DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Although the decision of the First-tier Tribunal under reference SC154/10/07895, SC154/11/04747 & SC154/11/04883 made on 25 July 2016 at London Fox Court involved the making of an error on a point of law, it is NOT SET ASIDE.

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

REASONS FOR DECISION

Introduction

1. The child support scheme is a system that is supposed to provide (financial) support for children (or, technically, for 'qualifying children' in the language of the Child Support Act 1991). Sometimes it goes horribly wrong; this is regrettably just such a case. Both parents have every right to feel aggrieved about the way they have been treated by the 'system'.

2. This appeal ultimately stems from a First-tier Tribunal decision taken on 14 November 2011, nearly six years ago. In the meantime two subsequent appeals involving the same parties but in relation to decisions taken by a later First-tier Tribunal in 2014 have already been allowed by the Upper Tribunal and remitted for re-hearing (CCS/1525/2015 and CCS/1526/2015). There are doubtless other appeals in train before the First-tier Tribunal involving the same parties. The qualifying children in this case are now aged 22 and 21 respectively. That tells its own sad story.

3. There have been major errors in this case by both the Child Support Agency and the First-tier Tribunal (and, for good measure, also by the Independent Case Examiner, whose role it is to consider complaints of maladministration by the Agency). The result has been a procedural mess of Gordian knot complexity.

The parties to this appeal

4. The Appellant is the parent with care ('the mother'). The First Respondent is the Secretary of State for Work and Pensions (whose operational arm for these purposes is the Child Support Agency, or the CSA). The Second Respondent is the non-resident parent ('the father').

Where it all went wrong: an outline

5. On 14 November 2011 the First-tier Tribunal ('the original Tribunal'), comprising District Tribunal Judge A and a financially qualified member, allowed the mother's three appeals relating to three maintenance calculations for successive periods. Shorn of detail, the original Tribunal's decision notice stated that the father's gross income (with rounding) was £29K up to the date ('the changeover date') on which he changed his status from being self-employed to that of being a director and employee of what was, in effect, his one-man company, and that there was a diversion of £32K thereafter; the two subsequent maintenance calculations were to be adjusted accordingly.

6. The original Tribunal's decision notice was ambiguous. It could be read in either of two ways. The first way ('the aggregated view') was that the father's gross income

was £29K up to the changeover date and thereafter £61K (being the total of £29K plus the diversion of £32K). The second way ('the sequential view') was that the father's gross income was £29K up to the changeover date and thereafter £32K.

7. Given the father's income on the aggregated view was assessed at being almost double that on the sequential view, the implications for the amount of his liability under the relevant child support maintenance calculations were obviously very significant.

8. In summary, although the original Tribunal's decision notice could be read either way, I am satisfied that its statement of reasons showed that the original Tribunal was in fact adopting the second or sequential view, i.e. that after the changeover date there had been a modest increase of about £3K p.a. in the father's total gross income for child support purposes, taking into account both formula income and variation income.

9. On 28 November 2011 the CSA recalculated the amount of the father's child support liability in the light of the original Tribunal's findings. However, the CSA took the aggregated view of the decision notice, and so the father's gross income was taken to be in the order of £61K p.a. after the changeover date.

10. The father repeatedly sought to challenge the CSA's implementing calculations. District Tribunal Judge A treated his correspondence as both a request for a correction and an application for permission to appeal, both of which were refused. The father then asked the First-tier Tribunal to consider the CSA's recalculations under the liberty to apply procedure.

11. On 25 July 2012, District Tribunal Judge A refused the liberty to apply application, finding (wrongly, as I will conclude) that the CSA had on 28 November 2011 correctly implemented the original Tribunal's decision. Permission to appeal to the Upper Tribunal against that decision was later refused.

12. However, on 11 July 2013, the CSA issued the parents with what were described as 'revised' maintenance calculations. These re-made or 'corrected' (in CSA-speak) the assessments of 28 November 2011 but this time on the basis of the sequential view of the father's income. These 'corrections' followed court proceedings brought against the father for an interim third party debt order, during which the CSA's presenting officer undertook to revisit the calculations in question. The result, inevitably, was a substantial reduction in the amount of the father's child support liability (which dropped from £177.43 p.w. to £78.86 p.w.).

13. On 1 August 2013 the mother promptly challenged the revised CSA calculation of July 11, 2013.

It gets worse

14. For reasons that are unclear to me, the CSA treated the mother's challenge to the maintenance calculation of 11 July 2013 as a complaint rather than an appeal. The dispute was considered first by the CSA's Resolution and Review Teams, and then "escalated" to the Independent Case Examiner (ICE). The ICE accepted the case for investigation on 9 January 2014 and closed the complaint on 8 September 2015. I have not seen the ICE's final report and nor do I need to see it for the purposes of these proceedings. However, the mother has helpfully provided copies of correspondence from the CSA's Complaints Review Team, which includes extracts from the ICE report, including a passage in which the ICE itself acknowledges an error that office made in processing and determining the complaint.

15. Finally, on 11 March 2016, and more than 2½ years after the CSA received the mother's timely appeal against the revised maintenance calculation of 11 July 2013, the papers were referred to the CSA's Appeals Unit. Four days later the Appeals Unit very properly referred the appeal to the First-tier Tribunal office.

A fresh look by the First-tier Tribunal

16. By this time (perhaps unsurprisingly) the financially qualified member who had sat on the original Tribunal had retired. As there was a possibility that the case might go to a fresh hearing, and it would be wrong for that tribunal to be composed of one member with prior knowledge of the case and one without such involvement, the case was transferred to a different judge, District Tribunal Judge B.

