IN THE UPPER TRIBUNAL **Appeal No. UA-2020-000421-CCS**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

P.P.

Appellant

- v -

Secretary of State for Work and Pensions

1st Respondent

and

S.P.

2nd Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 26 July 2022
Decision date: 1 November 2022

Representation:

Appellant: Mr Jody Atkinson of Counsel, instructed by Stowe Family Law
1st Respondent: Miss Harriet Wakeman of Counsel, instructed by the Government Legal Department
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 23 September 2019 under number SC904/16/00100 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 for reconsideration at an oral hearing.**

2. **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

The headline result

1. The father's appeal succeeds in part. There will need to be a fresh hearing of the mother's original appeal before the First-tier Tribunal. I cannot say what the final child maintenance liability will be in pounds and pence. That all depends on the findings made by the new First-tier Tribunal.

Introduction

2. 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. The parents are subject to the 2012 child support scheme. As their roles were reversed before the First-tier Tribunal, it is convenient to refer to them in this decision as "the father" and "the mother" respectively. This both avoids confusion and protects their privacy.

3. I have considered all the parties' oral and written submissions (i.e. their arguments) on the appeal. My conclusion is that the father's appeal to the Upper Tribunal succeeds at least in part. This is because the decision of the First-tier Tribunal involves two legal errors relating to Grounds B and C. For that reason, I set aside the Tribunal's decision. There will need to be a re-hearing of the appeal before the First-tier Tribunal as there are factual matters that need to be determined.

4. 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 errors that have been identified mean there will need to be a re-hearing in front of a differently constituted First-tier Tribunal, which will start afresh.

5. This is doubly unfortunate as the appeal relates to a decision originally taken back in 2016. I understand there is a series of challenges by the father to further consequential decisions relating to later years that still have to be resolved. However, this is the way that the child support maintenance adjudication machinery operates, for better or worse.

6. As a result, there may well need to be further and more detailed Directions before the re-hearing of this appeal is held. These are a matter best left to the discretion of the First-tier Tribunal's District Tribunal Judge.

The Upper Tribunal oral hearing of the appeal

7. I held an oral hearing of the father's appeal on 26 July 2022 in the Rolls Building in London. The father was represented by Mr Jody Atkinson of Counsel, instructed by Stowe Family Law. The Secretary of State was represented by Miss Harriet Wakeman of Counsel, instructed by the Government Legal Department. I am grateful to them both for their helpful oral submissions and written skeleton arguments, which went a long way to identifying, isolating and analysing the central legal points in issue on the appeal. The mother also attended the hearing, although she was not formally represented.

8. I am sorry that I have not been able to produce this decision within the timeframe that I had indicated at the end of the oral hearing. For various

reasons the process of determining and writing up this decision has taken longer than was anticipated. I apologise for the further delay and inconvenience that has been caused.

The background to the original appeal in outline

9. The father has a number of business interests. His main business is as sole director of a haulage company employing about ten HGV drivers. The parents have four children, being in date order two daughters (S and B) and two sons (J and A). The oldest, S, is now 26; the youngest, A, is now 16. As a result, as is often the case, the children have mostly moved on with their lives while their parents are still mired in an ongoing and seemingly never-ending child maintenance dispute.

10. On 21 January 2016 the Secretary of State's decision-maker in the Child Maintenance Service (CMS) decided that the father was liable to pay £18.01 a week in child maintenance for his two sons, the two youngest children, with effect from 25 January 2016. This figure was based on his historic salaried income for the 2014/15 tax year as provided by HMRC (being £7,800). The mother then applied for a variation, based on regulation 69 (unearned income) of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) ("the 2012 Regulations").

11. On 21 April 2016 the CMS decision-maker decided that the father was liable to pay £107.70 p.w. for A and J with effect from the same date as before. The increased assessment was based on the father's gross PAYE income (£7,800) together with the figure for unearned income supplied by HMRC (a dividend of £30,000). The mother asked for the assessment to be reconsidered, stating that in her view the £30,000 did not include certain rental income in cash that she claimed was received by the father. The CMS did not change the assessment and the mother appealed to the First-tier Tribunal.

The First-tier Tribunal's decision

12. The First-tier Tribunal proceedings took a long time and took various twists and turns which I need not rehearse here. Eventually the matter came before the First-tier Tribunal for a final hearing on 23 September 2019. In the event none of the three parties to the appeal attended the hearing.

13. The First-tier Tribunal issued a relatively detailed Decision Notice (pp.285-289). It stated that it was allowing the mother's appeal and so not confirming the decision of 21 January 2016 as revised and varied on 21 April 2016. Its Decision Notice essentially comprised three parts – (i) the 'headlines' of the Tribunal's decision, (ii) some 'Brief notes and comments' (in effect summary but quite extensive reasons, paras 1-22) and (iii) some 'Further comments about subsequent decisions' (paras 22-26). In outline, the First-tier Tribunal's decision was as follows.

14. First, it ruled that the father's unearned income for the relevant tax year under regulation 69 was £34,191 (the undisputed dividend of £30,000 plus rental income of £4,191, a figure taken from the father's HMRC self-assessment tax return (SATR)).

15. Second, the Tribunal decided that it was just and equitable to make a regulation 71 variation on the basis of diversion of income. The Tribunal concluded that

the father had diverted the sum of £134,073 in the 2014/15 tax year, holding that he could reasonably have paid himself a dividend of £164,073 rather than just the undisputed figure of £30,000.

16. The First-tier Tribunal's Decision Notice was issued to the parties on 21 October 2019. Each party then had one month in which to ask the Tribunal for a full Statement of Reasons for its decision. No party made any such in-time application.

17. The CMS then took the necessary steps to implement the First-tier Tribunal's decision. This resulted in the CMS writing to the father in January 2020 demanding immediate payment of £55,208.69 in arrears. This prompted the father to e-mail the First-tier Tribunal office on 29 January 2020, requesting that the Tribunal's decision be set aside. On 9 March 2020 the District Tribunal Judge refused to extend time for a Statement of Reasons to be prepared (p.304). On 22 April 2020 the District Tribunal Judge also refused permission to appeal (p.316, a ruling issued on 27 April 2020), noting that the father "has now, many months after the decision, decided to provide further information to the Tribunal about the operation of his business. The Tribunal could not take this into account in making its decision."

The proceedings in the Upper Tribunal

18. On 26 May 2020 the father's solicitors renewed his application for permission to appeal direct before the Upper Tribunal (pp.317ff). The grounds of appeal were five-fold: Ground A (procedural unfairness), Ground B (diversion of income variation), Ground C (unearned income variation), Ground D (other relevant child) and Ground E (shared care).

