DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant ("the father").

The decision of the First-tier Tribunal dated 9 June 2016 under file reference SC227/13/02971 does not involve a material error on a point of law. The tribunal's decision therefore stands.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The Upper Tribunal's decision in summary

1. The father's appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal ("the Tribunal") involves an error on one point of law but it is not a material error in the sense of one affecting the outcome. The Tribunal's decision therefore stands. .

The parties to this appeal

2. I refer to the parties in this appeal as simply the father, the mother and the Secretary of State respectively. The father, who was the Appellant before both the Tribunal below and the Upper Tribunal, is the non-resident parent. The mother is the parent with care and the Second Respondent. The Secretary of State is the First Respondent in these proceedings. For convenience I sometimes refer to the Secretary of State as simply "the Agency".

The issues in this appeal

3. The case is ultimately about the father's liability to support his son, James, who lives with his mother. James is now aged 20, a fact that tells its own story. The father is challenging an Agency maintenance calculation from November 2012 (and which took effect from 21 April 2009). His principal arguments are that the Agency closed the case in 2007 and that in any event he was no longer habitually resident in the United Kingdom (UK) after mid-2006. He also contends that the Agency's assessment of his income was fundamentally flawed. This is the second time the matter has come before the Upper Tribunal.

The 'first time around' appeal

4. In the 'first time around' appeal an earlier tribunal had heard the father's appeal on 16 March 2014. That tribunal dismissed the father's appeal against the Agency's decision dated 19 November 2012. The father then appealed to the Upper Tribunal on a wide range of matters. Many of those points were questions of fact which were for the tribunal to decide, and did not give rise to any arguable error of law.

5. However, I gave the father permission to appeal against that original tribunal decision on two procedural grounds. The first was that it appeared – given material that the father had subsequently obtained by way of a subject access request under the Data Protection Act 1998 – that the Agency may not have included all relevant evidence in its response to that first time around appeal and indeed that the child support case may in fact have been closed in 2007. The second was that it was

questionable whether there had been a fresh application by the mother for child support maintenance in April 2009, as the first tribunal found (in the alternative, if it was wrong about the case not having been closed in 2007).

6. Mr Kevin O'Kane, the Secretary of State's representative in that first time around appeal before the Upper Tribunal, supported the father's appeal on that occasion. I allowed the father's appeal (in the decision under reference CCS/4292/2014) and remitted the case for a complete re-hearing before a new First-tier Tribunal.

The 'second time around' appeal

7. The Tribunal duly heard the father's appeal for a second time on 9 June 2016. The Tribunal dismissed the appeal and confirmed the essence of the Agency's decision dated 19 November 2012. The Tribunal's decision notice conveniently recorded its material decisions as follows (emphasis as in the original):

> "1. The maintenance assessment was **not** cancelled in August 2007 because the Appellant ceased to be habitually resident in the United Kingdom.
>
> 2. The Appellant did not cease to be habitually resident in the United Kingdom in 2006.
>
> 3. The decision of 19 November 2012 is confirmed save that the maintenance calculation of £15.00 per week from the effective date 21 April 2009 is incorrect. The wrong period was used for the calculation of the Appellant's income as 396 days were used rather than one year. The nature of the error is set out in the submission paragraph 2 page 3.
>
> 4. The maintenance assessment for the effective date of 21 April 2009 will be recalculated correcting this error.
>
> 5. In all other respects the decision of 19 November 2012 is confirmed."

8. The Tribunal subsequently issued a full statement of reasons for its decision, elaborating on those summary reasons.

The proceedings in the 'second time around' appeal before the Upper Tribunal

9. I gave the father permission to appeal the Tribunal's decision on the second time around appeal to the Upper Tribunal. In doing so, I directed my comments in particular to the question of whether the child support case had been closed in 2007, as the father had argued but as the Tribunal found was not the case.

10. Mrs B Massie, now acting on behalf of the Secretary of State (for the Agency), provided a detailed and helpful written submission on the father's appeal. She did not support the appeal to the Upper Tribunal. Nor did the mother.

11. The oral hearing of this appeal took place at the Bradford Immigration and Asylum Tribunal venue on 16 November 2017. The father attended, representing himself, to put his case. Ms Zoë Leventhal of Counsel attended for the Secretary of State. The mother did not attend but has made submissions in writing, which I have taken into consideration.

The father's outline grounds of appeal in the 'second time around' appeal

12. The father's detailed grounds of appeal were organised around the three questions which the second time around Tribunal had posed to itself in the course of its statement of reasons. These were (1) was the case closed in 2007?; (2) did the

father cease to be habitually resident in the United Kingdom in 2006?; and (3) was the correct income used in the assessment? Obviously there may be a connection between questions (1) and (2). The Tribunal (in short) answered those questions as (1) No; (2) No; and (3) Yes (subject to a minor qualification). The father's case was that the correct answers were (1) Yes; (2) Yes; and (3) No. It makes sense to deal with them in the same order as the Tribunal. This is because if the child support case had indeed been effectively closed by the Agency in 2007, that might well be the end of the matter, not least as on the face of it that would imply that the Agency had no power to make the decision under appeal dated 19 November 2012.

Q1: Was the child support case closed in 2007?

Introduction

13. It will be recalled that the primary reason for setting aside the first time around Tribunal's decision was that evidence had come to light (as a result of the father's data subject request) which had not been put before that Tribunal by the DWP and which suggested that the father's child support case may in fact have been closed in August 2007.

The second time around First-tier Tribunal's decision

14. The second time around Tribunal came to the same conclusion as the first time around Tribunal. It recorded its finding in the decision notice that "The maintenance assessment was **not** cancelled in August 2007 because the Appellant ceased to be habitually resident in the United Kingdom".

15. The parties' respective positions on this issue before the Tribunal were as follows. The Agency said that although there had been discussions about closing the case it had never in fact been closed. The father said that he had been told by Agency staff in August 2007 that the case had been closed. The mother's written evidence was that she had never been told that the case had been closed and, if she had been, she would have appealed against any such decision to end the father's child support liability.

16. In its explanation, as set out in the statement of reasons, the Tribunal referred to a number of documents on the file (referred to in more detail below). In particular, the Tribunal referred to a number of screen-prints of the relevant child support account from September 2007 (and later) which stated that the account was 'open'. The Tribunal also noted the mother's position that she would have appealed any termination decision. As a result, the Tribunal then concluded as follows:

> "17. There is a difference between deciding to do something, intending to do something, and actually doing it. On the evidence before me, which includes consideration of the documents referred to above, the fact that no termination notice was never [sic] sent, and the fact that the first respondent regarded the assessment as still being open and recorded it as such long after August 2007, I find that for whatever reason the assessment was not terminated in August 2007. It remained open and the first respondent was entitled to make the assessment which is appealed against".

