IN THE UPPER TRIBUNAL **Case No.** CCS/706/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The father's appeal is dismissed. Although the First-tier Tribunal erred in law, the error did not affect the substance of the decision that it made and therefore its decision is not set aside.

REASONS FOR DECISION

1. This is an appeal, brought with my permission by the father of two qualifying children, against a decision of the First-tier Tribunal dated 10 November 2016, whereby it determined his appeal against various decisions of the Secretary of State, including a decision which, as revised on 4 February 2014, was to the effect that he was liable to pay child support maintenance to the children's mother, his ex-wife, at the rate of £234 per week from 5 June 2011 and £199 per week from 18 November 2012. The First-tier Tribunal said that it had dismissed the father's appeal, but in fact it allowed it to a very small extent although it rejected the father's central argument. That argument related only to assessments from 1 May 2012 and it was only in respect of that part of the First-tier Tribunal's decision that I gave permission to appeal. The First-tier Tribunal found that he was liable to pay £230 a week from 1 May 2012 to 16 November 2012, £193 per week from 17 November 2012 to 30 April 2013 and £183 per week from 1 May 2013 to 30 April 2014. (The amount of the father's child support maintenance is usually assessed annually from 1 May, but there was a reduction from 17 November 2012 because his second wife bore him a child then.)

2. There have been previous disputes between the parents about the assessment of child support maintenance and part of the background to the present case is a decision I gave on file CCS/2414/2011 on 21 June 2013. The father is a businessman and had been the sole shareholder in a particular company that he ran and I decided in relation to the periods before me that, as the First-tier Tribunal put it, "dividends received by [him] which cannot be brought into account under the base formula should be the subject of a variation and included as income not hitherto brought into account". Unsurprisingly, the First-tier Tribunal reached the same conclusion in relation to the later periods that were before it and that general approach has not been challenged.

3. However, the father claimed to have transferred 40% of the shares in the relevant company to his second wife and accordingly argued that only 60% of the dividends should be treated as his income from 1 May 2012. He produced part of a document (doc 284) upon which his wife was shown holding 40 of the 100 shares. The date of the document has been taken as being 2 April 2012 and, as the father had previously been the sole shareholder, it implied a transfer of shares to his wife during the preceding year.

4. His evidence, as recorded in the record of proceedings (which I accept is not a verbatim record), was to the effect that his wife had been made redundant in about 2012, or it could have been in 2010. He suggested to her that she should join him in

business and help with administration and health and safety. He had had three women working in the office and laid two off in about 2009 or 2010. One stayed and continued to work for him for three days a week (Tues, Wed, Thurs from 10 am to 3pm). He sent his wife on a course. He suggested he helped in the business, helping with health and safety, doing risk assessments [and something that I cannot read]. She did emails and checked his drafting. She started working for him in 2010. She had no contract and worked 20 hours a week until their daughter was born in 2012. She was not paid any salary or wages. As regards the transfer of shares, he explained that that was done because he "thought she should have a share". He asked his accountant who gave his approval. She had not been paid until then. He transferred 40% of the shares. No cash was involved. He wanted her to get an income and thought that dividends were better than a salary because they would depend on the profits. The accountant did not suggest a valuation. Their child was born on 17 November 2012 and his wife had worked 2 days per week since then. From about 2010 until she went on maternity leave, she had worked full-time for five-days a week for another organisation (not the company that had made her redundant). After 12 months' leave, she returned to work there on 2 days a week, which she was still doing. He confirmed that she had helped the father in his work after her redundancy while she had been in full-time work. She had not given him any money on the transfer of the shares. He had given her money for housekeeping.

