Neutral Citation Number: [2025] UKUT 162 (AAC)
Appeal No. UA-2024-001683-CSM

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

JP

Appellant

- v -

Secretary of State for Work and Pensions

First Respondent

and

LH

Second Respondent

Before: Upper Tribunal Judge Citron
Decided on consideration of the papers

Representation:
Appellant: by himself
1st Respondent: by Lauren Foody of the Decision Making and Appeals section of the Department for Work and Pensions
2nd Respondent: by Maguire Family Law

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC946/23/00848
Digital Case No.: 1658750899485687
Tribunal Venue: Bolton
Decision Date: 7 March 2024

SUMMARY OF DECISION

CHILD SUPPORT variations (5.8)

The Upper Tribunal decides that an error of law in relation to a variation to a child support maintenance calculation under regulation 69 or 69A of the Child Support

Maintenance Calculation Regulations 2012, whose effect was to increase the non-resident parent's gross weekly income from one figure in excess of the capped amount (£3,000), to another figure (even more) in excess of the capped amount, is not a material error, as it has no effect on the child support maintenance payable, which is the matter as to which the FTT has jurisdiction.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the First-tier Tribunal involved the making of an error in point of law as respects the Crows Nest variation (as explained in the Reasons section below). However, the error was not material, as it did not affect the child support maintenance payable. I therefore decline to set aside the First-tier Tribunal's decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

In what follows I also refuse two applications of the Appellant, as explained more fully below.

REASONS FOR DECISION

1. References in what follows to

    a. "**regulations**" are to the Child Support Maintenance Calculation Regulations 2012

    b. "**sections**" and "**Schedules**" are to sections and Schedules of the Child Support Act 1991

    c. numbers in square brackets are to the numbered paragraphs of the First-tier Tribunal (the "**FTT"**)'s statement of reasons in this case

    d. "**rules**" are to rules of the Tribunal Procedure (Upper Tribunal) Rules 2008

    e. "**Father**" are to the appellant

    f. "**Mother**" are to the second respondent

    g. the "**SoS**" are to the first respondent.

The appeal to, and decision of, the FTT

2. The decision of the FTT in question allowed Mother's appeal against the decision of the SoS of 5 January 2022 (a supersession decision under s17). The FTT found that Father was liable to child maintenance for two named qualifying children from 18 June 2021 at an amount to be recalculated by the Child Maintenance Service,

based on the maximum income figure of £3,000 per week. The FTT found that Father had a total income figure of £346,301.76; that was made up of a current income figure of £9,540 (not at issue in the appeal) and a variation of £336,761.76. The variation was

a. the 8% statutory rate of income applied to the value of Father's regulation 69A assets exceeding £31,250; this came out as:

   i. £3089.61 in respect of cash held in a Santander and Virgin Money account

   ii. £5,076.08 in respect of a Halifax stocks and shares ISA

   iii. £56,000 in respect of 50% of the Crows Nest property (this was the "**Crows Nest variation**")

   iv. £138,964 in respect of a director's loan to Walnuts Investments Ltd - I will refer to this as the "**Walnuts Investments variation**"

   v. £109,436.07 in respect of shares held in a Halifax shares account; and

b. regulation 69 unearned income of £24,196 from Father's Assetz account – to which I will refer as the "**Assetz variation**".

The grant of limited permission to appeal by the Upper Tribunal

3. The Upper Tribunal on 13 January 2025 issued my decision (the "**permission decision**") giving permission to appeal limited to an error of law in respect of the Crows Nest variation. The permission decision noted that the FTT found that the Crows Nest property was owned jointly by Father and his wife ([71, 74]); that Father had a 50% interest ([23]); and that Father's wife was running Crows Nest as a holiday let on a day-to-day basis with minimal involvement from Father ([23]). The FTT recorded Father's evidence that the income received from the holiday let business was split 95% to his wife and 5% to him ([77]). The permission decision went on to say this:

> "16. It seems to me that the FTT decision did not expressly address the question of whether Father's 50% interest in Crows Nest was being used in the course of a trade or business of Father's; but it seems reasonably arguable that the inference could be made from the factual findings that the FTT decision *did* make, that the Crows Nest property was being used for a business (the holiday let business) and that business was in part Father's (as he took 5% of the income received). It therefore seems to me realistically arguable that the FTT decision erred in not addressing this question and/or in failing to explain, adequately, how it reached the view that Father's 50% interest in Crows Nest was not excluded from regulation 69A(1) by reason of regulation 69A(4)(b).

