content has had to be recreated by references in other documents, that there are three First-tier Tribunal files (SC228/13/00952: the Formula Case, SC228/13/02650: the Departure Case and SC068/02074: the Reinstated/Combined Case), that there are three sets of different numberings on the pages and that the parties have been reversed so that the Appellant had become the Second Respondent and the Second Respondent had become the Appellant.

16. In order to concentrate on the points actually in issue in the body of this decision, I have summarised the chronology of the matter in an Appendix which sets out the main steps taken in the each of the First-tier files, although it should be understood that most of them are set out by way of background only and that the compass of this appeal is a relatively narrow one.

17. In summary, both parents disagreed with the decision made by the Child Support Agency ("the CSA") relating to maintenance which was effective from 17 July 2012 (page 372) and the decision relating to departure (or variation as it would now be called), which was made on 27 March 2013, which was effective from 25 December 2012 (pages 167 to 171). The effect of that latter decision, which is the one currently under appeal, was that

> "The effect of this is that the amount of the payments to [the Appellant] for child maintenance will be changed from £39.63 to £396.35 from 25/12/12. However, I have decided that it would not be just and equitable to allow the departure award in full and have restricted the effect of the Departure to £149.18 per week from 25/12/2012".

18. The Appellant appealed against that decision on 25 April 2013 (page 177). The Appellant's appeal in respect thereof was heard on 12 June 2015. The Tribunal Judge held that the appellant's appeal was to be allowed in part (the decision notice is no longer extant), but on grounds disadvantageous to her in that it was found that the Second Respondent's income was considerably below the amount used by the CSA in its decision-making process which led to the appeal. The Appellant appealed against that decision. The Judge set aside his decision on 11 August 2015 and ordered a retrial (pages 987 to 989). The Appellant then applied to withdraw her appeal on 6 November 2015. That application was granted and the appeal was withdrawn on 24 November 2015 (again the decision notice is no longer extant).

19. Belatedly the Second Respondent sought professional advice and was subsequently represented. On 19 October 2016 his representative put forward a submission and lodged an application that the Appellant's appeal should be reinstated under rule 17(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (as amended) ("the 2008 Rules"). That letter is not in the bundle either, but the Appellant's response of 25 November 2016 makes it reasonably clear what he had said. The application was late since it should have been made within one month under rule 17(5), but rule 5(3)(a) gives the Tribunal a general discretion to extend time (up to a limit of 13 months, within which the application had just been made).

The Reinstatement of the Appeal

20. On 10 February 2017 Tribunal Judge Broughton ordered that the appeal be reinstated (pages 1053 to 1055):

> "The Appeal under reference numbers [00952] and [02650] are reinstated under this Appeal number [02074]. The Tribunal notes the [Second] Respondent's submission regarding this but is bound to consider the overriding objective of dealing with all cases fairly and justly. The Appellant in this application, [C], did not apply within one month to reinstate the Appeal after it was withdrawn by the [Second] Respondent but time can be extended under the Tribunal rules and that request was made within the 13 month [time limit]. The Tribunal extends the time as considering all the factors in these cases and its complexity and the amount of

> money involved from both parties it is in the interests of justice that a decision is made relating to the dispute."

21. That was the salient part of the decision, but he went on to say that

> "The Appellant's representative has left with the Tribunal today a full copy of the papers for ref number [00952 and 02650] and copies are to be forwarded to the Appellant and both Respondents and put with the file for onward transmission to Newcastle SSCSS.
>
> The File is transferred to the Newcastle venue for hearing in accordance with the [Second] Respondent's request. It should be referred to a Judge for urgent consideration for the appointment of a financial member to sit on the hearing.
>
> The [Second] Respondent should file a further response to the appeals within 6 weeks.
>
> The issues before the Tribunal will be the same as before the last tribunal and deals with a decision made in 2013. It is therefore more likely that all the information will be in the bundle. [F] will be seeking a departure direction at the higher figure she sought and [C] will be opposing that and the effective date is in dispute. However if either party wishes to add to any further submissions they should do so within 6 weeks so as to enable listing directions to be given from Newcastle to ensure that there is no further delay and a decision can be made noting the age of the children and need to attain finality."

The Appellant's Email

22. In advance of the hearing of the reinstated appeal on 4 September 2018, the Appellant sent to SSCSA in Newcastle an email (page 1171) which read

> "Re the above appeal reference. This was my appeal withdrawn by myself and requested to be struck out by [C]. [C] then approached the Liverpool Tribunal Service under the 13 month rule to reinstate my appeal (after a failed attempt to get the CSA to revise their decision. [C] had no right of appeal as confirmed by the CSA (see p.1114 of these case papers) and Judge Grace concurred.
>
> The Liverpool Tribunal Service stated [C] could reinstate my appeal only as he was out of time – i.e. as myself being the appellant – [C] being the Second Respondent.

