IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001330-CSM**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

C.F.

Appellant

- v -

Secretary of State for Work and Pensions

1st Respondent

and

D.F.

2nd Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 10 October 2022
Decided on consideration of the papers

Representation:

Appellant:	Mr George Coates of Counsel
1st Respondent:	Ms Kym Cardona, DMA, Department for Work and Pensions
2nd Respondent:	In person

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 9 October 2020 under case file number SC140/18/00050 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by the First-tier Tribunal in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to a different First-tier Tribunal (District Tribunal Judge) for reconsideration at an oral hearing.**

2. **The file should be put before a District Tribunal Judge of the First-tier Tribunal to consider what case management directions are appropriate with a view to deciding whether any redactions to the documentary evidence are required under rule 14(2).**

3. **The First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This is the father's appeal to the Upper Tribunal so he is the Appellant. The Secretary of State is the First Respondent and the mother is the Second Respondent.

2. I have considered all the parties' written submissions. None of the parties has requested an oral hearing of the Upper Tribunal appeal and I am satisfied it is fair and just to proceed with a decision on the papers, having considered rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). My conclusion is that the Appellant's appeal to the Upper Tribunal succeeds. This is because the decision of the First-tier Tribunal involves a legal error – that Tribunal proceeded to a final decision on the papers in breach of its own procedural rules (which differ from those applying in the Upper Tribunal). For that reason, I set aside the Tribunal's decision. There will need to be a re-hearing of the father's original appeal before the First-tier Tribunal.

3. It is important that I emphasise that the previous First-tier Tribunal may (or, on the other hand, may not) have come to the right decision on the facts. However, the legal error that has been identified means there will need to be a re-hearing in front of a differently constituted First-tier Tribunal, which will start afresh.

4. There will need to be further Directions issued before the re-hearing is held. These Directions will need to include a ruling on what material if any from the original documentation needs to be redacted. The file should therefore be put before a District Tribunal Judge for that purpose (but not the one who made the decision now under appeal, which was dated 9 October 2020).

The background

5. The Appellant (the father) and the Second Respondent (the mother) are the parents of a young woman who is now aged 23. To protect her anonymity and privacy, I call their daughter 'D' in this decision. In 2016 the child support case relating to D was transferred to the latest child maintenance scheme. On 23 December 2016 the Secretary of State's CMS decision-maker decided that the Appellant was liable to pay £294.00 a week in child maintenance as from 18 December 2016.

6. On 25 August 2017 the father wrote to the CMS advising that D was no longer in full-time education with effect from July 2017. He wrote to HMRC's Child Benefit Office to similar effect.

7. The CMS decision-maker made enquiries and ascertained that D's child benefit had been stopped but had then been reinstated. Accordingly, on 25 October 2017 the decision-maker decided they were unable to supersede the decision of 23 December 2016. The decision-maker concluded that D was continuing in full-time non-advanced education and child benefit remained in payment. As such, D continued to be a qualifying child for the purposes of the child maintenance scheme.

8. The father applied for a mandatory reconsideration, which resulted in no change to the decision. The CMS made further enquiries of HMRC which confirmed that D's child benefit ceased on 3 September 2018 (in effect a year later than when the Appellant claimed it should have ceased).

9. As the First-tier Tribunal observed in an early Directions Notice (dated 10 July 2018), "it appears that the only issue in this appeal is whether or not D remained a qualifying child or left full time non advanced education or approved training after the academic year ending in the summer of 2017".

The First-tier Tribunal's decision

10. Cutting a very long story short, the First-tier Tribunal (District Tribunal Judge (DTJ) O'Hara) dealt with the father's appeal on the papers on 9 October 2020. The Tribunal's decision notice recorded that the father's appeal was disallowed and the CMS decision made on 25 October 2017 was confirmed. DTJ O'Hara explained her reasoning in a detailed full statement of reasons. In summary, DTJ O'Hara concluded that D continued to meet the definition of a qualifying child during the 2017/18 academic year.