5. The First-tier Tribunal was not impressed by that evidence, particularly as the father "was not able to show the date when the transfer took place, or that there had been any valuation before the transfer, or that the transfer was the result of an arms-length agreement for consideration". It considered that his evidence was "at best inconsistent" and lacked clarity. In particular, it said –

> "13. … It was not clear when his wife had started to work in the business: it could be any of 2010, 2012 or 12 months after their daughter was born in late 2012. It was not clear that his wife was actually receiving 40% of the dividends or whether he was simply continuing to give her housekeeping money and calling it a dividend. The amount that was paid was not recorded so similarly there was no certainty that she was in fact receiving 40% of the dividends. There was no evidence that the transfer had been properly arranged in terms of its date, valuation prior to the transfer or a date for the transfer. These factors led the tribunal to find that there was no evidence to support a transfer having taken place: the most that it could find was that [the father] had made a number of *ad hoc* payments to his wife, which falls far short of a required formal transfer required for her to establish an entitlement to a percentage of the dividends.
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> 16. The appellant and his representative accepted that there has been no valuation of the business before the transfer arrangements and agreed that if the tribunal were to find that there had been no transfer then all dividends would be eligible to be brought into account for the purposes of a variation, but they pointed out that since all of the dividends went into a joint account which was used for housekeeping and sine the appellant's wife worked in the business in the day, in the evening and at weekends that should in some way be recognised.
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> 17. The tribunal considered all of the submissions carefully. It remained satisfied that there was no proof of transfer and no proof of any valuation (the financially

> qualified member having reminded the appellant and his representative that any valuation would have been in multiples of the dividends paid so a not inconsiderable amount) and that throughout the relevant period the nature and extent of the appellant's wife's involvement in the business was in considerable doubt (paragraphs 10 and 11). To reduce the impact of the variation by in effect finding a valid transfer for which there was no evidence at all would be to award informality and to give significance to what, on the evidence, was a sham arrangement. …"

6. When applying to the First-tier Tribunal for permission to appeal, the father produced various documents in support of his contention that his wife had been working for the company and that the shares had been transferred to her. These comprised a document dated 19 January 2017 from the National Examination Board in Occupational Safety and Health showing that she had passed examinations on 23 October 2009 that qualified her for a National General Certificate in Occupational Health and Safety, copies of eight emails she had sent on company business on various dates from 2012 to 2016, a letter from the company's accountants stating that she had taken on the role of two named members of staff who had left in November 2008 and July 2009, the stock transfer form showing the transfer of the shares from the father to his wife on 1 May 2011 and a letter from the accountants explaining that it had not been necessary for there to be a valuation of the shares because the transfer "was a private transaction between a married couple" and therefore there was no liability for capital gains tax.

7. The First-tier Tribunal refused permission to appeal on the ground that no error of law had been demonstrated but an application was then made to the Upper Tribunal, solely on the ground that the First-tier Tribunal had erred in taking into account dividend income of his wife and I gave permission to appeal. I did so only in respect of assessments from and after 1 May 2012, because the transfer of shares on 1 May 2011 could not have had any impact before then, and I said –

> "2. An appeal lies only on a point of law. However, making a mistake as to a material fact which can be established by objective and uncontentious evidence can be an error of law, where unfairness has resulted from the mistake (see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, read with paragraph [27] of the judgment of Bean LJ in *Hussain v Secretary of State for Work and Pensions* [2016] EWCA Civ 1428). Since the Appellant had provided evidence to the First-tier Tribunal as to the proportion of the shares that he owned, it is arguable that he was not at fault for not having produced the actual stock transfer form at the hearing unless he had been directed to do so.
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> 3. Moreover, the Appellant's contention before the First-tier Tribunal that he had transferred shares to his wife from 1 May 2011 was consistent with his tax returns for the years 2012-2013 (doc 303) and 2013-2014 (doc 289) and there may also have been a tax advantage in the transfer of the shares. It is arguably not clear whether the First-tier Tribunal had regard to these matters, particularly the tax returns. On the other hand, the First-tier Tribunal was sceptical as to whether any dividends were actually paid to the Appellant's wife. I note that the company accounts for the years ending 30 April 2012 and 30 April 2013 stated that the whole of the dividends had been paid to "the director" (docs 246 and 8 and 264 and 6), as they had in the previous year (docs 234 and 6).
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> 4. Even if there was a genuine transfer of shares and the First-tier Tribunal's decision was wrong in law, there arises the question whether, in view of the First-tier

> Tribunal's scepticism about the amount of work that the Appellant's second wife was performing for the company, the First-tier Tribunal could have reached the same conclusion as it did by regarding the transfer of the shares, albeit a transfer of capital, as nonetheless also a diversion of income justifying a variation."