> [C] appears to be still the appellant regarding the above refence which I believe to be incorrect. I am still the appellant. Please review".

The Decision Notice and Statement of Reasons

23. After the hearing of the reinstated appeal on 17 September 2018 the Tribunal Judge produced what amounted to a combined decision notice and statement of reasons (pages 1180 to 1182) which stated as follows:

> "1. This was an appeal brought by the appellant against a variation decision of 27 March 2013 which resulted in the increase in the maintenance to be paid by the second respondent.
>
> 2. The history of the matter in brief is that there ha[ve] been previous hearings which had been adjourned and following an adjournment on the 12 March 2014 [the] appellant had withdrawn her appeal. That left the variation decision in situ and ultimately the amount to be paid by way of child maintenance unchanged.
>
> 3. The Second Respondent then applied for the appeal to be reinstated.
>
> 4. The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 as amended allow any party, i.e. including a respondent, to reinstate an appeal.
>
> 5. That reinstatement request had been granted and resulted in the appeal listed for hearing today.
>
> 6. At the hearing the question was posed to the parties – "who is the appellant?"
>
> 7. As it was agreed between the parties that the matter before the Tribunal was in fact the question of the variation decision made on 2[7] March 2013 which had an effective date of 25 December 2012, the Tribunal concluded that [F] was the appellant. Case law indicates that the Tribunal could not turn the Second Respondent into an appellant.
>
> 8. It was conceded by the Second Respondent that the matters relating to his representative's request for a mandatory reconsideration of issues occurring after the date of decision under appeal and circa 2015 were not before the Tribunal.
>
> 9. The appellant indicated the desire to withdraw the appeal.

10. The Second Respondent's representative argued that if the appellant were allowed to withdraw her appeal, this would negate the effect of Parliament amending the Rules to allow any party, and especially the second respondent, to reinstate the appeal.

11. The amended Rules as written do not prevent the appellant withdrawing the appeal.

12. It was suggested by the Second Respondent's representative that the appellant was estopped from withdrawing her appeal.

13. The Tribunal considered the Rules and noted that, although Parliament had decreed that any party could reinstate the appeal, it had not amended the Rules such that where the appellant had not reinstated the appeal, the appellant was estopped from withdrawing it again.

14. The Tribunal considered that had Parliament intended that to be the case it could have made provision for that to be the case when they amended the Rules allowing reinstatement by any party.

15. The second respondent's representative was unable to cite any authority to show that the appellant was estopped.

16. There were other matters discussed in the course of the consideration of whether or not the appellant was entitled to withdraw the appeal.

17. It was noted from the papers that it would appear that the Second Respondent had failed in an attempt at raising [an] appeal of his own. The Tribunal considered this was irrelevant to the decision as to whether or not the appeal could be withdrawn by the appellant because the appeal before the Tribunal was that of the appellant and not the second respondent.

18. That fact that the Second Respondent had a failed attempt at appealing is something between him and the First Respondent on the facts contained in the papers (namely that his letter of appeal had to be signed for[,] which went somewhat against the second respondent's assertion that [he] had not received the appeal).

19. The Tribunal also discussed with the parties whether the second respondent's reinstatement of the appeal was an attempt to process the second respondent's appeal which the

> First Respondent had indicated had not been received. This was again an irrelevant point.
>
> 20. The Tribunal used the phrase "failed appeal" because there is evidence of an appeal being sent by the second respondent to the First Respondent which appears not to have been acted upon even though it appears that the letter of appeal had to be signed for.
>
> 21. The fact that the Second Respondent had reinstated the appeal in the circumstance also gave rise to a question of whether the principle of coming to law with clean hands was relevant. It was decided it was not relevant.
>
> 22. The main reasons the Tribunal had considered that these discussions were not relevant was firstly because the way the Rules are worded which do not prevent the appellant from withdrawing the appeal as the rules are presently constituted. The second reason was the decision in *WM v. SSWP (DLA)* [2015] UKUT 642 (AAC). That case indicates the appellant's desire to withdraw binding on the Tribunal in terms of jurisdiction. The Tribunal has no jurisdiction in the appeal if it is withdrawn where there is no restriction imposed by a Tribunal on the appellant's ability to withdraw the appeal.
>
> 23. In this particular case there had been no restriction placed upon the appellant by any Tribunal in dealing with the appeal in the past.
>
> 24. The Tribunal accept that the effect [of] withdrawal of the appeal, which [it] had felt it could not refuse in the circumstances because of the way the Rules are written and the case of *WM* would be that perhaps a vicious circle of withdrawal and reinstatement would be created.
>
> 25. This gave rise to the possibility that there is a lacuna in the Rules when a tribunal is required to deal with a reinstated appeal where the party reinstating is not the appellant."

