[2021] UKUT 190 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CCS/1492/2018**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

BH

Appellant

-v-

Secretary of State for Work and Pensions

First Respondent

-and-

SB

Second Respondent

Before: Upper Tribunal Judge Poynter
Hearing date: 26 August 2020
Decision date: 8 February 2021

Representation
Appellant: Rambert de Mello of counsel
First Respondent Saoirse Townshend of counsel
Second Respondent In person

DECISION

1 Technically the appeal succeeds.

2 The case management decisions made by the First-tier Tribunal at Nottingham on 19 December 2017 are in error of law.

3 I set those decisions aside and, having given all parties an opportunity to make representations, I re-make the decision in the following terms:

1. The appeal is allowed.

2. The maintenance assessment made by the First-tier Tribunal on 1 November 2012, perfected by the Secretary of State on 23 July 2013, and purportedly revised on 8 March 2017, under which the Father is liable to pay child support maintenance for T at various weekly rates from various effective dates between 16 October 1997 and 18 June 2008 is set aside

3. I reinstate that maintenance assessment as originally made by the First-tier Tribunal and perfected by the Secretary of State (*i.e.*, in the form it took before the Secretary of State purported to revise it).

REASONS

Preliminary matters

References

1. Unless I say otherwise, when these reasons mention:

(a) "the Act", it is a reference to the Child Support Act 1991 as it was worded before the amendments made to it by the Child Support, Pensions and Social Security Act 2000 and the Child Maintenance and Other Payments Act 2008. References to numbered sections are also to the sections of the Act.

(b) "the 1993 Scheme", it is a reference to the first child support scheme, which was made by and under the Act.

This case is under the 1993 Scheme because the Mother's application for child support maintenance was made on 26 September 1997 before the second scheme came into effect in 2003.

(c) "the MAP Regulations", it is a reference to the Child Support (Maintenance Assessment Procedure) Regulations 1992, and references to numbered regulations are also to those Regulations.

As this is a case under the 1993 Scheme questions of procedure continue to be governed by the MAP Regulations, rather than by the Social Security and Child Support (Decisions and Appeals) Regulations 1999, which apply to the second and third schemes;

(d) "TCEA", it is a reference to the Tribunals, Courts and Enforcement Act 2007.

(e) "the SEC Rules", it is a reference to the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and references to numbered rules are also to those Rules.

The Secretary of State and the Child Maintenance and Enforcement Commission

2. On 1 November 2008, the functions of the Secretary of State for Work and Pensions in relation to child support, were transferred to the Child Maintenance and Enforcement Commission ("CMEC"). Then, on 1 August 2012, those functions were transferred back to the Secretary of State. The procedural history of this appeal covers the periods before, during, and after the existence of CMEC. For ease of reading, these reasons therefore refer to "the Secretary of State" throughout and that phrase should be read as instead referring to CMEC if the events described took place between 1 November 2008 and 31 July 2012 (both dates inclusive).

3. Further during the events that underly this appeal, the office of Secretary of State for Work and Pensions has been occupied by both men and women. The current Secretary of State is a woman and when I refer to the first respondent in the third person, I will use the pronoun "she" throughout.

Introduction

4. This appeal is the most recent round in long-running litigation about how much the appellant (from now on, "the Father") must pay to support his daughter, T, for periods going back as far as effective date of the initial maintenance assessment on 16 October 1997. To put that in perspective, T was just over a year old in October 1997: she is now 24.

5. The matter first came before me as one of four applications by the Father for permission to appeal against case management decisions first made by a District Tribunal Judge on 19 December 2017.

6. I refused permission to appeal in three of those cases and, on 6 December 2019, Mostyn J refused the Father permission to apply for judicial review of my decisions. In the fourth case (this one) I gave the Father limited permission to appeal on grounds other than those he had originally advanced (see paragraph 31 below).

7. The issue in this appeal is a technical one. It is not about whether the decision of the Secretary of State that was under appeal to the First-tier Tribunal was correct, but about whether she had the power to make that decision in the first place.

8. My reasons for supposing that she might not have such power arise from the procedural history of the case.

Procedural history

Background

9. The second respondent ("the Mother") first applied for child support maintenance to be assessed with respect to T on 26 September 1997.

10. The initial maintenance assessment was not made until more than ten years later on 19 February 2008. Under that maintenance assessment, the Father was liable to pay child support maintenance for T at the following rates from the following effective dates:

Effective Date	£pw
16 October 1997	56.84
27 August 1998	61.46
18 March 1999	0.00
27 March 2003	5.40
25 March 2004	5.50
31 March 2005	5.60
30 March 2006	5.70
29 March 2007	5.80
22 November 2007	6.00

11. The mother appealed to the First-tier Tribunal against that decision. That appeal was heard by Regional Tribunal Judge Gray (as she then was) sitting with a financially-qualified tribunal member ("the 2012 Tribunal") on 9 and 10 October 2012. The Mother attended that hearing. The Father did not attend and was not represented. The Secretary of State was represented by a presenting officer.

12. On 1 November 2012, the 2012 Tribunal allowed the Mother's appeal. So far as is relevant to the present proceedings, the operative words of its decision were as follows:

> "**The appeal by the mother numbered 01107 against the decision dated 19/02/08 is allowed. The decision of 19/02/08 is set aside.**

> **The case is remitted to the [Secretary of State] for the Maintenance Assessment to be recalculated in accordance with the principles and figures set out below.**
>
> **There is liberty to the [Secretary of State] to apply to the tribunal within one month of this decision being issued as to any clarification of the information required to make the new calculations.**
>
> **…**
>
> **34. There is liberty to the parents to apply to the tribunal within one month of the new calculations being issued as to the calculations themselves. This is as to arithmetical matters only. Issues of fact will not be re-opened.**"

The bold type represents the 2012 Tribunal's original emphasis.

