**[2020] UKUT 205 (AAC)**

**IN THE UPPER TRIBUNAL** **Appeal No. CCS/653/2018**

**ADMINISTRATIVE APPEALS CHAMBER**

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

**Between:**

**CA**

Appellant

**-v-**

**Secretary of State for Work and Pensions**

First Respondent

**-and-**

**TB**

Second Respondent

**Before: Upper Tribunal Judge Poynter**

**Decision date:** 14 April 2020
Decided on consideration of the papers

**Representation**
Appellant: Bury St Edmunds Citizens Advice
First Respondent DWP Decision-Making and Appeals, Leeds
Second Respondent In person

## DECISION

The appeal to the Upper Tribunal succeeds.

The making of the decision of the First-tier Tribunal given at Cambridge on 6 October 2017 under reference SC140/17/00204 involved the making of a material error on a point of law.

That decision is set aside.

The decision of the First-tier Tribunal is re-made in the following terms:

> **The appeal is allowed.**
>
> **The decision of the Secretary of State issued on 29 November 2016 and revised on 7 December 2016—which superseded the earlier decision dated 19 April 2000 that the father was liable to pay child support maintenance for James at the weekly rate of £73.01 from the effective date of Wednesday 12 April 2000—is set aside.**
>
> **The Tribunal does not substitute any decision for the decision it has set aside.**

## REASONS

### Summary

1. This is a long and detailed decision. It may therefore be helpful to begin with a summary.

2. This is a child support appeal against what the law calls a "superseding" decision, *i.e.*, one that changes an earlier maintenance assessment from a later effective date.

3. It is only possible to supersede an earlier decision if there are grounds to do so and in this case, the ground was that a "material change of circumstances" had occurred since the earlier maintenance assessment.

4. I have set aside the First-tier Tribunal's decision because it misidentified what the "material change of circumstances" was and, as a result, gave effect to the superseding decision from the wrong date: see paragraphs 121-142.

5. In reaching that conclusion, I hold that for child support—following the decision of Upper Tribunal Judge Jacobs in *CIS/3655/2007* in relation to social security—a "material" change is a change that *actually does* make a difference, not one that *might* make a difference.

6. I also suggest that, in change of circumstance cases, the Secretary of State is therefore required by rule 24 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 to include details of how the original and superseding

maintenance assessments were calculated as part of the response to an appeal against a superseding decision: see paragraphs 164-167.

7. With only a few exceptions, where the Secretary of State supersedes a maintenance assessment on his own initiative, regulation 24 of the Child Support (Maintenance Assessment Procedure) Regulations 1992 ("the Maintenance Assessment Procedure Regulations") requires him first to give the parent with care and absent parent notice of his intention to do so.

8. I hold that in most cases—including this one—where such a notice should have been given, but has not been, it is not possible to set an effective date for the superseding decision and it is therefore not possible in practice for a superseding decision to be made: see paragraphs 111-114.

9. Finally, I discuss:

(a) the fact that regulation 23(6), taken together with regulation 24, of the Maintenance Assessment Procedure Regulations, is incompatible with regulation 23(19). I also suggest how the incompatibility might be resolved: see paragraphs 110-118;

(b) how the First-tier Tribunal should approach appeals in which some of the elements in a superseding maintenance assessment have been carried forward from the earlier assessment, rather than re-assessed on the basis of up-to-date evidence: see paragraphs 150-162; and

(c) whether—even if it is possible to set an effective date in some circumstances where a regulation 24 notice should have been given, but has not been—a failure by the Secretary of State to give such a notice automatically invalidates any subsequent superseding decision: see paragraphs 167-170.

**Introduction**

10. This appeal is about James. Specifically, it is about how much his father, the second respondent, must pay for James each week as child support during a particular period.

11. The Secretary of State, who is the first respondent, decided on 7 December 2016 (revising an earlier decision made on 29 November 2016) that the father was liable to pay £7.30 per week for James from the effective date of Wednesday, 27 August 2014.

12. Previously, the father had been liable to pay £73.01 from the effective date of Wednesday 12 April 2000. The Secretary of State's decision therefore represented a backdated reduction of £65.71 per week over a period of 119 weeks from 27 August 2014 to 6 December 2016 (both dates inclusive). That is a total of £7,819.49.[1]

13. The appellant, who is James' mother, appealed against that decision to the First-tier Tribunal.

14. On 6 October 2017, the Tribunal refused that appeal and confirmed the decision of the Secretary of State.

15. The mother now appeals to the Upper Tribunal with my permission.

16. The main issue in the appeal is the effective date from which the decision imposing the weekly liability of £73.01 should be superseded.