19. On 24 June 2021, following an oral permission hearing, Upper Tribunal Judge Poynter decided it was in the interests of justice to admit the application (notwithstanding the absence of a Statement of Reasons) and granted permission to appeal on all grounds (p.351)

20. As noted above, and following the circulation of further written submissions and skeleton arguments, I held an oral hearing of the appeal on 26 July 2022. To cut a long story short, the Secretary of State's final position was that she supported the father's appeal to the Upper Tribunal on Grounds B and C but opposed his appeal on Grounds A, D and E. In a nutshell, and for the reasons that follow, I broadly agree with the Secretary of State's approach to the appeal before the Upper Tribunal.

Ground A: procedural unfairness

Introduction

21. Ground A is that it was procedurally unfair of the First-tier Tribunal, and not in accordance with the overriding objective, for the First-tier Tribunal to proceed with the hearing on 23 September 2019 in the father's absence when he had a good reason for not attending, which had been communicated to the tribunal's administrative team. This ground of appeal is not supported by the Secretary of State. For the reasons that follow, I reject this ground of appeal. I start by considering what the First-tier Tribunal file actually reveals.

What the First-tier Tribunal appeal file shows (at least up to the date of the hearing)

22. The Secretary of State's response to the mother's appeal to the First-tier Tribunal accounts for the first 153 pages of the appeal file. On 27 September 2016 a District Tribunal Judge issued detailed directions requiring the father to produce specified documents (p.154). The father's in-time response is at pp.156-221. On 14 June 2017 the District Tribunal Judge held a hearing (pp.222-230), which was adjourned with directions for the production of further evidence from the father (p.231). The father duly provided copies of further documents (pp.232-273). The District Tribunal Judge directed a hearing of the appeal (p.274) but subsequently retired before this could be arranged.

23. The appeal file then appears to have been lost in an HMCTS administrative black hole before it was placed before a different judge on 7 December 2018. He promptly set out detailed observations and made extensive directions for the father to disclose further specified documents (Direction 1(a) through to 1(m)) by 4 January 2019, with a proposed final hearing date of 14 January 2019 (pp.275-279). It is right to say that, although the judge signed off the directions on 8 December 2018, the proforma box requiring the clerk to note the date that the directions were actually issued to each party was left blank. However, on 4 January 2019 the judge postponed the hearing scheduled for 14 January 2019 as "both parents ask for an adjournment" and also extended the time for the father to comply with the directions until 31 January 2019 (p.280). The Secretary of State then filed a supplementary response dealing with the issue of unearned income, which relates to Ground C below; this was in response to Direction 2 of the directions dated 8 December 2018 (pp.281-283). Although he had complied at least in large part with the two earlier sets of directions for disclosure of evidence, the father did not, it seems, provide the further evidence required in accordance with the directions of 8 December 2018 and 4 January 2019.

24. The appeal file then shows that the First-tier Tribunal (the new judge sitting with an accountant member) held a hearing on 23 September 2019. The record of proceedings indicates that there was no attendance by any party (p.284).

<u>What the law says</u>

25. Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) states:

> **Hearings in a party's absence**
>
> **31.** If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing.

26. It should be noted that compliance with rule 31 does not prevent a decision being set aside on appeal on the ground that there has been a breach of the rules of natural justice if it turns out that the First-tier Tribunal drew the wrong conclusions from the evidence available to it. In *GJ v SSWP (CSM)* [2012] UKUT 447 (AAC) it was observed on the absent party's appeal: "The issue is

whether Mr J had a fair hearing. It is not whether the tribunal reasonably believed that he did" (*per* Upper Tribunal Judge Jacobs at paragraph 13).

What the First-tier Tribunal found

27. The First-tier Tribunal recorded on its Decision Notice, as well as in the record of proceedings, that none of the parties had attended the hearing. It made two comments about the father's non-attendance.

28. The first was in the opening paragraph of its 'Brief Notes and Comments':

> Mr P has failed to comply with the tribunal's directions of pp.276 & 277. As a result the tribunal did not have all relevant information. Unsurprisingly, though, a parent cannot thwart the appeal process by not cooperating. Where there is a real doubt about the question because a parent has failed to supply information that they could have supplied, the tribunal will normally determine the issue against the parent. Mr P was warned about the consequences of his non-compliance – see comments at the top of p.276.

29. The reference to the comments at the top of p.276 (presumably a typo for p.277) is to the statement in the directions of 8 December 2018 to the effect that "If a party fails to supply documentary evidence that they have been directed to supply and the tribunal is, in consequence, uncertain about the facts of the matter, it may determine the matter in issue against the party that has failed to comply."

30. The First-tier Tribunal's second comment was in relation to the discussion of the diversion of income variation:

> 18. The tribunal had to consider whether, in all circumstances of the case, spending essentially the very substantial amount of cash generated by the business in the year 31 March 2015 on new plant was reasonable. Again, Mr P had not complied with the tribunal's directions that had sought information about the acquisitions and that had explicitly invited Mr P to comment on the necessity or reasonableness of those acquisitions. Mr P had also passed up the opportunity to attend the hearing.

The parties' submissions on Ground A

31. The father's grounds of appeal to the Upper Tribunal argue that the First-tier Tribunal failed to set out the proper legal test for proceeding in the absence of a party. Moreover, the First-tier Tribunal seem to have been unaware of the reason why the father was not present, namely that he was at a funeral and had notified the tribunal in advance about this. It was therefore wrong to conclude that the father had deliberately not attended with the aim to "thwart the appeal process by not cooperating". There was, the grounds add, no history of ineffective hearings due to the father failing to attend. Furthermore, it was asserted, the father had not complied with the most recent set of directions because he had never received those directions. Mr Atkinson's other submissions on this ground of appeal, which relate more directly to the First-tier Tribunal's approach to the issue of diversion of income, are best considered in the context of Ground B below.

32. The Secretary of State, as already noted, does not support this ground of appeal. Miss Wakeman observes that as a matter of principle it is "difficult, but not impossible" for an appeal to succeed where an appellant has failed to obtain a Statement of Reasons from the First-tier Tribunal (see *TF v Secretary of State for Work and Pensions (ESA)* [2018] UKUT 265 (AAC)). She submits that the father cannot properly challenge the adequacy of the reasoning set out in the Decision Notice as that document was never intended to set out the First-tier Tribunal's full reasoning. So, for example, the absence of any reference in the Decision Notice to rule 31 is not in and of itself evidence of any error of law. Furthermore, while the father may argue the decision to proceed in his absence was procedurally unfair, it was not possible to determine if there had indeed been any procedural unfairness without sight of the First-tier Tribunal's complete Statement of Reasons. In sum, the father had effectively lost his remedy through his own inaction.