13. On 29 July 2013, the Secretary of State carried out the recalculation as directed by the 2012 Tribunal. She decided that the Father was liable to pay child support maintenance for T at the following rates from the following effective dates;

Effective date	£pw
Thursday, 16 October 1997	121.78
Thursday, 6 November 1997	121.78
Thursday, 12 February 1998	0.00
Thursday, 27 August 1998	88.55
Thursday, 5 November 1998	88.77
Thursday, 18 March 1999	5.10
Thursday, 6 April 2000	111.90
Thursday, 9 November 2000	129.52
Thursday, 8 November 2001	135.39
Thursday, 7 November 2002	152.55
Thursday, 27 March 2003	172.78
Thursday, 25 March 2004	179.53
Thursday, 31 March 2005	178.05
Thursday, 30 March 2006	174.01

Effective date	**£pw**
Thursday, 29 March 2007	179.12
Thursday, 28 June 2007	202.68
Thursday, 25 October 2007	191.96
Thursday, 22 November 2007	168.12
Thursday, 28 February 2008	191.96
Thursday, 19 June 2008	206.18

I will call this decision "the Disputed Decision".

14. On 5 August 2013, Regional Tribunal Judge Howard refused the Father permission to appeal to the Upper Tribunal against the 2012 Tribunal's decision.

15. Also on 5 August 2013, the Father sent the Child Support Agency an application under the liberty to apply that he had been granted by the Tribunal. The Child Support Agency received that application on 8 August 2013 and submitted it to the First-tier Tribunal the following day.

16. On 8 November 2013, a tribunal clerk referred the Father's liberty to apply application to Judge Howard for directions.

17. On 13 November 2013, Judge Howard replied to the clerk in the following terms:

> "I note that [the Father] is seeking PTA from the UTT *[sic]*. I am not prepared to consider this matter until that application has been determined."

Although nothing in this decision turns on the point, I understand that no decision has yet been made on that application.

18. On 30 January 2014, Upper Tribunal Judge Jacobs refused the Father permission to appeal to the Upper Tribunal against the 2012 Tribunal's decision.

19. On 21 February 2014, the Father sought permission to apply for judicial review of Judge Jacobs' refusal of permission to appeal.

20. On 27 March 2014, Hamblen J (as he then was) refused the Father permission to apply for judicial review on the papers.

21. The Father then renewed his application to an oral hearing and, on 15 August 2014, Nicola Davies J (as she then was) again refused it.

22. The Father then applied to the Court of Appeal for permission to appeal against that refusal.

23. On 28 January 2015, Sir David Keane sitting in his retirement as a judge of the Court of Appeal, refused the Father permission to appeal to the Court of Appeal against the High Court's refusal of permission to apply for judicial review.

Procedural history of this appeal

24. On 4 January 2017, the Secretary of State received a letter from the Father that was treated as an application to revise the Disputed Decision. Revision was requested on the basis that the maintenance requirement had been incorrectly calculated because it failed to take into account the fact that there was another child in the Mother's household whose father is not the Father.

25. On 8 March 2017, the Secretary of State purported to revise the Disputed Decision. That decision, which I will call the "Revising Decision", only affected the assessments with the following effective dates and, from those effective dates, the Father's revised weekly liability was as follows:

Effective date	**£pw**
Thursday, 16 October 1997	89.34
Thursday, 6 November 1997	89.34
Thursday, 27 August 1998	64.27
Thursday, 5 November 1998	64.43
Thursday, 6 April 2000	85.58

26. The Father appealed to the First-tier Tribunal against that decision because, he said, the income figures used were incorrect. In other words, the Father's case is that—notwithstanding his many failed attempts to appeal against the 2012 Tribunal's decision—the Secretary of State should not have used the earnings figures that had been set by that decision when calculating his revised liability.

27. On 19 December 2017, the appeal came before the District Tribunal Judge for case management directions together with another appeal (SC242/15/01144) in which the Father challenges a decision made by the Secretary of State on 21 January 2015 which superseded the Disputed Decision with effect from 11 September 2014. The two appeals seemed to have similar issues because, in SC242/15/01144, the Father was also seeking to overturn the findings of the 2012 Tribunal.

28. The judge did not give specific case management directions in SC319/17/01208 In the sense that he did not direct the production of documents of the provision of written submissions or skeleton arguments. He did, however, express the intention that it should be heard with SC242/15/01144 and a putative future appeal:

> "**Matters outstanding**
>
> 6. It is the appellant's case that on 17 March 2016 he made an application for a revision and/or supersession of the decision issued on 8th December 2012. Whilst the appellant has exhausted all his appeal rights in relation to the decision of 8th of December 2012, he is still entitled to make an application for a revision and/or supersession of that decision. The first respondent has not made a decision in relation to that application. The first respondent has made it clear that it considers the matter dealt with in 2012 as finalised and no longer a live issue. However, the application for a revision and/or supersession has not been addressed. A decision needs to be made on the specific point. The first respondent is now asked to make that decision. In the event that the appellant wishes to appeal against that decision, it is the tribunal's intention that any such appeal, once registered, is to be linked with and heard together with matters SC242/15/01144 and SC319/17/01208."

