IN THE UPPER TRIBUNAL **Appeal No. UA-2023-001189-CSM**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 259 (AAC)**

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

Between:

LM

Appellant

- v –

The Secretary of State for Work and Pensions

First Respondent

NM

Second Respondent

Before: Judge Markus KC
Decision date: 27th August 2024
Decided on consideration of the papers

Representation:
Appellant: In person
1st Respondent: Decision Making and Appeals, Leeds
2nd Respondent: In person

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. This appeal concerns a decision by the First-tier Tribunal to uphold a decision of the Secretary of State for Work and Pensions (through the Child Maintenance Service (CMS)) to make a special expenses variation to a child support calculation.

2. The Appellant, LM, is the mother of the qualifying child and she is the parent with care. NM is the father and non-resident parent.

3. LM requested an oral hearing of the appeal. The CMS and NM have stated that they agree to the appeal being decided without a hearing, but LM has not. I am satisfied that I can decide the appeal fairly without a hearing. I have all the relevant documents. LM has stated that information provided by her has been disregarded. Failure to

consider relevant evidence might demonstrate an error of law but, with the assistance of the parties' submissions, I am able to discern from the papers whether the FTT has taken into account the relevant evidence. There is no need for me to make further findings of fact and I do not need to hear oral evidence. The parties have set out their submissions in some detail. An oral hearing would not serve any useful purpose and I consider that to require one would be disproportionate.

Factual summary

4. In 2018 LM and NM jointly purchased a property and entered into a joint mortgage. Their child was born in 2019. The family lived at the property until the parents separated in 2020. Thereafter LM and the child have continued to live at the property and NM has lived elsewhere. NM retained a legal and equitable interest in the property. At the relevant time LM and NM each paid 50% of the mortgage payments.

5. The initial decision by the CMS that NM was liable to pay child support in respect of the child was made in November 2020. On 22nd February 2021 the CMS varied the decision and allowed a special expenses variation to NM's liability in respect of the mortgage payments made by him. The variation was made pursuant to Regulation 65 of the Child Support Maintenance Calculation Regulations 2012

6. LM appealed to the First-tier Tribunal (FtT) on 20th December 2022 the FtT dismissed her appeal. LM now appeals to the Upper Tribunal with the permission of Upper Tribunal Judge Wikeley.

Grounds of appeal

7. LM has advanced 5 grounds of appeal:

Ground 1: The FtT should not have decided to proceed to hear the appeal when the CMS had failed to comply with pervious directions.

Ground 2: The FtT wrongly decided that regulation 65 applied to permit a variation.

Ground 3: The FtT failed to take into account that the Family Court had made an order requiring NM to pay half of the mortgage payments.

Ground 4: Regulation 67 and not 65 was the applicable regulation.

Ground 5: Procedural unfairness.

8. Judge Wikeley was not sure that he was persuaded by grounds 1, 3 and 5 but did not refuse permission on them. The main basis of the grant of permission was on grounds 2 and 4 which concern the inter-relationship between regulations 65 and 67. I cand address grounds 1, 3 and 5 relatively briefly before turning to the two main grounds.

Ground 1

9. LM says that the FtT should not have proceeded with the hearing because the CMS had failed to comply with previous directions requiring it to provide an explanation for advice on its website which appeared to contradict the decision under appeal and to explain the applicability of Schedule 4B paragraph 2(3)(e) of the Child Support Act 1991. She says that at the hearing the Presenting Officer stated that the variation had been a mistake, that regulations 65 and 67 contradicted each other, and that he was

unsure of the case because he had only received the documents 2 hours before the hearing.

10. None of these matters amount to an error of law: The FtT acknowledged that the CMS had not provided explanations in accordance with the previous directions but decided to proceed in the light of the delay that had already occurred and because the Presenting Officer was present to assist. The FtT gave the Presenting Officer time to read the bundle and all parties had confirmed they were happy to proceed. The CMS had provided a supplementary submission explaining the difference in approach under regulation 65 and 67. The FtT's task was to apply the regulations not to review the correctness of its guidance. It would take into account the submissions of the Presenting Officer at the hearing but it was not required to follow his view as to the correctness of the decision.

Ground 3

11. The FtT addressed this in its statement of reasons. The Order post-dated the decision under appeal. Section 20(7) of the Child Support Act 1991 provides that a tribunal may not take into account of any circumstances not obtaining as at the date of the decision. The FtT did not make an error of law in this regard.

Ground 5

12. LM raises a number of matters under this ground none of which amount to procedural unfairness or other error of law. I deal with them briefly:

a. The appeal had previously been heard by a different judge who adjourned it part-heard with directions.