The Upper Tribunal's analysis of Ground A

33. The legal position governing challenges to the adequacy of reasons where there is a tribunal Decision Notice but no full Statement of Reasons was considered by Mr Commissioner Rowland in the unreported Social Security Commissioner's decision *CIB/4497/1998* (with emphasis added):

> 12. It must be in the nature of summary reasons that they are incomplete; otherwise I have some difficulty in conceiving what difference there could be between the standard of adequacy required for summary reasons and the standard of adequacy required for full reasons. The legislation provides a remedy for a party dissatisfied with the incomplete reasons given on a decision notice and it is equally efficacious if no summary reason is provided at all. That remedy is the request of a full statement of the tribunal's findings and reasons. If such a request is made, the issue on an appeal to a Commissioner is whether that full statement is adequate and it cannot matter that the summary reasons were deficient. If no request is made, the party has lost his or her remedy through his or her own inaction and it cannot be expected that there should then be an inquiry as to the adequacy of reasons that were never intended to be complete. If a decision were liable to be set aside because the summary reasons were inadequate (as opposed to being bad - see CIS/3299/97 and CIB/4189/97 (to be reported as R(IS) 11/99) at para. 8), it would have the effect that those who failed to request full statements would be placed in a better position than those who did make such requests, unless appeals on that ground were allowed even when the defect had been cured by the provision of an adequate full statement. Either result would be absurd. Furthermore, one consequence of too much scrutiny of summary reasons would inevitably be that the summaries themselves would become far more detailed and take longer to write. That might lead the President to cease to require even summary reasons to be given on decision notices and it seems to me that that would be a retrograde step. Whether or not the giving of summary reasons in every case in fact reduces the number of full statements that are requested, it improves the quality of justice.

34. Those principles were both confirmed and elaborated upon in the reported decision *R(IS) 11/99*, by the same Social Security Commissioner:

7. It is the commendable practice of chairmen to give a short statement of reasons for a decision under the heading "summary of grounds" when issuing any decision notice but such a summary is not to be confused with a full statement of the tribunal's decision. In *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478, Megaw J said:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

That applies whenever a document purporting to be a full statement of the tribunal's findings and reasoning is issued under regulation 23(3A), whether or not it is issued pursuant to the duty imposed by regulation 23(3C), but I do not consider that a "summary of grounds" can be challenged on the ground of inadequacy because, in my view, such a summary cannot be regarded as purporting to be a full statement. In CI/33/1998, it was submitted on behalf of the claimant that the refusal to issue full reasons because the request was made after 21 days suggested that the chairmen believed that the "summary of reasons" amounted to "proper, adequate reasons". I do not accept that submission. A chairman has a broad discretionary power to refuse to supply full reasons if the request is late.

8. On the other hand, a "summary of grounds" is not to be disregarded. The matters contained in it are reasons for the tribunal's decision, notwithstanding the fact that they are not intended to be a complete account of the reasoning. Therefore, if the "summary of grounds" in fact contains everything that the parties could properly have expected from a full statement of the tribunal's decision, as is often the case, a failure of a chairman to issue a document formally identified as a full statement when there is a duty to provide a full statement, will not, in my view, render the decision of the tribunal erroneous in point of law. Equally, even a very brief "summary of grounds" may give a sufficient indication of the tribunal's reasoning to enable an appeal to be brought under heads (a), (c), (d) or (e) of the possible grounds of appeal on a point of law I have identified in paragraph 4 above. Although such summary reasons cannot be criticised for inadequacy and a Commissioner is not entitled to infer that a matter has not been considered from the mere fact that it is not mentioned in those summary reasons, there is no reason at all why a plainly bad reason given in the summary should not be relied upon by an appellant as a ground upon which the tribunal's decision may be set aside on appeal.

9. It is therefore clear that, in practice, a person may be able to show an error of law without there being any full statement of the tribunal's decision, either because the point of law is justiciable without there being any evidence of the tribunal's reasoning or because sufficient evidence of their reasoning can be gleaned from the "summary of grounds". It cannot be said that the 1996 amendments in any way reduced the Commissioners' jurisdiction to hear appeals, although they may have reduced the number of justiciable appeals because some would-be

appellants have failed to ask for full statements of tribunals' decisions soon enough and are therefore restricted as to the points they can take.

35. Those principles apply with equal force since the inception of the Upper Tribunal by virtue of the Tribunals, Courts and Enforcement Act 2007. It follows, as Miss Wakeman rightly acknowledged, that it is difficult, but not impossible, for an appeal to succeed in the absence of a Statement of Reasons. This may be, for example, "because the point of law is justiciable without there being any evidence of the tribunal's reasoning or because sufficient evidence of their reasoning can be gleaned from the "summary of grounds"" (*R(IS) 11/99* at paragraph 9).

36. Tribunals up and down the country have to apply rule 31 on a daily basis. In doing so, they have to ask themselves whether (a) the parties had been notified of the hearing (or reasonable steps had been taken to that end); and (b) it was in the interests of justice to proceed with the hearing. In the absence of a Statement of Reasons we cannot be sure what information was before the First-tier Tribunal and what considerations it took into account. I bear in mind also that tribunals have a broad discretion to exercise in making such case management decisions. Accordingly, Ground A cannot succeed.

37. That being so, I do not strictly need to resolve some of the underlying factual matters relating to the father's non-attendance at the First-tier Tribunal hearing on 23 September 2019. I simply make the following observations about two of the arguments advanced on his behalf. These relate to the funeral attended by the father and to his non-compliance with the last set of tribunal directions for the disclosure of financial documents.

38. First of all, the father's attendance at a funeral on the day of the First-tier Tribunal hearing on 23 September 2019 was first raised as an issue in the grounds of appeal submitted to the Upper Tribunal (p.329). These grounds asserted that the father "had contacted the Tribunal several days before the hearing to tell them that he had to attend at a funeral and that he wanted the matter postponed". Judge Poynter, in observations accompanying his direction for an Upper Tribunal oral hearing, expressed some scepticism in this regard. He pointed out that there had been no mention of any request having been made for a postponement in the correspondence between the father (and his accountants) and the First-tier Tribunal in the six months from the promulgation of the First-tier Tribunal's decision to the refusal of permission to appeal. Judge Poynter also noted that there was no record in the Tribunal's GAPS records of any request for a postponement.

39. On this point, if a request for a postponement had been ignored, one would certainly have expected the party concerned to have raised the matter soon after having received the First-tier Tribunal's decision. As it was, the argument surfaced for the first time over six months later. Mr Atkinson makes the further point that the GAPS records are not necessarily always complete (an observation which I readily accept as accurate). Indeed, he points to the mother's evidence that "On Friday 20.9.2019 a representative from court contacted me via the telephone with regards to the hearing on Monday 23.9.2019, I informed the court's representative I was unable to attend due to a work commitment but was happy for the hearing to go ahead" (p.366). Mr Atkinson correctly notes that there is no record of this conversation on the

GAPS system either, so, he says, the absence of any mention of the father's communication on GAPS is not determinative. Mr Atkinson also produced for the Upper Tribunal oral hearing an e-mail from a fellow mourner confirming the father's attendance at the funeral on the hearing date. However, this does not in and of itself advance the case that a request for a postponement was made but ignored by HMCTS administration. On the balance of probabilities, and bearing in mind all the circumstances outlined above, I find that the father attended a funeral but no request for a postponement of the hearing was made.