The reference to the "decision issued on 8th December 2012" is to the decision of the 2012 Tribunal, which was issued on 18 December 2012.

29. The Father subsequently sent documents to the First-tier Tribunal, which the same District Tribunal Judge interpreted as applications to revise the directions he had given on 19 December 2017 and for permission to appeal to the Upper Tribunal against them. On 23 February 2018, he refused both those applications.

30. On 2 April 2018, the Father applied for permission to appeal to the Upper Tribunal.

31. On 5 September 2019, I gave permission to appeal limited to the question of

> "whether, instead of giving the directions it did, the First-tier Tribunal should:

(a) have informed the parties that it proposed to allow the appeal on the sole ground that the Secretary of State had no power to make the revising decision dated 8 March 2017, thereby reinstating the decision that was revised in its original form; and

(b) giving the parties an opportunity to make representations in relation to that proposed course of action."

32. If the appeal were to succeed on that basis, the Father would, of course, be worse off than if it were to fail. Although that is not an unusual outcome, it has led to a state of affairs where, counter-intuitively, the appellant now argues that, as I have limited the issues, the appeal should fail (thereby leaving the original case management directions in place) and both respondents submit that it should succeed.

33. The Secretary of State's position is now that she agrees with my provisional analysis and that she did not have power to make the Revising Decision. The Mother is not a lawyer and is unrepresented. Her main wish is that the question of the Father's liability for the whole of the case should now be brought to a swift resolution. However, she at least does not disagree with my provisional analysis.

Discussion

The issue

34. I gave leave in that limited form because I had formed the provisional view that the Secretary of State had no power to revise either the decision of the 2012 Tribunal, or the Disputed Decision that the District Tribunal Judge was therefore incorrect to have said that "[w]hilst the appellant has exhausted all his appeal rights in relation to the decision of [the 2012 Tribunal], he is still entitled to make an application for a revision and/or supersession of that decision".

35. Of course, the Secretary of State had power to supersede the 2012 Tribunal's decision and—as the Judge noted—the Father claimed to have applied for such a supersession on 17 March 2016.

36. But the decision made on 8 March 2017 did not purport to be a superseding decision. It was a revising decision and, as a general rule, the Secretary of State has no power to revise a decision of the First-tier Tribunal, or indeed, any decision that is not made under sections 11,12 or 17 of the Act.

37. This appeal therefore turns on the status of the Disputed Decision.

38. If, as the Father maintains, that decision was a fresh maintenance assessment under section 11 of the Act, replacing the one that was set aside by the 2012 Tribunal and carrying fresh rights of appeal, then the Secretary of State had power to revise it and the First-tier Tribunal was right to direct that the Father's appeal against the Disputed Decision (as revised) should be heard on its merits.

39. The alternative view—and the view that I formed on a provisional basis when giving permission to appeal—is that the Disputed Decision was not a fresh maintenance assessment but, rather, the final stage of the appeal against the original maintenance assessment: in other words, the Disputed Decision was merely carrying into effect a decision that the 2012 Tribunal had already made. If so, the source of the Secretary of State's power to make the decision was the directions given by the 2012 Tribunal under section 20 of the Act. In those circumstances, the Secretary of State would have had no power to revise the Disputed Decision and the only decision that the First-tier Tribunal could properly make on the Father's appeal against the Revising Decision would be to set it aside on the basis that—irrespective of its content—it had been invalidly made.

Reasons for my provisional view

40. I will begin by explaining my reasons for taking that provisional view and then consider the Father's submissions that it is wrong. What follows is in substance taken from my decision giving permission to appeal.

The relevant law

41. The relevant law may be summarised as follows.

42. The general rule, established by section 46A of the Act, is that all decisions about child support—whether they are made by the Secretary of State's decision makers or by the First-tier Tribunal—are final. That means what it says: the general rule is that once a child support decision has been made, it cannot be changed.

43. However, section 46A(1) says that that general rule is "[subject] to the provisions of this Act and to any provision made by or under Chapter 2 of part 1 of [TCEA]".

44. What that exception means is that decisions about child support made by the Secretary of State can be changed by—but only by—the following mechanisms:

(a) "Revision" by the Secretary of State under section 16 of the 1991 Act;

(b) "Supersession" by the Secretary of State under section 17 of the 1991 Act;

(c) Appeal to the First-tier Tribunal under section 20 of the 1991 Act;

45. It also means that decisions about child support made on appeal by the First-tier Tribunal can be changed by the following mechanisms:

(a) "Supersession" by the Secretary of State under section 17 of the 1991 Act;

(b) "Review" by the First-tier Tribunal under section 9 of TCEA.

(c) Appeal to the Upper Tribunal, and thereafter to the Court of Appeal under sections 11 and 13 of TCEA.

46. It is necessary to make a number of points about those exceptions.

47. First, "revision", "supersession", and "review" are all terms of art. In other words, they mean something different in child support law from what they mean in everyday conversation.

48. In particular, "revision" and "supersession" are not synonymous with each other or with the everyday English word "change". Rather they denote particular kinds of change:

49. The process of revision is used to correct earlier decisions that were wrong when they were first made. A revised decision takes effect from the same date as the original decision, except where what was wrong about the original decision was the effective date. In that circumstance—of course—the revised decision takes effect from the correct effective date.

50. There is no general or indefinite power to revise. Revision may be carried out within specified time limits or, at any time, in specified circumstances. Those time limits and circumstances are listed in regulation 17 of the MAP Regulations.

