[2020] AACR 3

(GC v Secretary of State for Work and Pensions & AE (CSM)
[2019] UKUT 199 (AAC))

Judge Gray **CCS/3413/2017**
14 June 2019

Child Support – Maintenance Agreement – Non-resident parent; Persons abroad

The appellant (father) appealed against a child maintenance assessment made by the respondent Secretary of State ("the Commission") in respect of his son (J) who lives in the UK with the second respondent (mother). The father has a son (W) from a previous relationship who is resident in Denmark with his mother, with whom the father has an informal arrangement, made without an order by the Danish Court.

The father argued that the Commission should have taken into account his upkeep of W when assessing his liability for J. The First–tier Tribunal (F-tT) upheld the decision of the Commission not to take payments for W into account and refused permission to appeal. The Upper Tribunal (UT) subsequently granted permission to appeal based on the fact that to their knowledge this was the first case directly raising this important point, and legal clarity was required

Held, allowing the appeal, that:

1. the appellant's liability for child support in respect of one son should be recalculated to take into account his liability to support his other son who lived in Denmark, under an informal arrangement made without a court order.

2. there was liability under the legislation of a jurisdiction outside the UK and such voluntary arrangements were taken into account. Paragraphs 30-32 explain the statutory mechanism by which this is achieved. Credible evidence was required to establish the arrangement itself. Mere liability under overseas legislation could not be sufficient unless it was shown that the liability had been assumed. That reflected the policy intention at paragraph 7.47 of the Explanatory Memorandum in the Child Support Maintenance Calculation Regulations 2012. Some evidence of payment under an agreement would be expected (paragraphs 33-34).

3. there was a clear policy intent to encourage parents to come to mutually agreed effective arrangements outside the statutory scheme. The appellant's liability in respect of J would be recalculated taking into account his liability to support W. The inclusion of W caused the amount of child support to be paid in respect of J to fall from £144.39 per week to £96.26 per week (paragraph 37).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This appeal by the claimant succeeds.

Having granted permission to appeal on 19 December 2017, in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Enfield and made on 10 August 2017 under reference SC 312/16/01928 and remake the decision as follows:

(i) The appellant's liability in respect of his son James is recalculated taking into account his liability to support his other son William, who is habitually resident in Denmark.

(ii) The inclusion of William causes the amount of child support to be paid in respect of James to fall from £144.39 per week to £96.26 per week.

(iii) £96.26 per week is payable by the father in respect of James from the original effective date.

REASONS

Background

1. In this child support case the appellant is the father of a qualifying child James, who lives in the UK with his mother, the second respondent. I will refer to James's parents as the father and the mother. Although the Secretary of State is the respondent in this case, I will refer to the body that administrates child support as the Commission.

2. The mother, the parent with care of James, applied to the Commission for child maintenance for him, and an assessment was made which the father appealed.

3. The sole issue before the First-tier Tribunal (F-tT) and before me has been whether the Commission is entitled to take into account the father's upkeep of William, his son from a previous relationship who lives with his mother in Denmark. The answer to that depends upon the meaning of regulation 52 (1) of the Child Support Maintenance Calculation Regulations 2012.

4. The F-tT upheld the decision of the Commission not to take payments for William into account and refused permission to appeal, but I granted it because to my knowledge it was the first case directly raising this important point, and legal clarity was required. During the course of argument, I have been referred to an unreported Scottish decision, *CSCS/76/2017*, in which Upper Tribunal Judge Gamble considered whether particular legislation in Lesotho placed a liability on a non-resident parent to maintain their child. The issue was limited to that factual question, and the case was decided without reference to the factors which I have considered, and without oral argument.

Proceedings before the Upper Tribunal

5. Following the filing of initial submissions and some further research by Mrs. Massie of the Government Legal Department who was then acting for the Secretary of State, I held an oral hearing in central London on 20 February. The father attended in person and the Secretary of State was represented by Ms Naina Patel of counsel. In a change of position from that argued at the F-tT, before me the Secretary of State has supported the father's appeal.

6. The mother has played no part before the F-tT or the Upper Tribunal, although she has, of course, had the opportunity to do so. I have treated her as opposing the appeal, and any concerns that she might have are dealt with by the inquisitorial approach which I have adopted in my questioning of the meaning of the relevant legislation.