17. It is relevant to that issue that James has a half-sister, Laura, who is older than him. Laura is the mother's daughter but not the father's. During the relevant period, Laura lived in the same household as her mother and James. To use the language of child support law, Laura was a "relevant child" (see paragraphs 64-67 below).

18. As the father was not Laura's father, he did not have to pay child support for her, only for James.

19. However, as will be seen at paragraph 36 below, while Laura was a "relevant child" her presence in the mother's household was reflected in the calculation of the mother's "exempt income", which is one element of the maintenance assessment.

**Which scheme?**

20. There are three child support schemes.

21. The father's liability is governed by the original scheme (i.e., the scheme established by the Child Support Act 1991 ("the Act") as it was worded before the amendments made by the Child Support, Pensions and Social Security Act 2000 and the Child Maintenance and Other Payments Act 2008). That is because the effective date of the initial maintenance assessment was before either of the two subsequent schemes came into effect.

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[1] That was the case at the time. The period was slightly shortened by a subsequent supersession: see paragraph 147.

22. The detailed rules for calculating the father's liability are set out in the Act—in particular, Schedule 1 ("the Schedule")—and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 ("the Maintenance Assessments and Special Cases Regulations").

23. The detailed rules for the procedure by which maintenance assessments are made—and can be changed—are set out in the Child Support (Maintenance Assessment Procedure) Regulations 1992 ("the Maintenance Assessment Procedure Regulations").

**The Secretary of State for Work and Pensions**

24. During the course of these proceedings, the office of Secretary of State for Work and Pensions has been occupied by four men and four women. The current Secretary of State is a woman. However, at the time of the decision under appeal and of the hearing before the First-tier Tribunal, the Secretary of State was a man and the First-tier Tribunal's written statement of reasons refers to him as such. For the sake of consistency, therefore, when I refer to the first respondent in the third person I will use the pronoun, "he", throughout.

**Procedural history**

25. The initial maintenance assessment was made on 2 March 2000. Under it, the father was assessed as liable to pay child support maintenance for James at the weekly rate of £81.70 from the initial effective date of Wednesday 8 September 1999.

26. That assessment was then superseded on 19 April 2000 by a fresh maintenance assessment under which the father's weekly liability reduced to £73.01 from the effective date of Wednesday 12 April 2000. I will refer to that assessment as "the Earlier Assessment".

27. On 1 September 2014 (i.e., more than 14 years later) Laura was excluded from child benefit. This was because she had left school the previous July and had ceased to be a "qualifying young person", that is a person over the age of 16 for whom child benefit can still be paid.

28. That change meant that Laura was no longer a "relevant child". It did not, however, lead to an immediate recalculation of the Earlier Assessment.

29. Next, on 29 November 2016, the Earlier Assessment was superseded with effect from Wednesday 23 November 2016, the beginning of the maintenance period that

included Laura's 20th birthday (which is the day after the final day on which anyone can be a "relevant child").

30. The terms of the superseding maintenance assessment were that the father was liable to pay child support maintenance for James at the weekly rate of £7.40.

31. Then, shortly afterwards, on 7 December 2016, that assessment was revised so as to reduce the father's weekly liability to £7.30 and to replace the effective date of 23 November 2016 with the earlier effective date of Wednesday 27 August 2014, which was the beginning of the maintenance period that included Monday 1 September 2014. I will refer to the superseding maintenance assessment as revised as "the Superseding Assessment".

32. On 25 February 2017, a different decision maker confirmed the Superseding Assessment on mandatory reconsideration and, on 24 March 2017, the mother appealed to the First-tier Tribunal.

**The calculation of the Earlier Assessment**

33. The father's weekly liability of £73.01 from the effective date of 12 April 2000 was calculated as follows.

34. The maintenance requirement was assessed at £83.05 namely :

| | | **£** |
|---|---|---|
| "Carer" allowance for the mother | | 52.50 |
| Child allowance for James | | 26.60 |
| Family premium | | 14.25 |
| | Sub-total | 93.35 |
| LESS | | |
| Child benefit | | 10.00 |
| | **Total** | **£83.05** |

35. The mother's net income was assessed at £117.04, her earnings from part-time work.

36. Her exempt income was assessed at £164.38 as follows:

| | | **£** |
|---|---|---|
| Personal allowance for the mother | | 52.50 |
| Child allowances for James and Laura (2 @ £26.60 each) | | 53.20 |
| Family premium | | 14.25 |
| Housing costs | | 44.73 |
| | **Total** | **£164.38** |

The calculation of the mother's exempt income included a child allowance for Laura because, at the time, Laura was a relevant child. That circumstance was (correctly) not reflected in any other aspect of the calculation.