   It was not unfair for the following hearing to be conducted by a different judge. As noted in the statement of reasons, the original judge was unable to hear the appeal. At the hearing the judge discussed this change with the parties and they were content to proceed. The judge considered all matters afresh.

b. The previous judge had adjourned for further submissions and explanation from the CMS, nothing had changed and so it was not fair for the second judge to proceed without those directions having been complied with.

   I have addressed this under Ground 1.

c. The FtT noted that the Presenting Officer was unable to explain the CMS' reasoning.

   The FtT reasonably took the view that the reasoning was set out sufficiently in the supplementary submission. The FtT was critical of the CMS' previous explanations but rightly decided to apply the law to the facts as found, which it did.

d. LM states that the appeal was to have been heard by a judge and financially qualified member.

   This was a misapprehension. There was no such direction and there was no unfairness in the appeal being heard by a judge alone.

e. The FtT failed to take into account section 28F(1)(b) of the Act (whether it was just and equitable to make the variation).

   It is clear from the statement of reasons that the FtT did address this.

Grounds 2 and 4: The inter-relationship between regulations 65 and 67

Legal Framework

13. Section 28F(1) of the Child Support Act 1991 permits the Secretary of State to agree to a variation to a child maintenance calculation if it falls within a case in Part 1 of Schedule B to the Act or in regulations and the Secretary of State agrees that it would be just and equitable to agree to the variation.

14. Paragraph 2 of Schedule 4B provides for a special expenses variation of a variety of descriptions to be prescribed by variation. Paragraph 2(3) provides:

> "(3) In prescribing descriptions of expenses for the purposes of this paragraph, the Secretary of State may, in particular, make provision with respect to –
>
> … c) debts of a prescribed description incurred, before the non-resident parent became a non-resident parent in relation to a child with respect to whom the maintenance calculation has been applied for:
>
> (i) For the joint benefit of both parents; …
>
> … e) the cost to the non-resident parent of making payments in relation to a mortgage on the house he and the person with care shared, if he no longer has an interest in it, and she and a child in relation to whom the application for a maintenance calculation has been made still live there."

15. The descriptions of special expenses variations are found in the Child Support Maintenance Calculations Regulations 2012. For the purpose of this appeal the relevant provisions are:

> **"65 Prior debts**
> (1) Subject to the following paragraphs of this regulation and regulation 68 (thresholds), the repayment of debts to which paragraph (2) applies constitutes special expenses for the purposes of paragraph 2(2) of Schedule 4B to the 1991 Act where those debts were incurred—
>
> (a) before the non-resident parent became a non-resident parent in relation to the qualifying child; and
>
> (b) at the time when the non-resident parent and the person with care in relation to the child referred to in sub-paragraph (a) were a couple.
>
> (2) This paragraph applies to debts incurred—
>
> (a) for the joint benefit of the non-resident parent and the person with care;
> (b) for the benefit of the person with care where the non-resident parent remains legally liable to repay the whole or part of the debt; …
>
> (3) Paragraph (1) does not apply to repayment of—
>
> (a) a debt which would otherwise fall within paragraph (1) where the non-resident parent has retained for the non-resident parent's own use and benefit the asset in connection with the purchase of which the debt was incurred; …

(h) amounts payable by the non-resident parent under a mortgage or loan taken out on the security of any property, except where that mortgage or loan was taken out to facilitate the purchase of, or to pay for repairs or improvements to, any property which was, and continues to be, the home of the person with care and any qualifying child;…"

67 Payments in respect of certain mortgages, loans or insurance policies
(1) Subject to regulation 68 (thresholds), the payments to which paragraph (2) applies constitute special expenses for the purposes of paragraph 2(2) of Schedule 4B to the 1991 Act.

(2) This paragraph applies to payments, whether made to the mortgagee, lender, insurer or the person with care—

(a) in respect of a mortgage or a loan from a qualifying lender where—

(i) the mortgage or loan was taken out to facilitate the purchase of, or repairs or improvements to, a property ("the property") by a person other than the non-resident parent;

(ii) the payments are not made under a debt incurred by the non-resident parent and do not arise out of any other legal liability of the non-resident parent for the period in respect of which the variation is applied for;

(iii) the property was the home of the applicant and the person with care when they were a couple and remains the home of the person with care and the qualifying child; and

(iv) the non-resident parent has no legal or equitable interest in and no charge or right to have a charge over the property; …"

The arguments before and decision of the First-tier Tribunal

16. The CMS had agreed a variation under regulation 65 on the basis that the mortgage was a debt within regulation 65(2)(a) and was not excluded by regulation 65(3). Before the FtT, LM argued that CMS should have considered the variation application under regulation 67 as provision which relates to mortgage payments, but that a variation could not have been made under that regulation because NM had a legal and equitable interest in the property. She also argued that, even if considered under regulation 65, that regulation did not apply either because NM retained the benefit of the property.