8. The Secretary of State supports the appeal. She argues that the First-tier Tribunal erred in law because, in finding the transfer to have been a sham, it took into account the incorrect view that a valuation of the shares would have been necessary for the transfer to be valid. She also argues that, since doc 284 was evidence that there had been a transfer of the shares, if the First-tier Tribunal regarded the totality of the evidence as insufficient to show a transfer, it erred in not giving the father an opportunity to produce the actual transfer document. However, regarding the point I raised in paragraph 4 of my reasons for giving permission to appeal, she argues that a decision that there was a proper transfer of shares in this case would not rule out a variation under either regulation 19(1A) or regulation 19(4) of the Child Support (Variations) Regulations 2000 (SI 2001/156). She does not seek a hearing but submits that the case should be remitted to the First-tier Tribunal.

9. Understandably, the mother has not addressed the law as such. However, she has referred to the history of the disputes over both child support maintenance and financial claims in the matrimonial proceedings and particularly the adverse findings made by judges as to the father's truthfulness, She also says that, at the hearing before the First-tier Tribunal, the father had been specifically asked whether he had any documentation to support his claim that the shares had been transferred and about the work that his wife did in the company and she also points out that his wife has used a variety of different job titles in her emails, apparently interchangeably. She says that she wants to be present at a hearing.

10. The father has not replied to either response and, although he asked for a hearing of his application for permission to appeal and has said that he would attend a hearing of the substantive appeal, he has not asked for a hearing of the substantive appeal.

11. I am satisfied that a hearing is not necessary, because I am satisfied that the appeal should be determined in favour of the only party who has asked for a hearing. Although the First-tier Tribunal's analysis was wrong in law, I am satisfied that the error did not affect the outcome of the appeal before it.

12. As the Secretary of State's submission implies, it is not necessary to rely on *E v Secretary of State for the Home Department* in order to find an error of law in this case, because the First-tier Tribunal took irrelevant considerations into account in finding that there had been no effective transfer of shares. I agree with the Secretary of State that doc 284 was evidence that there had been an effective transfer and that the lack of any valuation was not evidence that there had been no transfer. (The First-tier Tribunal also seems to have overlooked in this part of its decision the oral evidence or assertions (doc 805 and paragraph 16 of the statement of reasons) that the dividends were paid partly into a joint account, partly into the father's account account and partly into his wife's and that the net result was that all of the dividends were all available to the family. That point was made after the First-tier Tribunal had announced its "indicative outcome" as regards the transfer of shares, but should not have been overlooked in its final decision and its reasoning.)

13. The First-tier Tribunal also erred in its view that finding there to be a valid transfer would necessarily "reduce the impact of the variation" and "award informality". Variations to an assessment of child support maintenance may be made where a case is one prescribed for the purposes of paragraph 4(1) of Schedule 4B to the Child Support Act 1991. Paragraphs (1A) and (4) of regulation 19 of the 2000 Regulations, cited by the Secretary of State, provide –

> "(1A) Subject to paragraph (2), a case shall constitute a case for the purposes of paragraph 4(1) of Schedule 4B to the Act where—
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> (a) the non-resident parent has the ability to control the amount of income he receives from a company or business, including earnings from employment or self-employment; and
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> (b) the Secretary of State is satisfied that the non-resident parent is receiving income from that company or business which would not otherwise fall to be taken into account under the Maintenance Calculations and Special Cases Regulations."

> "(4) A case shall constitute a case for the purposes of paragraph 4(1) of Schedule 4B to the Act where—
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> (a) the non-resident parent ("P") has the ability to control the amount of income that—
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> (i) P receives, or
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> (ii) is taken into account as P's net weekly income,
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> including earnings from employment or self-employment, whether or not the whole of that income is derived from the company or business from which those earnings are derived; and
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> (b) the Secretary of State is satisfied that P has unreasonably reduced the amount of P's income which would otherwise fall to be taken into account under the Maintenance Calculations and Special Cases Regulations or paragraph (1A) by diverting it to other persons or for purposes other than the provision of such income for P."