The father's grounds of appeal on question (1)

17. The father's primary argument was that it was perverse for the Tribunal to conclude that the child support case had not been closed in August 2007. He devoted five printed pages of closely argued analysis of the documentation on the appeal file to support his contention that his case had in fact been closed on 27 August 2017 (to be precise at 12:37 on that date: see p.492).

The Secretary of State's response to the grounds of appeal on question (1)
18. It is only right to say that the position of the Secretary of State on this critical issue has shifted over time.

19. First of all, and following my setting aside of the first time around decision and the remittal of the appeal, the Agency argued in a submission to the new Tribunal that "on 17/09/07 the parent with care was contacted by telephone and advised the case was to be closed due to Non-resident parent residing in Spain … There is no evidence to support that written notification was issued" (p.418). That explanation was in effect repeated in the Agency's supplementary responses (pp.431 and 436) and was maintained at the second time around appeal hearing by the Agency's presenting officer.

20. Secondly, in her written response to the present Upper Tribunal appeal on behalf of the Secretary of State, Mrs B. Massie adopted a different line of argument. Her contentions may be summarised as follows: (i) the Agency decided on 27 August 2007 that the father was no longer habitually resident in the UK (relying on p.383); (ii) the Agency had failed to issue formal notifications to both parties of the decision to close the case, as was required by the legislation; (iii) in the absence of such proper notification, the time limits for appealing that decision had not started to run; but in any event (iv) the case closure decision was subsequently reconsidered and re-opened, with a nil calculation being put in place. This was said to be a revision decision based on official error. It was also said that again there had been no proper notifications, and so time limits for appealing that revision decision had also yet to start running. Accordingly, Mrs Massie argued, "although the decision of the SSWP to close the case in August 2007 was a reasonable one to have taken on the facts presented by the Appellant at the relevant time, it appears the SSWP reconsidered the decision subsequently on the basis of further information. Therefore the case was not closed at the date of the decision under appeal" (i.e. in November 2012).

21. Thirdly, and at the oral hearing, Ms Leventhal expressly abandoned Mrs Massie's point (iv). In my view she was entirely right to make that concession. The simple fact is that there is no persuasive evidence on file to support the hypothesis that a decision that the father was not habitually resident in the UK was reversed in 2007 or thereafter by way of a revision decision for official error. Mrs Massie suggests that the Agency took such a decision having obtained advice from the Advice and Guidance team. However, there is no trace on the file of firm evidence of such advice and certainly no record of any revision decision to that effect,

22. Ms Leventhal in effect reverted to what was a rather more sophisticated version of the Secretary of State's first position, as set out in paragraph 19 above. Her analysis of the relevant chronology was as follows.

23. On 2 August 2007 the Agency notified two decisions. The first was that the father's child support liability was reduced to £5 a week as from 26 July 2005 because the father was in receipt of a state benefit. The second was a nil assessment, with effect from 6 September 2005, on the basis that the father's income was now less than £5 a week (see Agency decision letters at pp.464 and 467).

24. On 6 August 2007 a 'Clerical decision form' was completed for the decisions taken on 2 August (p.442). This recorded as follows:

> "NRP benefit ceased 20/08/2005 as NRP went to live in Spain. Agency advised of this 09/09/2005 therefore effective date of this decision is 06/09/205. DCA checked and it confirmed NRP staying in Spain."

25. Ms Leventhal construed this record as an indication that, although a habitual residence decision had not been taken, the issue of the Agency's jurisdiction was at least now under consideration, given what was known about the father's whereabouts. The acronym 'DCA' was presumably a reference to debt collection agency (rather than a misprint for DCI, or departmental central index).

26. On 16 August 2007 the Agency's 'senior resolution manager' wrote to the father at an address in Spain (p.286), summarising the decisions of 2 August 2007, and advising that as a result "your outstanding arrears have been reduced to £19.20". The letter added:

> "In accordance with legislation, based on information provided, a decision was taken on 15 August that, for child support purposes, you are classed as being a resident of Spain and therefore outwith the Agency's jurisdiction. Your case is in the process of being closed… Eversheds have been instructed to cease their actions."

27. There is no evidence that any letter in similar terms was sent to the mother. Given that letter was in response to a complaint by the father, it is perhaps unsurprising. In any event that letter is corroborated by a screen print of an entry in the Agency's records dated 15 August 2007 (p.461) that recorded as follows:

> "Case closed and deselected from DCA. NRP habitually resident in Spain. No arrears can be collected. AC [staff initials] Debt service team."

28. That entry would suggest that DCA was indeed a reference to debt collection agency, and that Eversheds had been instructed to take (and then desist from) enforcement action.

29. On 27 August 2007 one Agency employee wrote an e-mail to AR, another staff member handling the case, to the effect that "if you make an adjustment for the debt of £138.06 [a sum wrongly calculated as a refund], I think you will be able to completely close the case" (p.381). On the same date AR completed a CSF773 form, known as an '*Authorisation for Technical adjustment/suspension*' which included the following freeform text "Case closed – no jurisdiction NRP lives & works in Spain, accounts error, T147 shows arrears £138.06. A/c breakdown done for incident" (p.383). Ms Leventhal accepted on behalf of the Secretary of State (as did Mrs Massie in the written submission) that this was a decision to 'close the case' (whatever that term means, a matter to which I return later). However, Ms Leventhal added, there was no evidence that any notification of the decision to that effect was sent out to the parties.

30. On 17 September 2007 a screen print (p.422) showed that an Agency employee had returned the mother's telephone call. The relevant entry read "advised that case should be closed as NRP resides in Spain". As Ms Leventhal commented, that entry was unhelpfully compact (and, I would add, ambiguous).

31. On 16 October 2007 another screen print (p.463) showed that a letter sent to the father had been returned from Spain as having been incorrectly addressed. There is no copy on file of what that letter was. It was part of the father's case that the letter in question was a letter notifying him of the decision to close the case.

32. Some 18 months later, on 27 April 2009, the mother telephoned the Agency to report that the father "is now living and working back in [the North East] at the previous address" (p.282). The Agency recorded that the relevant income enquiry forms would be sent out; the screen print showed the case status as being "open".

