IN THE UPPER TRIBUNAL **Appeal No. CCS/3034/2016**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 20 February 2016 under number SC242/14/05100 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 a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**

4. **The tribunal must decide the non-resident parent's liability for child support maintenance from and including the effective date which is 18 February 2014. In doing so, the tribunal must not take account of circumstances that were not obtaining at the time the decision under appeal was made (2 September 2014): section 20(7)(b) of the Child Support Act 1991. To be relevant further evidence should relate to the period over which the tribunal has jurisdiction.**

5. **The new tribunal is not bound in any way by the decision of the previous tribunal. It must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to its discretion under section 20(7)(a) of the Child Support Act 1991, any other issues that merit consideration.**

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

REASONS FOR DECISION

Background

1. The Appellant in this appeal is the mother of two children who live with her. The Second Respondent is the father. In this decision I refer to them as "the mother" and "the father" respectively.

2. On 10 September 2010 the Secretary of State decided that the father was liable to pay child support maintenance of £156 per week for the two children, from the effective date of 31 August 2010. On 20 February 2014 the mother applied for a variation on the grounds of assets and of income not taken into account. On 2 September 2014 the Secretary of State made a variation on the ground of assets but not on the ground of income not taken into account. That is the decision which the mother appealed to the First-tier Tribunal.

3. It is not necessary to set out the detail of the disputed issues regarding the father's income and assets. It is sufficient to explain that the issues included whether or not he had an interest in a property known as Flat 8 Grosvenor House ("Flat 8") and whether or not he had an interest in a family trust.

4. All the parties attended a hearing before the First-tier Tribunal on 17 September 2015. The tribunal allowed the appeal, set aside the decision of 2 September 2014, and remitted the case to the Secretary of State to recalculate child support in accordance with its decision. The tribunal made a number of findings regarding the father's income and assets but for present purposes I need set out only the following aspects of the decision:

   a) The father's income was higher than that on which the Secretary of State had based the formula calculation. The recalculation was to be based on the higher income figure.

   b) The value of the property at Flat 8 was exempt under the Child Support (Variation) Regulations 2000 because, although it was rented to a tenant, the father retained a room and it was his main home.

   c) During his ownership of Flat 8, the father's mother had received the rent in part settlement of the father's debt to her.

   d) The father had transferred the title of Flat 8 to his sisters, in February 2015 (ie after the date of the Secretary of State's decision) to be held on trust by the sisters for their mother in settlement of a debt that he owed her.

   e) The father had a 20% interest in the family trust. His interest was worth £38,000.

   f) The father may have handed his interest in the trust to his sisters in 2012 in settlement of debts. He was directed to produce evidence of the transfer to the Secretary of State but, if he failed to do so, the calculation of his weekly income figure from assets should take into account the £38,000 asset.

5. The tribunal supplemented the reasons given in the Decision Notice with a Statement of Reasons pursuant to a request by the mother. I return to some parts of the reasons below.

6. On 24 October 2016 I gave permission to appeal. I considered that there were arguable errors in the tribunal's decision that Flat 8 could be disregarded under Regulation 18(3). The tribunal did not address the statutory definition of "home" for this purpose, the evidence did not appear to support the tribunal's finding that Flat 8 was the father's principal home, and the tribunal's reasons were arguably inadequate to explain its conclusion that it was. In addition the finding in the statement of reasons that it was reasonable for the father to retain the flat in accordance with regulation 18(3)(b) did not appear to correlate with the Decision Notice which dealt with the flat only under regulation 18(3)(e). Finally, I

considered that it was arguable that the tribunal had erred in failing to determine whether the father had transferred his interest in the family trust to his sisters.

7. By written submissions the Secretary of State supports the appeal on the grounds relating to Flat 8 but has not addressed the tribunal's approach to the father's interest in the family trust. On behalf of the father, George Coates of counsel has prepared written submissions opposing the appeal and requesting an oral hearing. He also submits that the tribunal should not have considered the calculation of formula income.