The Secretary of State's submission as regards these paragraphs is a little unclear but I do not consider that there can be any doubt as to the relationship between the paragraphs in the context of this case. Paragraph (1A) operates to allow dividends received by a shareholder to be taken into account as income of that person, so that if the transfer of shares was effective in this case, it applied thereafter only to the dividends paid in respect of the shares still held by the father. Paragraph (4), on the other hand, would permit dividends paid in respect of shares transferred to his wife to be taken into account as his income to the extent that they represented an unreasonable diversion to her of what would otherwise have been taken into account as his income under paragraph (1A). The amount of the variation would be the same (see regulation 25).

14. Thus, the First-tier Tribunal was right to consider that, if the transfer was genuine, the dividends in respect of those shares could not be taken into account through a variation under regulation 19(1A) but it was wrong to consider that there was no alternative basis on which the dividends might be taken into account if there had been no good reason for the transfer. If the transfer was unreasonable, the dividends could have been taken into account through a variation under regulation 19(4).

15. It seems to me that the First-tier Tribunal failed to draw a distinction between a transaction that is a sham and one that is a device, intended only to secure a collateral advantage but nonetheless genuine and, indeed, one that needs to be genuine in order to secure the advantage. A transfer of shares can be genuine even if it is a mere gift. Moreover, it is not necessary for a husband and wife to keep their finances separate from one another provided each accounts to HMRC for income received in his or her name. Even ignoring the documents that were not before the First-tier Tribunal, I cannot see any basis for the First-tier Tribunal finding there not to have been a genuine transfer of shares in this case, when the documents, prepared by accountants for tax purposes, that were before the tribunal plainly pointed clearly to there having been a transfer. The financial arrangements between the father and his wife may have been informal, the transfer may have been for no consideration, and the transfer may have been a device intended perhaps both to avoid some liability for income tax and to avoid some liability for child support maintenance, but none of that implies that it was not a genuine transfer. On the evidence before it, the First-tier Tribunal ought to have found that there had been a transfer of the shares.

16. However, whether the transfer was a mere device and, if so, whether it worked are other matters. Even if a device, it may well have worked for the purpose of reducing to some extent the overall tax liability of the father and his wife. Whether it had the effect of reducing the father's liability for child support maintenance fell to be determined in the light of regulation 19(4).

17. There could be no doubt in this case that the father had the ability to control the amount of income he received from the company and that he diverted part of it to his wife when he transferred the shares to her. The only issue could have been whether he "unreasonably" reduced his income when doing so. That is not quite what the First-tier Tribunal asked itself, but there arises for me the question whether the findings made by the First-tier Tribunal would inexorably have led to it reaching the same conclusion under regulation 19(4) as it reached in respect of the transferred shares under regulation 19(1A).

18. The question of what is reasonable for the purposes of regulation 19(4) must be considered in the context of the purpose of the provision and, indeed, the purpose of the whole child support regime. It is expected that parents will support their children and regulation 19(4), like much of the rest of the 2000 Regulations, is obviously intended to prevent non-resident parents from avoiding that liability. An action that might be quite reasonable in the absence of any potential liability to support children may, for the purposes of regulation 19(4), be unreasonable if it has the effect of reducing a parent's ability to pay child support maintenance. Whether a diversion was unreasonable will depend on a number of factors and is likely to be a matter of judgment. In particular, it is necessary to consider the extent to which the action that amounted to a diversion of income was purely voluntary or was forced upon the parent by circumstances and the extent to which the reasons for carrying out the action reflected what can fairly be regarded as a diminution in his ability to pay child support maintenance.

19. Here, the transfer of shares was entirely voluntary. The only reason advanced by the father for the transfer of the shares to his wife was to remunerate her for her

work in the business. It is unnecessary to consider whether another reason might have been to reduce the overall tax liability of himself and his wife because I do not consider that gaining a tax advantage can ever contribute to the reasonableness of the diversion for the purposes of regulation 19(4). It would be absurd if a non-resident parent were to be allowed to enrich himself and members of his household at the expense of other children whom he is under an obligation to support, save to the extent that such enrichment is merely the consequence of action taken for some other good reason.