17. District Tribunal Judge B issued detailed Directions on 3 May 2016. Having reviewed the tangled procedural history of the case, District Tribunal Judge B reached the following provisional conclusions:

- District Tribunal Judge A's ruling of 25 July 2012 was the final decision on the four appeals heard by the original Tribunal (if that decision had not been finalised before), and so the mother's challenge could not be a challenge to the original Tribunal's decision of 14 November 2011;
- The mother's challenge of 1 August 2013 could only be a challenge to the 'corrected' maintenance calculation issued on 11 July 2013;
- The mother's appeal against that decision was bound to succeed, as the Secretary of State had no power to revise or supersede the decision of 25 July 2012, which had purportedly confirmed the decision of 14 November 2011;
- There was a procedural irregularity in the Tribunal's ruling of 25 July 2012, as it had been made by District Tribunal Judge A sitting alone, and not by that Judge and the financially qualified member sitting together.

18. Those provisional conclusions led District Tribunal Judge B to pose the question as to whether it would be in the interests of justice to set aside the Tribunal's ruling of 25 July 2012 under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; "the 2008 Rules"). The parties' comments on that course of action were invited, the competing considerations having been summarised in these terms:

> 31. If I set aside the decision, the eventual outcome of these proceedings is likely, in my provisional view, to be that the "revised" maintenance calculation (or something very like it) replaces the original maintenance calculation with the result that the child support maintenance that [the father] has to pay, and [the mother] is entitled to receive, will be considerably reduced. If I do not set the decision aside, it is likely that the original maintenance calculation will remain in place, with the opposite result.
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> 32. The main consideration in favour of its being in the interests of justice to set [District Tribunal Judge A's] decision aside is that, as presently advised, I believe it to be wrong. In principle, it would be unjust to allow a mistaken decision to remain in place so as to require [the father] to pay more child support maintenance than was legally due.
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> 33. On the other hand, [the father] could have challenged [District Tribunal Judge A's] decision at the time by applying to the Upper Tribunal for permission to appeal. On the information available to me, he did not do so. If that is correct, it could be argued that [the mother] was entitled to regard [District Tribunal Judge A's]

> decision as final once the time for appealing against it had expired and to arrange her affairs on that basis. It would arguably be unjust to her for the matter to be re-opened nearly a year later.

19. Having considered the parties' various submissions, and having concluded that there was no necessity for an oral hearing (a case management decision which has not been challenged on any side), District Tribunal Judge B subsequently issued a decision notice on 25 July 2016, coincidentally four years to the day after the liberty to apply ruling by District Tribunal Judge A. In a nutshell, the new decision (and the decision now under appeal in these Upper Tribunal proceedings) was as follows, breaking it down into its four constituent elements (which I describe as issues (1)-(4) below):

> (1) there had been a procedural irregularity in the ruling of 25 July 2012;
>
> (2) the ruling of 25 July 2012 should be set aside as it was in the interests of justice to do so;
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> (3) the mother's appeal against the 'corrected' maintenance calculation of 11 July 2013 was allowed; and
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> (4) however, the maintenance calculation of July 11, 2013 was re-made in the same terms, namely reflecting the sequential rather than the aggregated view of the father's income.

20. On 15 August 2016 District Tribunal Judge B gave the mother permission to appeal to the Upper Tribunal against the decision of 25 July 2016. In doing so, two particular issues were highlighted, namely:

> (a) the power of the Secretary of State to revise decisions that have been taken in accordance with directions given by the First-tier Tribunal and subsequently confirmed by the Tribunal on application by a party;
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> (b) the correct procedure to be followed where the First-tier Tribunal makes an error in a 'liberty to apply' application but the party disadvantaged by that error does not appeal against that ruling to the Upper Tribunal.

The parties' submissions to the Upper Tribunal

21. Both the Secretary of State and the mother have made detailed submissions on the appeal before the Upper Tribunal. I have considered all those points, even if they are not all referred to in the analysis below.

22. The father was given the opportunity to make submissions on the appeal but did not do so within the allotted time. On 6 June 2017 he sent the Upper Tribunal office an e-mail stating that the bundle of documents had not been sent to his correct address and asked for a new bundle and an extension of time. In a ruling of the same date I refused both requests, as I took the view he was well aware of the Upper Tribunal proceedings and I was not satisfied he had acted in a timely manner. Accordingly, I have not considered any submissions from the father on the main issue raised by this appeal.

23. I subsequently directed a further round of submissions on what I have called "the composition issue", namely whether District Tribunal Judge A's ruling of 25 July 2012 was the product of a properly constituted First-tier Tribunal. I considered submissions from all the parties on that issue.

The Upper Tribunal's analysis

Introduction

24. In this analysis I consider (I) the meaning of 'liberty to apply'; (II) the First-tier Tribunal's decision of 25 July 2012 and what is meant by 'procedural irregularity'; (III) the fate of the First-tier Tribunal's decision of 25 July 2016; (IV) the two further matters raised in the grant of permission to appeal by District Tribunal Judge B; and (V) the mother's remaining grounds of appeal. There is, however, an important preliminary point as to jurisdiction to note at the outset.

An important preliminary point as to jurisdiction

25. Not all First-tier Tribunal decisions are capable of being appealed to the Upper Tribunal. Section 11(1) of the Tribunals, Courts and Enforcement Act (TCEA) 2007 refers to "a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal *other than an excluded decision*" (emphasis added).

26. There is a list in section 11(5) of TCEA 2007 of particular decisions which are "excluded decisions" for the purposes of section 11(1). A decision "to set aside an earlier decision of the tribunal" is an excluded decision (see section 11(5)(d)(iii)). However, this is qualified by the opening words of section 11(5)(d), which refer to tribunal decisions taken under section 9 of TCEA 2007, which deals with reviews of First-tier Tribunal decisions.