> 17. I would add, acting inquisitorially, the following related points, which seem to me realistically arguable:
>
> > a. even if there was no legal error in not excluding Father's 50% interest in Crows Nest from regulation 69A(1) by reason of regulation 69A(4)(b), it seems to me realistically arguable that the FTT decision erred in law by not explaining, adequately, why it was in all the circumstances just and equitable (in the language of section 28F(1)(b)) to make the variation by reference to 50% of the value of Crows Nest, when it appeared to accept that Father was entitled to only 5% of the income received;
> >
> > b. I have noted that the variation in relation to Father's 50% interest in Crows Nest amounts to £56,000 and that the overall correct income figure as found by the FTT decision was just over £346,000 – this means that, even if the Crows Nest variation had not been made, the income figure would have been over £290,000 per year, and so over £5,500 per week – well in excess of the capped amount (see regulations 73 and 2). It could thus be argued that any errors of law with respect to the Crows Nest variation are not *material* to the FTT decision, in that they do not affect the outcome that the child maintenance support amount is [based on the maximum income figure of] £3,000. Nevertheless, I consider that the opposite – that errors with regard to the Crows Next variation *are* material – is realistically arguable, principally because the maintenance calculation can be used for other purposes i.e. top up applications to the court under section 8(6) (I have in mind *Dickson v Rennie [2014] EWHC 4306 (Fam)* at [30])" (the words in square brackets in the penultimate sentence have been added to better express what I was trying to say in that sentence).

The SoS's response to the appeal

4. In its response, the SoS supported the appeal on the permitted ground. It submitted that, although Father was over the weekly income set out in paragraph 10(3) of Schedule 1, the Crows Nest error of law was still material; it cited s8(6) and *Dickson v Rennie*; it submitted that it was essential that the correct calculation of child maintenance liability was made, to prevent an incorrect gross weekly income figure being used to calculate additional provisions that the parent with care may receive.

5. The SoS asked the Upper Tribunal to set the FTT decision aside and remit the appeal for rehearing by a differently constituted FTT.

Mother's response to the appeal

6. Mother did not wish to dispute Father's appeal against the Crows Nest variation. She asked that the Upper Tribunal re-make the decision itself, rather than remitting it to the FTT for reconsideration. Her reasons for taking this position included (a) that there was a final hearing before the Family Court on 5 June 2025, which she did not want to be delayed (she felt there had already been considerable delay, and she had a very serious illness) and (b) her view that, in her circumstances, it would not make a difference to her Family Court case, if the child support maintenance calculation excluded the Crows Nest variation.

Father's applications

7. The case management directions permitted Father to reply to the responses of the SoS and Mother; in the event, Father did not make any such reply.

8. Father did, however, send an email to the Upper Tribunal on 3 February 2025 asking for "new documents relating to the proceedings" (relating to Walnuts Investments Ltd – a short letter from his wife, and an "interactive investor" statement; and a statement from Assetz for the 2021-22 tax year) to be "considered as part of my Upper Tribunal appeal, as per rule 43.1(A), The Upper Tribunal considers that it is in the interests of justice to do so". The email referred to "the grounds that a party was not present at the First-tier Tribunal to answer questions relating to the businesses, namely [Father's wife]". He requested a face to face hearing in London. Father's email advanced arguments in support of a ground of appeal that had been considered in the permission decision and determined not to be realistically arguable (that the Walnuts Investments variation was in error of law). It also advanced arguments in regard to a ground that had not been included in Father's original application for permission to appeal: it was expressed as follows:

> **"Double counting; Assetz Capital Income and Halifax Sharedealing Account,** the effective date for the calculation was 28/06/2021, the unearned income from Assetz Capital was £24,196.55; crucially this was from tax year April 2020-2021 April. During 2021 to 2022 the only income derived from Assetz Capital was £235.79, this because all the money was transferred to the Halifax Sharedealing account by the 21st April 2021. The FTT took the figure for the Halifax Sharedealing account on the 5th July 2021, a figure which was now much higher than the year before because of the transfers from Assetz Capital. The income has therefore been counted twice because they used income from the year before. As a result the Assetz Capital unearned income was an error in law, the figure used was prior to the effective date. But worse still the transfer of cash across is in excess of £250,000. I am collating all of the necessary statements for the Upper Tribunal. This may make the FTT's figure even more adrift than the £24,196.25 due to the double counting, something which they are obliged to avoid. They have not."