33. As noted above, Ms Leventhal did not support Mrs Massie's hypothesis that the case closure decision had been reversed by a revision decision for official error. Ms Leventhal's position was that the second time around Tribunal had erred in law in concluding that the case had not been closed, as the screen print references to 'open' status on which it had relied were too tenuous an evidential basis for such a finding, given the other evidence discussed above. Ms Leventhal argued that the Tribunal should rather have found that the case had been closed but that decision had not been notified to the parties. If it had been notified, as required by legislation, then the mother would have appealed and the First-tier Tribunal would have had to address the underlying issue of whether or not the father was habitually resident in the United Kingdom at the relevant time. However, as it was two Tribunals had already examined that issue and both had found against the father on the facts. That being so, Ms Leventhal argued that either the Tribunal's error about case closure was not material or, if it was, the Upper Tribunal should re-make the Tribunal's decision in the same terms.

The Upper Tribunal's analysis of question (1)

Introduction

34. There are a number of interconnected preliminary legal issues which need to be addressed at the outset in considering this first question. The first of these is what is actually meant by a decision to 'close the case'? It is then important to consider the statutory requirements for the three types of determination which I characterise below as a 'jurisdiction decision', a 'supersession decision' and a 'debt decision'.

What is meant by 'closing the case'?

35. A perennial problem (at least for lawyers) is that government bodies (such as the Agency) frequently use terminology for day-to-day administrative purposes in both the child support and benefits adjudication systems which is not reflected in the language of the relevant legislative scheme. 'Closing the case' is a good example. Neither the Child Support Act 1991 ("the 1991 Act") nor the myriad regulations made under the Act use the expression 'closing the case'. Its meaning for the ordinary citizen may be clear enough – the case is closed and the Agency will have nothing more to do with you – but both the legal basis for, and the implications of, that conclusion are not always so self-evident.

36. The present appeal is a case in point. "Closing the case" may refer to one or more of what are conceptually at least three different legal processes. First, it may simply be a decision confined to a finding that the Agency no longer has jurisdiction under the 1991 Act, e.g. as the father was no longer habitually resident in the United Kingdom. Second, it may be a consequential decision that an existing maintenance calculation should be superseded on the basis that the non-resident parent no longer has an ongoing child support liability going forward (owing to that lack of jurisdiction). Third, it may be a further consequential decision to desist from pursuing arrears of child support for a past period, e.g. perhaps because for whatever reason the sum involved is no longer worth chasing and should be written off. I refer to these three types of determination as the 'jurisdiction decision', the 'supersession decision' and the 'debt decision' respectively.

37. It is possible, of course, that a decision might encompass all three types of decision in one fell swoop. However, one of the difficulties in the present appeal, largely due to the Agency's poor record-keeping, is defining precisely what type of decision was taken by whom and at what stage when purportedly 'closing the case'. This is important in practice because of the statutory requirements (e.g. as to notification) that relate to each of these different types of determination.

The jurisdiction decision

38. A decision that (e.g.) a non-resident parent is not habitually resident in the United Kingdom deprives the Agency of its jurisdiction (i.e. the legal power) to make a maintenance calculation. The relevant provision is section 44(1) of the Child Support Act 1991, which read as follows at the material time (and is the same today; and note that paragraph (2A) is irrelevant for present purposes):

> '(1) The Secretary of State shall have jurisdiction to make a maintenance calculation with respect to a person who is—
>
> (a) a person with care;
>
> (b) a non-resident parent; or
>
> (c) a qualifying child,
>
> only if that person is habitually resident in the United Kingdom, except in the case of a non-resident parent who falls within subsection (2A).'

39. What then are the formalities for such a section 44 decision? At the outset the child support decision-making (and appeals) regime was closely modelled on that for social security cases. Indeed, today the principal secondary legislation comprises the Social Security *and* Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991 (emphasis added) or 'the 1999 Regulations'). There is accordingly every reason to think that the underlying principles are broadly the same as between benefits and child support cases respectively. The basic position in social security law is certainly clear: there is "no statutory requirement that a decision on a benefit claim must be committed to writing in order to qualify as a 'decision', although obviously it is good administrative practice to do so … what the claimant must be sent is 'written notice of the decision', not that the decision itself must be recorded in writing" (*Secretary of State for Work and Pensions v AM (IS)* [2010] UKUT 428 (AAC) at paragraph 33). However, a non-communicated decision is inchoate, or lacking in full legal effect, as was explained at paragraph 34 of the same decision:

> '34. These comments, of course, are without prejudice to the well-established principle that an official decision which is not properly communicated to the party concerned is, at the very least, for the time being ineffective. In R(I) 14/74 Mr Commissioner Lazarus held that "In my view it is not possible to make an effective decision without communicating it to the person whose rights are dealt with in it. Writing the words of an intended decision on a piece of paper and placing the piece of paper in a file is not a complete decision-making process" (at paragraph 14(a)). In *R (Anufrijeva) v Secretary of State for the Home Department and another* http://www.bailii.org/uk/cases/UKHL/2003/36.html[2003] UKHL 36, the House of Lords (Lord Bingham of Cornhill dissenting) rejected the argument that a non-communicated decision was nonetheless effective for the purpose of terminating the claimant's income support award, although the majority of their Lordships were not unanimous in explaining the precise scope of that principle (see further *GB v CMEC* [2009] UKUT 189 (AAC)).'

40. That said, the statutory requirements for effectively 'closing the case' following a habitual residence decision are very much context specific. In particular, there is an important difference between a habitual residence decision in the context of refusing a new claim for child support and a habitual residence decision in relation to an existing maintenance calculation. An example of each type of case will suffice.

41. As to the former, assume that a mother makes a fresh child support application, naming the child's father as a foreign national, who the Agency finds is in fact habitually resident overseas. All that is required is the notification of the section 44 decision and hence the decision not to make a maintenance calculation under section 11 of the 1991 Act. That refusal decision will in turn generate the mother's right of appeal (see section 20(1)(b)).