27. In the present case District Tribunal Judge B was not acting under section 9 of TCEA 2007, but rather under rule 37 of the 2008 Rules, which deals with set asides for procedural reasons. So the decision of 25 July 2016 was <u>not</u> an excluded decision and accordingly is capable of being appealed to the Upper Tribunal. That much was accepted by Upper Tribunal Judge Turnbull (on a concession by the Secretary of State) in *MP v Secretary of State for Work and Pensions (DLA)* [2010] UKUT 103 (AAC) (at paragraphs 16-18).

28. It also appears from the drafting of rule 37 that the First-tier Tribunal may exercise the power to set aside of its own initiative, without an application from any party, and indeed in principle may do so at any time. The one-month time limit for making a set aside request in rule 37(3) by definition applies only to applications by parties.

(I) The meaning of 'liberty to apply'

29. The original Tribunal's decision of 14 November 2011 had stated that "Any party may apply to the Tribunal, within one month of the issue of notification of the recalculation, for the Tribunal to determine the correctness of the recalculation". Mrs Jenny Tarver, for the Secretary of State, contends that "liberty to apply" is a device whereby a party can challenge the implementation of a Tribunal decision by the Secretary of State, i.e. to ask the Tribunal whether the Secretary of State has correctly understood the Tribunal's decision and correctly calculated the arithmetic. By necessary inference it is not a means of challenging the substance of the Tribunal's original decision. This is consistent with the long-established practice in appeals relating to overpayments of social security benefits of remitting outstanding issues over complex arithmetical calculations to the original decision-maker, but with the right to refer the matter back to the tribunal in the absence of agreement (see e.g. R(SB) 11/86 at paragraph 8).

30. This understanding is also consistent with the practice of making orders allowing the parties 'liberty to apply' that developed in the common law courts. As McCloskey

J has recently observed when considering the proper scope of 'liberty to apply', there are few reported cases and "bright line rules or principles do not abound" (*R (on the application of AM, SASA, MHA and SS) v Secretary of State for the Home Department* [2017] UKUT 372 (IAC) at paragraph (38)). That said, according to McCloskey J in the same passage, the clearest principle is that "liberty to apply serves to 'work out' the order of the court, rather than to vary it" (see also *Cristel v Cristel* [1951] 2 KB 725 at 728 and 730 and *Community Care North East v Durham County Council* [2010] EWHC 959 (QB) at paragraph [35]). I respectfully agree.

(II) The First-tier Tribunal's decision of 25 July 2012 and "procedural irregularity"

The context

31. The decision of District Tribunal Judge A on 25 July 2012, refusing the father's liberty to apply application, was on any view a "decision which disposes of proceedings" within rule 37(1) of the 2008 Rules. On one view it was the First-tier Tribunal's final word on the subject of the appeals that it had determined on 14 November 2011 and so disposed of those proceedings. But given that a "decision which disposes of proceedings" includes (unless the context indicates otherwise) "disposing of a part of the proceedings", the better view may be that it disposed of the liberty to apply application, being part of the proceedings. In any event, such a decision may be set aside by the First-tier Tribunal where both it is in the interests of justice so to do (rule 37(1)(a)) and one of the conditions set out in rule 37(2) is made out (rule 37(1)(b)). So consideration of the interests of justice comes into play only if one such procedural problem has arisen.

32. In the present case none of the particular circumstances detailed in rule 37(2)(a)-(c) applied. Instead, in setting aside the liberty to apply ruling, District Tribunal Judge B relied upon rule 37(2)(d), the catch-all provision that applies where "there has been some other procedural irregularity in the proceedings". The legislation does not define the expression "procedural irregularity" and with good reason – as to do so would deprive rule 37(2)(d) of some valuable 'wriggle-room' to secure justice in individual cases where the nature of a particular procedural injustice has not been anticipated in the other categories under rule 37(2). Perhaps the most that can be said is that "the power is limited to procedural errors; it does not allow a decision to be set aside for matters that relate to the substance of the decision" (E. Jacobs, *Tribunal Practice and Procedure* (2nd edition, p.535, see now p.4th edition, p. 571), approved by Upper Tribunal Judge Ward in *R (LR by ER) v First-tier Tribunal (HESC) & Hertfordshire CC (SEN)* [2012] UKUT 213 (AAC) at paragraph 47).

33. District Tribunal Judge B found a "procedural irregularity" in the Tribunal's ruling of 25 July 2012 on the basis that it had been made by District Tribunal Judge A sitting alone, and not by that Judge and the financially qualified member sitting together (i.e. by the original Tribunal). In so finding, District Tribunal Judge B relied on the Upper Tribunal's decision in *GO and HO v Barnsley Metropolitan Borough Council (SEN)* [2015] UKUT 814 (AAC) as authority for the proposition that the Tribunal which considers the substantive issues in an appeal must be constituted the same way throughout.

The composition issue

34. The Upper Tribunal decision in *GO and HO v Barnsley Metropolitan Borough Council (SEN)* certainly stated that "the First-tier Tribunal must have the same, no more than three, person constitution *throughout* the appeal proceedings" (at paragraph 43). However, that was a case in which the Tribunal had held two hearings to decide the appeal (i.e. the case went part heard after a first adjourned hearing). The Tribunal panel had comprised the same Judge (Judge W) on both occasions, but specialist members X and Y at the first hearing and then specialist

members X and Z at the second hearing. So, in all, four members (W, X, Y and Z) heard that appeal over two hearings. In reaching his decision in *GO and HO v Barnsley Metropolitan Borough Council (SEN)*, Upper Tribunal Judge Wright relied upon a decision of a three-judge panel in *MB and others v SSWP (ESA and DLA)* [2013] UKUT 111 (AAC); [2014] AACR 1. That was also a case which was concerned with the proper composition of Tribunal panels at a full substantive hearing of an appeal.