40. Second, Mr Atkinson contended that the reason why the father had not complied with the First-tier Tribunal's directions was that he had not received them. In particular, Mr Atkinson emphasised that the box at the end of the form requiring the clerk to insert the date of issue to the parties (rather than the date of the judge's signature) had been left blank. The natural inference, he argued, was that the directions had not actually been issued to the parties. There are at least three difficulties with this argument. First, the father obviously knew about the contemporaneous direction for a hearing on 14 January 2019, as he joined the mother in subsequently asking for a postponement (p.280; and the father's assertion would also require that subsequent directions notice, which gave him an extension of time to comply with the directions, also not to have been issued). Second, the GAPS records show that on 17 December 2018 a clerk processed the directions notice, her note recording "I've issued it to all parties to avoid delay – also emailed [the judge] as he requested to be informed when issued" (p.399C, clerical action no.49). Third, the CMS evidently received the directions, as they filed a supplementary submission in response to the regulation 69 point raised by the judge in those directions (and it is most unlikely that the clerk issued the directions to the CMS but then not to the father).

41. Thus, leaving aside the difficulty posed by the absence of a Statement of Reasons, the argument that there was a procedural unfairness in going ahead in the father's absence is not supported by the facts. Ground A fails in any event.

Ground B: diversion of income variation

Introduction

42. Ground B is that the First-tier Tribunal erred in its approach to the application of a variation on the basis of the father's diversion of income. This ground of appeal is supported by the Secretary of State.

43. In its December 2018 pre-hearing directions, the Tribunal raised the issue of diversion in the following terms:

> First, there is the question of *diversion*. In short, the company's accounts indicate that the company made a post-tax profit of £145,000 in the year to 31 March 2015 but that [the father] had only paid himself a dividend of £30,000. The question, then, is whether income that [the father] might reasonably have taken from the company (and that which might, in part, have been used to support J and A) was unreasonably diverted (i.e. retained within the company). It may be that much of that profit was used to fund the purchase of new lorries/trailers etc. The tribunal will need to consider whether, given his responsibilities for J and A, it was reasonable for [the father] to invest in the business to the extent he did.

What the law says

44. Regulation 71 of the 2012 Regulations deals with diversion of income and provides as follows:

> **Diversion of income**
>
> **71.**—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where—
>
> (a) the non-resident parent ("P") has the ability to control, whether directly or indirectly, the amount of income that—
>
> (i) P receives, or
>
> (ii) is taken into account as P's gross weekly income; and
>
> (b) the Secretary of State is satisfied that P has unreasonably reduced the amount of P's income which would otherwise fall to be taken into account as gross weekly income or as unearned income under regulation 69 by diverting it to other persons or for purposes other than the provision of such income for P.
>
> (2) Where a variation is agreed to under this regulation, the additional income to be taken into account is the whole of the amount by which the Secretary of State is satisfied that P has reduced the amount that would otherwise be taken into account as P's income.

45. The application of a variation to a maintenance calculation is subject to the test laid down in section 28F(1) of the Child Support Act 1991:

> **Agreement to a variation**
>
> **28F.—** (1) The Secretary of State may agree to a variation if–
> (a) the Secretary of State is satisfied that the case is one which falls within one or more of the cases set out in Part I of Schedule 4B or in regulations made under that Part; and
> (b) it is the Secretary of State's opinion that, in all the circumstances of the case, it would be just and equitable to agree to a variation.

46. This appeal does not turn on any legal argument about the interpretation of regulation 71. Rather, it turns on the way that the First-tier Tribunal applied regulation 71 in the context of section 28F and in the particular circumstances of this case.

What the First-tier Tribunal found

47. The First-tier Tribunal, in its detailed Decision Notice (a Decision Notice that I must acknowledge was more detailed than many full Statements of Reasons), stated as follows:

> 10. A variation under reg.71 may be made where (i) a parent controls the amount of income they receive and (ii) they unreasonably reduced the amount of income that would otherwise be taken into account for child support purposes by diverting what would otherwise have been income to other people or for other purposes.

11. Clearly, Mr P controlled P Haulage Ltd and controlled the amount of income that he personally received from the company.

12. The company accounts for the year to 31 March 2015 (and indeed for the year 31 March 2016) show that Mr P's company was doing very well. The post-tax accounting profit for the year 31 March 2015 was £145,260 – see, for instance, p.98.

13. As of 31 March 2015, the total amount of undistributed profits stood at £173,388 [p.95]. Legally, Mr P could have paid that entire sum as a dividend to himself as well as the £30,000 dividend that was declared.

14. Care needs to be taken when considering a diversion in respect of profit accrued in earlier years. If there are a series of diversions, one year after another, there is risk of double counting: the fact that the profit is "diverted" and not distributed means that it remains available for distribution in subsequent years.

15. That said, in this case, there was no suggestion of any earlier diversion such that some part of the £173,388 should be excluded from consideration on that basis.

16. Although the post-tax profit was stated as £145,260 in the accounts, that figure was net of depreciation of £50,183 which is essentially an accounting entry (not money spent or a debt incurred or, for that matter, an allowable expense for tax purposes). Further, the overall accounting profit was inflated by profit made on the disposal of assets [£31,370]. The view of the tribunal was that the company's underlying trading profit, which, all things being equal might reasonably have been taken as dividend by Mr P was £164,072. That was the amount of cash ("profit") generated by the company's successful trading operations in the year to 31 March 2015.

17. But at the end of the year [31 March 2015], the company's cash reserves had not grown by £164,000. This was for simple reason that Mr P had acquired new plant valued at £200,771 (presumably cabs and trailers). (He had also disposed of old plant for £40,000.) As far as the tribunal could tell – Mr P did not attend the hearing to offer any explanations – the bulk of those acquisitions had been paid for in cash. The amount owed to trade creditors [p.98] (which included hire-purchase debts) had not increased to any great extent during the year 31 March 2015.

18. The tribunal had to consider whether, in all circumstances of the case, spending essentially the very substantial amount of cash generated by the business in the year 31 March 2015 on new plant was reasonable. Again, Mr P had not complied with the tribunal's directions that had sought information about the acquisitions and that had explicitly invited Mr P to comment on the necessity or reasonableness of those acquisitions. Mr P had also passed up the opportunity to attend the hearing.

19. The tribunal could not infer that the acquisitions had had any substantial impact on the profit generated by the company. Mr P had not shown that hi "investment" had substantially increased the size of his fleet; acquisitions may have been old-for-new, like-for-like. The tribunal did not know when the acquisitions had been made: for all the tribunal knew, all the plant might have been acquired in late March 2015.