8. The mother has sent written submissions in response. She supports the appeal on some of the grounds identified by me. She also pursues other grounds on which I did not give permission to appeal and raises a number of other matters not previously raised. Although I did not refuse permission to appeal on any of the grounds originally advanced by the mother, I do not determine any issues other than those upon which I gave permission to appeal. The respondents have not addressed any other issues and it is not necessary for me to determine them as I have decided to allow the appeal for the reasons below and to remit the appeal to be heard afresh by another First-tier Tribunal. The remaining issues raised by the mother can be subsumed in that hearing.

9. I note the father's request for an oral hearing of this appeal. However, I am satisfied that an oral hearing is not necessary. The appeal is concerned with errors of law and I have sufficient information in the papers, including the written submissions of all parties, to decide whether the tribunal erred in law. There are a number of disputed factual matters raised by the parties but it is not for the Upper Tribunal to determine matters of fact. As I have said, the parties will be able to raise all relevant factual matters before the next First-tier Tribunal and adduce additional relevant evidence if they wish to do so, subject to any directions by the First-tier Tribunal.

Statutory framework

10. The appeal to the First-tier Tribunal was concerned with the mother's application for a variation to the formula assessment on the grounds of assets and income not taken into account, pursuant to paragraph 4 of Schedule 4B of the Child Support Act 1991. This appeal is principally concerned with the application relating to assets.

11. The Child Support (Variations) Regulations 2000 include the following:

> **18.— Assets**
>
> (1) Subject to paragraphs (2) and (3), a case shall constitute a case for the purposes of paragraph 4(1) of Schedule 4B to the Act where the Secretary of State is satisfied there is an asset—
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> (a) in which the non-resident parent has a beneficial interest, or which the non-resident parent has the ability to control;
>
> (b) which has been transferred by the non-resident parent to trustees, and the non-resident parent is a beneficiary of the trust so created, in circumstances where the Secretary of State is satisfied the non-resident parent has made the transfer to

reduce the amount of assets which would otherwise be taken into account for the purposes of a variation under paragraph 4(1) of Schedule 4B to the Act; or

(c) which has become subject to a trust created by legal implication of which the non-resident parent is a beneficiary.

(2) For the purposes of this regulation *"asset"* means —

(a) money, whether in cash or on deposit, including any which, in Scotland, is monies due or an obligation owed, whether immediately payable or otherwise and whether the payment or obligation is secured or not and the Secretary of State is satisfied that requiring payment of the monies or implementation of the obligation would be reasonable;

(b) a legal estate or beneficial interest in land and rights in or over land;

…

(3) Paragraph (2) shall not apply—

…(b) in relation to any asset which the Secretary of State is satisfied is being retained by the non-resident parent to be used for a purpose which the Secretary of State considers reasonable in all the circumstances of the case;

…(e) to property which is the home of the non-resident parent or any child of his;

…"

12. Regulation 1(2) provides that "home" has the meaning given in regulation 1(2) of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000. The definition there is:

"(a) the dwelling in which a person and any family of his normally live; or

(b) if he or they normally live in more than one home, the principal home of that person and any family of his…"

Discussion and conclusions

Flat 8 Grosvenor House

13. The First-tier Tribunal's Decision Notice included the following findings regarding Flat 8:

"g) The father owns a property at Flat 8 Grosvenor House … The mother argues [Flat 8] is rented out and should be taken into account. The father argues, through his representative, that it is rented out but should count as his home as he has retained a room there and uses it from time to time. Given this is a flat he purchased prior to his marriage and considering all the evidence, we are satisfied that the flat is to be treated as his main home and therefore is exempt under Regulation 18(3)(e) of the Child Support (Variation) Regulations 2000."

14. The tribunal also found that the father was in debt to his mother and his sisters and that, in February 2015, he transferred Flat 8 to his sisters to be held on trust

for his mother in settlement of the debt. In addition, the tribunal found that during his ownership of Flat 8, the rental income had been paid to his mother in part settlement of the debt. She declared the income in her tax return and the father did not.