9. It seems to me fair and just to treat Father's February email as applications (1) for set aside, under rule 43, of the aspect of the permission decision which refused permission to appeal against the Walnuts Investments variation; and (2) for a new ground of appeal to be admitted, namely, that the FTT decision erred in law in making the Assetz variation as it involved an element of "double counting".

Why I have determined the appeal, and Father's applications, without a hearing

10. In their responses, both the SoS and Mother asked the Upper Tribunal to determine the appeal without holding a hearing. Father, in his email of 3 February, asked that a hearing be held.

11. It seems to me fair and just to determine the appeal, as well as Father's applications, without a hearing: all three parties had the opportunity to make written submissions, through the process set out in case management directions; there was nothing in those written materials that required clarification or further explanation, to enable me to determine matters fairly and justly; and so holding a hearing would gave caused unnecessary delay.

Why I have refused Father's applications for set-aside of the permission decision, and to introduce a new ground of appeal

12. I refuse both Father's applications, for the following reasons.

Application for set-aside

13. The power to set aside under rule 43 requires two elements: some procedural irregularity in the Upper Tribunal proceedings, and a determination that it is in the interests of justice to set aside the relevant decision (here, the element of the permission decision that refused permission to appeal on the ground of an error of law in the Walnut Investments variation). In this case, neither element is present:

    a. the documents sent with Father's 3 February 2025 email (relating to Walnuts Investments Ltd – a short letter from his wife, and an "interactive investor" statement; and a statement from Assetz for the 2021-22 tax year) do not (in the language of rule 43(2)(b)) "relate to the proceedings": the relevant proceedings (grant of permission to appeal) concerned whether there was an arguable error of law in the FTT decision; to the extent these documents were "new evidence", they were not relevant to the question of whether the FTT decision had erred in law; and to the extent they were already in the FTT bundle (such as the Assetz statement), that was already before the Upper Tribunal; nor was there any other kind of procedural irregularity in the Upper Tribunal proceedings; and

    b. even if it could be argued that the documents sent by Father on 3 February 2025 did "relate to the proceedings", it would not be in the interests of justice to set aside the permission decision, as they did not affect the reasoning in the permission decision for finding no arguable error of law in

the FTT decision's Walnuts Investments variation (see paragraph 12 of that decision, in particular).

Application to admit new ground of appeal

14. I have borne the following in mind as regards to application to admit a new ground of appeal:

    a. the application was made more than three months after the deadline for making an application for permission to appeal; and there was nothing to explain why it had not been made with the original application (which was itself 38 days late, but had been admitted); this is a very significant degree of "lateness";

    b. the application was made some three weeks after the permission decision was issued; the process, set out in case management directions, of the respondents responding to the appeal, was already under way; admitting a new ground of appeal would mean re-starting that process, with consequent delay;

    c. the application did not, however, imperil a hearing date;

    d. as to the merits of the new ground of appeal,

        i. the FTT was clearly alive to the issue of double counting and took pains to avoid it: see [52] and [103]

        ii. it is not the task of the appeals tribunal to revisit and re-evaluate the detailed evidence: Father's criticism of the FTT decision is connected with its detailed fact-finding and evaluative judgement; the hurdle to showing a material error of law in these matters is high

        iii. in all the circumstances, the prospects of success of Father's new ground, as a material error of law, are in my view low;

    e. overall, it does not seem to me fair and just to admit Father's new ground (with the inevitable delaying effect on the proceedings): there is no good reason why it was not presented with his other grounds in his original application for permission to appeal; and its prospects of success are low.

15. I note that, even if I had admitted the new ground and found that the Assetz variation was in error of law, that would not have changed my decision (as explained in the following section) to decline to set aside the FTT decision (as Father's gross weekly income would have exceeded £3,000 even without the Assetz variation and the Crows Nest variation, combined).

Why I have decided that the permitted ground of appeal is made out, but that the error of law is not material

16. It seems to me that the effect of Mother's response to the appeal is that she concedes, as a matter of fact, that Father's 50% holding in the Crows Nest property was being used in the course of Father's trade or business. It follows that the FTT decision erred in law in making the Crows Nest variation. The only question is whether this legal error was material, given that, even without the Crows Nest variation, Father's gross weekly income (as found by the FTT) exceeded £3,000.