42. As to the latter, where there is an existing maintenance calculation in place, the section 44 decision alone will not suffice. Regard must be had also to paragraph 16 of Schedule 1 to the 1991 Act. At the material time, this read as follows (omitting provisions which are not material to the present case):

> '16.—(1) A maintenance assessment shall cease to have effect—
>
> (a) on the death of the absent parent, or of the person with care, with respect to whom it was made;
>
> (b) on there no longer being any qualifying child with respect to whom it would have effect;
>
> (c) on the absent parent with respect to whom it was made ceasing to be a parent of—
>
> (i) the qualifying child with respect to whom it was made; or
>
> (ii) where it was made with respect to more than one qualifying child, all of the qualifying children with respect to whom it was made;
>
> (d) where the absent parent and the person with care with respect to whom it was made have been living together for a continuous period of six months;
>
> (e) where a new maintenance assessment is made with respect to any qualifying child with respect to whom the assessment in question was in force immediately before the making of the new assessment.
>
> (2) …
>
> (3) …
>
> (4) ...
>
> (4A) …
>
> (5) Where—
>
> (a) at any time a maintenance assessment is in force but the Secretary of State would no longer have jurisdiction to make it if it were to be applied for at that time; and
>
> (b) the assessment has not been cancelled, or has not ceased to have effect, under or by virtue of any other provision made by or under this Act,
>
> it shall be taken to have continuing effect unless cancelled by the Secretary of State in accordance with such prescribed provision (including provision as to the effective date of cancellation) as the Secretary of State considers it appropriate to make.
>
> (6) …
>
> (7) Any cancellation of a maintenance assessment under sub-paragraph (4A), (5) or (6) shall have effect from such date as may be determined by the Secretary of State.

> (8) Where the Secretary of State cancels a maintenance assessment, he shall immediately notify the absent parent and person with care, so far as that is reasonably practicable.
> (9) Any notice under sub-paragraph (8) shall specify the date with effect from which the cancellation took effect.
> (10) …
> (11) The Secretary of State may by regulations make such supplemental, incidental or transitional provision as he thinks necessary or expedient in consequence of the provisions of this paragraph.'

43. As Judge Gray held in *TB v Secretary of State for Work and Pensions and RB (CSM)* [2017] UKUT 218 (AAC) (at paragraph 40, omitting footnotes)

> 'where a lack of jurisdiction arises under section 44(1) of the Act due to cessation of habitual residence by an absent parent any maintenance assessment (which includes an IMA) remains in force under paragraph 16(5) of schedule 1 to the Act until it is cancelled or has ceased to have effect by virtue of any other provision.'

44. Judge Gray in the same case also held, having reviewed the development of the statutory scheme and the relevant case law, that paragraph 16 of Schedule 1 to the 1991 Act drew an important distinction "between cancellation, which requires specific further action, and cessation, which does not" (at paragraph 73). Judge Gray helpfully summarised her conclusions "in a nutshell" as follows:

> '(a) The case was governed by the old (original 1993) child support scheme. It concerned whether, and if so the date from which, a maintenance assessment should be cancelled due to an absent parent ceasing to be habitually resident but notifying the agency of that some 10 years after the event, during which period both children had grown up and ceased to be qualifying children. I consider the meaning of *'ceased to have effect'* in paragraph 16 schedule 1 Child Support Act 1991 and related provisions.
> (b) There is a distinction in relation to the need for formal adjudication in relation to a potentially supervening event which calls for investigation as to the need for cancellation, and the position where a supervening event inevitably causes a maintenance assessment to cease to have effect. In the latter case a formal decision (as opposed to simple notification) is not required.
> (c) Prior to notification of, and during the period of investigation as to whether there has been a loss of habitual residence resulting in a lack of jurisdiction for the making of a maintenance assessment, continuation of a maintenance assessment then in place is provided for pending cancellation under paragraph 16(5) schedule 1 Child Support Act 1991.
> (d) Regulation 7 of the Maintenance Arrangements and Jurisdiction Regulations 1992 provides for the cancellation of an assessment where such an assessment *"is in force".*
> (e) A maintenance assessment which has ceased to have effect because the only remaining qualifying child has turned 19 is not in force. Accordingly the Secretary of State cannot take steps to cancel it.
> (f) Where an assessment is no longer in force the Secretary of State has no power under the child support legislation to make decisions affecting the assessment whilst it was in force.'

The supersession decision

45. It follows from the analysis above that where there is an existing maintenance calculation a section 44 decision does not, of itself, 'close the case'. Something else

is needed. That something else is a supersession decision, in other words a decision made under section 17 of the 1991 Act superseding the current maintenance calculation and ending (or cancelling) the liability under that calculation. Section 17(1) provides that a supersession decision may be made either following an application to that end or on the Secretary of State's own initiative. Further and more detailed provision for supersession decisions is to be found in the 1999 Regulations. At the material time, regulation 6A provided for an existing assessment where there had been "a relevant change of circumstances since the decision had effect" (see regulation 6A(2)(a) and (3)). Again, as at the material time, regulation 7B made detailed provision for the effective date of a supersession decision under section 17 (after April 6, 2009, equivalent provision was made by paragraph 3(c) of Schedule 3D to the 1999 Regulations). In particular, at the date in question regulation 7B(18) provided as follows:

> '(18) Where a superseding decision is made in a case to which regulation 6A(2)(a) or (3) applies and the relevant circumstance is that the non-resident parent, person with care or the qualifying child has moved out of the jurisdiction, the decision shall take effect from the first day of the maintenance period in which the non-resident parent, person with care or qualifying child leaves the jurisdiction and jurisdiction is within the meaning of section 44 of the Child Support Act.'

46. The question of notification of such a supersession decision is dealt with by regulation 15C of the 1999 Regulations. In particular regulation 15C(5) provided as follows at the relevant time:

> '(5) Where the Secretary of State makes a decision that a maintenance calculation shall cease to have effect—
>
> (a) he shall immediately notify the non-resident parent and person with care, so far as that is reasonably practicable;
>
> (b) where a decision has been superseded in a case where a child under section 7 of the Child Support Act ceases to be a child for the purposes of that Act, he shall immediately notify the persons in sub-paragraph (a) and the other qualifying children within the meaning of section 7 of that Act; and
>
> (c) any notice under sub-paragraphs (a) and (b) shall specify the date with effect from which that decision took effect.'

47. It is not entirely clear whether the phrase "a decision that a maintenance calculation shall cease to have effect" is to be understood more broadly or rather in the narrower sense as analysed by Judge Gray in *TB v Secretary of State for Work and Pensions and RB (CSM)* (i.e. in contradistinction to the calculation being cancelled). Either way, it makes no difference, as it is equally plain from the terms of paragraphs 16(5) and (7)-(9) of Schedule 1 to the 1991 Act that a supersession decision cancelling an assessment must be notified to both parents and specify the date from which the cancellation takes effect.