The father's grounds of appeal and the parties' submissions on the appeal

11. The father's detailed application for permission to appeal to the Upper Tribunal boiled down to two grounds of appeal. The first and primary ground of appeal was the submission that the First-tier Tribunal made a series of procedural errors in deciding this child support appeal, and in particular by making a final decision on 9 October 2020 without holding a further oral hearing. The second ground of appeal turned on the Tribunal's application (in law and fact) of the test for a qualifying child for the purposes of the child support regime. I gave the father permission to appeal on both grounds.

12. The parties have all taken the opportunity to make written submissions on the appeal to the Upper Tribunal. I have considered all those responses. Ms Kym Cardona, on behalf of the Secretary of State, supports the appeal on the first ground and so does not address the second ground. The Appellant and the Second Respondent have made further written submissions respectively in favour of and resisting the appeal.

The adjudication history before the First-tier Tribunal

13. I observed when giving the father permission to appeal that this case had a "somewhat tortuous and protracted adjudication history". However, for present purposes the key features of that history are as follows.

14. On 16 November 2018 DTJ Rolt directed that the appeal be listed for hearing before any judge 'ticketed' to hear child support cases. Following the parties' representations on the mode of hearing, a Tribunal caseworker confirmed that direction on 16 January 2019. The father then made an application for witness summonses (e.g. for one of D's teachers to attend the hearing), but this application was for some reason not referred to a judge by HMCTS. The matter was then listed before DTJ Bird for a hearing on 23 October 2019. On receipt of the file the week before that hearing, DTJ Bird issued detailed case management directions on 17 October 2019, highlighting several outstanding issues in the case. In the event, the hearing on 23 October 2019 became a case management hearing. The Tribunal's record of proceedings baldly

recorded "Adj.[ourned]. Made directions". The Judge accordingly adjourned the appeal with further directions, including for HMRC to supply certain evidence (Directions dated 23 October 2019, amended on 19 November 2019 and issued on 12 December 2019). It was directed that on such evidence being supplied, "the file shall be referred to DTJ Bird who shall deal with case management from this point onwards… The next hearing shall take place … with a time estimate of 1.5 hours before DTJ Bird". It seems evident from those directions that DTJ Bird heard a mixture of evidence and submissions on procedural matters.

15. Meanwhile on 13 January 2020 the mother sent the Tribunal office an email, addressed to DTJ Bird, asking that the material attached should be for the Judge's eyes only and kept in confidence. The COVID-19 pandemic then struck and DTJ Bird moved to another judicial post. In this hiatus no further action was taken on the case until 19 August 2020, when the matter came back before DTJ Rolt. He instructed the clerk to write to the mother in the following terms:

> Thank you for your email of 13.01.2020 and I am sorry for the delay in contacting you. This is due in part to the Covid 19 crisis. The documents have been referred to a Tribunal Judge who has asked that I write to you in the following terms. All documents are disclosed to all parties and no document will be seen by the Tribunal Judge dealing with this appeal that is not also seen by the parties. It is unclear what parts of the documents you wish to have redacted and why. Please send back further copies of the documents supplied with any redactions that you consider should be made and the reasons for them and this will be referred for further consideration. It would help if you would do this within the next 21 days.

16. I interpose here that it is, of course, quite in order for a party to ask for redactions to documents to maintain their confidentiality for the purposes of rule 19 of the First-tier Tribunal's procedural rules. A party may also make a request for a direction under rule 14 for certain information not to be disclosed. However, absent such special cases, which must be subject to careful judicial scrutiny and oversight, it is simply not appropriate for one party to seek to ensure that the Judge sees documents which are withheld from the other party.

17. DTJ Rolt's instructions to the Tribunal clerk were promptly communicated to the mother by way of an e-mail from the clerk to the mother on 21 August 2020. It might have been better if they had been issued as a direction to all parties, but nothing turns on that now.