The Grant of Permission to Appeal

24. On 9 November 2018 District Tribunal Judge Jacques gave permission to appeal (pages 1188 to 1189) on the following basis:

> "1. This appeal was originally withdrawn by the Appellant. It was then reinstated by the Second Respondent.

> 2. At the hearing on 17.09.18 the Appellant indicated that she still wanted to withdraw the appeal. The Tribunal acceded to that. The Second Respondent objects.
>
> 3. It occurs to the Tribunal that the following issues arise and need to be clarified:
>
> (i) where an appeal is reinstated as here, who then becomes the Appellant? The Tribunal considered that it could not convert the Second Respondent into the Appellant.
>
> (ii) where an appeal is reinstated as here, can the appeal be withdrawn again? The Tribunal considered that there was nothing in the legislation to prevent that.
>
> (iii) if the appeal is correctly withdrawn, is there a right of appeal to the Upper Tribunal available to the other parties?
>
> 4. Perhaps 3(iii) is the first issue but if it were to stop there the first two points would be unanswered."

25. That decision notice was issued to the parties on 14 November 2018. The Second Respondent gave notice to the Upper Tribunal of the grant of permission to appeal on 13 December 2018 (pages 1190 to 1196).

The Rules on Withdrawal

26. The 2008 Rules provide that

> "17(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it–
>
> (a) … by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) In the circumstances described in paragraph (3), a notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.
>
> (3) The circumstances referred to in paragraph (2) are where a party gives notice of withdrawal–
>
> (a) … in a criminal injuries compensation case …

> (b) in a social security and child support case where the Tribunal has directed that notice of withdrawal shall take effect only with the Tribunal's consent; or
>
> (c) at a hearing.
>
> (4) An application for a withdrawn case to be reinstated may be made by-
>
> (a) the party who withdrew the case
>
> (b) where an appeal in a social security and child support case has been withdrawn, a respondent.
>
> (5) An application under paragraph (4) must be made in writing and be received by the Tribunal within 1 month after–
>
> (a) the date on which the applicant was sent notice under paragraph (6); or
>
> (b) if the applicant was present at the hearing when the case was withdrawn orally under paragraph (1)(b), the date of that hearing.
>
> (6) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule."

27. Rule 17 was amended with effect from 8 April 2013 by virtue of the Tribunal Procedure (Amendment) Rules 2013 ("the 2013 Rules"). The Explanatory Note to the 2013 Rules stated that the amendments to Rule 17 extended the power "to withdraw the case to circumstances in which a case has been adjourned part-heard". Rule 17(1)(a) was amended to remove from sub-paragraph (1)(a) the words "at any time before a hearing to consider the disposal of the proceedings (or if the Tribunal disposes of the proceedings without a hearing, before that disposal)". Additionally rule 17(3) was amended to include a new sub-paragraph (3)(b) which had formed no part of the rule prior to 8 April 2013.

28. Sub-paragraphs (4) and (5) in the form in which they currently exist were introduced by the Tribunal Procedure (Amendment) Rules 2015 with effect from 21

August 2015 and were therefore applicable to this case. Prior to that date the relevant rules stated that

> "(4) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (5) An application under paragraph (4) must be made in writing and be received by the Tribunal within 1 month after—
>
> (a) the date on which the Tribunal received the notice under paragraph (1)(a); or
>
> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

The Decision in *WM v. Secretary of State for Work and Pensions (DLA)*

29. In ***WM*** the proceedings were adjourned part-heard for some months, but the Tribunal made no direction in accordance with rule 17(3)(b) (which had come into force on 8 April 2013) before adjourning. Shortly before the hearing was to resume, the appellant sent a written notice of withdrawal to the Tribunal. Instead of accepting the withdrawal, the Tribunal wrongly proceeded as if its consent to the withdrawal was required. It refused to accept the withdrawal and proceeded to make a decision on the appeal in the absence of the parties. It decided that the appellant was not entitled to an award of either component of disability living allowance.

30. The appellant's appeal was first listed for hearing on 4 December 2013. The decision notice recorded that the appeal had been adjourned part heard and that the hearing would resume on 20 February 2014. She sought advice from two separate welfare rights organisations and was told that, on withdrawal of the appeal, the award of benefit would remain in place unchanged. Accordingly, on 14 February 2014 she gave written notice that she was withdrawing her appeal. That notice was received by the Tribunal on 18 February 2014. She made it plain in her written notice that neither she nor her husband would be in attendance on 20 February 2014 because she could not afford the funds for a carer to accompany her to the Tribunal. On 20 February 2014 (and in her absence) the Tribunal proceeded to refuse consent to the withdrawal of the appeal. The Tribunal determined that she had no entitlement to benefit with

effect from 10 February 2012, that being the date of her application for supersession. It held that rule 17(3)(c) applied as the application made by the appellant "was at a hearing". Such an interpretation meant that the Tribunal's consent to the withdrawal was required under rule 17(2). The Tribunal found that the absolute right to withdraw an appeal or part of a party's case was before a hearing. It stated that:

> "as the hearing commenced on 4 December 2013 and was adjourned part heard until 20 February 2014 the application made on 18 February 2014 was made 'at a hearing'."