17. The relevant right of appeal to the FTT under s20 in this case is that in respect a decision of the SoS under s17. The subject matter of that decision was how much child support maintenance was payable (see s11(2)). Child support maintenance means periodical payments which are required to be paid in accordance with a maintenance calculation (s3(6)). Maintenance calculation means a calculation of maintenance made under the Child Support Act 1991. Effect is given to variations under regulation 69 and 69A by "increasing the gross weekly income of the non-resident parent which would otherwise be taken into account by the weekly amount of the additional income except that, where the amount of gross weekly income calculated in this way would exceed the capped amount, the amount of the gross weekly income taken into account is to be the capped amount" (regulation 73(1)). Capped amount here means £3,000, the figure specified in paragraph 10(3) of Schedule 1.

18. It would seem from these provisions that the FTT decision's legal error with regard to the Crows Nest variation was not material since it did not affect the amount of child support maintenance payable (being the matter over which the FTT had jurisdiction): even without this variation, Father's gross weekly income, as determined by the FTT decision, exceeded the capped amount.

19. The question is whether section 8(6) affects or changes this conclusion.

20. Section 8(6) sets out three conditions to be satisfied, if the court is to exercise "any power which it has to make a maintenance order in relation to a child" (maintenance order means an order requiring the making or securing of periodical payments to or for the benefit of a child, under various pieces of family law legislation). The first is that a maintenance calculation is in force with respect to the child. The second is that the non-resident parent's gross weekly income exceeds the figure in paragraph 10(3) of Schedule 1. *Dickson v Rennie* decided that the reference here to gross weekly income means that income as determined by the SoS (as opposed to being something for the court to determine). Holman J put it thus at [30]:

> "… Section 8(6)(b) merely refers in the abstract to what is essentially a question of fact, namely, as a matter of fact that the gross weekly income does exceed the specified figure. But it seems to me crystal clear from the scheme of the Act as a whole, and s8(6) within it, that even although the question may be said to go to the jurisdiction of the court, to make a top-up order the relevant 'gross weekly income' for the purposes of s8(6)(b) has to be the gross weekly income that has been assessed or calculated by the

> Secretary of State or the CMS. Quite clearly that subsection is, indeed, providing a 'top-up' jurisdiction; it is not providing some avenue of challenge or appeal to the calculation or assessment that has earlier been performed by the Secretary of State or the CMS."

21. The third condition in s8(6) is that

> "the court is satisfied that the circumstances of the case make it appropriate for the non-resident parent to make or secure the making of periodical payments under a maintenance order in addition to the child support maintenance payable by him in accordance with the maintenance calculation."

22. It seems to me clear that s8(6), much like the provisions cited at paragraph 17 above, is concerned with whether or not the non-resident parent's gross weekly income exceeds the capped amount (£3,000); if it does, the court has power to 'top-up' the child support maintenance payable. Section 8(6) is not, however, concerned with "by how much" the non-resident parent's gross weekly income exceeds £3,000 – and this is seen in with the wording of the third condition (which is really an expression of the court's discretion), which speaks of "addition", not to the amount of *gross weekly income*, but to the amount of the *child support maintenance payable* (which doesn't change, once gross weekly income exceeds £3,000).

23. I accept that the last part of the last sentence from *Dickson v Rennie* quoted above (from the semi-colon onwards) could be read as giving s8(6) a broader remit, of preventing challenge or appeal to the SoS's "calculation or assessment" of gross weekly income; but, read in context, these words are simply reiterating the point at issue in the case i.e. that the second condition in s8(6) works off the SoS's determination of gross weekly income; it was not a comment on the breadth of the court's discretion as described in the third condition.

24. I conclude that there is nothing in s8(6), or indeed in *Dickson v Rennie*, that would change or effect the initial conclusion, on the basis of the operative provisions of the legislation alone, that an error of law in relation to a variation under regulation 69 or 69A, whose effect was to increase gross weekly income from one figure in excess of the capped amount, to another figure (even more) in excess of the capped amount, is not a material error, as it has no effect on the child support maintenance payable, which is the matter on which the FTT had jurisdiction.

25. For this reason, I decline to exercise my discretion to set the FTT decision aside.

Zachary Citron
Judge of the Upper Tribunal

Authorised by the Judge for issue on 30 May 2025