15. The statement of reasons elaborated on the tribunal's findings in relation to Flat 8, as follows:

> "10. Shortly before Mr [N] married Ms [S] he bought Flat 8 … on 06/07/2004… On 20/01/2012 Mr [N] entered into a tenancy agreement with Mr [W] for a one-year tenancy of Flat 8…. The rent is shown as £650 per calendar moth no the agreement but Mr [N] receives the monthly sum of £598 from [name of agency]…On 13/02/2015 Mr [N] transferred his interest in Flat 8…, to his sisters … to satisfy the debt to his mother of £130,000…
>
> …
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> 21. We found that in accordance with the exemption in regulation 18(3)(b) of the Child Support (Variations) Regulations 2000 [the father]'s Flat 8 … was his home and did not count as an asset. We based this on the fact that it is possible to live in two homes according to housing law by leaving furniture and possessions in a property, while not occupying it full-time. We thought it was reasonable for Mr [N]] to retain the flat as his home given he was living at his mother's, an arrangement which could come to an end and did not provide him with secure future housing."

16. The above passages manifest errors of law which go to the core of the tribunal's conclusion regarding Flat 8.

17. First, the tribunal failed to address the statutory definition of "home" for this purpose (set out at paragraph 12 above). Although that definition presupposes that a person may have two homes, paragraph (b) provides that, if a person normally lives in two homes, only his "principal home" counts for the purposes of those Regulations. Even if it could be said on the evidence that the father Flat 8 was a home for the father, it could not have been his "home" for the purpose of regulation 18(3)(e) unless he normally lived in it and it was his "principal home". In this case, the latter would have involved the tribunal making a choice between Flat 8 and his mother's house. They could not both have been his "principal home".

18. The parties have not made submissions as to the legal test for determining either where a person "normally lives" or what is the "principal home", and it is not appropriate to undertake a detailed analysis of the phrases here. Where a person normally lives requires little if any elaboration, and is a question of fact to be determined on the evidence. In the child support context, the Mr Commissioner Mesher gave brief consideration to the test for "principal home" in R(CS) 2/96. There is case law considering the same phrase in landlord and tenant legislation: see for instance Ujima Housing Association v Ansah (1997) 30 HLR 831. In both contexts, it is clear that a range of factors is relevant and the test is not directed at a simple counting of the amount of time spent at each home. Moreover, intention is to be determined not by the subjective intention or motives of the person claiming the principal home but by an objective assessment of that person's actions and intention. I also draw attention to Mr Commissioner Mesher's observation at paragraph 12 that the phrase "principal home" is "directed to ascertaining what is normal as at the date at which the calculation of housing

costs is being made, which might exclude the consideration of some long-term considerations."

19. Paragraph 21 of the First-tier Tribunal's statement of reasons makes it clear that the tribunal in this case failed to consider whether Flat 8 was the father's "principal home" rather than simply his home. I do not know what the tribunal meant by the phrase "main home" in the Decision Notice, but there is no indication that it had in mind the statutory definition and in particular the need to decide which of the two candidate homes was his principal one. That was a material error of law.

20. Second, the tribunal failed adequately to address the evidence before it relating to Flat 8, in particular to reconcile matters of dispute, and made inadequate findings of fact to support the conclusion that Flat 8 was the father's home. There was no examination by the tribunal of the evidence relating to the disputed claim that the father had access to or use of a room in the flat, the nature and stability of the living arrangement with the father's mother, nor in the light of that on what basis the tribunal found that he had retained the flat in order to enable him to live there should he need to do so. The mother produced evidence to support her case that he did not live at Flat 8 (page 81-85). The judgment in the family proceedings upon which the father relied pre-dated the letting to a tenant in 2012 and shed little if any light on the position at the time of the decision. In March 2015 the father said that that tenant was a "co-tenant … for my mother" and that he administered this "essentially acting as her agent" (page 95). However, the written tenancy agreement does not appear to bear this out. Of course things changed in 2015 when the father disposed of the flat, but what happened in 2015 that would only be relevant to the position at the effective date in so far as it shed light on the position at that time. As far as I can tell, when the father disposed of the flat his living arrangements with his mother had not changed and this might call into question the claim that he had retained the flat in case the arrangements with his mother came to an end. In addition, the father's position in 2014 was that he lived at Flat 8 and had his correspondence sent to his mother's address (for instance at page 23), not that he retained the flat in case the arrangements with his mother ended. He also said that he had retained it in order to satisfy a debt to his mother and because of his general financial insecurity, and relied on MG v Child Maintenance and Enforcement Commission [2010] AACR 37 (page 262). The tribunal did not address the father's case in these respects, nor the possible inconsistencies between his case and the proposition that he had retained the flat in order to live in it should the arrangements with his mother cease.