35. The present case is different. District Tribunal Judge A was not deciding the substantive appeal on 25 July 2012. The original Tribunal had done that on 14 November 2011. Rather, District Tribunal Judge A was dealing with a post-hearing matter, namely the father's liberty to apply application (the scope of which, as noted above, is limited to arithmetical or linguistic elucidation and not to substantive variation).

36. What then should be the composition of a First-tier Tribunal on a child support liberty to apply application where the original hearing has been heard by a judge and accountant member sitting together? The composition for such cases is not laid down in either the Act or in the Rules. Rather, the requirements are set out in the Senior President of Tribunals' Practice Statement entitled *Composition of Tribunals in Social Security and Child Support cases in the Social Entitlement Chamber on or after 01 August 2013* (dated 31 July 2013). The version in force at the time in question was not materially different. The Practice Statement shows that a financially qualified member can be appointed "where the appeal may require the examination of financial accounts" (paragraph 7a). Paragraph 10 of the Practice Statement also provides as follows:

> "10. A decision, including a decision to give a direction or make an order, made under, or in accordance with, rules 5 to 9, 11, 14 to 19, 25(3), 30, 32, 36, 37 or 41 of the 2008 Rules may be made by a Tribunal Judge, except that a decision made under, or in accordance, with rule 7(3) or rule 5(3)(b) to treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise) of the 2008 Rules must be made by the Chamber President."

37. The effect of this is that a Tribunal Judge sitting alone "may" deal with most pre- or post-hearing matters. The Rules do not make express provision for liberty to apply applications as such, but such requests are best seen simply as a special form of post-hearing application for a direction under rule 6. According to paragraph 10 of the Practice Statement, matters within rules 5 to 9 "may be made by a Tribunal Judge". As a matter of general principle, therefore, a Tribunal Judge may deal with a liberty to apply application, but that would not preclude the matter being dealt with by a Judge and a financially qualified member in appropriate cases, e.g. where the nature of the application required accountancy expertise.

38. On that analysis, District Tribunal Judge A was entitled to deal with the application alone and it was not a procedural irregularity to do so. If that view is right, then the "interests of justice" do not come into the matter, as rule 37(1)(a) and rule 37(2) will not have been met. Moreover, if District Tribunal Judge A was so entitled to deal with the liberty to apply application, then it follows District Tribunal Judge B was wrong to conclude that there had been a procedural irregularity.

The parties' submissions

39. Mrs Jenny Tarver, the Secretary of State's representative, acknowledges that in principle a liberty to apply application may be dealt with by a judge sitting alone, but observes that the addition of a financially qualified member is not precluded. She

argues that if District Tribunal Judge A had considered the application jointly with the accountant member, rather than as a single judge, then it is less likely the mistake would have been made. Accordingly, the composition of the tribunal was directly related to the error made in the decision of 25 July 2012 and amounted to a procedural irregularity.

40. The mother disagrees; she argues that District Tribunal Judge A was able to deal with the liberty to apply application alone, as there is nothing in the Act or the procedural rules to say to the contrary.

41. The father has not commented directly on the composition issue.

The Upper Tribunal's conclusion on the composition issue

42. I agree with the mother that District Tribunal Judge A was able to deal with the liberty to apply application alone and so without the accountant member. Decisions such as *GO and HO v Barnsley Metropolitan Borough Council (SEN)* and *MB and others v SSWP (ESA and DLA)* are distinguishable as they were both concerned with the requirement that the substantive decision on an appeal be heard by the same panel. I accept Mrs Tarver's point that had the accountant member sat with District Tribunal Judge A it is perhaps less likely that the mistake would have been made. However, either the First-tier Tribunal dealing with the father's liberty to apply application was correctly constituted under the Senior President of Tribunals' Practice Statement or it was not. For the reasons set out above, I consider it was correctly constituted. It may have been unwisely constituted in the event, but it was not improperly constituted.

43. For good measure I also note that by 2016 the financially qualified member in question who had sat on the original Tribunal had retired. If, however, that member had retired much earlier, say immediately after the final substantive hearing in November 2011, but before the liberty to apply application was considered in July 2012, the logic of Mrs Tarver's argument is that the decision of the original Tribunal would have had to be set aside and the case completely reheard. That cannot be right.

44. I therefore conclude that the First-tier Tribunal was properly constituted in the form of District Tribunal Judge A to deal with the liberty to apply application on 25 July 2012. It follows there was no procedural irregularity within the meaning of rule 37. To that extent I conclude that District Tribunal Judge B erred in law in the subsequent ruling of 25 July 2016.

So where does this leave District Tribunal Judge B's ruling of 25 July 2016?

45. District Tribunal Judge B in the ruling of 25 July 2016 decided both that there was a procedural irregularity in making the liberty to apply ruling of 25 July 2012 and also that it was in the interests of justice to set aside that ruling. However, the conclusion above to the effect that there was no procedural irregularity within the meaning of rule 37 means that as a matter of law there was no scope to set aside the 25 July 2012 ruling, whatever the interests of justice might dictate. In short, there was no trigger under rule 37(1)(b) and (2) such as to bring into question the interests of justice. For the present, that disposes of issue 2 as raised by the ruling of 25 July 2016, namely the setting aside of the ruling of 25 July 2012 as being in the interests of justice. However, it brings into sharp focus issues 3 and 4, being the mother's appeal against the 'corrected' CSA maintenance calculation of 11 July 2013 and the re-making by District Tribunal Judge B of the calculation of 11 July 2013.