20. In the context of the need to support his children and without more information, the diversion of profit to buy new plant was not reasonable: Mr P had diverted the amount of £134,073 in the year 2014/15. He could reasonably have paid a dividend of £164,073 rather than just £30,000.

21. Given that the child-support regime allows for a maximum amount of £3,000 per week of income to be taken into account, a diversion limited to £114,438 would have produced the same child-support liability of £364 per week.

22. It is conceivable that there was further diversion by way of "wages" or other payments to Mr P's wife or to other third parties. It was not necessary for the tribunal to consider this as Mr P's income had already reached the £3,000 maximum.

The parties' submissions on Ground B

48. Mr Atkinson submits that the First-tier Tribunal's conclusion on diversion of income was one that no reasonable tribunal could have come to, taking into account in particular the need to give proper consideration to the just and equitable requirement in section 28F of the Child Support Act 1991. It was not in dispute that the haulage firm's profits in the year ending 31 March 2015 were £145,260 (p.98) and that an even larger sum (just over £200,000) was spent during that year on new trucks for the business (p.218). However, this was not the usual level of any surplus, as for the following financial year profits were a much more modest £21,523 (p.128). The First-tier Tribunal's conclusion was that the father had unreasonably diverted income by failing to draw down an additional dividend of £134,073, in addition to the £30,000 dividend that had been declared (which was the same figure as in the year ending March 2014). In effect, the Tribunal had decided that it fell outside the band of reasonable decisions for the company to pay the father anything less than £164,073. In doing so, it had failed to give any weight to the possibility of there being good business reasons for purchasing the trucks and other plant.

49. Miss Wakeman, in short, submits that while the father failed to obtain a Statement of Reasons, the summary reasons given in the Decision Notice give a sufficient indication of the First-tier Tribunal's reasoning to enable an appeal to be brought. She agrees with Mr Atkinson that this is on the basis that the First-tier Tribunal's conclusion was one that no reasonable tribunal could have come to, taking into account the need to give proper consideration to the just and equitable requirement in section 28F of the Child Support Act 1991.

The Upper Tribunal's analysis of Ground B

50. I decided in relation to Ground A that the father's failure to obtain a Statement of Reasons from the First-tier Tribunal was fatal to that particular ground of appeal (see above). Does the same apply here? It will be recalled that as a matter of general principle, an appellant "may be able to show an error of law without there being any full statement of the tribunal's decision, either because the point of law is justiciable without there being any evidence of the tribunal's reasoning or because sufficient evidence of their reasoning can be gleaned from the "summary of grounds"" (R(IS) 11/99 at paragraph 9 and *Wolesley Centers Ltd V Simmons* [1994] ICR 503 at 507F).

51. In short, I agree with the submissions of both counsel that although the father failed to obtain a Statement of Reasons, the (extensive) reasons in the Decision Notice give a sufficient indication of the Tribunal's reasoning in respect of Ground B to enable an appeal to be successfully brought on the basis that the Tribunal's conclusion was one that no reasonable tribunal, properly directing itself, could have reached.

52. In that context I recognise that the First-tier Tribunal's detailed directions of 8 December 2018 required the father to provide e.g. a full breakdown for the year to 31 March 2015 of the haulage company's capital expenditure on vehicles and plant, of disposals of vehicles and plant, of depreciation in the company accounts and of any business plans going to the question of whether it was reasonable to use business profits for capital expenditure (Directions 1(g)-1(k)). The directions furthermore warned that if a party failed to produce evidence as directed, "and the tribunal is, in consequence, uncertain about the facts of the matter, it may determine the matter in issue against the party that has failed to comply" (p.277).

53. The First-tier Tribunal was also entitled to proceed on the basis of drawing adverse inferences from non-compliance with case management directions (see reported Commissioner's decision *R(CS) 6/05*; see also *SSWP v HS (JSA)* [2016] UKUT 272 (AAC); [2017] AACR 29). However, it must be fair to do so with sufficient warning in advance. The case law shows that a finding of fact may be made against a party where that party fails to produce evidence that he or she could *reasonably* be expected to produce. However, as Mr Commissioner (now Upper Tribunal Judge) Jacobs held in *R(CS) 6/05* (at paragraph 25):

> "As the key factor is the inference that the party's lack of co-operation is indicative of an inability to answer the opposing case, it is always relevant to consider whether there is another explanation for the lack of co-operation."

54. However, as Miss Wakeman acknowledges, while the father in the present appeal omitted to submit the further documentation as directed, the First-tier Tribunal was still required to consider the evidence before it in the round in order to reach a decision. It is axiomatic that the just and equitable test under section 28F vests decision-makers and tribunals with a broad discretion (*RC v Secretary of State for Work and Pensions and WC* [2009] UKUT 62 (AAC); [2011] AACR 38 at paragraph 36). In that decision the Upper Tribunal specifically rejected the "all or nothing" approach to the application of a variation, pointing out that it "changes a test of what is just and equitable into a crude instrument that is incapable of producing that effect and can cause the

opposite" (at paragraph 42). But what the First-tier Tribunal appears to have done – faced with the father's non-compliance and non-attendance – is to have set the variation at the maximum possible level that it speculated the father's haulage company could have paid out in dividends. In effect, the First-tier Tribunal concluded it was unreasonable for the father to have taken a dividend of anything less than £164,073 (notwithstanding the fact that the actual dividend paid out (£30,000) was the same as in the previous year). In doing so, the Tribunal omitted to take account the major implications that a dividend of that size (which was significantly higher than the company's profit for the year) would have had on the father's haulage company. The clear impression given is that the variation was set at an effectively penal level to reflect the father's non-compliance and non-attendance. In doing so, the First-tier Tribunal cannot have properly considered in the round whether it was just and equitable to make such a variation.

55. Mr Atkinson invites me to provide further guidance as to the proper approach in a diversion of income case where a tribunal is dealing not with a service company but with a trading business with undoubted capital requirements. I decline to do so, given the breadth of the just and equitable test.

56. But what then should the First-tier Tribunal have done in this case, faced with the father's failure to comply with the latest directions and both parties' non-attendance? One possibility would have been to adjourn, so as to give the father a final opportunity to provide the relevant documentation. Such a course of action might have been justified given that the father did not appear to be a serial non-complier, but rather on two previous occasions had supplied earlier evidence in response to tribunal directions as required. If an adjournment were considered to be an insufficiently robust form of case management, another option would have been for the First-tier Tribunal to issue a provisional decision. This would technically be an adjournment with a direction, namely that the provisional decision would take effect by a certain date unless further evidence was supplied (see e.g. *AB v CMEC (CSM)* [2010] UKUT 385 (AAC)).

57. Be all that as it may, Ground B succeeds for the reasons already given.

Ground C: unearned income variation

Introduction

58. Ground C is that there was a plain error of law on the face of the Decision Notice, in that the First-tier Tribunal was not entitled, irrespective of any factual findings it might make, to go behind the HMRC figure for the father's unearned income. This ground of appeal is supported by the Secretary of State.