21. The tribunal's failure to weigh these material considerations, its very selective recital of the evidence before it and its inadequately explained findings in the decision notice and statement of reasons, amount to material errors of law.

22. Mr Coates now points to other evidence and says that it was sufficient to support the tribunal's decision. I have some doubts about that but, in any event, it cannot be said that the evidence was capable of supporting *only* that conclusion and, in the light of the errors of law which I have found, the decision cannot stand.

23. The third error of law arises from the tribunal's treatment of regulation 18(3)(b) and (e). Mr Coates submits that the tribunal did not conflate the provisions but made distinct findings that each of subparagraphs (b) and (e) was satisfied. That is not borne out by the Decision Notice or Statement of Reasons. The former

stated clearly that the relevant exemption was that in subparagraph (e). It made no mention of (b) and there is nothing in the wording of the Decision Notice to indicate that the tribunal had decided that (b) applied. Although the tribunal referred to subparagraph (b) at paragraph 21 of its Statement of Reasons, that must have been a typing error as the rest of that sentence and the following sentence addressed the substance of the exemption at (e). In this context, I find that the final sentence of paragraph 21 was a factor relied upon by the tribunal in support of its conclusion that Flat 8 was the father's home. In any event, even if the tribunal had made a discrete decision that the exemption at subparagraph (b) applied, the factual basis for that decision was fundamentally flawed for the reasons which I have already given.

The family trust

24. The mother claimed that the father had a 20% beneficial interest in properties held under a family trust upon which rental income was received. The father's case was that he transferred his interest in 2012 to his sisters in settlement of debts owed to them. There was little evidence before the tribunal regarding this matter. The tribunal's decision, as set out in the Decision Notice, was:

> "The father's evidence was that he handed over his 20% interest to his sisters in 2012 in settlement of debts arising from loans to pay his legal costs, which was confirmed in letters written by his sisters. We accept that he may have done this and direct that he produces to the Child Support Agency documentary evidence in the form of a variation of trust or office copy entries showing he no longer has a beneficial interest in the properties within 28 days. If he fails to do this, the Child Support Agency should include the £38,000 in the calculation of his weekly income figure from assets."

25. There was no additional reasoning in this regard in the Statement of Reasons.

26. I gave permission to appeal on the ground that arguably the tribunal should have decided the question of the transfer for itself. The Secretary of State has not addressed this ground. The father submits that a tribunal may remit part of a decision to the Secretary of State, for instance where complex calculations have to be made, and the tribunal gave the parties liberty to apply.

27. Section 20(7)(a) of the Child Support Act 1991 provides:

> "(7) In deciding an appeal under this section, the First-tier Tribunal –
>
> (a) Need not consider any issue that is not raised by the appeal;…"

28. The effect of the identical provision in section 12(8)(a) of the Social Security Act 1998 has been explained as follows by a Tribunal of Commissioners in R (IS) 2/08:

> 47. Section 12(8)(a) of the 1998 Act does not provide a complete answer. It provides that, in deciding an appeal, a tribunal need not consider any issue that is not raised by the appeal. The implication is that a tribunal must consider every issue that **is** raised by the appeal and, as a tribunal has an inquisitorial or investigative function, that includes any issue that is "clearly apparent from the evidence" (*Mongan v Department for Social Development* [2005] NICA 16 (reported as R3/05 (DLA)). Therefore, what a tribunal must not do is ignore an issue that is clearly apparent from the evidence. However, it does not follow that the tribunal must make a **decision** on

> **every** issue raised by the appeal if there is a more appropriate way of dealing with one or more issues.
>
> 48. It is well established that a tribunal allowing an appeal because the decision under appeal was made without jurisdiction is entitled simply to set aside the decision without substituting another. So too may a tribunal when allowing an appeal on the ground that the original decision was not made against the correct parties and in such a case it is plainly open to the Secretary of State to make another decision in place of the one that has been set aside (R(H) 6/06). In our judgment, the same approach can be applied where an issue first arises in the course of an appeal. When an appeal against an outcome decision raises one issue on which the appeal is allowed but it is necessary to deal with a further issue before another outcome decision is substituted, a tribunal may set aside the original outcome decision without substituting another outcome decision, provided it deals with the original issue raised by the appeal and substitutes a decision on that issue. The Secretary of State must then consider the new issue and decide what outcome decision to give. In that outcome decision, he must give effect to the tribunal's decision on the original issue unless, at the time he makes the outcome decision, he is satisfied that there are grounds on which to supersede the tribunal's decision so as, for instance, to take account of any changes of circumstances that have occurred since he made the decision that was the subject of the appeal to the tribunal. Because his decision is an outcome decision, the claimant will have a right of appeal against it."