<u>The debt decision</u>

48. This type of closure decision can be dealt with much more shortly. Very simply, decisions about debt enforcement fall outside the tribunal system. As Commissioner (now Upper Tribunal Judge) Rowland explained, "questions about the ability of a person to pay child support maintenance and the method of enforcement of such maintenance are questions for the Secretary of State and not for a tribunal or Commissioner" (*R(CS) 5/98* at paragraph 6). Thus the extensive statutory provisions about enforcement (sections 29-41C of the 1991 Act) ultimately have to be resolved

through the courts, not the tribunals. So a decision about whether to waive any arrears of child support is not a matter for either the First-tier Tribunal or the Upper Tribunal. It follows that the format for notification of such decisions is equally not governed by the 1999 Regulations.

Applying those principles to the circumstances of the present case

49. I remind myself that the father's primary argument was that his child support case had been closed for all purposes on 27 August 2017 (see paragraph 17 above). As noted at paragraph 33 above, Ms Leventhal's submission was also that the Tribunal had erred in law in concluding that the case had not been closed, as the screen print references to 'open' status on which it had relied were too tenuous an evidential basis for such a finding given the other evidence on file. Ms Leventhal further argued that the Tribunal should have found that the case had been closed but that this decision had not been properly notified to the parties. I agree with Ms Leventhal as regards both those submissions. However, as will be clear from the preceding analysis, it is important to be more precise about what is meant by "closing the case".

50. Given the sequence of events described above (at paragraphs 23-30), I am satisfied that the Agency took a jurisdiction decision on 15 August 2007 (see paragraphs 26 and 27). Furthermore, given the analysis above, as there was an extant child support assessment (albeit one that specified a nil liability (see paragraph 23 above), that jurisdiction decision, finding that the father was no longer habitually resident in the United Kingdom, needed to be followed by an effective supersession decision cancelling the child support liability.

51. That then takes us to the 27 August 2007 decision, the precise nature of which is problematic. It is certainly a debt decision, as that seems clear from the associated correspondence (p.381) and the terms of the official form used to record the decision, namely the CSF773 *Authorisation for Technical adjustment/suspension* (pp.382-383). It is much less clear that it is a supersession decision. I say that as nowhere does it record that the last relevant assessment dated 2 August 2007 is being superseded. Nor does it state anywhere from which date that assessment was being superseded (although this might be seen as academic, given that the existing liability was a nil assessment). The thrust of Ms Leventhal's submission was that the 27 August 2007 decision was in substance both a supersession decision and a debt decision, and on balance I am prepared to accept that, even though it was not fully articulated as such, not least as the contemporaneous documents give the clear impression that Agency staff thought that they were acting so as to close the case for all purposes.

52. However, that is not the end of the matter. Even if the 27 August 2007 decision was both a supersession decision and a debt decision, in effect implementing the 15 August 2007 habitual residence decision, was the 27 August 2007 case closure decision properly communicated to the parties? More particularly, were the parents advised not just that there had been a supersession decision but that it was effective from such-and-such a date (and that the decision carried appeal rights)?

53. The father argues that he and the mother were so notified, and refers to the screen print entry dated 16 October 2007 (p.463), showing that a letter sent to him in Spain had been returned as having been incorrectly addressed. However, there is no indication anywhere on file as to the nature of that letter or its contents.

54. I have come to the conclusion on the balance of probabilities that the parents were not notified in accordance with the statutory requirements. They should have

been sent a letter akin to the decision letters of 2 August 2007 (pp.464 and 467), explaining that the previous assessment had been superseded from a specified date. There are no copies of any such letter on file, or any hint that such letters were indeed sent. I recognise that the quality of the Agency's record-keeping in this case has not been ideal. However, I bear in mind the Tribunal's finding that the mother, had been sent such a letter, would have lodged an appeal against a decision to cancel the assessment. The mother's approach to the present proceedings confirms that conclusion is eminently sustainable. It is also corroborated by the fact the county court financial proceedings were resolved on the basis that child maintenance was for the Agency to determine. But there was no such contemporaneous appeal by the mother.

55. My conclusion is thus that the Agency undoubtedly made a habitual residence decision on 15 August 2007 and a debt decision on 27 August 2007, and probably made a supersession decision on 27 August 2007, but the supersession decision was not properly notified to the parents. As noted above, it is a fundamental principle of public law that a decision which is not communicated in accordance with the relevant statutory requirements is not a fully effective decision. In particular, the mother's appeal rights (to which she was plainly entitled) did not arise.

56. I return later to the further implications of these conclusions about the purported closure of the case and the Tribunal's approach to that issue. However, first it is necessary to consider the two other questions before the Tribunal.

Q2: did the father cease to be habitually resident in the UK in 2006?

Introduction

57. The father's case, put very simply, was that he had moved to Spain in mid-2006 with every intention of settling there and so had abandoned his habitual residence in the United Kingdom. Neither the first time around nor the second time around Tribunal accepted that argument.

The second time around First-tier Tribunal's decision

58. The second time around Tribunal's decision notice recorded its decision that "the Appellant did not cease to be habitually resident in the United Kingdom in 2006." The Tribunal's statement of reasons addressed this issue in some detail at paragraphs 18-26, running to just over a page of printed text. The Tribunal's conclusion on that issue was in the following terms:

> '26. The Appellant says that he gave up his habitual residence in the United Kingdom in 2006. It is for him to establish that. The appellant produces little evidence that he remained in Spain for any significant period of time or that his intention was to establish his habitual residence there. There is substantial evidence that he retained a home in the United Kingdom and that others considered that he lived there. That is the address the appellant returned to. His partner continued to operate a business in the United Kingdom. The appellant has now shown that he lost his habitual residence in the United Kingdom in 2006 or any time. I find there was no intention to permanently or indefinitely leave the United Kingdom. I find that he retained his habitual residence in the United Kingdom and has never ceased to be habitually resident here.'

The father's grounds of appeal on question (2)

59. I acknowledge that in his grounds of appeal the father has provided a detailed critique (running to more than 2 sides of A4) of the Tribunal's findings and conclusion on habitual residence. He reasserts his position that he and his partner went to Spain with no intention of returning to the United Kingdom and lived there for about three

years. He argues that they only returned to the United Kingdom because the global banking crash deprived them of ready access to working capital in Spain. He relies in part on the Agency's decision that he was not habitually resident in the United Kingdom. He also refers to the facts that he and his partner had businesses in Spain, a home in Spain and got married in Spain. He points out that they had sold their cars when they left the United Kingdom. He also relies on further evidence in the form of Spanish bank statements and phone bills, which had not been put before the Tribunal by the Agency, but which had previously been provided to the Agency before it made its decision on habitual residence.