51. The process of supersession is *primarily* used to change earlier decisions that were correct when they were made but have ceased to be correct because something has changed. Again, supersession is only possible where at least one of the grounds set out in regulation 20 of the MAP Regulations exists.

52. Superseding decisions usually take effect from a later date than the original decision. But not always. In certain circumstances, superseding decisions can have retrospective effect. The date from which a superseding decision takes effect is governed by section 17(4) of the Act and regulation 23 of the MAP Regulations.

53. The process of supersession is *also* used to change decisions that were incorrect when they were made but which cannot be revised, either because the time limits for revision have been missed or because the none of the grounds for revision in regulation 17 of the MAP Regulations exists. In those circumstances, the superseding decision has prospective effect except in the circumstances explained in paragraph 59 below.

54. Revision and supersession are processes that, at first, can only be undertaken by the Secretary of State. The First-tier Tribunal has no original powers to revise or supersede. It can only make a revising or superseding decision on appeal from a decision of the Secretary of State that revises or supersedes an earlier decision (or where the Secretary of State should have revised or superseded an earlier decision but has not done so).

55. The Secretary of State has no power to revise a decision made by the First-tier Tribunal on appeal: see section 16(1) and (1A) of the Act.

56. It follows from paragraphs 44 to 45 above—and it is important for the purposes of these applications—that **a decision made on appeal by the First-tier Tribunal can *never* be *revised***. It can *only* be superseded. Different considerations apply if the First-tier Tribunal makes a decision on a *referral* by the Secretary of State under section 28D(1)(b) of the 1991 Act, but that is not this case.

57. The only grounds upon which the Secretary of State has power to *supersede* a decision of the First-tier Tribunal are set out in regulation 20 of the MAP Regulations. They are:

(a) that there has been a relevant change of circumstances since the decision had effect or it is expected that a relevant change of circumstances will occur; or

(b) that the decision was made in ignorance of, or was based on a mistake as to, some material fact.

It is not possible for the Secretary of State to supersede a tribunal decision on the grounds that the decision is wrong in law: see regulation 20(5).

58. Whenever a superseding decision is made, it is important to identify the day from which it takes effect. Section 17(4) of the Act states:

> "(4) Subject to subsection (5) and section 28ZC, a [superseding] decision … shall take effect as from the beginning of the maintenance period in which it is made or, where applicable, the beginning of the maintenance period in which the application was made."

Section 28ZC has no application in this case and subsection (5) empowers the Secretary of State to make regulations prescribing exceptions to that general rule. Where an exception applies, a superseding decision takes effect from some other date that the beginning of the maintenance period in which it (or the application for it) was made.

59. Those exceptions are now set out in regulation 22. However, only one exception applies in cases where a tribunal decision is superseded on the basis of ignorance of, or a mistake as to, some material fact. That exception is set out in regulation 22(10), which is in the following terms:

> "(10) Subject to paragraph (25), where –
>
> (a) a decision made by an appeal tribunal or the First-tier Tribunal under section 20 of the Act or the Upper Tribunal or a Child Support Commissioner is superseded on the ground that it was erroneous due to a misrepresentation of, or that there was a failure to disclose, a material fact; and
>
> (b) the Secretary of State is satisfied that the decision was more advantageous to the person who misrepresented or failed to disclose that fact than it would otherwise have been but for that error,
>
> the superseding decision shall take effect as from the date the decision of the appeal tribunal, the First-tier Tribunal, the Upper Tribunal or the Child Support Commissioner took, or was to take effect."

Paragraph (25) of reg 22 (which is mentioned in the opening words of paragraph (10)) does not apply in this case.

60. In all other cases, a decision superseding a tribunal decision on the ground of ignorance or mistake of fact takes effect in accordance with section 17(4) and therefore has prospective effect only.

Which decisions can be revised?

61. By section 16(1) of the Act, the Secretary of State has power to revise "[a]ny decision to which subsection (1A) applies" and subsection (1A) applies to:

> "(a) a decision of the Secretary of State under section 11, 12 or 17;
>
> (b) *[Revoked]*

(c) a decision of the First-tier Tribunal on a referral under section 28D(1)(b).”

The 2012 Tribunal’s decision was not made on a referral under section 28D(1)(d) but on appeal under section 20(1) of the Act, so the Secretary of State had no power to revise it.

62. The Disputed Decision, however, was made by the Secretary of State. If it was made under the powers conferred by sections 11, 12, or 17 of the Act, then she subsequently had power under section 16(1) and (1A)(a) to revise it in an appropriate case.

63. But if the Disputed Decision was not made under any of those powers then the Secretary of State had no power to revise it. That is so irrespective of any inconvenience that the absence of a power to revise may cause.

64. When giving permission to appeal, I took the provisional view that the Disputed Decision was not made under section 11 because, as it applies to the 1993 Scheme, that section governs the way in which “[a]ny application for a maintenance assessment” is to be “dealt with”. In other words, the section is about making the initial maintenance assessment in a case and the Disputed Decision did not fall into that category, the initial maintenance assessment in this case having been made on 19 February 2008, more than five years previously. On behalf of the Father, Mr De Mello disputes that conclusion: see 75 below 76 below.

65. It is not, however, in dispute that the Disputed Decision was not made under section 12. As it applies to the 1993 Scheme, that section deals with interim maintenance assessments. The Disputed Decision is not such an assessment.