18. What actually happened thereafter is shrouded in some obscurity. The GAPS clerical notes on the Tribunal's case management system refer to the action taken on 21 August 2020. The next GAPS entry is dated 30 September 2020 and states that "There does not appear to have been any response to the previous notepad entry. Referring back on interloc". The following GAPS entry refers to the disposal of the appeal on 9 October 2020. What is clear is that the appeal file before the Judge on that date included further documentary evidence about D's education at pp.136-159, which appears to have been supplied by the mother. The Schedule of Evidence records these papers as having been received on 18 March 2020. These documents have been extensively redacted. I observe that the original unredacted evidence is held on the First-tier Tribunal's administrative file. However, there is no judicial ruling on file, e.g.

under either rule 14 or rule 19, to explain why the redactions have been made. So there is nothing to suggest that the process that DTJ Rolt envisaged ever took place. Be all that as it may, the Appellant's representative states that the Appellant was not provided with a copy of pp.136-159, whether redacted or unredacted. This worrying assertion is confirmed by the GAPS record, which does not list any evidence (edited or otherwise) as having been issued to the parties during the whole of 2020. This may be something that fell through the gaps in the extraordinary circumstances of the pandemic with all the associated problems experienced by HMCTS staff.

19. In any event, on 9 October 2020 DTJ O'Hara dealt with and dismissed the appeal on the papers. Her decision notice concluded as follows:

> Having considered the evidence in the case, the fact that all parties have had the opportunity to attend a hearing and the Directions issued on 12.12.19 and taking account of the factors in the overriding objective, including the delay from the date of decision, the need for finality in appeals, proportionality and the issues in the case, I have decided to conclude the appeal without a further hearing.

The Upper Tribunal's analysis

20. The Appellant's first ground of appeal is made out.

21. The starting point must be rule 27 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685). Insofar as is relevant, this provides as follows:

> **Decision with or without a hearing**
>
> **27.**—(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
>
> (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
>
> (b) the Tribunal considers that it is able to decide the matter without a hearing.
>
> (2) This rule does not apply to decisions under Part 4.
>
> (3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).

22. The decision that the First-tier Tribunal took on 9 October 2020 was plainly one that disposed of the proceedings. Equally clearly it was not one that fell within the exceptional cases covered by rule 27(2) and (3). The Judge obviously felt that she was able to "decide the matter without a hearing" (as required by rule 27(1)(b)) and gave detailed reasons for doing so – on both the decision notice (see paragraph 19 above) and in the full statement of reasons (at paragraph [24]). But was it a case where "each party has consented to, or has not objected to, the matter being decided without a hearing" within rule 27(1)(a)?

23. There is only possible answer to that question. No.

24. Thus, rule 27 requires that the First-tier Tribunal "must" (not "may") hold a "hearing" before making a decision which disposes of the proceedings unless certain conditions (which are not relevant here) are met. A "hearing" is defined

as “an oral hearing” (including a remote hearing: see rule 1(3)). Rule 27 can hardly mean that the First-tier Tribunal is entitled to go ahead and decide the appeal ‘on the papers’ simply because at an earlier stage in the proceedings there has been an oral case management hearing. In Social Security Commissioner’s unreported and indeed unpublished decision *CE/1218/2013*, a tribunal adjourned for further evidence and directed the matter be determined on the papers when re-listed. Mr Commissioner Bano held as follows:

> As Judge Mark pointed out in *CIB/2940/2012,* a claimant’s right to an oral hearing extends to the whole hearing, including any further or adjourned hearing. The tribunal would therefore have needed the consent of the claimant if they had decided to conclude the appeal in his absence, and would then have needed to give the claimant an opportunity of commenting on the additional evidence and obtaining any new evidence of his own which he wished to adduce. However, in this case the tribunal also directed that the adjourned hearing could take place before a different tribunal, as in fact it did. By doing so, the first tribunal made it impossible for any regard to be had to the evidence given at the hearing before them. The decision of the second tribunal to allow the appeal to proceed on the basis directed by the earlier tribunal therefore breached the claimant’s right to an oral hearing at each stage of the appeal, and since it did not allow the claimant’s oral evidence to be taken into account, it also breached his right to a fair hearing.