The Secretary of State's response to the grounds of appeal on question (2)

60. Mrs Massie, in the written response on behalf of the Secretary of State, does not address this ground of appeal in any detail. Rather, she simply observes that the Appellant's evidence did not persuade the Tribunal that he had at any time ceased to be habitually resident in the United Kingdom. She further argues that the Appellant's detailed submissions in support of this ground of appeal are no more than an attempt to re-open the Tribunal's factual findings on habitual residence. Ms Leventhal essentially adopted the same line of argument at the oral hearing. She pointed out that the Appellant had appeared in front of two Tribunals, neither of which had been persuaded that he had ceased to be habitually resident in the United Kingdom. She further argued that this was ultimately a question of fact and no error of law had been identified in the Tribunal's approach to this issue.

The Upper Tribunal's analysis of question (2)

61. The question for the Tribunal was not whether the Appellant was living in Spain. He clearly was living in Spain for a period. But it is well established as a matter of principle that presence alone does not amount to habitual residence. In any event, the question the Tribunal had to determine was not whether the father was habitually resident in Spain but rather whether he had at any time lost his habitual residence in the United Kingdom. This is not necessarily a binary choice.

62. Indeed, it must be borne in mind that a person may be habitually resident in more than one country at the same time – see *Armstrong v Armstrong* [2003] EWHC 777 (Fam); [2003] 2 FLR 375 at paragraphs 18-24. As a matter of law it is also clear there is no real difference between *habitual residence* (typically used in family law contexts) and *ordinary residence* (typically used in relation to tax and tax credits) – see *Ikimi v Ikimi* [2001] EWCA Civ 873, [2002] Fam 72 at paragraph 31. The Court of Appeal's recent decision in *Arthur v HMRC* [2017] EWCA Civ 1756 is an example of a case where an individual was found to be ordinarily resident in the United Kingdom even though he simultaneously had employment and accommodation in another country. It is also always important to consider the context in which habitual residence is to be assessed. As Commissioner Rice held in reported decision *R(CS) 5/96* at paragraph 9 (emphasis in the original):

> 'As I understand it, **the purpose underlying the child support legislation is the social need to require absent parents to maintain, or contribute to the maintenance of, their children.** In determining as question of fact whether in the above context a person has ceased to be habitually resident in this country, it appears to me that emphasis should be put on factors directed to establishing the nature and degree of his past and continuing connection with this country and his intentions as to the future, albeit the original reason for his move abroad, and the nature of any work being undertaken there are also material. It is not enough merely to look at the length and continuity of the actual residence abroad.'

63. Finally, as Newey LJ observed in *Arthur v HMRC*, "to succeed in an appeal from an FTT decision on residence or ordinary residence, it must be shown (to quote from Lloyd LJ's judgment in *Revenue and Customs Commissioners v Grace* [2009] EWCA Civ 1082, [2009] STC 2707, at paragraph 4):

> "(1) that the decision is one which 'no person acting judicially and properly instructed as to the relevant law could have come'; or (2) that the reasoning for the decision contains something which is on its face bad law and which bears on the determination".

64. Newey LJ was referring in that passage to ordinary residence, as *Arthur v HMRC* was a tax credits case, but given the juristic alignment between habitual residence and ordinary residence the same principles as to the scope of the Upper Tribunal's appellate jurisdiction must equally apply to a First-tier Tribunal's findings on habitual residence.

65. So the Tribunal's findings and conclusion on habitual residence have to be considered against the backdrop of these legal principles as set out above. The Tribunal directed itself properly on those tenets – there is nothing in its decision "which is on its face bad law" in terms of statement of principle within the terms of the second category of case in *Revenue and Customs Commissioners v Grace*. As such the father's ground of appeal can only succeed on a rationality challenge within the first limb of the test posed by Lloyd LJ, namely by showing that this Tribunal's decision on habitual residence was "one which 'no person acting judicially and properly instructed as to the relevant law could have come'". The father's difficulty here is that the Tribunal took into account a wide range of factors, including e.g. that the father had a tenancy agreement in Spain and had opened a Spanish bank account. But the Tribunal also noted that there were a number of factors which demonstrated that the father retained a link with the United Kingdom, such as the fact that he had a property here – the fact that it was let out in his absence did not diminish its significance.

66. In my judgment potentially the father's best point in this context concerns the failure by the Agency to put before the Tribunal the Spanish bank account statements and phone bills. Arguably this challenge straddles the two types of case envisaged by Lloyd LJ in *Revenue and Customs Commissioners v Grace*. On the face of it, and as Ms Leventhal conceded, that omission would appear to have been a breach of rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2865), namely the requirement on the Agency to provide with its response "copies of all documents relevant to the case in the decision maker's possession". I do not doubt the father's assertion that he had provided these various statements to the Agency before it made its habitual residence decision.

67. Ms Leventhal had two responses to that argument. The first was that the obligation imposed on the Agency by rule 24 did not negate an appellant's own responsibility to produce relevant material in support of his own case. At first sight this is not a desperately attractive argument, given that an appellant may reasonably expect that a public authority such as the Agency will comply with its statutory duties in terms of compiling its response to the appeal along with the accompanying bundle. However, Ms Leventhal's argument has rather more traction in the particular circumstances of this appeal. This was, after all, a second time around appeal, so the father had had ample opportunity to check that everything he wanted to be before the Tribunal was in the appeal papers. He produced them only *after* the second time around hearing, stating that he had located them on an old computer back-up "after

an exhaustive search" (p.545). Yet the Tribunal had previously issued adjournment directions at an earlier hearing in March 2016 which had specifically provided that "any further documents … accompanied by a brief explanation of their relevance" should be submitted by a set date (p.504). Ms Leventhal also makes the point that on closer scrutiny these various Spanish bank statements etc. cover a period of only about 6 months.

68. Taking all those factors into account, I am not persuaded that the father's second ground of appeal is made out. The father has appeared in person before two different tribunals more than two years apart (in March 2014 and June 2016), so had ample opportunity to assemble and put his case. Neither Tribunal was persuaded that he had given up his habitual residence in the United Kingdom, however his presence in Spain might have been characterised. In particular, I find no material error of law in the second time around Tribunal's decision on habitual residence.

Q3: was the correct income used in the assessment?