46. Having concluded that there is an error of law involved in the making of District Tribunal Judge B's ruling of 25 July 2016, I am faced with a stark choice. First, I have a discretion as to whether to leave that decision intact or to set it aside – thus according to statute the Upper Tribunal "may (but need not) set aside the decision" (TCEA 2007, section 12(2)(a)). Second, if – but only if – I set that ruling aside, I must either remit (send back) the appeal to the First-tier Tribunal or re-make the decision. So that takes us directly to the fate of the ruling of 25 July 2016.

(III) The fate of the First-tier Tribunal's decision of 25 July 2016

47. The usual fate of a First-tier Tribunal that involves an error of law is to be set aside. The default position is that such is the fair and just outcome. However, there are circumstances in which such a decision is left to stand, despite the error of law. For example, if the substantive decision involves an error of law but in the round is essentially sound, both in fact and law, that is a good reason for deciding to exercise the discretion under section 12(2)(a) so as not to set aside the decision in question (see e.g. *AS v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 159 (AAC) at paragraphs 23-25).

48. Mrs Tarver for the Secretary of State advocates leaving the decision of District Tribunal Judge B in place. She contends that the ruling of 25 July 2016 was the right decision on the facts and one which correctly reflected the intention of the original Tribunal's decision of 14 November 2011. She suggests this is the most pragmatic course without further delay in an already protracted case. She adds that such an outcome would prevent the father having to pay a higher and incorrect sum by way of child support but (she argues) would still leave the mother with appeal rights against that original decision (I return to this latter point later).

49. The mother, entirely understandably, takes a very different view. Her argument is that District Tribunal Judge B's ruling of 25 July 2016 should be set aside and the decision of District Tribunal Judge A, which was in clear and categorical terms, should be reinstated. She points out that the original Tribunal's decision was challenged at the time by the father and upheld on several occasions by the First-tier Tribunal. The original Tribunal's decision notice was, she says, "clear, considered and quite specific"; there was no ambiguity at the time. She repeats her previous claims that the father has disguised his various sources of income and failed properly to disclose all relevant documentation.

50. It is therefore important at this stage to examine exactly what was decided by the original Tribunal. I referred above in outline to what I described as the "aggregated" and "sequential" interpretations of the original Tribunal's decision as its findings related to the father's income.

51. The relevant parts of the original Tribunal's decision notice on 14 November 2011 read as follows, dealing with the mother's three appeals:

> "The appeal SC154/10/07895 is allowed from the effective date of the 26th October 2009.
>
> The income figure used to calculate the maintenance assessment is incorrect. The gross income for the maintenance assessment for the period up to 19th January 2010 is to be taken as £28,890 per annum.
>
> A variation is granted from the 20th January 2010 there is a diversion of income in the sum of £32,050 gross per annum.

…

The appeal SC154/11/04747 is allowed.

The income to be taken into account for the maintenance assessment is as determined in appeal no SC154/10/07895 after the variation has been granted. There is no reduction in income until [the father] applies for and obtains JSA.

The appeal SC154/11/04883 is allowed.

The income to be taken into account from the effective date of the 17th January 2011 is that as determined in appeal no SC154/10/07895 after the variation has been granted.

The case is remitted to the Commissioner to recalculate the amount of the child support assessment in accordance with the directions given in the statement of reasons.

Any party may apply to the Tribunal, within one month of the issue of notification of the recalculation, for the Tribunal to determine the correctness of the recalculation."

52. Whilst the decision notice is not entirely free from ambiguity, it is quite easy to see how it was understood as meaning that the father's income was to be taken as £28,890 for the period up to 19 January 2010 (formula income only) and £60,895.50 (£28,890 + £32,050.50) thereafter (formula income plus variation income). Indeed, I accept that may well be the more natural reading of the terms of the Decision Notice.

53. The statement of reasons provided with the Decision Notice provided much more by way of detail. The original Tribunal explained its finding that the father had been self-employed in the period immediately after the effective date of the maintenance assessment (26 October 2009). It found that he had been self-employed trading as 'DI' and providing services to 'DR Ltd' during this period. The statement of reasons explained how the panel had arrived at the gross annual earnings of £28,890 for that initial period (at paragraphs [22]-[29]). It also pointed out that, contrary to the CSA's finding, the father could not have been an employee of 'DI', at least at that time, as that company was not incorporated until 19 January 2010.

54. The statement of reasons then turned to the incorporation of 'DI' and the period after 20 January 2010. In its analysis of the evidence, the original Tribunal noted that the father was now an employee of 'DI' which was providing services to 'DR Ltd'. It recorded that the father's PAYE income from 'DI', at the derisory rate of £5.80 an hour, was only £10,005 p.a. However, it found that 'DI' was actually charging out the father's time at £20 an hour. The original Tribunal concluded that £22,045.50 in income was being diverted into the company which the father effectively controlled. It concluded that it was just and equitable to grant a variation. The result was that in effect the CSA was to calculate the maintenance assessment "from the 20th January 2010 on the basis of [the father] being a PAYE employee earning £32,050.50 per annum gross" (at paragraph [42]). That figure of £32,050.50 per annum gross was obviously the sum of £10,005 p.a. (the declared PAYE formula income) and £22,045.50 (the varied income on account of the diversion) – see generally the original Tribunal's statement of reasons at paragraphs [30]-[42].