What the law says

59. Regulation 69 of the 2012 Regulations deals with unearned income. As amended, it provides as follows:

> **Non-resident parent with unearned income**
>
> **69.**—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where the non-resident parent has unearned income equal to or exceeding £2,500 per annum.

(2) For the purposes of this regulation unearned income is income of a kind that is chargeable to tax under—

(a) Part 3 of ITTOIA (property income);

(b) Part 4 of ITTOIA (savings and investment income); or

(c) Part 5 of ITTOIA (miscellaneous income).

(3) Subject to paragraphs (5) and (6), the amount of the non-resident parent's unearned income is to be determined by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year and, where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil.

(4) For the purposes of paragraph (2), the information in relation to property income is to be taken after deduction of relief under section 118 of the Income Tax Act 2007 (carry forward against subsequent property business profits).

(5) Where—

(a) the latest available tax year is not the most recent tax year; or

(b) the information provided by HMRC in relation to the latest available tax year does not include any information from a self-assessment return; or

(c) the Secretary of State is unable, for whatever reason, to request or obtain the information from HMRC,

the Secretary of State may, if satisfied that there is sufficient evidence to do so, determine the amount of the non-resident parent's unearned income by reference to the most recent tax year; and any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return.

(6) Where the Secretary of State is satisfied that, by reason of the non-resident parent no longer having any property or assets from which unearned income was derived in a past tax year and having no current source from which unearned income may be derived, the non-resident parent will have no unearned income for the current tax year, the amount of the non-resident parent's unearned income for the purposes of this regulation is to be treated as nil.

(7) Where a variation is agreed to under this regulation, the non-resident parent is to be treated as having additional weekly income of the amount determined in accordance with paragraph (3) or (5) divided by 365 and multiplied by 7.

(8) Subject to paragraph (9), where the non-resident parent makes relievable pension contributions, which have not been otherwise taken into account for the purposes of the maintenance calculation, there is to be deducted from the additional weekly income calculated in accordance with paragraph (7) an amount determined by the Secretary of State as representing the weekly average of those contributions.

> (9) An amount must only be deducted in accordance with paragraph (8) where the relievable pension contributions referred to in that paragraph relate to the same tax year that has been used for the purposes of determining the additional weekly income.

What the evidence said

60. The screen-print of the HMRC data supplied to the CMS stated that the total amount of the father's unearned income was £30,000 (p.75). The father's SATR for 2014/15 confirmed a payment of a dividend of £30,000 (p.178). Additionally, the property pages of the SATR included details in respect of two properties. First, the income from a furnished caravan holiday let was £7,573 but with allowable expenses of £9,251, resulting in a loss for the year on that venture (after making provision for capital allowances of £27,063) of £28,741 (p.191). Second, another rental property had a taxable profit of £4,191 (£6,900 in rent minus £2,709 in loan interest) (p.192).

What the First-tier Tribunal found

61. The First-tier Tribunal decided that the father's unearned income for the purpose of regulation 69 was £34,191, and not just the dividend payment of £30,000. In its summary reasons it explained that the father had no taxable income from the caravan furnished holiday let. However, it noted he had a profit of £4,191 declared on his SATR from the other rental property. The Tribunal stated that this taxable income could not be set off against the loss from the caravan holiday let (citing section 127ZA of the Income Tax Act 2007). The Tribunal added that "it was not clear why the figure from HMRC had not included the property income of £4,191.00", so concluding that the father's total unearned income for 2014/15 was not £30,000 but rather £34,191.

The Upper Tribunal's analysis of Ground C

62. This ground of appeal turns on the proper interpretation of regulation 69(3). Paragraphs (5) and (6) of regulation 69 are not relevant to the facts of the present case. It follows that the material part of regulation 69(3) reads as follows:

> the amount of the non-resident parent's unearned income is to be determined by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year and, where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil.

63. In effect, the First-tier Tribunal read the key phrase "is to be determined by reference to information provided by HMRC" as meaning "is to be informed by reference to information provided by HMRC", rather than as being conclusively decided by such information. It is right to say the Tribunal's approach is supported by the learned commentary in E. Jacobs, *Child Support: The Legislation* (15th edition, 2021), p.591, which states (emphasis in the original):

> The amount of the unearned income is fixed *by reference* to information provided by HMRC under para (3) or by other sufficient evidence under para (5). The regulation does not provide that the Secretary of State or the tribunal must accept the calculation of the amount by HMRC, allowing the

Secretary of State or the tribunal to make a different assessment of the available evidence.

64. In disagreeing with that passage, Miss Wakeman, in her skeleton argument, described the wording of regulation 69(3) as "unambiguous". I beg to differ. It positively reeks of ambiguity. It could mean that the figure provided by HMRC is determinative. Or the phrase could mean, as the learned commentary suggests, that the HMRC figure is simply the starting point for the CMS or the Tribunal's enquiry. If the former and conclusive meaning was intended, it is certainly arguable that the statutory language could have been made much clearer. It could, for example, have simply said that "the amount of the non-resident parent's unearned income is the figure provided by HMRC" or (echoing regulation 36 on the meaning of "historic income") "the amount of the non-resident parent's unearned income is the amount identified by HMRC". However, the process of statutory interpretation is not just about the words used. Those words must be read in a purposive manner and in the context of the relevant provision as a whole.

65. As to context, the closing phrasing of regulation 69(3) is instructive. This provides that where the HMRC information "does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil." As both counsel pointed out, it would be both bizarre and illogical if the Secretary of State and the First-tier Tribunal could go behind a positive non-nil unearned income figure but not go behind a nil figure. Such an approach would mean that the taxpayer who fraudulently failed to declare any unearned income at all would actually be in a better position in the child support scheme than the negligent taxpayer who had carelessly under-stated the amount of their unearned income.

66. As to purpose, and as Mr Atkinson rightly reminded me, it is plain that one of the objectives of the 2012 child support reforms was, so far as possible, to streamline the process of information gathering by enabling the CMS to rely on HMRC data, provided by a direct IT link, without the need for further investigation. This represented a conscious shift in policy from the earlier 1993 and 2003 schemes, under which tribunals were empowered to make their own assessment of a non-resident parent's income and were not bound by the figures accepted by HMRC (see *Gray v Secretary of State for Work and Pensions and James* [2012] EWCA Civ 1412; [2013] AACR 5 and *DA v Secretary of State for Work and Pensions* [2014] UKUT 142; [2014] AACR 36).

67. If the First-tier Tribunal considers that the HMRC figure contains a mistake then, as the grounds of appeal suggest, the correct approach is to accept the figure in question but to set out the Tribunal's concerns and direct that the Tribunal's Decision Notice (and, where relevant Statement of Reasons) should be sent to HMRC. Should HMRC agree with the Tribunal and amend the figure in question, this would permit an 'any time' revision of the maintenance calculation under regulation 14(1)(f).