17. LM observed that the CMS provided information on the variation application form and other publicly available documents which indicated that a variation for mortgage payments could only be made if the paying party had no legal or equitable interest in the property. Letters to LM from CMS also indicated that this was the position, although their position was unclear.

18. The FtT found that the information provided by CMS was incorrect. It decided that the mortgage payments fell within regulation 65 and were not excluded by regulation 65(3), but did not fall within regulation 67.

The grant of permission to appeal by the Upper Tribunal

19. In giving permission on grounds 2 and 4 in regard to the inter-relationship between regulations 65 and 67, Judge Wikeley stated that it would be helpful if the Secretary of State's representative would explain the underlying policy objective in terms of the linkage between the two regulations.

The parties' submissions in the Upper Tribunal

20. The CMS (Secretary of State) does not support LM's appeal. They make the following submissions (the non-resident parent is referred to as NRP, the parent with care as the PWC and the qualifying child as the QC):

> "9. Firstly, the policy intent behind variations and special expenses is to allow for additional financial factors to be considered which are not captured in the maintenance calculation. A special expenses variation is intended to allow a NRP to apply for a reduction in child maintenance if they incur certain additional costs relating to the PWC, QC or relevant other child which are not taken into account in the normal maintenance calculation rules. If a variation is awarded for special expenses, the NRP's gross weekly income is reduced by the weekly amount of those expenses allowed.
>
> 10. A variation *can* be considered under Regulation 67 if the NRP makes payments to a mortgage lender, insurance company or PWC for a mortgage or loan in certain circumstances.
>
> …11. [Regulation 67(2)(2)(a)] … doesn't apply in this case because the debt related to the mortgage repayment is a mortgage which was taken jointly by the NRP and PWC.
>
> 12. To satisfy the requirements set out in the regulation 67, it should have been taken by a person *other* than the NRP. The strict wording suggests that the mortgage should have been taken out by the PWC. The debt also does not satisfy regulation 67(2)(a)(iv) as the debt is a legal mortgage and the NRP has a legal and equitable interest in the property. Therefore, it does not fall within the scope of regulation 67.
>
> 13. Accordingly, paragraph 47 in the Statement of Reasons (SOR) correctly finds:
>
> > *"the mortgage was not taken out by a person other than the non-resident parent. [NM] is the non-resident parent and he and [LM] took the mortgage out jointly in 2018."*
>
> 14. The correct regulation to apply in the case is regulation 65(3)(h) which sets out that for the purposes of regulation 65, prior debts would not include amounts payable by the NRP under a mortgage, except where that mortgage or loan was taken out to facilitate the purchase of, or to pay for repairs or improvements to any property which was and continues to be the home of the PWC and any qualifying children.
>
> 15. In this case, the debt falls within this exception as the PWC and QC continue to live there. It is also important that we consider regulation 65(3)(a) which states that a debt which would otherwise fall within paragraph (1) would not be permitted where NRP has retained for the NRP's own use and benefit the asset in connection with the purchase of which the debt was incurred.

> 16. It seems that the interpretation of "use and benefit" is taken not to mean an interest in the property, but rather could mean where the NRP continued to use the property to live in. Therefore, this would not exclude the repayment of mortgage where the NRP does not continue to live there or utilise the property for his advantage."

21. LM's appeal submissions and reply to the submissions of the CMS are in summary:

a. The FtT should have considered this variation application under regulation 67 which is applicable to a mortgage variation.

b. The wording of regulation 67(2)(a)(i) does not mean that the mortgage must have been taken out by the PWC. It applies where it is taken out by a person "other than" the NRP.

c. The FtT found that "The mortgage was not taken out by 'a person other than the non-resident parent'. NM is the non-resident parent and he and LM took the mortgage out jointly in 2018." LM submits that regulation 67(2)(a) does not include the words "not taken out" and the addition of those words put a different meaning on the sentence. A joint mortgage should have been considered under regulation 67.

d. Although regulation 67 is applicable to a mortgage variation, it does not apply in this case because NM has a legal and equitable interest in the property.

e. The mortgage payments do not fall within regulation 65 because regulation 65(3)(a) applies. NM retained the benefit of the asset as he had a legal and equitable interest and would receive a share of the proceeds when it was sold.

f. NM also benefitted from the asset by way of the variation to the child maintenance calculation.

g. The mortgage cannot be classed as "Prior Debt" as it was not an amount paid prior to separation.

22. NM agrees with the FtT's decision.

Discussion and conclusion

23. I agree with the FtT that the guidance and other information provided to members of the public by the CMS was incorrect or misleading. However, the task of the tribunal was to apply the law as set out in the legislation.

Regulation 65

24. The mortgage was a debt incurred before NM became a non-resident parent and at a time when NM and LM were a couple – regulation 65(1).