7. The father was happy to align himself with Ms Patel's written and oral submissions on the legal issues. I took some brief evidence from him following those submissions. Two legal points upon which Ms Patel was able to take brief and inconclusive instructions seemed of sufficient importance to allow time for the Secretary of State position on them to be clarified in further written submission, and that has now been provided to me. In the event

they take the narrow issue no further. I apologise for the time it has taken since then for this judgment to be issued.

The law

8. The first provision I cite is section 9 of the Child Support Act 1991 (hereafter referred to as the Act)

Agreement about maintenance

> *9 (1) "in this section "maintenance agreement" means any agreement for the making, or for securing the making, of periodical payments by way of maintenance, or in Scotland ailment, to or for the benefit of any child."*
>
> *(2) Nothing in this Act shall be taken to prevent any person from entering into a maintenance agreement.*
>
> *(2A) the Secretary of State may, with a view to reducing the need applications under sections 4 and 7 –*
>
> > *(a) take such steps as the Secretary of State considers appropriate to encourage the making and keeping of maintenance agreements, and*
> >
> > *(b) in particular, before accepting an application under those sections, invite the applicant to consider with the Secretary of State whether it is possible to make such an agreement.*

9. The main provision in issue is Regulation 52 of The Child Support Maintenance Calculation Regulations 2012 (hereafter referred to as the 2012 Regulations). The relevant part reads as follows:

Non-resident parent liable to maintain a child of the family or a child abroad

> *52 – (1) a case is to be treated as a special case for the purposes of the 1991 Act where –*
>
> > *(a) an application for maintenance calculation has been made or a maintenance calculation is in force with respect to a qualifying child and a non-resident parent;*
> >
> > *(b) there is a different child in respect of whom no application for maintenance calculation may be made but whom the non-resident parent is liable to maintain –*
> >
> > > *(i) in accordance with a maintenance order made in respect of that child as a child of the non-resident parent's family, or*
> > >
> > > *(ii) in accordance with an order made by a court outside Great Britain or under the legislation of a jurisdiction outside the United Kingdom; and*

> *(c) The weekly rate of child support maintenance, apart from this regulation, would be the basic rate or the reduced rate or be calculated following agreement to a variation whether rate would otherwise be the flat rate or the nil rate.*
>
> *(2) in any such case the amount of child support maintenance is to be calculated in accordance with paragraph 5A of Schedule 1 to the 1991 Act as a child in question were a child with respect to whom the non-resident parent was a party to a qualifying maintenance arrangement.*

10. Relevant to the interpretation of that regulation is regulation 48 of the Regulations:

Non-resident parent party to another maintenance arrangement

> *48 (1) An agreement described in paragraph (2) is an agreement of a prescribed description for the purposes of paragraph 5A (6) (b) of Schedule 1 to the 1991 Act (that is an agreement which is qualifying maintenance arrangement for the purposes of that paragraph).*
>
> *(2) The agreement may be oral or written and must satisfy the following conditions-*
>
> *(a) it must relate to a child of the non-resident parent who is habitually resident in the UK;*
>
> *(b) it must be between the non-resident parent and a person with whom the child has their home (but not in the same household as the non-resident parent) and who usually provides day-to-day care for that child; and*
>
> *(c) it must provide for the non-resident parent to make regular payments for the benefit of the child.*
>
> *(3) the payments mentioned in paragraph (2) (c) may include payments made by the non-resident parent direct to the person mentioned in paragraph (2) (b) or payments to other persons.*

11. Paragraph 5A of Schedule 1 to the Child Support Act 1991 provides:

Non-resident parent party to other maintenance arrangement

> *5A- (1) This paragraph applies where –*
>
> *(a) the non-resident parent is a party to a qualifying maintenance arrangement with respect to a child of his who is not a qualifying child, and*
>
> *(b) the weekly rate of child support maintenance apart from this paragraph would be the basic rate or a reduced rate or calculated following agreement to a variation where the rate would otherwise be a flat rate or the nil rate.*
>
> *(2) the weekly rate of child support maintenance is the greater of £7 and the amount found as follows*

(3) First, calculate the amount which would be payable if the non-resident parent's qualifying children also included every child with respect to whom the non-resident parent is a party to a qualifying maintenance arrangement.

(4) Second, divide the amount so calculated by the number of children taken into account for the purposes of the calculation.

(5) Third, multiply the amount so found by the number of children who, for purposes other than the calculation under subparagraph (3), are qualifying children of the non-resident parent.