Introduction

69. The Agency's maintenance calculation of 19 November 2012 assessed the father's child support liability as being £15 a week from 21 April 2009, £19 a week from 20 April 2010 and £22 a week from 19 April 2011. Those assessments were based on the father having a sole source of taxable income for each of the three tax years in question (2009/10, 2010/11 and 2011/12). The decision maker explained that these assessments were based on self-employed partnership income as detailed at pp.15-23 (see p.8). It was further noted (p.2) that the father was or had been a partner in a partnership engaged in buying and leasing out distribution rights to feature films designed to take advantage of the tax deferral scheme known as "film sale and leaseback" (p.2).

70. The nature of such a scheme is that an individual puts capital into the partnership on joining, and receives a substantially larger capital sum back by way of a tax rebate (thus being an attractive arrangement for anybody looking for an immediate and significant lump sum). It appears that the father had invested some £100,000 in the partnership and received a larger sum by way of a tax refund – the precise amounts are not material for present purposes. The corollary, however, is that partnership profits are retained within the scheme and in future years the individual pays larger tax bills so HMRC eventually 'recovers its money'.

71. The existence of the partnership itself (Zeus Films LLP) has not been in dispute. It was recognised by the District Judge in the ancillary relief judgment (dated 23 December 2004) at p.341, setting out the key features as follows:

> "1. The scheme is more properly a tax deferment scheme rather than a tax avoidance scheme.
> 2. Ultimately, over a 15 year period the tax rebated will be repaid by way of income tax being assessed on escalating lease rental payments received by the film partnerships of which the Respondent [the father] is a member. This rental income is not actually received by the Respondent. Instead it is used to repay interest on capital borrowed to invest in the partnerships and to repay the borrowed capital itself."

72. The first time around Tribunal adopted that same explanation of the scheme, and held that the partnership profits attributed to the father remained his income for child support assessment purposes (see p.359 at paragraph 4 and p.366 at paragraph 13). Although the father challenged that finding at the time, it was not necessary to deal with it as part of the first Upper Tribunal appeal.

The second time around First-tier Tribunal's decision

73. In its statement of reasons the second time around Tribunal recorded the father's case as being that he was a member of the partnership but had not received any income from it. The Tribunal then reviewed the evidence on file but went on to confirm the income assessment contained in the Agency's decision of 19 November 2012, subject to one relatively minor arithmetical correction as regards the 2009/10 tax year. The concluding passage read as follows:

> "30. I dealt with a directions hearing in this appeal on 16 March 2016. I warned the appellant on that occasion that if he disputed the figures in the partnership tax statements that he should seek from HMRC confirmation of what his true income was for the relevant years. I warned him that in the absence of such confirmation any subsequent tribunal would be likely to conclude that the partnership statements used were an accurate reflection of his income. The appellant accepts that. He said that he had written to HMRC in March 2016 and was still awaiting a reply from them. I do not accept his explanation that [he has] been unable to get a response from HMRC since March 2016.
>
> 31. It may well be that the appellant has not received any money from the partnership. Partnership profits are however taxed not on drawings but on earnings. There may be many reasons why a partner does not receive those earnings. It does not alter the fact that he has earned them and they are taxable income which is income properly to be used in the maintenance assessment. I find that the earnings set out in the partnership statements at pages 15, 16, and 17 is income of the appellant properly used in the maintenance assessment."

The father's grounds of appeal on question (3)

74. The father's contention was that the Agency's assertion, relied upon by the Tribunal, that pp.15-17 were copies of the partnership tax statements was demonstrably false and incorrect. They contained no mention of Zeus Films LLP. Although the statements mentioned him by name, there was no indication as to what they were about. The statements had not been supplied by HMRC, as the Tribunal had directed the Agency to do back in October 2013 (see p.208, corrected at p.267). He had now had a letter from HMRC – since the second time around Tribunal hearing – stating that he had no taxable income for the tax years in question. If pp.15-17 were true documents, then the sums involved would have been recorded against his tax liability in respect of each of the relevant years.

The Secretary of State's response to the grounds of appeal on question (3)

75. Mrs Massie's written submission focussed almost exclusively on the issue of case closure and did not address this third issue. At the oral hearing, Ms Leventhal's main argument on this ground of appeal was that the question of the father's income had been resolved on the facts by both the first and second Tribunals. No question of law arose, and the father was simply seeking to re-argue factual findings with which he disagreed. Accordingly question (3), Ms Leventhal somewhat dismissively submitted, need not trouble the Upper Tribunal.

The Upper Tribunal's analysis of question (3)

76. As it happens, initially I have found this issue somewhat troubling. There is no doubt that this type of tax deferral scheme can generate some complex legal issues in terms of the proper attribution of such earnings under the various child support schemes (see e.g. *FQ v Secretary of State for Work and Pensions* [2016] UKUT 446 (AAC); [2017] AACR 24, decided in the context of the current and third variant of the child support scheme). However, on further consideration I have concluded that Ms

Leventhal's analysis is correct. The father had two main arguments to the contrary, which I will take in reverse order.

77. The first is his reliance on the HMRC letter of 22 July 2016 (see p.590), written about 6 weeks after the second time Tribunal hearing and so obviously not before that Tribunal. This letter states as follows:

> "I have reviewed Self-Assessment and can advise that there are no tax calculations for 2009-10 to 2011-12. This is because we did not process any tax returns completed by you. We have entered nil returns for these years".

78. On the face of it this is compelling evidence in support of the father's arguments. However, it is trite law that on an appeal confined to error of law a party cannot produce fresh evidence as to the facts with a view to seeking to undermine a tribunal's factual findings that were sustainable on the evidence that was actually before it. Indeed, as Commissioner Powell explained in unreported decision *CDLA/7980/2016*, "finality is another important principle. Parties cannot demand a rehearing simply because, at the original hearing, they failed to adduce the right evidence, failed to ask the right questions or failed to advance the right arguments" (at paragraph 11). I did consider whether the Tribunal Judge had been a little unrealistic in refusing to accept the father's explanation that by June 2016 he had not received an answer from an inquiry to HMRC originally made in March 2016. There are, however, two responses to that question. The first is that it is ultimately a question of fact for the first instance Tribunal to determine. The second is that the father appears not to have made the inquiry in March 2016 at all – he actually wrote to HMRC only on 24 April 2016 (p.592) followed by a further enquiry on 23 June 2016 (p.591). Had he made his request in good time, he may well have had his reply from HMRC by the time of the Tribunal hearing. But he did not, so he did not have it, and no error of law is disclosed in the Tribunal's approach in this respect.