31. Upper Tribunal Judge Knowles QC overturned that decision and remade it. She held that

> "35. Rule 17(1)(a) – unless qualified by a direction pursuant to Rule 17(3)(b) – gives a party the absolute right to withdraw its case by sending or delivering a written notice of withdrawal. This will be the case even if a hearing to consider the disposal of proceedings has commenced and has been subsequently adjourned as happened in this case and in the case of *LJ*. The language bears no other interpretation and is, in my view, quite clear.
>
> 36. Here, the tribunal strained to interpret the phrase 'at the hearing' in rule 17(3)(c) so that it would apply at the time the notice of withdrawal was received whenever that was. Not only did this interpretation ignore the effect of the 2013 changes to Rule 17 but it was inconsistent with the definition of 'hearing' in Rule 1(3), namely "an oral hearing and includes a hearing conducted in whole or part by video link, telephone or another means of instantaneous two-way electronic communication". There was no oral hearing taking place on 18 February 2014 and thus the notice of withdrawal took immediate effect on that date. The tribunal sitting on 20 February 2014 was without jurisdiction to make any change to the Appellant's award of DLA.
>
> 37. My interpretation is reinforced by the addition of Rule 17(2)(b) to Rule 17 with effect from 8 April 2013. I observed, when giving permission to appeal that, if the tribunal was correct that its consent to a withdrawal during an adjournment of the proceedings was required, there was no possible justification for the inclusion of Rule 17(3)(b) in the revised Rules. It seems to me that this Rule operates as an invitation on an adjournment of proceedings – whether part heard or not - for a tribunal to direct in a social security or child support

case that any written notice of withdrawal received thereafter should not have effect unless the tribunal consents to it. It is quite obvious that the tribunal in this case was contemplating the validity of the Appellant's entitlement to her current award of DLA. It would have been a prudent and straightforward matter both to have warned the Appellant of this fact and to have guarded against a withdrawal of the proceedings by making a direction in the terms of Rule 17(3)(b). Unfortunately and I suspect through oversight, the tribunal did not take the course which was legitimately open to it.

38. The tribunal in this case was most exercised at the prospect that a party might seek to withdraw its case or part of it during a break in the proceedings on the day of the hearing itself when, for example, the tribunal might have risen to eat lunch. Rising to eat lunch does not, in my view, constitute a formal adjournment of the proceedings which might trigger the possibility of a withdrawal pursuant to Rule 17(1)(a). Adjournment of proceedings – whether from one day to the next or from one month to another - is marked by a decision notice stating that fact and, alongside any other necessary directions, making provision for when the proceedings might conclude. No hearing within the meaning of Rule 1(3) is taking place once an adjournment as I have described it takes effect.

39. When a tribunal rises to eat lunch, it is plain to me that an oral hearing is ongoing and that, pursuant to Rule 17(3)(c), the tribunal's consent to any application for withdrawal made at a hearing is necessary. If a tribunal has concerns about the possibility of withdrawal during the course of the proceedings, it may wish to make the Rule 17(3)(b) direction either as part of its case management directions or at the start of the hearing. Likewise, if the case has to be formally adjourned either to the next day, the following week or to some later date, a tribunal may wish to consider whether to make the Rule 17(3)(b) direction if it has not already done so. However all of these issues are matters of judgment for a tribunal seised of a particular case and I make it plain that my comments are not intended to set a precedent for how tribunals should case manage the proceedings in each and every social security or child support appeal.

40. Finally and contrary to the views expressed by the tribunal, the case of *BP* preceded the changes to Rule 17 and is no longer good authority on the interpretation of Rule 17 since it relies on the very wording which was excised from Rule 17(1)(a) with effect from 8 April 2013. Instead, I align myself with the reasoning set out in the case of *LJ* which drew attention to the intention behind the amendments to Rule 17

> set out in the Explanatory Note. The case of *AE* does not detract from either the reasoning in *LJ* or in this decision since it did not consider in detail the timing and consequential effect of any notice of withdrawal.
>
> 41. Given the analysis set out above, I conclude that the written notice of withdrawal received by the tribunal on 18 February 2014 had immediate effect and brought the proceedings to a conclusion. The tribunal erred in law by not accepting the notice on that date and by soliciting submissions about it from the Respondent. Given the effect of this valid notice, the tribunal was without jurisdiction to determine any matter relating to the Appellant's entitlement to DLA on 20 February 2014 and erred in law by so doing."