(6) For the purposes of this paragraph, the non-resident parent is a party to a qualifying maintenance arrangement with respect to a child if the non-resident parent is –

(a) liable to pay maintenance or aliment for the child under a maintenance order, or

(b) a party to an agreement of a prescribed description which provides for the non-resident parent to make payments for the benefit of the child,

and the child is habitually resident in the United Kingdom.

The issues

12. The issue I had to decide concerned the status of an arrangement between William's parents in Denmark which was made without an order of the Danish court. Whilst there may be features of the Danish scheme that put the father in a different position to non-resident parents with children in other jurisdictions, much of my analysis and conclusion will be of wider application.

13. I have been considerably assisted by the initial submission of Mrs Massie, then acting on behalf of the Secretary of State, and more recently the skeleton argument of Ms Patel, which she developed skilfully at the hearing.

My original concerns

14. Although I granted permission to appeal, I raised at that stage what I considered to be potential difficulties of the Commission taking into account informal overseas obligations. My concerns were twofold and linked.

15. First, historically within the child support schemes there had been a requirement for formality before a maintenance arrangement made in the UK could be taken into account, and the position under regulation 52 (1) (b) (i) seemed to preserve that. Non-statutory arrangements in respect of other children habitually resident in the UK are taken into account only where the non-resident parent is liable to maintain a child in accordance with a maintenance order. Under section 54 of the 1991 Act "maintenance order" has the meaning given in section 8 (11) which, put shortly, is a formal order of the Court.

16. The position under regulation 52 (1) (b) (ii) regarding a child not habitually resident in the UK is that the non-resident parent is liable to maintain that child in accordance with either an order made by a court outside Great Britain, (the equivalent position) or under the legislation of a jurisdiction outside the United Kingdom. If, as is suggested, that provides for the inclusion of children subject to less formal arrangements in another jurisdiction, that is a more favourable position for those with such overseas arrangements, and may militate against an interpretation of regulation 52 which gives that result: if people with less formal arrangements in other jurisdictions are in a preferential position vis-a-vis their counterparts in the UK, can that be what Parliament intended?

17. The second point that I wished to clarify was the status of voluntary arrangements within the UK, and the meaning of what in Child Maintenance Service (CMS) literature is described as a Family Based Arrangement (FBA), a term that does not appear in the legislation.

The arguments of the Secretary of State

18. In a general submission as to construing the domestic legislation, Ms Patel reminds me that where there is a construction which more positively reflects the UK's obligations under the United Nations Convention on the Rights of the Child, I should prefer it. If the obligation to William is taken into account, the welfare of two children is recognised, rather than the welfare of only the child living in the UK.

19. The construction contended for by the Secretary of State is that informal arrangements for the support of children outside the UK, where they are made under the jurisdiction of another state, are taken into account in assessing maintenance under the UK 2012 scheme. She submits that in interpreting the legislation I should have regard to both the structure of regulation 52 and the place within the 2012 Regulations of Family Based Arrangements (FBA).

20. She does not accept that the regulation puts in place a lower standard for taking into account children who live abroad, because of the place of FBAs within the 2012 Regulations.

Maintenance agreements and Family Based Arrangements

21. The interpretation section of the Child Support Act 1991, section 54 (1), defines a maintenance agreement by reference to section 9 (1) of that Act, (set out above) As relevant here, it is any agreement for the making of periodical payments by way of maintenance, or in Scotland aliment, to or for the benefit of the child.

22. Section 9 (2A), inserted by the Welfare Reform Act 2012 and effective from 25 November 2013, empowers the Secretary of State to encourage the making of maintenance agreements. Ms Patel argues that the family-based arrangement system may be in consequence of that or authorised by it. In support she prays in aid the Explanatory Memorandum to the 2012 regulations, which I am entitled to take into account as an aid to interpretation, and a passage in a Child Maintenance Service (CMS) leaflet which she cites not as an aid to interpretation but to establish consistency of approach to FBAs.

23. Regulation 48 (1) provides for an agreement that contains the features set out in subparagraph (2) to be a "qualifying maintenance arrangement" for the purposes of paragraph

5A (6)(b) of schedule 1 to the Child Support Act 1991. Although informal, such arrangements are taken into account under that provision within the statutory maintenance calculation.

24. This approach, she submits, is replicated in regulation 52 in its reference to liability under the jurisdiction of another state: a legal order is not required, merely liability under a foreign legislative scheme.