55. District Tribunal Judge B, in the directions notice dated 3 May 2016, expressed the following provisional view:

> "19. My provisional view is that, for the period from 18 October 2010, the 'revised' maintenance calculation is correct to base itself on gross annual earnings of £32,050.50 rather than the sum of that figure and £28,890.00. I agree that, on its own, the decision section of the decision notice is ambiguous and could be read as requiring the two figures to be aggregated. However, in my provisional view, the decision notice as a whole required the figure of £32,050.50 to be substituted for the figure of £28,890.00 with effect from 18 October 2010, rather than added to it."

56. The reference in the first and final sentences to "18 October 2010" was simply a slip of the word-processor for "20 January 2010" in both instances.

57. In the final ruling of 25 July 2016, District Tribunal Judge B confirmed that "the decision dated 14 November 2011 required that the unvaried income should be replaced by the varied income … not added to it" (paragraph [5b]). Moreover, "I am confident the original tribunal never intended the varied net weekly income to be added to the unvaried net weekly income" (paragraph [17]).

58. For the reasons set out above, I am also more than satisfied that is the correct reading of the purport of the original Tribunal decision of 14 November 2011. It is clear that the Tribunal's assessment of the father's income after 20 January 2010 as amounting to £32,050.50 included both formula income and diverted income on a variation.

59. So, having (wrongly) decided that District Tribunal Judge A's ruling of 25 July 2012 involved a procedural irregularity, District Tribunal Judge B set aside that ruling and (rightly) re-made the CSA decision of 11 July 2013 in line with the "sequential" rather than "aggregated" reading of the original Tribunal's decision of 14 November 2011. In doing so, District Tribunal Judge B undertook a comprehensive analysis of the various arguments in favour of setting aside the 25 July 2012 ruling or leaving it intact. District Tribunal Judge B concluded that the arguments for setting it aside "heavily outweigh" the arguments to the contrary. I agree with that analysis.

60. Thus, given that District Tribunal Judge B arrived at the correct outcome, on any objective reading of the true terms of the decision of the original Tribunal on 14 November 2011, I do not consider it appropriate to set aside the First-tier Tribunal's decision of 25 July 2016. To do so would be to leave in place the erroneous decision of District Tribunal Judge A on 25 July 2012 on the liberty to apply application, a ruling which would now, given the passage of time, be beyond any form of legal challenge. So, despite the error of law in District Tribunal Judge B's ruling, I decline to set aside that decision. To that extent the mother's appeal to the Upper Tribunal succeeds on a technicality but not to any practical effect to her advantage, as the decision of 25 July 2016 – which ultimately confirmed the CSA's 'corrected' maintenance calculations of 11 July 2013 – stands.

61. However, that is by no means the end of the matter, not least as District Tribunal Judge B's grant of permission to appeal raised two further issues (see paragraph 20 above).

(IV) The two further matters raised in the grant of permission to appeal

62. The first additional issue raised by District Tribunal Judge B was as follows, namely what was

> "(a) the power of the Secretary of State to revise decisions that have been taken in accordance with directions given by the First-tier Tribunal and subsequently confirmed by the Tribunal on application by a party."

63. It will be recalled that following the original Tribunal decision of 14 November 2011, the CSA (wrongly) recalculated the father's maintenance assessments on 28 November 2011, based on the "aggregated" reading of the Decision Notice. The result was that the father's child support liability for the relevant period was assessed to be £177.43 a week. The father's attempts to challenge this figure, as noted above, came to naught, culminating in the ruling by District Tribunal Judge A on 25 July 2012, refusing his liberty to apply application. However, on 11 July 2013 the CSA issued a 'corrected' maintenance calculation for the same periods, adopting the "sequential" view of the original Tribunal's decision, which resulted in a weekly child support liability of £78.86, approximately half of the previous assessment.

64. In his directions notice dated 3 May 2016, District Tribunal Judge B expressed the following provisional views:

(i) the original Tribunal's decision was finalised by 25 July 2012, if not before;
(ii) the Secretary of State thereafter had no power to "revise" the original Tribunal's decision, as section 16 of the Child Support Act 1991 only allows the Secretary of State to revise a Tribunal decision given on a variation referral under section 28D, which did not apply in this case;
(iii) the Secretary of State did in principle have the power to supersede the original Tribunal's decision;
(iv) however, a supersession was possible only where either there was a relevant change of circumstances (not the case here) or where the Tribunal's decision was made in ignorance of, or based on a mistake of fact as to, some material fact;
(v) the decision of 25 July 2012 was not made in ignorance of, or based on a mistake of fact as to, some material fact – rather it was based on a mistake as to the legal effect of the original Tribunal's decision, which was an error of law, and the Secretary of State is barred from superseding a Tribunal decision on such a basis (see regulation 6A(2)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), i.e. "the 1999 Regulations");
(vi) in any event, any such supersession could only take effect prospectively, unless based on the effect of a misrepresentation (paragraph 11 of Schedule 3D to the 1999 Regulations).

65. So, in a nutshell, District Tribunal Judge B's view was that although the CSA had come to the right decision in terms of the outcome of its corrected calculation of 11 July 2013, it had no power so to act. District Tribunal Judge B confirmed that view in the ruling of 25 July 2016.

66. I note that until shortly before the 11 July 2013 re-assessment the CSA itself had adhered to the same view. In a letter to the father dated 18 April 2013, the CSA's legal enforcement case officer explained that "we have no jurisdiction to overturn an appeals decision and your application to revisit the decision was rejected". However, the CSA then had a change of mind. As noted at paragraph 12 above, this seems to have followed court proceedings against the father for an interim third party debt order, during which the CSA's presenting officer undertook to revisit the calculations

in question. In doing so on 11 July 2013, the CSA purported to rely on regulation 3A(1)(e) of the 1999 Regulations to revise the earlier implementation decision.