25. The mortgage was incurred for the joint benefit of NM and LM. It was a joint mortgage to enable them jointly to purchase the property to live in. Accordingly, unless excluded under regulation 65(3), it was a special expense within regulation 65(2).

26. The FtT decided that the property was retained for NM's benefit because he retained a legal and beneficial interest, but found that it was not retained for his own use because he did not live there. Therefore the debt was not excluded by regulation 65(3)(a).

27. LM's approach to "use and benefit" in effect elides the meaning of the two words because she treats the benefit (NM's legal and equitable interest) as also amounting to his use. Parliament has used two words deliberately and they are plainly intended to denote different things.

28. There are two other important features of the provision. First, it requires a finding as to the purpose for which the asset was retained and this may be different to the purpose for which it was acquired. Second, the sub-paragraph requires a finding as to the purpose for which the asset was retained by the non-resident parent: "the non-resident parent has retained [the asset] for the non-resident parent's own use and benefit".

29. The same phrase in the predecessor to regulation 65 (regulation 2 of the Child Support (Variations) Regulations 2000) was addressed by Commissioner Williams in *CCS/3674/2007*. He said this at paragraph 19:

> "The second area of contention is whether A retained the assets for his own use and benefit. To be caught by this test, it is not enough that A has retained the assets. That may be simply because – as was one contention here – someone must retain them until they are sold, but they are retained solely to ensure an orderly sale. It must be considered whether that retention was, at the time of the retention, **for** the retainer's own use and benefit (emphasis mine). That is a question of fact, but it involves forming a view on the facts about the retainer's intention at the relevant time. It is not enough that the retainer has some use and benefit at some later time. Nor is it enough the other way to show that someone else has some use and benefit at some later time."

30. In that case A (the non-resident parent) was still living at the property, but that did not of itself mean that the asset was retained for his use and benefit.

31. In the present, case, as the FtT found, the property was acquired in 2018 for the purpose of providing a home for LM and NM. But after LM and NM separated, the property was lived in by LM and the child, and not by NM. It is implicit in the FtT's conclusion that the purpose for which it was retained was for LM and the child to live in. It was not retained for NM's use.

32. It is also arguable that the property was not retained for NM's benefit. By analogy with the reasoning set out above in *CCS/3674/2007,* the property had to be retained for as long as LM and the child were living there. The asset was retained to enable them to live there. The fact that NM would ultimately have a share in the proceeds of sale does not mean that that was the purpose of retaining the asset. However, in the light of my decision that the FtT was correct in concluding that the asset was not retained for NM's use, I do not need to decide that matter.

33. Dealing with the other submissions by LM regarding regulation 65: a) The submission that the benefit in this case was the special expense variation is a circular argument without merit; and b) The submission that the mortgage was not a "Prior Debt" is also without merit. "Prior Debts" are defined by regulation 65. If the debt falls within the statutory definition, it is a special expense.

34. Finally and for completeness, the FtT was correct to conclude that the debt was not excluded by regulation 65(3)(h). I cannot detect an argument by LM to the contrary. The wording of the provision is clear and its application on the facts was without doubt. The mortgage was taken out to purchase the property which was and continued to be the home of LM and the child.

Regulation 67

35. LM's position is that regulation 67(2)(a)(i) does not preclude a joint mortgage. That is not supported by the statutory wording. If LM was correct, the regulation would provide that "the mortgage was taken out …by the non-resident parent and a person other than the non-resident parent". The plain meaning of the words used is that the non-resident parent should not have been involved in taking out the mortgage. That meaning is compatible with subparagraph (ii). The FtT did not add a gloss to the statutory words. It had to decide whether the mortgage was taken out by a person other than the non-resident parent, and the FtT found that it had not been. In any event, LM's submissions on regulation 67(2)(a)(i) do not advance her case because a) the mortgage was excluded from regulation 67 by virtue of subparagraph (iv) and b) this is the result for which LM contends, ie that the debt was not a special expense.

Does regulation 67 preclude consideration of a mortgage under regulation 65?

36. LM submits that the FtT should not have considered regulation 65 as mortgage debts should be considered only under regulation 67. There is nothing in the statutory provisions to support that submission. The statutory wording of each regulation is clear and it was the tribunal's task to apply those regulations to the facts. Indeed LM's submission is contradicted by regulation 65(3)(h) which makes express provision for the application of regulation 65 to mortgages.

37. Regulations 65 and 67 address different situations in regard to mortgages. Regulation 65 is capable of including a joint mortgage held by the two parents whereas I have found that regulation 67 is not (see above). In addition and in any event, regulation 67 does not apply where the non-resident parent has a legal or equitable interest in the property but regulation 65 may do so.

38. For the above reasons I dismiss LM's appeal

Kate Markus KC
Judge of the Upper Tribunal
Authorised for issue on 27th August 2024