IN THE UPPER TRIBUNAL Appeal Nos: CCS/2298 & 2299/2019

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Jones

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Birmingham, on 12 November 2018 with case numbers SC/319/16/02309 & SC319/16/02310 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore remits the appeal to be decided afresh by a differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The fresh decision will follow an oral re-hearing. The form of that hearing (whether by phone, video or in person) will be a matter for the First-tier to direct.

(2) The First-tier Tribunal should have regard to the points made in the documents set out in the following paragraph, (3).

(3) A copy of: the Appellant's application for permission and notice of appeal dated 7 October 2019 with enclosures; the Upper Tribunal's decision granting permission to appeal dated 20 December 2019; and the Respondent's submission dated 16 April 2020 should be provided to the First-tier Tribunal re-hearing the appeal together with this decision.

REASONS FOR DECISION

1. I allow this appeal for the reasons submitted by the Appellant and supported by the Secretary of State ('the First Respondent'). The First Respondent, in its submission dated 16 April 2020, has supported the appeal being allowed on the grounds for which I granted permission to appeal on 20 December 2019. I allow the appeal on those grounds. For the same reasons that I considered that it was arguable that the First-tier Tribunal had erred in law in a material manner, I am satisfied that it did so err.

2. In the First Respondent's submissions dated 16 April 2020, Stuart Davies, on behalf of the Secretary State, submitted that the appeal should be allowed and the First-tier's decision of 12 November 2018 be set aside. It was submitted that the matter should be remitted to a fresh First-tier Tribunal for a new decision.

3. The First Respondent's submissions were not able to be forwarded electronically to the Appellant nor Second Respondent for lack of email addresses nor in hard copy due to the administrative pressures and reduced staffing available during the COVID-19 Pandemic. Therefore, there have been no responses from the Appellant nor Second Respondent to the Secretary of State's submissions.

4. In light of the fact that: I will be allowing the appeal and setting aside the First-tier's decision, an outcome in favour of the Appellant; and I have substantial written evidence and submissions on the law before me which I have considered; it is not in the interests of justice to hold a hearing of the substantive appeal. No evidence is required to be heard as the question on the appeal is one of law and there is no reason to suppose evidence from the Appellant or Second Respondent would make any difference to the outcome.

5. The Appellant and Second Respondent have not responded to the First Respondent's submissions of 16 April 2020 as they have not received them. However: a) as the First Respondent supports this appeal; and b) to save an administrative step and the time and potential delay in waiting for the submissions from the Appellant and Second Respondent during the COVID-19 pandemic, I am satisfied that it is in the interests of justice to proceed to determine the appeal and issue a decision to the parties.

6. I therefore proceed to decide the appeal on the papers pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I am satisfied it is in the interests of justice to do so. All parties had an opportunity to present their cases in writing pursuant to my original decision granting permission to appeal on 20 December 2019. The Second Respondent did not take up this opportunity within the month provided by the directions nor at any time since. I had all the relevant papers in the bundle before me, the issue was an appeal on a point of law only and to hold a hearing would only have caused further delay in a case that is already old (the decision of the First-tier under appeal being eighteen months old).

7. I am acutely aware that I am determining the appeal without having received the Appellant's observations and representations, as provided for in my direction number 3 when I granted permission to appeal on 20 December 2019.

8. Therefore, the Appellant will have the opportunity to apply to set aside this decision under Rule 43(2)(a) and (b) of the Upper Tribunal Rules 2008 because the First Respondent's submissions have not been received by the Appellant and the Appellant's submissions in reply have not been prepared and considered by me. If she wishes to apply to set aside this decision she will also have to address whether it is in the interests of justice under Rule 43(1)(a) to do so.

Background

9. The Appellant appeals the decision of the First-tier Tribunal ("the First-tier") dated 12 November 2018. By way of background, I adopt and set out below the Secretary of State's chronology.

10. The Appellant, the resident parent, is a mother with care of two children. The non-resident parent ('NRP') is their father, the Second Respondent.

07/04/11 The Second Respondent was liable to pay child support maintenance of £0.00 per week, in respect of the two children, from the effective date of 22/03/11.

(N.B. This decision is not the subject of this appeal)

01/08/11 The Appellant applied to the Secretary of State for the maintenance calculation made on 07/04/11 and effective from 22/03/11 to be revised due to a change in circumstances namely:

(i) The Appellant stated that the Second Respondent had declared an income during a divorce hearing

(N.B. No decision was made upon this application)

03/05/12 The Appellant applied to the Secretary of State for the maintenance calculation made on 07/04/11 and effective from 22/03/11 to be revised due to a change in circumstances namely:

(ii) The Appellant stated that the Second Respondent was working.

(N.B. No decision was made upon this application)

21/04/15 Transitional closure of 2003 Child Support scheme was notified. Liability ended 16/04/15.

20/09/16 The Child Maintenance Agency's complaints section identified 2 historical errors, 01/08/11 and 03/05/12 when changes were

reported by the Appellant but no decision had been notified by the Child Maintenance Agency.