37. As the mother's exempt income exceeded her net income, she was treated as having no assessable income. This is an aspect of the calculation that will become important, see paragraphs 52 and 133 below.

38. The father's net income was assessed at £248.65, his earnings from work.

39. The father's exempt income was assessed as £102.63, namely a personal allowance of £52.20 and housing costs of £50.43.

40. Subtracting the father's exempt income of £102.63 from his net income of £248.65 gave a figure of £146.02 for the father's assessable income.

41. The next step in the formula is to add together the assessable income of each parent and divide the resulting sum by 2. If the resulting figure is less than the maintenance requirement, then the absent parent's notional liability to pay child support maintenance is half his assessable income.

42. In this case, the first stage of that calculation gave a figure of £73.01 ((£146.02 + £0.00) ÷ 2). As that figure was less than the maintenance requirement of £83.05, the father's notional liability was also £73.01 (£146.02 ÷ 2).

43. Whether or not that notional liability becomes an actual liability, however, depends upon the protected income calculation, which is designed to ensure that paying child support maintenance will not cause the disposable income of the absent parent's household to fall below either:

(a) the protected income figure; or

(b) 70% of the absent parent's net income,

whichever is higher.

44. The first stage of the protected income calculation involves assessing the weekly disposable income of the absent parent's household. In this case, that figure was £283.30, the sum of the net earned income of the father (£248.65) and his partner (£34.65).

45. The next stage is to assess the protected income of the father's household. In this case, that figure was £189.83, as follows:

| | | **£** |
|---|---|---|
| Personal allowance for a couple | | 81.95 |
| Housing costs | | 50.43 |
| Council tax | | 10.96 |
| Standard margin | | 30.00 |
| | Sub-total | 173.34 |
| PLUS | | |
| Additional margin | | 16.49 |
| | **Total** | **£189.83** |

The additional margin fell to be included because the disposable income of £283.30 exceeded the sub-total figure above. The amount of the margin is 15% of the difference ((283.30-173.34) x 15% = £109.96 x 15% = £16.49).

46. Subtracting the father's notional liability of £73.01 from his disposable income of £283.30 gave £210.29. As that figure exceeded both the protected income figure of £189.83 and 70% of his net income (£248.65 x 70% = £174.06) the notional liability became the father's actual liability.

**The calculation of the Superseding Assessment**

47. The same formula was used to calculate the father's weekly liability of £7.30 from the effective date of 27 August 2014.

48. The maintenance requirement was £99.48, namely:

| | | £ |
|---|---|---|
| "Carer" allowance for the mother | | 36.20 |
| Child allowance for James | | 66.33 |
| Family premium | | 17.45 |
| | Sub-Total | 119.98 |
| LESS | | |
| Child benefit | | 20.50 |
| | **Total** | **£99.48** |

The "carer" allowance element of the calculation reduced to 50% of the income support personal allowance for a single person aged 25 or over because James—who had been less than 1 on the earlier effective date of 12 April 2000—was 15 as at the effective date of 27 August 2014: see regulation 3(b)(3) of the Maintenance Assessments and Special Cases Regulations.

49. The mother's net income was assessed at £117.04. This figure was carried forward from the Earlier Assessment, rather than reassessed.

50. However, her exempt income was £200.91, as follows:

| | | £ |
|---|---|---|
| Personal allowance for the mother | | 72.40 |
| Child allowance for James | | 66.33 |
| Family premium | | 17.45 |
| Housing costs | | 44.73 |
| | **Total** | **£200.91** |

Again, the figure for housing costs was carried forward from the Earlier Assessment, rather than reassessed.

51. As the mother's exempt income exceeded her net income, she was treated as having no assessable income.

52. In other words, even though the mother's exempt income no longer included a child allowance for Laura, her assessable income was still nil, just as it had been when Laura was a relevant child: see paragraphs 36–37 above.

53. The father's net income was assessed at £248.65. Once again, that figure was carried forward from the Earlier Assessment, rather than reassessed.

54. The father's exempt income was assessed at £122.83, namely a personal allowance of £72.40 plus housing costs of £50.43. As before, the figure for housing costs was carried forward from the Earlier Assessment, rather than reassessed.

55. Subtracting the father's exempt income of £122.83 from his net income of £248.65 gave a figure of £125.82 for the father's assessable income.

56. The next step in the formula is set out in paragraph 41 above. The first stage of that calculation gave a figure of £61.91 ((£125.82 + £0.00) ÷ 2). As that figure was less than the maintenance requirement of £99.48, the father's notional liability was also £61.91 (£125.82 ÷ 2).