67. Regulation 3A(1)(e) undoubtedly allows the decision-maker to revise an earlier decision at any time on the basis of "official error". This may sound a promising rationale. However, there are at least two problems with this approach, as District Tribunal Judge B astutely identified. First, "official error" means (in essence) departmental official error (see regulation 1(3) of the 1999 Regulations), not judicial error, and in this case the CSA's official error had been overtaken by, and subsumed within, the Tribunal's error in its liberty to apply ruling. Secondly, and in any event, regulation 3A(1) does not apply to decisions taken on appeal by a First-tier Tribunal - only on a section 28D referral, which was not the case here (see regulation 3A(3) of the 1999 Regulations).

68. For those reasons Mrs Tarver accepts that the CSA's decision-maker acted without jurisdiction in making the so-called 'corrected' maintenance calculation of 11 July 2013. I agree. It follows that the Secretary of State has no power to revise a decision that has been taken in accordance with directions given by the First-tier Tribunal and subsequently confirmed (albeit wrongly) by the Tribunal on application by a party.

69. The second further issue was posed as follows, namely what is

> "(b) the correct procedure to be followed where the First-tier Tribunal makes an error in a 'liberty to apply' application but the party disadvantaged by that error does not appeal against that ruling to the Upper Tribunal."

70. So what then should the Secretary of State do when his decision-maker realises that a mistake has been made in such circumstances, i.e. where the decision-maker incorrectly implements the original Tribunal's decision and the error in that decision as implemented is itself compounded by the Tribunal refusing a subsequent liberty to apply application? Mrs Tarver pragmatically suggests that in such a case the decision-maker, rather than purporting to make a 'revised' or 'corrected' decision, should refer the matter to the Tribunal and request a set aside of the erroneous liberty to apply ruling, which would enable the Tribunal then to re-make the liberty to apply decision. In my view there are actually two routes by which this end might be achieved.

71. First, the Secretary of State might apply to the Tribunal for a set aside under rule 37 of the 2008 Rules. The decision-maker would have to apply within one month of the erroneous liberty to apply ruling (rule 37(2)), unless the Tribunal agreed to extend time (under rule 5(3)(a)). Alternatively, the Tribunal could decide to act under rule 37 of its own accord, but it would still have to be satisfied that the conditions in both rule 37(1)(a) and (b) were met. However, that may not be straightforward, as the present case has shown.

72. Second, the Secretary of State might apply to the Tribunal for permission to appeal to the Upper Tribunal under rule 38. This is again subject to a one-month time limit (rule 38(3)), subject again to any extension of time as required and as appropriate. The Tribunal might then decide either to review the decision itself (rules 39 and 40 and TCEA 2007, section 9) or grant (or indeed refuse) permission to appeal to the Upper Tribunal.

73. Alternatively, if the Secretary of State were to make such an application for permission to appeal, and the other parties were to be asked for their views, then the

First-tier Tribunal must set aside the decision and refer the matter for redetermination by a fresh tribunal if all parties were agreed there was an error of law (and not necessarily the same error): see Child Support Act 1991, section 23A(3). In another recent decision in a different jurisdiction I have questioned whether it is appropriate for the duty under section 13(3) of the Social Security Act 1998 (a parallel provision to section 23A(3)) to be framed in mandatory terms, rather than vesting the Tribunal with a discretionary power (see *AF v Secretary of State for Work and Pensions (No.2)* [2017] UKUT 366 (AAC) at paragraphs 48-54). Either way, whether formulated as a mandatory duty or a discretionary power, this mechanism could have assisted in the present case.

(V) The mother's remaining grounds of appeal

74. The mother has set out her grounds of appeal in some detail at various stages in these proceedings. She is (entirely understandably) both aggrieved and frustrated at how this case has been handled, especially by the CSA. Mrs Tarver summarises the mother's further grounds of appeal as essentially turning on two issues: first, the denial of her appeal rights and, secondly, the failure of the original Tribunal to secure full financial disclosure from the father before reaching its decision. I regard that as a fair summary of the mother's main points.

75. As to the first issue, the mother's argument is that she was effectively denied her appeal rights by the CSA's decision on 11 July 2013 to ignore District Tribunal Judge A's liberty to apply ruling (of 25 July 2012) followed by its refusal to allow her to appeal those 'corrected' calculations. There was certainly an inordinate delay in the mother's appeal against the 11 July 2013 recalculations being sent to the First-tier Tribunal office (see paragraph 14 above). As District Tribunal Judge B observed, if the mother's dispute had been referred promptly to the CSA Appeal Unit, "then the issues that now arise would be very much simpler to resolve". A large part of that period of delay (20 months in all) was accounted for by the time taken for the Independent Case Examiner's investigation – which has conceded it was in error in not requiring the CSA to provide the mother with appeal rights against the 11 July 2013 decision.

76. In my view the mother's appeal rights as against the CSA's decision of 11 July 2013 were substantially delayed rather than completely denied. District Tribunal Judge B in July 2016, three years later, exhaustively considered the mother's challenge to the 'corrected' decision of 11 July 2013 and agreed that it had been made without legal authority (although, of course, this did not in the event assist the mother as District Tribunal Judge B re-made the decision in the same terms). That decision might well have been made three months later rather than three years later.

77. Yet the lengthy delay of itself cannot directly affect the resolution of the legal issues arising on the appeal against the decision of 11 July 2013. Either the CSA had correctly interpreted the original Tribunal's decision or it had not. I readily acknowledge that justice delayed can mean justice denied, and of course there is a Convention right to judgment within a reasonable time under Article 6(1). However, tribunals have no power to award compensation for any breach of Article 6, meaning that any financial remedy for delay needs to be sought elsewhere (see *AS v. Secretary of State for Work and Pensions (CA)* [2015] UKUT 592 (AAC); [2016] AACR 22 at paragraphs 49-59).