68. Finally, I should simply add that I am not at all sure that section 127ZA of the Income Tax Act 2007 has the effect in this case that the First-tier Tribunal found it did. However, I heard no argument from counsel on the point and indeed it does not arise for decision given the construction that I have found properly applies to regulation 69(3).

Conclusion on Ground C

69. I therefore agree with both Mr Atkinson and Miss Wakeman that the First-tier Tribunal erred in law and so Ground C is made out. If this were the only matter on which the Tribunal went wrong, I could simply re-make the decision to the effect that the father's unearned income for the 2014/15 tax year was £30,000 (and not £34,191). However, the matter is going to have to be remitted to a new tribunal in the light of Ground B succeeding. I therefore leave the matter to be determined by the new tribunal but that should not take it too long, barring the appearance of some compelling new evidence to the contrary.

Ground D: relevant other child

70. Ground D is that the First-tier Tribunal erred by not having regard to a "relevant other child" (a "ROC"). In this case, the two "qualifying children" under the instant maintenance calculation were the couple's two younger children, namely their sons, J and A. For present purposes a ROC is defined as a child, other than a qualifying child, in respect of whom the non-resident parent (or their partner) receives child benefit (paragraph 10C(2) of Schedule 1 to the Child Support Act 1991). The presence of a ROC means that a reduction has to be applied to the non-resident parent's gross weekly income. The percentage reduction to be applied is 11% in the case of one ROC (paragraph 2(3) of Schedule 1). Mr Atkinson submitted that the couple's daughter B was a ROC and so the First-tier Tribunal erred by not applying the percentage reduction. This ground of appeal is not supported by the Secretary of State.

71. In support of this ground of appeal, Mr Atkinson noted that the CMS decision under appeal was taken on 21 April 2016 and had an effective date of 25 January 2016. Furthermore, the broadly contemporaneous court order dated 31 December 2015 on file (at p.344) recorded that "the parties agree that B has moved to live with her father". There was also an earlier letter from the magistrates' court (dated 12 February 2014) recording that B "now resides" with her father and that the mother was now "making payments [for B to the father] via the CSA" (p.42). Mr Atkinson further submitted that the Secretary of State was plainly aware that B was living with her father as he had a separate case in which he was the parent with care (see also the computer notes at p.142) and so should have flagged up this information in her written response to the appeal before the First-tier Tribunal.

72. Miss Wakeman submitted that it was for the First-tier Tribunal to determine the appeal based on the evidence before it. There was no reference to there being any ROC in the CMS's original maintenance calculation under appeal and the father had not raised the issue in the course of the First-tier Tribunal proceedings. In addition, there was in any event documentary evidence from the mother that she was receiving payments of £125 a month from the father in respect of B during 2015 (see her note at p.42 and copy bank statements at pp.52-71).

73. I consider that the evidential basis for a finding that B was a ROC at the material time is simply too slim to support a conclusion that the First-tier Tribunal erred in law. In particular, there is no evidence at all as to whether the father was in receipt of child benefit for B at the relevant time. In saying that I recognise that in practice the 'child benefit book' may well not follow a teenage

child as she moves from one parent's home to the other's, regardless of what the technical niceties of the law may require.

74. It follows Ground D does not succeed. This is not to say that the matter cannot be revisited when the appeal is re-heard by a new First-tier Tribunal, but the father will need to produce some evidence that he was receiving child benefit for B at the time in question if he is to show that she was indeed a ROC for the purpose of the maintenance calculation under appeal.

Ground E: shared care

75. Ground E is that the First-tier Tribunal had no regard to the court order in force that provided for the father to have shared care of the couple's child A for more than 156 nights a year. It is said that the CMS were bound to have regard to the terms of this court order under regulation 46(4) of the 2012 Regulations and that a Band C three-sevenths shared care discount on the father's child support liability should necessarily have followed. This ground of appeal, as with Grounds A and D, is not supported by the Secretary of State.

76. There is a short answer to this point, as Miss Wakeman observes. The First-tier Tribunal can only decide the case on the evidence before it. It cannot fairly be criticised for not having regard to evidence which was not before it and about which it had no inkling. The court order in question (dated 31 December 2015) appears in the appeal bundle for the first time at p.344, having been submitted direct to the Upper Tribunal along with the application for permission to appeal in May 2020. It was not put in evidence before the First-tier Tribunal in September 2019. End of.

77. It follows Ground E does not succeed.

78. However, the court order will plainly be in evidence before the new Tribunal that hears the remitted appeal. It may therefore be helpful to say something about regulation 46(4), as Mr Atkinson invites me to do. Regulation 46 itself provides as follows:

> **Decrease for shared care**
>
> **46.**—(1) This regulation and regulation 47 apply where the Secretary of State determines the number of nights which count for the purposes of the decrease in the amount of child support maintenance under paragraphs 7 and 8 of Schedule 1 to the 1991 Act.
>
> (2) Subject to paragraph (3), the determination is to be based on the number of nights for which the non-resident parent is expected to have the care of the qualifying child overnight during the 12 months beginning with the effective date of the relevant calculation decision.
>
> (3) The Secretary of State may have regard to a period of less than 12 months where the Secretary of State considers a shorter period is appropriate (for example where the parties have an agreement in relation to a shorter period) and, if the Secretary of State does so, paragraphs 7(3) and 8(2) of Schedule 1 to the 1991 Act are to have effect as if—
>
> (a) the period mentioned there were that shorter period; and
>
> (b) the number of nights mentioned in the Table in paragraph 7(4), or in paragraph 8(2), of that Schedule were reduced proportionately.

(4) When making a determination under paragraphs (1) to (3) the Secretary of State must consider—

(a) the terms of any agreement made between the parties or of any court order providing for contact between the non-resident parent and the qualifying child; or

(b) if there is no agreement or court order, whether a pattern of shared care has already been established over the past 12 months (or such other period as the Secretary of State considers appropriate in the circumstances of the case).

(5) For the purposes of this regulation—

(a) a night will count where the non-resident parent has the care of the qualifying child overnight and the child stays at the same address as the non-resident parent;

(b) the non-resident parent has the care of the qualifying child when the non-resident parent is looking after the child; and

(c) where, on a particular night, a child is a boarder at a boarding school, or an in-patient in a hospital, the person who would, but for those circumstances, have the care of the child for that night, shall be treated as having care of the child for that night.

79. Mr Atkinson suggests that there is conflicting Upper Tribunal jurisprudence as to whether regulation 46(4) means that the CMS (and, on appeal, the First-tier Tribunal) is bound by a court order or agreement, or whether regulation 46(4) merely means that the CMS or Tribunal has to give some consideration to any order or agreement, but can make a contrary finding of fact as to what is expected. He submits that the former approach was taken in *JS v Secretary of State for Work and Pensions* [2017] UKUT 296 while the latter approach adopted in a subsequent similarly-entitled decision, namely *JS v Secretary of State for Work and Pensions and ZS* [2018] UKUT 181.