32. She summarised her conclusion as follows:

> "2. I have decided that a notice of withdrawal given by a party in accordance with Rule 17(1)(a) has immediate effect. There is thus no need for a tribunal to make a decision about whether to consent to the withdrawal. A withdrawal in accordance with Rule 17(1)(a) has that effect even if, for example, proceedings before a tribunal are adjourned part-heard. However the immediate effect of Rule 17(1)(a) may be qualified in a social security or child support case if a tribunal has directed, pursuant to Rule 17(3)(b), that notice of withdrawal shall only take effect with the consent of the tribunal. In those circumstances notice given under Rule 17(1)(a) will not take effect without the consent of the tribunal."

33. It is apparent from this explanation that the Tribunal in that case was not concerned with the question of the reinstatement of an appeal or the purported withdrawal of a reinstated appeal.

The First Question

34. Where an appeal is reinstated as here, who then becomes the appellant?

35. The short answer is that the identity of the appellant remains unchanged; there is nothing in the 2008 Rules to provide otherwise. The respondent seeks to reinstate the appeal not to take it over, but to compel the appellant to carry on with it until the end.

That does not, however, make him the appellant. The Tribunal cannot convert the respondent into the appellant.

36. The Tribunal was therefore correct to decide that the Appellant remained the Appellant and that the reinstatement of the appeal did not turn the Second Respondent into the Appellant.

The Second Question

37. Where an appeal is reinstated, as here, can the appeal be withdrawn again?

38. The Tribunal found for the appellant and allowed her to withdraw the appeal for two reasons:

(i) although Parliament had decreed that any party could reinstate the appeal, it had not amended the Rules such that where the appellant had not reinstated the appeal, the appellant was estopped from withdrawing it again. Had Parliament intended that to be the case it could have made provision for that to be so when it amended the Rules allowing reinstatement by any party.

(ii) it was bound by the decision in ***WM v. SSWP (DLA)*** which indicated that the appellant's desire to withdraw was binding on the Tribunal in terms of jurisdiction.

39. The obvious problem with the Tribunal's decision, as the Tribunal itself accepted, is that it creates a vicious circle of withdrawal and reinstatement. If an appeal can be first withdrawn and then reinstated and then withdrawn again, why should it not be reinstated again and so on *ad infinitum*?

40. The answer is that the rule only allows one bite of the cherry to each party. The appellant may withdraw the appeal once; the respondent may apply for the withdrawn appeal to be reinstated once. Thereafter the ability to seek withdrawal or reinstatement is exhausted. Rule 17 does not on its true construction permit a second bite of the

cherry to either party.[1] Any other open-ended construction of the legislation would lead to the absurdity mentioned in the last paragraph and recognised by the Tribunal itself.

41. It is not therefore the case that the Rules are so worded that they do not prevent the appellant from withdrawing a reinstated appeal. The Tribunal was wrong so to decide. Once a withdrawn appeal has been reinstated it must be adjudicated upon on its merits.

42. There is therefore no lacuna in rule 17 when a Tribunal is required to deal with a reinstated appeal where the party who sought and obtained the reinstatement is the respondent. The ability to seek withdrawal and reinstatement have been exhausted and the appeal must be adjudicated upon on its merits. If the appellant seeks to challenge the decision on the merits, the proper course is to ask for a statement of reasons and to seek permission to appeal that substantive decision, not to seek an impermissible withdrawal of the appeal for a second time.

43. The one argument which the Appellant has raised in her submissions which might have had some traction if made in time was in relation to an alleged procedural irregularity in the making of the order for reinstatement. She sets out the story at page 1228. There is no doubt that she was aware that there had been an application for reinstatement and indeed made lengthy (but frankly unfocussed) submissions opposing it. However, she says that when she spoke to the Tribunal Office she was told that the application would be dealt with without a hearing. She also insists that she had not received any notice of the hearing when it actually took place. She suggests that this was because the Tribunal Judge had decided to hold an *ex parte* hearing, but there can be no conceivable reason why he would have done so and the CSA was certainly notified of the hearing. There might, however, have been an argument that notification to her had gone astray.

[1] In one limited sense an appellant may have two bites of the cherry by withdrawing the appeal and then applying to reinstate it under rule 17(4)(a), but he is not asking for the same thing twice over: he can withdraw it once and can apply to reinstate it once.

44. The problem for the Appellant, however, is that the order for reinstatement was made on 10 February 2017 and she did not appeal against that order nor did she seek to set it aside for more than 18 months.

45. I am bound to say that I do not see how an application to set aside the decision would have succeeded since the power to set aside under rule 37 of the 2008 Rules only applies in the case of a decision "which disposes of proceedings" and the reinstatement of the appeal did not dispose of the proceedings - far from it. She did make a complaint against the making of the decision. That was adjudicated upon and her complaint was rejected (page 1229), but she did not seek to appeal against it.