66. Which leaves section 17.

67. At first glance, that appears more promising. As it applies to the 1993 Scheme, section 17(1) provides:

“**Decisions superseding earlier decisions**

17.—(1) Subject to subsection (2), the following, namely—

(a) any decision of the Secretary of State under section 11 or 12 or this section, whether as originally made or as revised under section 16;

> (b) any decision of an appeal tribunal or the First-tier Tribunal under section 20;
>
> (c) *[Revoked]*
>
> (d) any decision of an appeal tribunal or the First-tier Tribunal on a referral under section 28D(1)(b);
>
> (e) any decision of a Child Support Commissioner or the Upper Tribunal on an appeal from such a decision as is mentioned in paragraph (b) or (d),
>
> may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on the Secretary of State's own initiative."

68. The 2012 Tribunal's decision is a "decision of an appeal tribunal or the First-tier Tribunal under section 20" so the Secretary of State had power to supersede it. But that is not the power that the Secretary of State was exercising when she made the Disputed Decision.

69. First, as is clear by analogy with the decision of the majority of the Court of Appeal in *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (also reported as *R(DLA) 1/03*) on the similar rules for social security, the process of supersession consists of replacing one "outcome decision" with another.

70. An "outcome decision" is one that affects the absent parent's pocket. It decides either that the absent parent is liable to pay child support maintenance for specified qualifying children at a specified weekly rate from a specified effective date, or that he is not so liable.

71. Once that is appreciated, it becomes clear that until the Disputed Decision was made, the 2012 Tribunal had not made an outcome decision that could be replaced. The very fact that the Tribunal gave liberty to apply demonstrates that that was so. The Disputed Decision was carrying the Tribunal's decision into effect, not replacing it with another one.

72. Second, even if that difficulty could somehow be overcome, it is only possible for the Secretary of State to supersede an earlier decision when there are grounds on which to do so. As set out in paragraph 57 above, the only grounds on which the Secretary of State can supersede a Tribunal decision are that that there has been—or it is expected that there will be—a relevant change of circumstances or that the decision was made in ignorance of, or was based on a mistake as to, some material fact.

73. Neither of those grounds applied when the Disputed Decision was made. The Secretary of State was not saying that the Tribunal had made mistake about the facts or that circumstances had changed since the effective dates it identified. On the contrary, she had to accept that the First-tier Tribunal's decision was correct: she was just doing the arithmetic.

74. On that basis, my provisional view when granting permission to appeal was that:

(a) when the Secretary of State made the Disputed Decision, she was not acting under powers conferred by sections 11, 12 or 17 of the Act but rather under the authority of the 2012 Tribunal, which it, in turn derived from section 20 of the Act.

(b) as the recalculation was carried out by direction of, and—because of the grant of liberty to apply—under the supervision of, the 2012 Tribunal, its status was that it was part of the 2012 Tribunal's decision.

The mere fact that the Disputed Decision was not made under sections 11, 12 or 17 of the Act would be sufficient to establish that it cannot be revised. If paragraph (b) above is correct, then the considerations in paragraph 61 above also prevent revision.

The Father's submissions

75. On behalf of the Father, Mr De Mello submits that those provisional views were mistaken. His submissions are set out in two skeleton arguments and may, I hope, be summarised as follows:

76. First, it is submitted that the remittal to the Secretary of State was made under section 20(8) of the Act which, it is submitted, was in the following terms at the relevant time:

> "(8) If an appeal under this section is allowed, the First-tier Tribunal may—
>
> (a) itself make such decision as it considers appropriate; or
>
> (b) remit the case to the [Secretary of State], together with such directions (if any) as it considers appropriate."

A decision to remit under section 20(8)(b), it is said, has the effect that the subsequent decision is made under section 11 of the Act and can therefore subsequently be revised and, indeed, appealed. As a result, the Secretary of State had power to make the Revising Decision, the Father has a right of appeal against the revising decision on its

merits, and the First-tier Tribunal's case management directions, which contemplated the Tribunal considering that appeal on its merits were correctly given.

77. Second, it is submitted that, even if—contrary to the first submission—the Secretary of State did not have power to revise the disputed decision, she had power to supersede it and the grounds, for exercising that power should be investigated at a future hearing before the First-tier Tribunal.

78. Third, it is submitted that the Secretary of State in any event retained power to revise the Disputed Decision but not on the basis of the figures found by the First-tier Tribunal.

Discussion of the Father's submissions

Was the Disputed Decision made under section 11

79. It is necessary to begin by correcting an error in Mr De Mello's skeleton argument. Although section 20 of the Act does exist in a version that contains a subsection (8) in the terms quoted at paragraph 76 above, it is not that version that applies in this case.

80. To elaborate:

(a) Section 20 has existed in a number of different versions since it was first enacted. However, it is only necessary to go back as far as 1 June 1999, when the whole section was substituted by section 42 of the Social Security Act 1998. It is unnecessary to set out the substituted version here. Suffice it to say that it did not include a subsection (8) or provision in the terms set out above.

(b) Then, with effect from 3 March 2003, section 10 of the Child Support, Pensions and Social Security Act 2000 (the 2000 Act) again substituted a new section 20, which does contain a subsection (8) in the terms quoted by Mr De Mello.

(c) However, Article 3 of, and the Schedule to, the Child Support, Pensions and Social Security Act 2000 (Commencement No.12) Order 2003 (SI 2003/192) which brought section 10 of the 2000 Act into force only did so for certain purposes, none of which affect the present appeal.