25. So far as the position in Denmark is concerned she suggests that the available information about the Danish scheme (albeit limited, despite the best efforts of the Secretary of State to obtain more detail) shows that had there not been agreement between William's parents the State authority would have stepped in. The voluntary agreement was, in these circumstances, "under the legislation of a jurisdiction outside the UK."

My analysis

26. I accept the arguments put forward by Ms Patel.

27. The Explanatory Memorandum at paragraph 7 shows that there is a clear policy intent to encourage parents to come to mutually agreed, effective arrangements for child maintenance outside the statutory scheme. Issues of policy are not for me; however, during the years I have been dealing with child support appeals I have read studies from various countries which establish a positive link between regular payment of child support which is agreed, over and above payment of that which is directed.

28. Paragraph 7.47 of the Memorandum states that, in order to encourage parents to make their own maintenance arrangements children supported outside the statutory scheme, whether through a family based arrangement, court order or under child maintenance schemes abroad, will be acknowledged in the same way as qualifying children within the maintenance calculation. The point is made that non-resident parents will be required to provide evidence of a formal or informal agreement.

29. These voluntary arrangements are to be known as family based arrangements, and I am satisfied that, whilst not a term used in the Act or Regulations, such an approach is contemplated in and authorised by section 9 (2A) of the Act, and detailed in regulation 48 which enables informal maintenance arrangements in respect of children habitually resident in the UK to be taken into account within the statutory maintenance calculation.

30. The clear policy intention is to equate the position of a non-resident parent's children who live in the UK and children who are subject to maintenance schemes abroad so that both are taken into account in any statutory calculation. I accept that the legislative intention was to achieve that by treating overseas agreements under the legislation of a jurisdiction outside the UK as a special case under regulation 52 (1)(b)(ii), and applying the same calculation process as is applicable to qualifying maintenance arrangements within regulation 48. This is achieved by the application of paragraph 5A of schedule 1 to the 1991 Act to the extra-statutory maintenance arrangements made under both regulations.

31. The informal agreements described in regulation 48 (2) are taken into account by this route under the clear terms of regulation 48 (1), which states that such agreements are qualifying maintenance arrangements for the purposes of paragraph 5A.

32. Although the terms of paragraph 5A (6) provide that a child who is the subject of a qualifying maintenance arrangement must be habitually resident in the UK (as does regulation 48), where a special case is established under regulation 52 (1) a deeming provision, regulation 52 (2), comes into operation. Under that provision the amount of child support maintenance is calculated in accordance with paragraph 5A "as if" the child in question was a child in respect of whom the non-resident parent was a party to a qualifying maintenance arrangement. Any difficulties as to a child's habitual residence are thus negated.

The factual position, and my conclusion in this case

33. There has never been any challenge to the fact that the father has been contributing financially to the upkeep of his son in Denmark. The issue was as to whether the informal arrangement sufficed to include his support for that child under a statutory maintenance calculation.

34. A special case under regulation 52 is made out where a non-resident parent is liable to maintain another child under the legislation of jurisdiction outside the UK. The Secretary of State's investigations confirm that had the parents not made an agreement between themselves, the Danish state legislation would have been invoked. Accordingly, there was liability under the legislation of a jurisdiction outside the UK and such voluntary arrangements are taken into account; however, credible evidence is required to establish the arrangement itself. Mere liability under overseas legislation cannot be sufficient unless it is shown that the liability has been assumed. This reflects the policy intention at paragraph 7.47 of the Explanatory Memorandum. Although I accept that there does not need to be any particular formality of approach, and one cannot be prescriptive as to the level of evidence, some evidence of payment under an agreement would be expected.

35. Here, in addition to the documentary evidence in the bundle I heard from the appellant that he had been maintaining William as agreed with William's mother since their separation, which occurred over 10 years ago. I accept that evidence.

36. I do not need to decide whether the document which William's mother has signed as reflecting their agreement may amount to a new written agreement between them; that is because it is in any event evidence to support the original oral agreement. Although it came into being after the decision under appeal, my taking it into account does not offend section 20 (7) (b) Child Support Act 1991, the date of decision rule. It is not a change of circumstances; it reflects the arrangement that pertained prior to that decision: *R/CS/3/01* applied.

37. Accordingly, there having been no challenge to the figures set out in the submission of the Secretary of State as to the effect of the overseas arrangement on the maintenance calculation, I make the decision that should have been made originally, which reduces the amount payable by the father in respect of James from £144.39 to £96.26. That amount applies from original effective date.