46. So far as permission to appeal is concerned, rule 38 of the 2008 Rules, so far as material, provides that

> **"Application for permission to appeal**
>
> 38(1) This rule does not apply to asylum support cases or criminal injuries compensation cases.
>
> (2) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.
>
> (3) An application under paragraph (2) must be sent or delivered to the Tribunal so that it is received no later than 1 month after the latest of the dates that the Tribunal sends to the person making the application—
>
> (za) the relevant decision notice …
>
> …
>
> (5) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (3) or by any extension of time under rule 5(3)(a) (power to extend time)—
>
> (a) the application must include a request for an extension of time and the reason why the application was not provided in time; and
>
> (b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.

> (6) An application under paragraph (2) must—
>
> (a) identify the decision of the Tribunal to which it relates;
>
> (b) identify the alleged error or errors of law in the decision; and
>
> (c) state the result the party making the application is seeking".

47. Whilst there is no longer an absolute time limit on applications (previously an application could not be accepted if it was more than a year late), the Tribunal would have to exercise its discretion and make use of its power to extend time under rule 5(3)(a) to accept an application out of time. The power in rule 5(3)(a) is subject to the overriding objective set out in rule 2. As to that Judge Jacobs explained in ***R(KS) v. First-tier Tribunal & CICA*** [2012] UKUT 281 (AAC); [2013] AACR 9:

> "11. The tribunal had power to extend that time under rule 5(3)(a). The power is unfettered: *R (CD) v First-tier Tribunal (CIC)* [2010] UKUT 181 (AAC); [2011] AACR 1 at [26]. As such, it has to be exercised judicially and in accordance with the overriding objective in rule 2. Within that framework, the tribunal is required to take account of any factor that is rationally related to the proper judicial exercise of the power to extend time. Those factors were conveniently classified in relation to permission to appeal by McCowan LJ in *Norwich and Peterborough Building Society v Steed* [1991] 1 WLR 449 at 450:
>
> > "The matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reasons for the delay; thirdly, the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the respondent if the application is granted."
>
> It may be that other factors have to be taken into account under the overriding objective. The impact on other users of the tribunal system may be an example."

48. The delay in this case would now have been more than 3 years since the decision to reinstate the appeal. Moreover, it seems to me that the chances of success of any

appeal would be speculative given that the Tribunal had said in the very broadest terms when reinstating the appeal

> "The Tribunal notes the [Second] Respondent's submission regarding this but is bound to consider the overriding objective of dealing with all cases fairly and justly ... The Tribunal extends the time as considering all the factors in these cases and its complexity and the amount of money involved from both parties it is in the interests of justice that a decision is made relating to the dispute."

Given the breadth of that decision, it is difficult to see that it was wrong in law.

49. Moreover, the sum at stake was not inconsiderable. Under the variation decision which the respondent sought to challenge after the reinstatement of the appeal, the effect was that the amount of the payments to the Appellant for child maintenance would have been changed from £39.63 to £149.18 from 25 December 2012. In addition, a further factor militating against the grant of permission to appeal out of time is that, once the time for appealing has elapsed, the respondent who was successful in the Tribunal below is entitled to regard the decision in his favour as being final. In my judgment the factors against the grant of permission to appeal out of time far outweigh any factors weighing in its favour.

50. I am therefore satisfied that the First-tier Tribunal would not admit an out of time application for permission to appeal against the reinstatement decision of 10 February 2017, which would now be more than 3 years out of time, and I have no reason to believe that any further application to the Upper Tribunal for permission to appeal out of time would be treated any differently. The reinstatement decision must therefore stand.

51. So far as the second reason adduced by the Tribunal is concerned, as is apparent from what I have set out above the decision in ***WM*** does not govern the present circumstances.

52. It was not concerned with reinstatement by a respondent under rule 17(4)(b), not least because the amendments to rule 17(4) and (5) did not come into effect until 21

August 2015, whereas the decision in ***WM*** was concerned with a decision which was made on 20 February 2014. What it concerned was that a notice of withdrawal given by a party in accordance with rule 17(1)(a) had immediate effect so that there was no need for a tribunal to make a decision about whether to consent to the withdrawal. A withdrawal in accordance with Rule 17(1)(a) had that immediate effect even if proceedings before a tribunal were adjourned part-heard. The immediate effect of rule 17(1)(a) could be qualified in a social security or child support case if the tribunal directed pursuant to rule 17(3)(b) that notice of withdrawal should only take effect with the consent of the tribunal. In those circumstances notice given under rule 17(1)(a) would not take effect without the consent of the tribunal.