05/10/16 The Secretary of State's made a decision under **Section 17 of the Child Support Act 1991**, i.e. refusing to supersede the maintenance calculation. The First Respondent's decisions were that:

The Second Respondent continued to be liable to pay £0.00 per week, in respect of the two children, from the effective date of 01/08/11.

The Second Respondent continued to be liable to pay £0.00 per week, in respect of the two children, from the effective date of 03/05/12.

17/10/16 The Appellant requested an appeal against the decisions dated 05/10/16.

17/11/16 The Secretary of State's Response Writer was unable to revise the decision dated 05/10/16 in the Appellant's favour in accordance with Section 16 of the Child Support Act 1991, as substituted by Section 40 of the Social Security Act 1998. The Second Respondent remained liable to pay £0.00 per week, in respect of the two children, from the effective date of 22/02/11. As the Response Writer found no errors in the maintenance calculation, the appeal was refused.

12/11/18 On appeal by the Appellant against the First Respondent's decisions of 05/10/16, the First-tier Tribunal determined that as the 2003 scheme had closed on 16/04/15 and there was no jurisdiction to deal with the two applications for supersession made by the Appellant (the parent with care).

(*The decision of the First-tier of 12/11/18 is the subject of this appeal*)

17/04/19 The First-tier gives its reasons in a Statement of Reasons

The First tier's decision

11. The First-tier concluded its statement of reasons as follows:

'The regulation [Regulation 8 of The Child Support (Ending Liability in Existing Cases and Transition to New Calculation Rules) Regulations 2014 or 'ELEC Regulations'] makes reference to "may treat the

application as withdrawn" rather than must. The Tribunal found that the purpose of the regulations was to allow the phased transition from the 2003 Scheme to the 2012 one. Such transition had been ongoing over a period of time and required a degree of certainty and finality to allow all parties to organise their finances accordingly. Accordingly, once the Agency had informed the parties the case was closed, which effectively brought the outstanding application to an end, they had treated these applications as withdrawn and some 18 months later no longer had the power to make any further decision on the 2011 and 2012 applications by [the Appellant].

For these reasons the Tribunal found that [the Appellant] could not appeal the refusals to supersede and there was no jurisdiction to hear her appeals.'

The Appellant's submissions

12. The core of the Appellant's grounds of appeal and submissions was as follows:

'We submit that under Section 17 Child Support Act, the Secretary of State has a statutory duty to process information that requires either a supersession, or a refusal to supersede a maintenance calculation. We submit this obligation is not removed simply through a choice over future maintenance payments.

The obligation of the Secretary of State is evident by the term used in Regulation 8 ELEC which states the Secretary of State ('may' rather than "must") treat the application as withdrawn.

……..
Schedule 1 paragraph 16(1)(b) Child Support Act 1991 states;

16.-(1) A maintenance calculation shall cease to have effect –
…….

(b) on there no longer being any qualifying child with respect to whom it would have effect;

In the present case, qualifying children well still eligible at the time of the case closure. Hence there was no permanent end to the jurisdiction.

It is our submission that thee FTT erred in law by its reliance on regulation 8 ELEC and disregarding the provisions of Schedule 1 paragraph 16(1)(b) CSA. It failed to address whether jurisdiction remained intact under such provisions until those calculations "ceased to have effect" through a permanent event.

As implied by Judge Levenson [in *Brough v Law* [2011]EWCA Civ 1183], the statutory duty of the Secretary of State does not disappear automatically and we]submit that the FTT erred in law by inadequate findings as to why the jurisdiction was not intact given no 'Permanent Event' was applicable.'

Discussion and Decision

13. The First-tier decided that the closure of the 2003 scheme applications for child maintenance on 16 April 2015 meant that there was no power for the Secretary of State to make the decisions that were made on 5 October 2016 refusing supersession in respect of decisions made in 2011 and hence there was no jurisdiction for the Tribunal to hear any appeals against the supersession decision.

14. I am satisfied that the First-tier erred in law in a material manner in making its decision on 12 November 2018 and in the reasons it gave for its decision on 17 April 2019.

15. I am satisfied that the First-tier Tribunal erred in law in its overly restrictive interpretation and application of Regulation 8 of The Child Support (Ending Liability in Existing Cases and Transition to New

Calculation Rules) Regulations 2014 ('ELEC Regulations) in this case. Regulation 8 provides:

'Treating applications for a maintenance assessment or for a maintenance calculation falling to be made under existing rules as withdrawn

8. Where the power in paragraph 1(1) of Schedule 5 to the 2008 Act is exercised in relation to a case mentioned in paragraph 1(2)(b) or (d) of that Schedule (application for a maintenance assessment or for a maintenance calculation falling to be made under existing rules), if none of the interested parties exercises a choice to remain in the statutory scheme before the liability end date, the Secretary of State may treat that application as withdrawn. '

16. I am satisfied that there was power for the Secretary of State to make supersession decisions in respect of child maintenance calculations up to 16 April 2015 and the First-tier Tribunal has jurisdiction to hear appeals against such decisions. There is nothing within Regulation 8 which removes the Secretary of State's power to do so nor which removes the Tribunal's jurisdiction from hearing appeals in respect of those decisions even if they are made after 16 April 2015. I adopt and reply upon the Secretary of State's submissions in coming to this conclusion.