79. That then takes us to the father's other main argument in relation to this ground of appeal – that the Tribunal was wrong to rely on the 'false and incorrect' documents at pp.15-23 and especially the statements at pp.15-17. These need more detailed consideration. The statements at pp.15-17 appear to be standard HMRC short form partnership statements. Each of the three statements lists the father by name with his address and national insurance number. They clearly date from three successive tax years, as at the foot of each form is printed the reference HMRC 12/08, HMRC 12/09 and HMRC 12/10 respectively. Someone had added in handwriting respectively 09/10, 10/11 and 11/12, tax year references which also align with the printed text accompanying boxes 7 and 9. Box 11 on each form, labelled 'Profit', has an entry for each year (£8,614, £9,054 and £9,483). It is perfectly true there is no reference to Zeus Films LLP on any of the statements, although "Ingenious Media" had been annotated on the first statement. Pages 18-23 are a copy of the financial statements for Zeus Films LLP for 2010/11; these confirm that no members received any *salaried remuneration* during that tax year although *profits* were allocated to members (p.23). Those accounts also confirm Ingenius as the partnership operator (p.23), as incidentally the first time round Tribunal had accepted (p.359).

80. I do not consider the father's point about the Tribunal's directions in October 2013 takes him anywhere. The Tribunal on that occasion directed both the father and the Agency to produce copies of his tax returns for the relevant years (pp.207-208). The father replied that he had filed no tax returns for the years in question (p.213). The Agency replied (p.274) that it had only secured the unhelpful print-out from HMRC at p.278, which referred to an employment date ending before 2007. Be that as it may, the Agency's investigators obtained the Zeus Films LLP statements from

the parent company Ingenious Investments (p.496). It was then a question of fact as to what the Tribunal made of all that evidence.

81. I can see no warrant for interfering with the Tribunal's conclusion on the facts on the issue of the father's partnership earnings. It was a sustainable conclusion on the evidence it had before it in the light of the way the case had been argued. The father's case was that he had not received any income from Zeus LLP. The Tribunal correctly recognised that he may not have received any money from the partnership. But as the Tribunal correctly observed, partnership profits are taxed not on *drawings* but on *earnings*. This is consistent with the approach of Upper Tribunal Judge Mesher in *AR v Bradford Metropolitan Borough Council (HB)* [2008] UKUT 30 (AAC), reported as *R(H) 6/09*:

> '11. There can be no doubt that when a partnership is making profits any drawings that are taken by a partner are not to be taken into account as income at all. Otherwise there would be an unfair and inappropriate double counting. That was one of the points of decisions *CCS/3156/2000* and *CCS/1246/2002* that were enclosed with my direction of 13 October 2008. Regulation 28(1)(b) of the CTB Regulations, like Schedule 1 to the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (SI 1992/1815) that were in issue in those cases, requires the earnings of a person in self-employment as a partner to be the person's partnership share of the difference between the gross receipts of the employment and the deductions allowed by the regulations. That amount is to be taken into account as earnings whether drawings are taken or not. Any drawings cannot be regarded as earnings, as I think the local authority agrees, but in the context of the Regulations as a whole the drawings cannot be taken into account as other income. To do so would involve taking into account both the claimant's share of the profits (independently of whether any profits were withdrawn) and the actual drawings from that share of profits.'

The Upper Tribunal's decision

82. Drawing those various threads together, my overall conclusion is as follows.

83. First, the second time around Tribunal made an error of law on question (1), in deciding that the case had not been closed. In short, the evidence before the Tribunal demonstrated that the case had been closed in 2007 but that decision had not been notified to the parents, and in particular to the mother. It was therefore an inchoate and ineffective decision as not properly communicated to an affected party.

84. Second, the Tribunal did not err in law on question (2), the issue of habitual residence.

85. Third, the Tribunal did not err in law on question (3), the assessment of the father's income for the tax years in issue.

86. The question then is: how should the Upper Tribunal now dispose of the appeal?

87. Ms Leventhal submitted that there were two ways forward. One way was to leave the decision of the First-tier Tribunal intact on the basis that there was no material error of law (or, if there was, that the Upper Tribunal, even though allowing the appeal, should decline to set aside the First-tier Tribunal's decision as a matter of discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007; "the 2007 Act"). The other was for the Upper Tribunal to allow the appeal, to set aside the Tribunal's decision and re-make the decision in terms that (a) the case had

been closed; (b) that case closure decision had not been properly notified; but (c) on the other issues in dispute (habitual residence and the assessment of earnings) the Tribunal had come to the correct decision in any event (section 12(2)(b)(ii) of the 2007 Act).

88. There is, however, a third way which should be mentioned for completeness, namely to allow the appeal, set aside the Tribunal's decision and remit to a new First-tier Tribunal for a fresh hearing. Understandably nobody argued for that option. It is plainly an undesirable option and a choice of last resort, given the lengthy course of these proceedings to date. I therefore disregard that possibility.

89. It is well-established that the focus of the Upper Tribunal's error of law jurisdiction is on *material* errors of law. As the Court of Appeal explained in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 (at paragraph 10), "each of these grounds for detecting an error of law contain the word "material" (or "immaterial"). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

90. So, applying that test, was the Tribunal's error of law material? I conclude that it was not. The Tribunal was wrong to decide that the case had not been closed. However, the fact of the matter was that that case closure decision had not been notified to the parties and so remained inchoate – so the effect was essentially the same. The mother in particular had not been given an opportunity at the time to challenge the Agency's decision on habitual residence (and the consequential and necessary supersession decision flowing from that). The case was still live, as the case closure decision had not been communicated properly and so the mother's appeal rights had yet to be notified. Furthermore, that finding on case closure did not infect the Tribunal's decision on the other two questions in issue, namely the habitual residence and earnings assessment points. The Tribunal's factual findings on the habitual residence question meant that the Agency's previous habitual residence decision had been reversed on appeal and so the Secretary of State had the power to make the 2012 decision now under appeal.

91. If I am wrong about that, and the error of law by the Tribunal was material, then as a matter of discretion I consider that it would be wrong to set aside the Tribunal's decision. I say that as the father has already had two opportunities before the First-tier Tribunal to persuade them of the merits of his case, which has been rejected on both occasions. Given the obvious public and private interest in finality, I consider that the First-tier Tribunal's decision should stand in any event.

Conclusion

92. For the reasons explained above, the Upper Tribunal dismisses the father's appeal. The decision of the First-tier Tribunal is not set aside.

Signed on the original
on 15 December 2017

Nicholas Wikeley
Judge of the Upper Tribunal