25. Judge Mark’s decision in *CIB/2940/2012* was in fact published as *RW v Secretary of State for Work and Pensions (IB)* [2013] UKUT 238 (AAC). This was another case in which the first tribunal adjourned for further evidence and the second tribunal subsequently decided the case on the papers. Judge Mark held as follows:

> 8. The basic principle is that a party is entitled to an oral hearing of their case at First-tier level. In this case, the claimant had asked for an oral hearing, which is why one was held ... That right to an oral hearing extends to the whole of the hearing, including any further or adjourned hearing if the matter is not concluded on the first occasion. It was not open to the tribunal to decide, without the clear consent of the claimant, that it could hold a further hearing on papers to consider the medical evidence. He had as much right to attend that hearing, make representations as to the contents of the medical reports and give evidence as to any matter contained in them, in the same way as he would have had the right to do so had they been available at the initial hearing. The right to an oral hearing is not satisfied by allowing the claimant to attend only part of the hearing.

26. There are other difficulties with the approach taken by the First-tier Tribunal in this case on 9 October 2020. DTJ Bird had expressly directed a further hearing. The parties were presumably all anticipating one. Therefore, as a matter of natural justice, the First-tier Tribunal should have first invited representations on how to proceed before taking the course it did. I recognise that DTJ Bird had reserved the case to himself but subsequently moved to another judicial post. To that extent at least there might be no reason in principle why a second judge should not have decided the case. However, as Ms Cardona correctly observes,

the First-tier Tribunal on 9 October 2020 had no record of any evidence given by the parties at the hearing in 2019. Furthermore, the father was effectively denied the opportunity to comment on the education evidence at pp.136-159 in two ways – by the failure to issue the evidence in the first place compounded by the decision to proceed on the papers.

27. What does the mother say by way of response? The Second Respondent's central submission is that the First-tier Tribunal's decision should be upheld and the father's appeal dismissed. She contends that the evidence was fully considered by DTJ O'Hara who delivered a thorough and reasoned decision dismissing the father's original appeal. The mother denies that DTJ O'Hara made any procedural error; rather, it is said, she exercised her judgement appropriately and judiciously. The mother further argues that any re-hearing would be wholly disproportionate as there would be, in effect, only one outcome to the father's underlying appeal. She also makes a series of serious allegations about the father's conduct of other litigation between the parties, but these matters do not directly affect the current proceedings (it is perhaps only right to record that the father makes serious allegations in return, but again they are not directly in issue on the present appeal).

28. The Second Respondent's arguments are unpersuasive. There may well be some merit in the mother's observations about the structural problems in successive child support systems. However, so far as this appeal is concerned, she has no effective argument to counter the point that the First-tier Tribunal acted in breach of the mandatory rule 27(1)(a) and in breach of the rules of natural justice. In those circumstances it would be quite wrong for me to find there was an error of law but then exercise my discretion so as to leave the First-tier Tribunal's decision in place (one option contemplated by the Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)).

The outcome of this Upper Tribunal appeal

29. I therefore conclude that the First-tier Tribunal's decision involves a material error of law.

30. For that reason I allow the father's appeal and set aside the First-tier Tribunal's decision. I do not need to address the second ground of appeal and I do not consider it appropriate for me to re-make the decision under appeal, which will require further fact-finding of the sort best conducted by the First-tier Tribunal. Both parents will undoubtedly have further submissions they wish to make on the substantive issues in the appeal. I therefore remit the case to the First-tier Tribunal for re-hearing.