'*The Secretary of State's submission*

1.On 01/08/11 and 03/05/12 [the Appellant], the parent with care, made applications regarding the income of the NRP. These were not properly actioned at the time, with no decisions being made upon them. There were eventually actioned properly, with decisions being made (not to supersede) on 05/10/16. However, in the meantime, the child maintenance application for the 2003 scheme was closed and liability ended 16/04/15.

2. The question which concerned the tribunal was the impact of the closure of the child maintenance application on 16/04/15. The tribunal concluded that this closure had the effect of rendering the decisions made on 05/10/16 as invalid, and therefore the appeal of those decisions was also invalid:

> *"11. [final bullet point] …Accordingly once the Agency had informed the parties that the case was closed, which effectively brought the outstanding applications to an end, they had treated these applications as withdrawn and some 18 months later no longer had*

the power to make any further decisions on the 2011 and 2012 applications by The Appellant"

3. The tribunal relied on regulation 8 of the Child Support (Ending Liability in Existing Cases and Transition to New Calculation Rules) Regulations 2014, to justify this conclusion. That regulation states:

.....
4. In the above regulation the application for child maintenance under the 2003 scheme is deemed withdrawn if no parties exercise a choice to stay in the scheme. This is what occurred in this case, hence the 2003 scheme application closing on 16/04/15. After that date there is no further liability under this scheme. However, what about liability before that end date? The tribunal have interpreted this regulation in such a way as to prevent any further action on the 2003 case at all. However, I submit, this is to over interpret this regulation. It creates a cut-off date at which there is no future liability (beyond the closure date), but it does not prevent actions to determine aspects of the liability prior to this date. There is nothing in the regulation that pertains to that. If the regulation were interpreted this way then any number of legitimate applications or appeals, which obviously can take some time to resolve, could suddenly be invalidated just by the fact that time had passed beyond the end date of the 2003 child maintenance application.

5. The supersession applications made by the parent with care, decided by the Secretary of State on 05/10/16, were legitimately made and the subsequent decisions had to be made. Therefore, I submit that the Secretary of State had the jurisdiction to make the decisions and equally the First-tier Tribunal also had the jurisdiction to consider the appeals, (although limiting any decision it may make to the liability end date 16/04/15, by virtue of Regulation 8 of the Child Support (Ending Liability in Existing Cases and Transition to New Calculation Rules) Regulations 2014). As such, I submit the tribunal erred in law in failing to deal with the substantive issues in the appeal regarding the actual merits of the decisions not to supersede, and by wrongly deciding that there was no jurisdiction to hear the appeals.'

17. I agree with these submissions which although not identical to, echo the submissions on behalf of the Appellant of 7 October 2019 as summarised above.

Conclusion

18. I am therefore satisfied that that the First-tier erred in law in a material manner in the decision it came to on 12 November 2018. I therefore allow this appeal and set aside its decision.

Remaking or remittal

19. I am not satisfied that the Upper Tribunal is in a position to re-decide the appeal because it will need to hear and consider all the evidence, including in particular the oral evidence of the Appellant and Second Respondent, and make fresh findings of fact. It will need to consider the appeal against the substantive decisions not to supersede earlier maintenance calculations under section 17 of the Child Support Act 1991.

20. The Upper Tribunal is not in a position to make further findings on the facts simply based on the written submissions and evidence without hearing from the Appellant (and the Second Respondent, if possible) in oral evidence. It would be necessary to determine the reliability and credibility of the parties' oral evidence and explore and test the evidence they give rather than simply rely on the written documents.

21. Further, the Upper Tribunal is not established to be a primary fact-finding tribunal and does not sit in a panel with members. On the facts of this case I am not satisfied I could fairly re-make the decision without hearing from the parties and without that assistance and necessary financial expertise of a financial panel member. I am satisfied that I would need to hear oral evidence from the Appellant and Second Respondent and receive expert assistance from a financial panel member.

22. For these reasons, the appeal will have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber). The First-tier should have regards to the documents and points made above. The Upper Tribunal is not in a position to re-decide the first instance appeal because the First-tier Tribunal will need to make fresh factual findings.

23. The form of that re-hearing (whether by phone, video technology or in person) will be for the First-tier to direct. The First-tier should have

regards to the points made above. It will be in the parties' best interests to attend in person or participate remotely (through phone or video technology) so that the tribunal has the opportunity to hear their oral evidence and all relevant evidence can be presented.

24. The Appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether her appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Rupert Jones
Judge of the Upper Tribunal

Dated 26 May 2020