20. A need to provide fair remuneration, or a fair share of the profits in proportion to work done, for a member of his household would, on the other hand, be a good reason for a diversion of income. However, in this case, the First-tier Tribunal was simply not satisfied as to "the nature and extent of the appellant's wife's involvement in the business". It only needed to be satisfied on the balance of probabilities, but it is plain that it regarded the father's evidence to be so vague and contradictory as to be worthless. In these circumstances, there was not even a basis for reducing the amount of the variation.

21. That the First-tier Tribunal was not impressed by the father's evidence is not surprising. He was vague as to when his wife had started work. There was no documentary evidence that she had done any significant amount of work by comparison with him, or at all, and no suggestion that any attempt had been made to relate the amount of any work to the amount of her share of the dividends. (The total dividends declared on 30 April, at the end of each accounting year, were £30,000 in 2011, £51,750 in 2012 and £48,000 in 2013.) In particular, the First-tier Tribunal was plainly not impressed by the assertion that the father's wife worked 20 hours a week for the company when there was evidence that she was working on five days a week for another organisation for much of the period in issue. There was no detailed evidence as to what she did and no arrangement had been made for her to be remunerated before the transfer of shares. Moreover, the First-tier Tribunal will have been aware of the history of the case, to which the mother has drawn attention on this appeal, which provided obvious reasons for scepticism in the absence of corroboration.

22. In these circumstances, I am not persuaded that the First-tier Tribunal's error of law justifies setting its decision aside. It is plain that, had it found the transfer of shares to be valid, it would quite properly have made the same variation, but under regulation 19(4) rather than 19(1A) insofar as it related to the dividends payable to the father's wife.

23. I do not consider that regard should be had to the additional evidence provided on this appeal. There was no unfairness in the proceedings before the First-tier Tribunal. The father was represented and it was he who was arguing that the transfer of shares to his wife meant that a variation in respect of the dividends due to his wife was inappropriate. He might reasonably have been expected to bring evidence to the hearing before the First-tier Tribunal in support of his explanation for the transfer but, in any event, as the mother submits, he or his representative could have asked for an adjournment if they only realised during the course of the hearing that he needed to provide an explanation for the transfer or to provide some documentary corroboration for his oral evidence.

24. In any event, insofar as the evidence now produced relates to the father's wife's work, it is not exactly compelling. The evidence of the qualification in occupational health and safety shows that the examinations were passed in October 2009, which is some time before the father had suggested in oral evidence that his wife had started working for his company and had been sent by him on a course. It might, perhaps be regarded as consistent with the accountants' letter dated 25 January 2017 to the father's representative regarding the two former employees of the company although it did not say who had sent her on the course. The letter from the accountants said that, due to financial constraints, one of the former employees had her employment terminated in November 2008 and the other in July 2009 and that they had been employed since June 2004 and October 2003 respectively. it concludes by saying that the father's wife "took on the work of these employees and was remunerated through dividends by virtue of her shareholding". No doubt the information as to the dates of employment of those two employees is accurate but the letter begs the questions when and how the accountants knew that the father's wife had taken on the work of those employees and, indeed, to what that work amounted. If the accountants were merely repeating what they had recently been told by the father, the letter adds nothing to his evidence. The letter also leaves unexplained the lack of any remuneration between 2008 or 2009 and 2011. The provision of three emails from the summer of 2012 and another four from 2015 and 2016 and therefore after the periods in issue in this case, does not really take his case any further forward because they do not show a contribution to the business that needed to be reflected in a 40% share in it or, indeed, by any share in it.

25. That is not to say that the First-tier Tribunal would not have been entitled to take a different view of the case. However, the question whether the father's wife had been working in the business to a significant extent was a question of fact and the First-tier Tribunal was entitled to reject such little evidence as was before it. Although it erred in finding there to have been no effective transfer of shares, its statement of reasons makes it clear that it was in any event not satisfied that the father's wife had been working for his business to any significant extent and that therefore, had it not misdirected itself, it would have found that the transfer of shares represented a diversion of the father's dividends to her that was unreasonable for the purposes of regulation 19(4).

Mark Rowland
24 September 2018