57. However, whether or not that notional liability becomes an actual liability depends upon the protected income calculation (see paragraph 43 above).

58. As before, that calculation begins by assessing the weekly disposable income of the absent parent's household. That figure was again assessed at £283.30, the sum of the carried forward figures for the net earned income of the father (£248.65) and his partner (£34.65).

59. Then the protected income of the father's household was calculated as £317.89:

| | **£** |
|---|---|
| Personal allowance for a couple | 113.70 |
| Pensioner premiums | 112.80 |
| Housing costs | 50.43 |
| Council tax | 10.96 |
| Standard margin | 30.00 |
| **Total** | **£317.89** |

By now, the reader will not be surprised to learn that the amounts for housing costs and council tax were carried forward from the Earlier Assessment and were not reassessed.

60. As the father's protected income exceeded his disposable income, paying any child support maintenance would inevitably mean that disposable income was below the levels outlined in paragraph 57 above.

61. In those circumstances, the formula assessed the father's liability as nil and he became liable to pay the flat rate minimum amount of £7.30 under paragraph 7(1) of the Schedule and regulation 13 of the Maintenance Assessments and Special Cases Regulations.

**The First-tier Tribunal's decision**

62. As stated at paragraph 14 above, the First-tier Tribunal refused the mother's appeal and upheld the Superseding Assessment.

63. The judge found (at [20-23]) that the Secretary of State had power to supersede an earlier decision "where he is satisfied that the decision is one in respect of which there has been a material change of circumstances since the decision was made" and that Laura ceasing to be a dependent child was self-evidently material because the implementation of that change in circumstances led to a change in the amount of the Earlier Assessment. The Secretary of State had power to supersede earlier decisions on his own initiative and so, contrary to what had been argued on behalf of the mother, it was irrelevant whether she was under an obligation to disclose the fact that she had ceased to receive child benefit for Laura and whether she had, in fact, disclosed that change in her circumstances. Further at [25]-[30], the material circumstance was that "a relevant child … [had ceased] to be a relevant child" within regulation 23(19)(b) of the Maintenance Assessment Procedure Regulations, so that the effective date of the supersession was the beginning of the maintenance period in which the change had occurred, namely Wednesday, 27 August 2014.

**Reasons for setting aside the First-tier Tribunal's decision**

*Was Laura a "relevant child"?*

64. The judge spent part of the written statement of reasons grappling with the question of whether Laura was a "relevant child", a phrase that he believed had not been defined for the purposes of the Maintenance Assessment Procedure Regulations. He decided that she was.

65. His conclusion was correct, as was his belief that that there was no definition of "relevant child" for the purposes of the Maintenance Assessment Procedure Regulations as a whole.

66. However, he appears to have overlooked regulation 23(24) which establishes a definition for the purposes of regulation 23(19), the provision on which he relied.

67. The definition says that, in regulation 23(19), the phrase "has the same meaning as in regulation 1(2) of the Maintenance Assessments and Special Cases Regulations", namely:

> "… a child of an absent parent or a parent with care who is a member of the same family as that parent".

The word "family" is also defined in regulation 1(2) and, in turn, that definition takes the reader to the definition of "day-to-day care". However, it is unnecessary for me to quote those other definitions in full. It is clear that when one applies them, Laura was indeed a "relevant child".

*Finality of decisions and supersession*

68. Under section 46A(1) of the Act, decisions about child support are final.

69. That rule is expressed to be:

> "[s]ubject to the provisions of this Act and to any provision made by or under Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007".

The words "[s]ubject to the provisions of this Act" have the effect that decisions which would otherwise be final may lawfully be changed by revision under section 16 of the Act, supersession under section 17 or on appeal under section 20.

70. Section 20 of the Act does not empower the Secretary of State to change a decision at all. It empowers the First-tier Tribunal to do so if the decision was made by the Secretary of State and that decision is appealed to it. Similarly, the effect of the words "[s]ubject to … any provision made by or under Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007" is that decisions which would otherwise be final may lawfully be changed by the Upper Tribunal on appeal from the First-tier Tribunal. They do not confer any power on the Secretary of State.

71. As we are concerned with the Secretary of State's powers to change decisions, that leaves revision under section 16 and supersession under section 17.

72. The difference between revision and supersession is that a revising decision corrects the original decision, normally from the same effective date. However, there is

an exception to that where—as here—a decision is revised because its effective date is said to have been wrong.

73. Supersession replaces the earlier decision, normally from some later date.

74. The Secretary of State presented the appeal to the First-tier Tribunal on the basis that the decision challenged was the superseding decision dated 28 November 2016 as revised on 7 December 2016.