(d) That is because, the policy of the 2000 Act was to replace the original child support scheme with what was then called the "New Scheme" and must now be called the "2003 Scheme". The new section 20 was intended to apply to the 2003 Scheme only, so it was only brought into force for the purposes of cases where an

application for child support maintenance was made to the Secretary of State and the effective date would be on or after 3rd March 2003 and of a number of other cases that are set out in Article 3. For cases such as this, which have continued in the 1993 Scheme—or, as it had become, the "Old Scheme"—section 20 continued to apply as it had been worded on 2 March 2003.

(e) The 1993 Scheme version of section 20 was then amended with effect from 14 July 2008 by the Child Support and Other Payments Act 2008 and, again, with effect from 3 November 2008 by the Transfer of Tribunal Functions Order 2008 (SI 2008/2833) to reflect the fact that appeal tribunals had been replaced by the First-tier Tribunal.

81. At that point, the wording of the 1993 Scheme version of section 20 was as follows:

> "**Appeals to First-tier Tribunal.**
>
> **20.**—(1) Where an application for a maintenance assessment is refused, the person who made that application shall have a right of appeal to the First-tier Tribunal against the refusal.
>
> (2) Where a maintenance assessment is in force—
>
> (a) the absent parent or person with care with respect to whom it was made;
>
> (b) …
>
> shall have a right of appeal to the First-tier Tribunal against the amount of the assessment or the date from which the assessment takes effect.
>
> (3) Where a maintenance assessment is cancelled, or an application for the cancellation of a maintenance assessment is refused—
>
> (a) the absent parent or person with care with respect to whom the maintenance assessment in question was, or remains, in force; or
>
> (b) where the application for that assessment was made under section 7, either of them or the child concerned,
>
> shall have a right of appeal to the First-tier Tribunal against the cancellation or refusal.

> (4) A person with a right of appeal under this section shall be given such notice of that right and, in the case of a right conferred by subsection (1) or (3), such notice of the decision as may be prescribed.
>
> (5) Regulations may make—
>
> (a) provision as to the manner in which, and the time within which, appeals are to be brought.
>
> (b) …
>
> (6) …
>
> (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; and
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision or assessment appealed against was made."

The section was subsequently amended with effect from 25 February 2013 by the Welfare Reform Act 2012 so as to introduce a requirement for what is known as "mandatory reconsideration" before the right of appeal arises. However, it was in the form set out above—and not the form that appears in the skeleton argument for the Father—that section 20 applied to the 2012 Tribunal.

82. The omission of any provision equivalent to subsection (8) in the New Scheme version of the provision is striking. The 1993 Scheme version says nothing about the First-tier Tribunal's powers of disposal when it allows an appeal. Rather, the existence and extent of those powers must be inferred from what is said.

83. Fortunately, the inference is not hard to draw. Subsections (1)-(3) establish a "right of appeal" in the circumstances that are specified. As that phrase is not qualified or subject to restrictions, it is implicit that Parliament intended the appeal to be a full appeal on all issues of fact and law.

84. It is also implicit that Parliament intended that right of appeal to be effective. It must therefore also have intended that the First-tier Tribunal should have the dispositive powers necessary to give effect to a full right of appeal.

85. In my judgment, it follows that when the First-tier Tribunal allows an appeal under the 1993 Scheme version of section 20, the only limits on its powers of disposal are those that are inherent in the fact that what it is doing is hearing an appeal against a specific decision and those set out in its procedural rules.[1] So, for example, it cannot require the parties to reach a settlement or order one party to pay compensation to another.

86. However, within those limits, its powers are broad. At one end of the spectrum, the Tribunal may simply set aside a decision of the Secretary of State without substituting one of its own. And if it does so, then the consequences would be as Mr De Mello submits: setting aside the decision under appeal in those circumstances will leave the application for child support maintenance, or the application for supersession of an existing maintenance assessment, extant and the Secretary of State will be under a duty to decide that application under section 11 or section 17 of the Act.

87. At the other end of the spectrum, it can re-make the maintenance assessment itself by giving an outcome decision. In those circumstances, the decision is obviously that of the Tribunal rather than the Secretary of State.

88. In so saying, I reject Mr De Mello's submission (at paragraph 10 of his skeleton argument) that the Secretary of State has "exclusive jurisdiction" to make maintenance assessments. I accept that section 44(1) of the Act confers the *primary* power on her. But, on appeal, the First-tier Tribunal stands in her shoes and may exercise that power itself. Even on the wording of the law that Mr De Mello believed to apply, the Tribunal has express power to "itself make such decision as it considers appropriate": see section 20(8)(a) as it is worded for "New Scheme" cases.

89. Alternatively, the First-tier Tribunal can take a middle course and make findings of fact on all the disputed issues but direct the Secretary of State to carry out the calculations necessary to assess the absent parent's liability on the basis of those findings. And, if it does so, it can retain control over those calculations to the extent that it thinks fit.

90. Given the complexity of the 1993 Scheme, the First-tier Tribunal will usually take the middle course of having the Secretary of State undertake the arithmetic. But it does not necessarily follow that the resulting decision is the Secretary of State's, rather than the Tribunal's.

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1 In so saying, I do not wish to imply that section 20(8) as it applies to the 2002 and 2012 Schemes imposes such limits. I incline to the view that it does not and that section 20(8)(a) is wide enough to allow a "middle course" decision. But that is a matter that remains to be decided in an appeal that turns on the point.

91. Rather, it is important to have regard to what individual tribunals have actually ordered.

92. I accept—and here I depart from the provisional views that I expressed when giving permission to appeal—that the First-tier Tribunal has power to decide the issues of principle and then wash its hands of the arithmetic by directing the Secretary of State to make a new maintenance assessment that will carry fresh rights of appeal.