53. I am therefore satisfied that the Tribunal fell into error when it allowed the Appellant to withdraw for a second time the appeal which had already been reinstated when she had not appealed that reinstatement decision within time. Neither the Rules as drafted nor any authority binding on the Tribunal required it to reach that conclusion.

54. It is not therefore necessary to make a direction under rule 17(3)(b) that notice of withdrawal shall take effect only with the Tribunal's consent, as the Second Respondent has argued. It is not open to the Appellant to seek to withdraw the now reinstated appeal.

The Third Question

55. If the appeal is correctly withdrawn, is there a right of appeal to the Upper Tribunal available to the other parties?

56. In the light of the conclusions which I have reached in relation to the second question, the third question does not arise. The appeal was not correctly rewithdrawn and it is now too late to appeal the decision to reinstate it.

57. If an appellant has exercised a right to withdraw without the need for permission under rule 17(1)(a), which gives a party the absolute right to withdraw its case by sending or delivering a written notice of withdrawal, there can be no appeal since there has been no decision by the First-tier Tribunal. That would be the case even if a

hearing to consider the disposal of proceedings had commenced and had been subsequently adjourned as happened in ***WM***. An appeal by another party would only be available in the event that the Tribunal had to give consent to a withdrawal in the three circumstances set out in rule 17(3), although it would also be open to a respondent to apply for reinstatement under rule 17(4)(b) where an appeal has been withdrawn in a social security and child support case.

Conclusion

58. For the reasons set out above I am satisfied that the Tribunal made an error of law which was material to its decision and for that reason the decision of the Tribunal should be set aside.

59. I therefore allow the appeal and set aside the decision of the Tribunal. I remit the matter to a new tribunal which should conduct a complete rehearing of the matter.

60. I am not, however, determining the merits of any such rehearing. I note, but specifically do not determine, the questions as to the merits which the Second Respondent raised in Section F of his notification of appeal in the last three paragraphs (page 1193).

61. It is for the new tribunal itself to decide what decision to make on the facts as found by it, depending on the view it takes of the facts and providing it makes proper findings of fact and gives adequate reasons. It would not be appropriate for me to express any opinion either way on the merits of the reheard case.

Directions

62. Any more detailed directions for the rehearing before the new tribunal should be left to a Tribunal Judge of the First-tier Tribunal (Social Entitlement Chamber), having considered any further submissions which the parties may wish to make on such practical matters.

63. The following directions apply to the hearing before the new tribunal:

(1) The new tribunal should not involve any member who was a member of the Tribunal involved in the hearing of the original appeal.

(2) The new tribunal must consider and make relevant findings as to the correctness of the departure decision dated 27 March 2013 and the effective date of any such departure.

(3) The new tribunal is not bound in any way by the decision of the previous Tribunal.

(4) These directions may be supplemented as appropriate by later directions by a Tribunal Judge of the First-tier Tribunal (Social Entitlement Chamber).

Coda

64. I am bound to say that this is a decision which I reach with no enthusiasm. This litigation has dragged on for far too long. (I do not seek to apportion blame for that situation since it will only inflame matters further and will not contribute to the all too necessary ultimate resolution of the case.) The twins whose support as children lay at heart of it are now 23. It will involve consideration of a decision made as long ago as 27 March 2013. It may even involve a further appeal to this Chamber against any further decision of the First-tier Tribunal. In the present circumstances that First-tier decision may perforce be delayed for some considerable time. Any onward appeal would be even more protracted. I would very strongly urge the parties to reconcile their differences and reach a mutually acceptable accommodation to bring this matter to an end.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **22 May 2020**

APPENDIX

Chronology

In each case F is the Appellant, the Secretary of State is the First Respondent and C the Second Respondent

SC228/13/00952 (the Formula Case)

25 March 2011 Decision on child support maintenance
C liable to pay child support maintenance of £0 per week from the effective date of 22 March 2011
Page 365

2 July 2011 F applies for review of decision of 25 March 2011
F applies to commissioner for maintenance assessment made on 25 March 2011 to be reviewed due to change in circumstances, namely a change in housing costs
Page 365

10 July 2012 Commissioner's decision superseding decision of 25 March 2011
C liable to pay £38.63 per week with an effective date of 17 July 2012
Page 372

12 December 2012 Refusal to revise notification issue
F disputed the decision, but decision maker unable to revise the decision
Page 365, 465-466

28 December 2012 F lodged appeal against the decision of 10 October 2012 in 00952
F argued that since 2002 that income was inconsistent with lifestyle. She disagreed with C's income declaration and stated that he had a lifestyle which exceeded his ability to pay
Page 365, 380-386

16 February 2013 Decision maker unable to revise decision of 10 July 2012; appeal continued

F asked for the decision to be revised as the income used did not reflect the circumstances. After lengthy investigation was unsuccessful in identifying any other source of income and it was decided to refuse to revise the decision
Page 365