29. In the present case the question whether the father had an interest in the trust was raised in the appeal and the tribunal was obliged to consider it. Although, as the Tribunal of Commissioners said, that does not necessarily mean that a tribunal must decide an issue raised, in this case the tribunal should have made a decision on the issue. Neither the way in which the issue arose nor the nature of the issue was akin to the examples given by the Tribunal of Commissioners at paragraph 48 of its decision. This was not a new issue which arose consequent on the determination of the appeal. The tribunal had previously directed the father to provide all relevant documentation in relation to the alleged trust income (page 88) and there was some evidence before the tribunal about it. The tribunal could not make a decision on this aspect of the appeal without determining the dispute as to the father's interest in the trust. Either the tribunal should have determined the issue on the evidence or considered whether to exercise its discretion to adjourn for the production of further evidence.

30. There is another problem with the way in which the tribunal disposed of this matter. If the tribunal had directed the Secretary of State to decide whether the evidence provided by the father was sufficient to establish that he had transferred his interest to his sisters, that would have generated a further appealable decision. However the tribunal's direction was that the mere provision to the Secretary of State of the father's evidence would result in the asset being excluded from the calculation. This meant that there was no factual determination on that issue by the tribunal nor would there be a determination by the Secretary of State whether the father's evidence established that he had transferred his interest. Not only did the tribunal abdicate its own responsibility to determine the dispute as to the father's interest, but the effect of its direction was that there would be no further outcome decision by the Secretary of State as to the father's interest in the trust against which there would be a right of appeal.

31. I agree with the father that it was open to the tribunal to require the Secretary of State to make a fresh calculation, consequent upon the tribunal's determination of

the issues in the appeal, and the parties had liberty to apply in relation to the arithmetical calculation. But failing to determine a core issue in the appeal itself is an entirely different matter and in the present case the tribunal's failure to decide it was an error of law.

32. The father has now provided evidence which was not before the First-tier Tribunal, purporting to showing that his interest in the trust was transferred to the sisters in 2012. The mother has not commented on this evidence and I say no more about it. It will be for the next tribunal to determine whether the father had an interest in the trust at the relevant time.

The formula income calculation

33. The tribunal decided that the formula calculation had been based on out of date wage slips and substituted a higher income figure than had been used by the Secretary of State. The father now says that, as the appeal concerned the mother's application for variations and did not raise any issue regarding the formula calculation, the tribunal should not have substituted a different income figure.

34. I reject this. The father's salary was an issue raised in the appeal. The amount of the salary clearly arose on the evidence. It was put in issue by the mother (pages 34 and 202), the father was aware that the mother had put in issue the amount of the formula calculation (page 264, paragraph 28), and the salary on which that calculation was based was raised at the hearing (see the record of proceedings at page 300). Moreover, a variation decision is part of the maintenance calculation.

35. In any event section 20(7)(a) of the 1991 Act confers a discretion on the tribunal to consider an issue that is not raised by the appeal. That discretion must be exercised judicially. In the present case, in the light of the factors that I identify at paragraph 35, the father was clearly on notice that the amount of his salary could be considered and he had an opportunity to address it at the hearing. It was not unfair for the tribunal to deal with it.

Disposal

36. In the light of the errors of law made by the tribunal, I allow the appeal and set aside its decision. I am not in a position to re-make the decision under appeal. There are substantial factual disputes between the parties which need to be resolved on consideration of all the evidence, following an oral hearing. Therefore there will need to be a fresh hearing before a new First-tier Tribunal, for which I have given directions.

Signed on the original
on 9 October 2017

Kate Markus QC
Judge of the Upper Tribunal