93. There are very good reasons why it should not do so. Child support law—in common with the law of social security on which much of it is based—excludes the usual rules against re-litigating facts: what lawyers refer to as *res judicata* and issue estoppel. By section 46(2) of the Act findings of fact and determinations of issues that form part of a previous decision are only conclusive for the purposes of further such decisions "[i]f and to the extent regulations so provide". No such regulations have yet been made. It follows that what is final is the Tribunal's decision itself—which in the circumstances under consideration would be the decision to set aside the original maintenance assessment—and not the findings of fact or determinations that are the building blocks of that decision.

94. If, therefore, a tribunal directs the Secretary of State to make a new maintenance assessment under section 11 that will carry fresh rights of revision or appeal, it is potentially undermining its findings of fact and reasoning. When making that maintenance assessment, the Secretary of State's decision maker will be bound by any directions given by the Tribunal, and that is probably also true of any subsequent decision maker who considers whether to revise the maintenance assessment. However, given section 46A(2), I cannot see any basis on which a tribunal hearing an appeal against that later maintenance assessment (whether as revised or as originally made) would be bound by the earlier tribunal's findings of fact and reasoning. On the contrary, I judge it would be bound to reconsider the earlier tribunal's findings and determinations if either party were to ask it to do so.

95. For those reasons, I judge that something close to express language would be required to show that a tribunal had directed the Secretary of State to make a new maintenance assessment that would carry fresh rights of appeal. Nevertheless, I accept that the Tribunal has that power.

96. However, at least under section 20 as it applied in this case, no tribunal is obliged to give such a decision and the 2012 Tribunal did not in fact do so.

97. The wording quoted at paragraph 12 above shows that the 2012 Tribunal was taking what I have described as the middle course. It made findings of fact on all the disputed issues but directed the Secretary of State to carry out the necessary

calculations—the word “recalculated” is expressly used—to assess the absent parent’s liability on the basis of those findings. There needed to be a new maintenance assessment because the 2012 Tribunal had set the previous one aside. But that maintenance assessment was made by that Tribunal itself, subject to the Secretary of State doing the arithmetic needed to perfect it. That is put beyond doubt by the wording of the liberty to apply given at paragraph 34 of its decision which was expressly limited “to arithmetical matters only”.

98. The submission that the 2012 Tribunal intended the Secretary of State to make a new maintenance assessment which would carry fresh appeal rights cannot be reconciled with the fact that it gave liberty to apply. The inconsistency can be looked at in a number of ways.

99. First, if the 2012 Tribunal had intended the Secretary of State’s recalculations to give rise to a new section 11 maintenance assessment with a fresh right of appeal, the grant of liberty to apply would have been redundant. In those circumstances, the Secretary of State’s decision would have been final by virtue of section 46A of the Act and, as the 2012 Tribunal would not have been considering an appeal against *that* decision when deciding the liberty to apply application, it would have had no power to change it.

100. Put another way, the grant of liberty to apply shows that the 2012 Tribunal was not handing the power to make a final outcome decision back to the Secretary of State. Rather it clearly intended to remain seised of that issue to the extent that there was a dispute about the calculations.

101. Third, if one assumes—contrary to the view I take of the matter—that the grant of liberty to apply and the Secretary of State’s making a new maintenance assessment under section 11 can subsist together, one then has to consider how the former can be reconciled with the right of appeal that would arise against the latter. The Father’s liability for the same period would potentially be being considered by two different tribunals at the same time and—for the reasons I give at paragraphs 93 to 94 above—the Tribunal hearing the appeal would not be bound by the findings of fact made by the 2012 Tribunal.

102. Indeed, that is precisely what the Father is seeking to achieve in these proceedings. Having made an application under the liberty to apply given by the 2012 Tribunal, he also seeks to use an appeal against the Disputed Decision (as revised) to re-litigate not merely the calculations that are consequential on the 2012 Tribunal’s findings of fact but those findings themselves.

103. It cannot be the case that the law contemplates that more than one decision governing the Father's liability can exist at the same time in relation to the same period. Such an outcome would be inconsistent with the principle of finality in section 46A of the Act and would be impossible to implement in practice.

104. It also cannot be the case that the 2012 Tribunal intended that its decision would risk bringing about that state of affairs.

105. Therefore, if the Disputed Decision was made under section 11, the inconsistency could only be avoided by construing section 20 as preventing the First-tier Tribunal from taking the middle course I describe at paragraph 89 above and, in particular, from granting liberty to apply. For the reasons I have given at paragraphs 82 to 89 above, it is not possible to interpret section 20 as limiting the Tribunal's powers in that way.

106. For all those reasons, I reject Mr De Mello's primary submissions. The Disputed Decision is not a maintenance assessment under section 11 of the Act. Neither is it an interim maintenance assessment under section 12, or a superseding decision under section 17. If it is necessary to assign an epithet to it, then it is a "recalculation"—which is what the 2012 Tribunal directed the Secretary of State to do. It takes effect by virtue of the Tribunal's powers under section 20 of the Act. It therefore cannot be revised under section 16 of the Act.

Should the disputed decision be treated instead as a superseding decision?

107. Mr De Mello submits that if—as I have decided—the Secretary of State did not have power to revise the Disputed Decision, she had power to supersede it and the grounds, for exercising that power should be investigated at a future hearing before the First-tier Tribunal.