12 June 2015 Decision notice issued
Appeal allowed in part and decision made on 10 July 2012 set aside. From the effective date of 10 October 2111 C was liable to pay child support maintenance of £32.46 per week and from the effective date of 12 July 2012 C was liable to pay £38.63 per week. The appeal was allowed in respect of the change in the effective date.
Not extant

11 August 2015 Decision notice issued
Decision of Tribunal set aside. The Tribunal misdirected itself as to the effective date of the interim maintenance assessment

6 November 2015 Request for withdrawal
Granted and appeal withdrawn on 24 November 2015
Pages 987 - 989

SC228/13/02650 (the Departure Case)
27 August 2002 Letter from F to CSA
Referred to C's lifestyle outweighing the salary stated

9 October 2002 Request for departure application form
Request made by the complaints resolution team for a departure application form to be issued to F

9 October 2002 CSA issued application departure form to F
Allows CSA to take into account other things it would not normally look at when making a calculation
No return received

13 December 2002 2002 CSA issued application departure form to F
Allows CSA to take into account other things it would not normally look at when making a calculation
No return received

10 July 2012 Current maintenance assessment calculated (subject of appeal)
£38.63 per week calculated on 10 July 2012 and effective from 17 July 2012
C had a partner living with him and the information regarding his partner's income was not provided
Interim maintenance assessment was imposed
Page 372

18 July 2012 CSA issued application departure form to F
Allows CSA to take into account other things it would not normally look at when making a calculation
No return received

28 December 2012 CSA accepted F's application for departure
This is the date on which the CSA states that it received an effective application for a departure direction from F in respect of lifestyle inconsistent with declared income.
Decided effective date for departure direction would be 25 December 2012
Pages 380-386

21 February 2013 Further information received from F
Page 115 to 116

27 February 2013 CSA gave notice of application to C
CSA gave notice of application to C; he was invited to make representations, but no response reived
Pages 141 to 143

30 March 2013 Decision notified (made 27 March 2013)
Departure direction from 25 December 2012 increased C's child support maintenance liability from £38.63 per week to £149.18 per week

Pages 155 to 157

25 April 2013 F lodged appeal against decision notified on 30 March 2013
Ground lifestyle inconsistent with declared income
Disagrees with effective date – been trying for years to request CSA investigate C's financial circumstances as always had lifestyle inconsistent with his declared income
Information provided by C in response to the appeal is dated 13 March 2013 and predates the date of the departure decision made on 27 March 2013. The CSA submits that it was possible that C's intention was that the information should be considered in relation to F's departure application
Pages 177, 178 to 179

12 June 2015 Decision notice issued
Appeal allowed. Decision made on 27 March 2013 set aside
DWP to calculate C's liability to pay child support maintenance from the effective date of 25 December 2012 based on a weekly income of £205.15. This is his declared net income of £148.26 per week plus a departure direction award of £52.89 per week
Not extant

11 August 2015 Decision notice issued
Decision issued on 12 June 2015 set aside. Linked to other decision dated 12 June 2015 which was set aside
Pages 987 to 989

6 November 2015 Request for withdrawal
Granted and appeal withdrawn 24 November 2015
Not extant

SC068/02074 (the Reinstated/Combined Case)

24 November 2015 Appeals 02650 and 00952 withdrawn
Appeals withdrawn
Decisions of CSA stand
Not extant

18 December 2015 C's advisors notified CSA that departure decision was incorrect
Did not apply for reinstatement of 02650
Pages 1031 to 1033

3 February 2016 Decision on maintenance assessment
Decision to confirm interim maintenance assessment effective from 1 October 2011 and to impose a departure decision effective from 25 December 2015 (subject of 02650)
Page 1116

11 February 2016 Letter from CSA Departure decision review of maintenance assessment
Departure decision effective rom 25 December 2012 at a reduced rate of £142.11
Page 1116

16 May 2016 Refusal to conduct a mandatory reconsideration
Letters issued on 11 February 2016 and 1 April 2016 advised decision did not carry right of appeal

27 May 2016 Appeal to Tribunal
Following the refusal to conduct a mandatory reconsideration
Decision subject to earlier appeal by F (03650). The earlier appeal was allowed, set aside and withdrawn. C did not apply for the appeal to be reinstated

8 July 2016 Directions Notice issued (dated 5 July 2016)
Case to be listed for a directions hearing to consider whether the appeal can be admitted

26 August 2016 Adjourned
SoS had not received Directions notice dated 5 July 2016. SoS to file submission as to why letter of 11 February 2016 did not amount to a decision which carries appeal rights together with comments on F's submission

28 September 2016 Directions Notice issued

F added as a party to the proceedings. All parties directed to file any further submissions as to whether appeal 02650 should be reinstated