80. I did not hear submissions from Miss Wakeman on this point, as on her analysis the matter did not arise for determination. However, even if there is a conflict between the approach taken in the above two cases (and I am not at all sure there is), the point was surely settled decisively by Upper Tribunal Judge Poole QC (as she then was) in *EA v SSWP and SA (CSM)* [2019] UKUT 149 (AAC) at paragraph 13:

> … Regulation 46(4) makes it clear that, in making the Regulation 46(2) determination, the Secretary of State must consider the terms of any court order. But Regulation 46(4) does not say the Secretary of State "must give effect to" or "must accept" the terms of any court order. It imposes an obligation on the Secretary of State only to consider any court order, when determining the number of nights the NRP is expected to have care of the qualifying child in the relevant 12 month period. After taking a court order into account, in many cases the Secretary of State will conclude that the arrangement in it properly reflects the shared care a NRP is expected to enjoy in the relevant 12 month period, because in the normal course it will be expected that the provisions in a court order will be observed. But in my opinion, it is open to the Secretary of State in other cases to consider the

terms of any court order or agreement, and nevertheless make a Regulation 46(2) determination in terms which do not reflect the court order, for example where there is clear evidence that what is in the court order is not in fact what is expected in terms of overnight care during the relevant period.

81. It follows, as Judge Poole QC ruled, that "the terms of the court order about contact are one consideration which must be taken into account when making the Regulation 46(2) determination, but those terms are not conclusive of the outcome of the determination" (paragraph 16). This reflects the position under both of the two earlier child support schemes: see e.g. *Child-Villiers v. Secretary of State for Work and Pensions* [2002] EWCA Civ 1854 at [27] *per* Potter L.J. and also [34] *per* Chadwick L.J., the unreported Commissioner's decision *CCS/2885/2005*, paragraph 9; and *PB v. CMEC* [2009] UKUT 262 (AAC) at paragraph 24.

The outcome of this Upper Tribunal appeal

82. I therefore find that Grounds B and C (but not Grounds A, D and E) are made out and conclude, despite the absence of a Statement of Reasons, that the First-tier Tribunal's decision involves an error of law to that extent. For that reason I allow the father's appeal and set aside the First-tier Tribunal's decision. Despite the age of this case, I do not consider it appropriate for me to re-make the decision under appeal. Both parents may well have further arguments they wish to make, especially on the ground of appeal relating to diversion of income. In addition, this is the type of case where the forensic skills of a financially-qualified panel member may be helpful in analysing the father's financial affairs. For those reasons, I remit the case to the First-tier Tribunal for re-hearing.

83. There are at least two other matters of more general note.

Two other matters

84. The first concerns the process for applying for a Statement of Reasons in child support cases. As Mr Atkinson rightly pointed out, in the typical social security appeal heard by a First-tier Tribunal the appellant will know from the tribunal's decision notice what the effect of the tribunal's decision will be. The same is not necessarily true in child support cases. In many child support cases the real terms cash impact of the tribunal's decision will not become evident until the CMS issues its implementation decision – and that may be after a longer period than the one month window allowed for parties to make a request for a Statement of Reasons. Even if, as here, the First-tier Tribunal's decision notice sets out a weekly maintenance liability, it is most unlikely (bordering on the inconceivable) that it will include any calculation of arrears. It may be that the HMCTS standard letter accompanying a decision notice needs to stress that the one month does not run from the CMS implementation decision. It may be that District Tribunal Judges could be more flexible in deciding whether to allow out of time applications for a full statement in child support cases. It may be that the procedural rules could be amended so that the one month runs from the notification of the CMS implementation decision. Policymakers should perhaps consider these and doubtless other options.

85. The second and more general matter concerns the relationship between enforcement procedures (fought out typically in courts) and the appeal process about child support liabilities (disputed in tribunals). In the instant case the father was concerned that the CMS might undertake enforcement procedures while he was still disputing the First-tier Tribunal's decision through the appeals process. In correspondence before the oral hearing, the Secretary of State's representative indicated that enforcement action "should be put on hold" pending the outcome of the ongoing appeal. In this context reference was made to the *Child Maintenance Decision Makers Guide* (DMG) Volume 6 chapter 71002A. This advice lists a series of eleven pre-enforcement checks that the decision-maker must consider before proceeding with civil enforcement. Point 11 of the checklist asks: "is the case fully up to date and have all queries from the NRP been dealt with?"

Conclusion

86. 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.

The subsequent cases

87. There is one final point to make. The CMS has made at least six maintenance calculations since the maintenance calculation which is under appeal in the present proceedings. It appears that in each case the CMS has carried forward the £137,073 variation on the grounds of diversion of income to each and every decision. However, the First-tier Tribunal had made the following observations at the end of its detailed decision notice under the heading "Further comment about subsequent decisions":

> 23. The tribunal can only address the decision under appeal. It has no jurisdiction to revisit (and amend) and subsequent decisions – i.e., the annual review decisions with effective dates 25 January 2017, 25 January 2018 and 25 January 2019. Those decisions and the liability they set are not *directly* affected by this decision.
>
> 24. It is now up to the Child Maintenance Service to decide whether to revise those later decisions pursuant to reg.14(3A) Child Support Maintenance Calculations Regulations 2012.
>
> 25. If later decisions are revisited, the CMS should be careful not to double-count the same "diverted income". However, it should also note that the diversion of what would otherwise have been income to buy £200,000 of new plant in the year in the year to 31 March 2015 has a significant bearing on the size of the accounting entry for depreciation [£181,323] *for the year to 31 March 2016.* [The tribunal notes that it could not tally that level of depreciation with the assets on p.131 and the stated depreciation rates p.130: the figure for depreciation seemed inexplicably high.]

> 26. Subsequent CMS decision-makers should remember that the scale of diversion is *not* necessarily limited to the amount of the annual profit stated in the accounts or even the accrued undistributed profit. Diversion itself may have the effect of deflating profit (e.g. as here in creating a subsequent depreciation entry or, say, as a "wage" to a spouse counts as an "expense"). Ultimately, it is the amount of the diversion that is relevant not the amount of accounting profit.

88. In other words, the CMS appear to have done precisely what the First-tier Tribunal warned it against doing. But just as the subsequent CMS decisions were not matters before the First-tier Tribunal, in the same way the Upper Tribunal has no jurisdiction over those later decisions. Mr Atkinson indicated that the father was seeking mandatory reconsideration of these other decisions. The District Tribunal Judge will doubtless be kept busy making appropriate case management directions for the re-hearing of this appeal and possibly related subsequent appeals.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 1 November 2022