108. As the Disputed Decision had the status of a decision of a tribunal under section 20, I accept that the Secretary of State had power to supersede it on the grounds set out in paragraph 57 above. However, the Secretary of State did not in fact exercise that power. Instead she purported to revise it.

109. This ground of appeal can therefore only succeed if the letter dated 4 January 2017 should have been treated as also being an application for supersession.

110. In my judgment, it should not. As stated at paragraph 24 above, the issue raised by that letter was whether, when the Secretary of State carried out the recalculations that led to the Disputed Decision, she arrived at an incorrect figure for the maintenance requirement (which is part of the formula under the 1993 Scheme).

111. Under section 16(2) of the Act:

> "(2) In making a decision under subsection (1) [*i.e.*, a revising decision], the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause the Secretary of State to act on the Secretary of State's own initiative."

Therefore the Secretary of State was only *required* to deal with the matters raised in the letter dated 4 January 2017.

112. However, the Secretary of State had a discretionary power to deal with other matters if she decided to do so. Can she be criticised for not having done so?

113. In my judgment she cannot. The issue the Secretary of State had to decide on the application that had been made was whether the maintenance requirement had been correctly calculated as part of the Disputed Decision. That was a quick, yes or no, decision. On the law as I have held it to be, the Secretary of State had no power to decide it either way but, if she had, there would have been no reason to complicate matters by considering issues about supersession that had not been raised.

114. It is not clear whether the decision maker who made the Revising Decision even knew that the Father had made an application under the liberty to apply that had been granted by the 2012 Tribunal's decision or that the Father had—as he claims—made an application to supersede the 2012 Tribunal's decision on the ground of ignorance or error of material fact. Even if he did know that, it was open to him to take the view that the issues that the Father now seeks to raise would be better dealt with in the context of those applications.

115. Now that the decision is under appeal, and I am standing in the shoes of the First-tier Tribunal, I need to re-consider the exercise of that discretionary power. Further, as I explained in *CA v Secretary of State for Work and Pensions and TB (CSM)* [2020] UKUT 205 (AAC) at [157] (in the context of a similar rule in section 17(2) of the Act), I must now exercise it as a *judicial* discretion.

116. As such I cannot ignore the Father's vexatious behaviour in relation to this litigation as a whole.

117. The Father did not apply to set aside the 2012 Tribunal's decision for procedural reasons. He attempted to appeal against it but was denied permission to do so. Only two legal procedures remain open to him to challenge it.

118. The first is to make an application under the liberty to apply granted by the 2012 Tribunal. He has made that application. If it is successful—as I accept it may be—that will correct the error of calculation that led to the purported revision in this case.

119. The second is to apply to supersede the 2012 Tribunal's decision on the ground of ignorance or error of fact. The Father says he has made such an application. Even if he has not, there is nothing to stop him making one now.

120. If the Father can establish that the 2012 Tribunal's decision was based on erroneous facts, there will be grounds on which to supersede it. And if he also establishes that it was "erroneous due to a misrepresentation of, or that there was a failure to disclose, a material fact" and that the decision was more advantageous to the person who misrepresented or failed to disclose that fact, then the superseding decision will be retrospective: see paragraph 59 above.

121. The Father is within his legal rights to pursue either of those applications. What he may not do, however, is to attempt to reopen the 2012 Tribunal's decision by seeking to relitigate the issues it decided in appeals against other decisions that relate to different issues or different periods. To seek to do so is an abuse of process.

122. I refuse to exercise the discretionary power in section 16(2) so as to further that abuse of process.

123. Moreover, in the (admittedly unlikely) event that the First-tier Tribunal becomes seised of future appeals in which the Father seeks to challenge the 2012 Tribunal decision—other than appeals arising out of the applications mentioned in paragraphs 118 and 119 above—they should be referred to a District Tribunal Judge at an early stage with a view to considering whether the proceedings, or part of them, should be struck out as having no realistic prospect of success. The Secretary of State's appeal writer should draw this decision to the attention of the First-tier Tribunal when responding to any such appeal.

Did the Secretary of State retain power to revise the Disputed Decision except to the extent that it incorporated the figures in the 2012 Tribunal's directions?

124. No.

125. That is because all parts of the Disputed Decision were made under powers deriving from section 20 of the Act, rather than sections 11, 12 or 17.

Conclusion

126. For all those reasons, my decision is as set out on pages 1 and 2 above.

127. The only procedures by which the Father can possibly attain his desired outcome, are those set out in paragraphs 118 and 119 above. He should restrict himself to those procedures and not seek to reopen the 2012 Tribunal's decision in unrelated appeals. He should expect the First-tier Tribunal and the Upper Tribunal to exercise their case management powers firmly if he takes the latter course in the future.

128. Finally, I have been asked to comment about the enforcement of the arrears of child support maintenance owed by the Father. However, I cannot do so. Such matters are beyond my jurisdiction. The law says that when making a liability order "the court … shall not question the maintenance assessment under which the payment of child support maintenance fell to be paid": see section 33(4) of the Act. A maintenance assessment remains in force—and enforcement is therefore to be based on it—unless and until it is set aside or varied on appeal. Any views the First-tier Tribunal or Upper Tribunal may have about enforcement are therefore irrelevant: it must take place on the basis of the current maintenance assessment even if that assessment is being challenged on appeal.

Signed (on the original)
on 8 February 2021

Richard Poynter
Judge of the Upper Tribunal

Corrected on 3 August 2021 before inclusion on the website of the Administrative Appeals Chamber.