78. As to the second issue, the mother argues that the original Tribunal had erred in law by failing to secure full financial disclosure from the father before reaching its decision. She adds that the CSA's original implementation decision had arrived at a

figure for the father's child support liability approximately in line with what she had expected. If the 25 July 2012 liberty to apply ruling by District Tribunal Judge A had not confirmed the 28 November 2011 assessments, then she would at that time have challenged on appeal the original Tribunal's decision for failure to address her arguments about the father's lifestyle. She had thereafter been disadvantaged by the subsequent turn of events. Mrs Tarver makes three points on this ground of appeal.

79. First, Mrs Tarver argues that the original Tribunal had recognised in its statement of reasons that the father had not provided full disclosure, but considered that it still had sufficient information to make a decision. Mrs Tarver contends that the original Tribunal was entitled to proceed as it did, given its wide powers as regards evidence under rule 15 of the 2008 Rules. I agree with Mrs Tarver on this point; this was a classic case management decision in respect of which a tribunal enjoys a broad discretion. In this context I recognise that the original Tribunal hearing took all morning and a short part of the afternoon session, and it is clear from the record of proceedings and the statement of reasons that the panel took extensive oral evidence on the issues it had to determine.

80. Second, Mrs Tarver agrees with the mother that the original Tribunal failed properly to determine the mother's claim for a variation based on the father's lifestyle. The original Tribunal stated that it need not consider that issue, given its decision on the diversion ground for a variation. However, I take a different view from Mrs Tarver on this matter. The original Tribunal's decision has to be read as a whole; the panel had made detailed findings about the father's income on the basis of both the formula and a diversion variation and was clearly alive to the "just and equitable" requirement. The statement of reasons also noted the father had access to capital arising out of both the ancillary relief proceedings and his recent redundancy. Whilst the reasoning on this point may have been compressed, I consider it was adequate in the circumstances. Yet this all assumes that the mother can properly challenge the substance of the original Tribunal's decision, which takes us to Mrs Tarver's third point.

81. Third, Mrs Tarver argues that in these Upper Tribunal proceedings the mother has only appealed against the decision of District Tribunal Judge B (dated 25 July 2016); she has not appealed against the original Tribunal's decision of 14 November 2011. However, Mrs Tarver submits that it was the 25 July 2016 decision that disposed of the proceedings before the First-tier Tribunal regarding the mother's appeals against the Secretary of State's three original maintenance calculations (made on 10 August 2010, 16 February 2011 and 28 April 2011 respectively). On that basis she argues that "the time limit for appealing the decision of 14/11/11 did not start to run until 28/07/16, when the decision of 25/07/16 was issued" (see rule 38(3)(a) of the 2008 Rules). She adds that while the one month time limit has already expired, it is possible to apply for an extension of time but only in the following 12 months. The mother has made it abundantly clear in correspondence that she wishes 'to preserve her appeal rights', so she may well have made such an application for permission to appeal.

82. I fear I have to disagree with Mrs Tarver's analysis, for two main reasons.

83. First, the point about the absolute statutory 12-month bar applies only to the time limit for appealing decisions by the CSA to the First-tier Tribunal: see rules 22(8) and 23(5) and (8) of the 2008 Rules (and is also subject to extension in exceptional cases under the principle in *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818). That absolute 12-month rule does not apply to appeals at the next stage, from the First-tier Tribunal to the Upper Tribunal, which is in issue here (see Tribunal

Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 21). In principle an application for permission to appeal to the Upper Tribunal can be admitted at any time after the expiry of the normal one month time limit, although of course the longer the delay the more difficult it may be to justify an extension of time under rule 5(3)(a). That might suggest the mother may still be in time to make such a challenge.

84. Second, however, and more fundamentally, I do not accept Mrs Tarver's argument that the original Tribunal's decision of 14 November 2011 was not finalised until 25 July 2016, and that it was District Tribunal Judge B's decision of that latter date which disposed of those proceedings for the purpose of the time limit for lodging an application for permission to appeal to start running. In my view the correct analysis is that it was the original Tribunal's decision of 14 November 2011 which disposed of all issues in the proceedings arising out of the Secretary of State's three maintenance calculations from the various dates in 2010 and 2011. District Tribunal Judge A's ruling of 25 July 2012 then disposed (wrongly, as it turned out) of the subsequent liberty to apply application, being a part of those proceedings. District Tribunal Judge B's ruling of 25 July 2016 disposed of the mother's appeal against the CSA's 'corrected' maintenance calculations of 11 July 2013. The time limit for appealing against the original Tribunal's decision accordingly ran from the date it issued its statement of reasons in 2011. It will be recalled that the father had made an unsuccessful application to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the decision of 14 November 2011. If Mrs Tarver's analysis is correct, then the time limit for appealing runs from one date (in 2011) for the father and a much later date (in 2016) for the mother, which cannot be right.

85. It follows that while I understand the mother's deep sense of grievance and frustration, insofar as it is relevant to the present proceedings I conclude she is out of time for lodging an appeal against the original Tribunal's decision of 14 November 2011.

Conclusion

86. For all the reasons above I conclude that the FTT's decision involves an error of law and so the mother's appeal to the Upper Tribunal is – technically at least – allowed (Tribunals, Courts and Enforcement Act 2007, section 11). However, the decision of the First-tier Tribunal dated 25 July 2016 is not set aside and therefore stands.

Signed on the original
on 02 October 2017

Nicholas Wikeley
Judge of the Upper Tribunal