The redaction issue

31. The default setting in any litigation is that all the evidence and submissions in an appeal should be seen equally by the judge and every party to a case. As Upper Tribunal Judge Jacobs put it in *AB v CMEC (CSM)* [2010] UKUT 385 (AAC):

> 23. A parent has a right under the First-tier Tribunal's rules of procedure to keep certain information confidential. That right is limited to the addresses of that parent and the qualifying child: rule 19. The tribunal also has the power to prohibit disclosure of information to one of the parties. That

> power is limited to information that would be likely to cause serious harm: rule 14(2). Apart from those limited provisions, the proceedings operate on the basis that the whole of the evidence is available to the tribunal, the parties and their representatives.

32. Thus, rule 19 applies only where a parent "would like their address or the address of the child to be kept confidential" (rule 19(2)). Where a parent has notified as much, the Secretary of State and the Tribunal "must take appropriate steps to secure the confidentiality of the address and of any information which could reasonably be expected to enable a person to identify the address, to the extent that the address or that information is not already known to each other party" (rule 19(4)). The term "address" is unhelpfully left undefined, so it may be a moot point as to whether it is confined to residential addresses or extends to e-mail addresses. Custom and practice in HMCTS appears to adopt the broader meaning, but the fact remains that rule 19 has its limits. Addresses and information which would enable an address to be identified can be redacted but no more.

33. Redactions under rule 14(2), on the other hand, are limited to information that would be likely to cause "serious harm". As the learned commentary in Volume III of *Social Security Legislation 2022/23* (eds Rowland and Ward, p.1245) explains:

> It is suggested that "serious harm" merely means harm that would be sufficiently serious to justify what would otherwise be a breach of the right to a fair hearing guaranteed by art.6 of the European Convention on Human Rights. In effect, the application of this rule requires a person's art.8 rights to be balanced against his or her art.6 rights.

34. Rule 14(2) provides in full as follows:

> (2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
>
> (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
>
> (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

35. As Ms Cardona helpfully observes, the equivalent provision to rule 14(2) in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) was considered in *R (Immigration Law Practitioners Association) v Tribunal Procedure Committee* [2016] EWHC 218 (Admin); [2016] 1 WLR 3519. Blake J held as follows:

> 15. The rule can only apply where the two requirements are met. The first requirement is where a person is likely to be caused serious harm by disclosure. 'Serious harm' is not defined in the Rules but I agree … that it must be limited to significant physical and mental suffering; harm to commercial or privacy interests, distress or anxiety is not enough. This would need to be established by credible information rather than mere assertion. 'Likely' involves establishing something higher than a mere risk or possibility of harm although is less than the application of the ordinary civil standard (see *Cream Holdings v Bannerjee* [2004] UKHL 4; [2005] 1

> AC 253 per Lord Nicholls at [12] to [23] and particularly at [21] citing *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 585). It will be an unusual case where the evidence meets this standard, and if it does, the judge must still consider the second requirement whether the making of the direction is consistent with the interests of justice and proportionate.

36. Those observations confirm the bar for making redactions under rule 14(2) is a relatively high one. The redactions made to the papers in the current appeal go way beyond what is permissible under rule 19, and so presumably were based on rule 14(2). I reiterate, however, that there is no indication on file that any judge has applied their mind to whether the redactions are appropriate within the terms of that provision.

37. I should record that in his reply to the First and Second Respondents' written responses the Appellant's representative applies for all redacted documents in these Upper Tribunal proceedings to be released to all parties in their unredacted form. I refuse that application for three reasons. The first is that the redactions appear to relate to the merits of the underlying appeal on the point of substance (whether D continued to be a qualifying child at the relevant time) and do not directly affect the legal issues arising on this further appeal. The second is that such disclosure would be disproportionate as it would necessarily involve yet further delay in a case that has already experienced lengthy delays. The third is that the decision on whether any redactions (and if so which) are appropriate is a decision best taken by the First-tier Tribunal charged with fact-finding on the re-hearing of the original appeal. The file should therefore be put before a District Tribunal Judge for appropriate directions as regards the application (if any) of rule 14(2).

Conclusion

38. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by the First-tier Tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 10 October 2022