75. That was clearly correct:

(a) As a matter of procedure, revising decisions do not carry a right of appeal. The appeal is against the earlier decision, as revised.

(b) As a matter of substance, the Secretary of State had not decided that the Earlier Assessment was incorrect when it was made. The decision was that circumstances had changed since then, and that the Earlier Assessment should be changed to reflect that.

*Grounds for supersession*

76. Section 17(1)(a) of the Act says that the Secretary of State may supersede "any decision … under section 11 … or this section whether as originally made or as revised under section 16". Section 11 confers the power to make maintenance assessments.

77. However, the Secretary of State's power to supersede an earlier decision must be exercised in accordance with (in original scheme cases) regulations 20-22 and 24 of the Maintenance Assessment Procedure Regulations. Those regulations are made under section 17(3) of the Act which empowers the Secretary of State to make regulations setting out the grounds on which,[2] and the procedure by which, a superseding decision may be made.

78. There are two main grounds on which an earlier decision could be superseded, namely that:

(a) there had been a material change of circumstances since the earlier decision was made: see regulation 20(2)(a) (where the superseding decision is made on the Secretary of State's own initiative), and regulation 20(3) (where the superseding decision is made following an application from an absent parent or a person with care); and

[2] Technically, "the cases and circumstances in which".

(b) that the earlier decision was made in ignorance of, or was based upon a mistake as to, some material fact (regulation 20(2)(b) and (4)).

79. There are other grounds, but they do not apply in this case. That is because they relate to departure directions (regulation 20(2)(c)); or to "lookalike" appeals (regulation 20(4A)); or to decisions that were erroneous in point of law (regulation 20(5)); or to interim maintenance decisions (regulation 20((6) and (7)).

80. For the reasons set out in paragraph 75 above, this is a change of circumstances case.

*The effective date of a superseding decision—the general rule*

81. The date from which a superseding decision must take effect is fixed by law.

82. The Secretary of State has no discretion about that date. So, for example, he cannot just pick the date that seems to be fairest or most just. He has to follow the rules. So do the First-tier Tribunal and the Upper Tribunal.

83. The general rule is set out in section 17(4) of the Act. It is that 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".

In other words, superseding decisions are *prospective* (except to the extent that they are back-dated to the beginning of the maintenance period in which they are made or in which the application to supersede was made).

84. A "maintenance period" is a period of seven days starting on the same day of the week as the effective date of the initial maintenance assessment in the case: see section 17(4A). In this case, maintenance periods start at the beginning of each Wednesday and run to end of the following Tuesday.

85. The decision under appeal was made on Tuesday 29 November 2016. That was the final day of the maintenance period that began on Wednesday 23 November 2016.

86. Therefore, if the general rule applies, Wednesday 23 November 2016 is also the earliest date from which the decision can take effect: it cannot take effect from Wednesday 27 August 2014.

*The effective date of a superseding decision—exceptions*

87. There are exceptions to the general rule, which might alter that conclusion. Section 17(4) is expressed to be "[s]ubject to subsection (5) and section 28ZC".

88. Section 28ZC is about decisions that are superseded following a test case. That is not relevant in this case.

89. That leaves subsection (5), which says that the Secretary of State can make regulations that create exceptions to the general rule described in paragraph 84 above.

90. The power conferred by subsection (5) was used to make regulation 23 of the Maintenance Assessment Procedure Regulations.

91. Under regulation 23, the effective date of the superseding decision depends upon the ground for supersession.

92. In the circumstances of this case, only paragraphs (4)-(9), (19) (21) and (24) of regulation 23 are potentially relevant.

93. Paragraph (1) is not relevant because it applies where an application for supersession is made during the 28 day period following a notice by the Secretary of State under regulation 24: see regulation 23(6) and paragraph 107 below.

94. Paragraph (2) is not relevant because it applies where the change of circumstances is that certain social security benefits—not including child benefit—either begin to be paid or cease.

95. Paragraphs (3) and (10) are not relevant because they apply where the ground for supersession is ignorance or mistake of fact, or error of law, not change of circumstances.

96. Paragraph (11) is not relevant because it concerns decisions that are taken under section 28ZC of the Act following a decision in a test case (see paragraph 89 above).

97. Paragraphs (12) and (13) are not relevant because they concern the supersession of interim maintenance decisions.

98. Paragraph (14) is not relevant because it concerns departure directions.

99. Paragraphs (15)-(18) had been revoked by the time under consideration in this appeal.

100. Paragraph (20) is not relevant because it concerns certain types of decision taken in lookalike appeals, where a test case is pending, but before it has been decided.

101. Paragraphs (21)-(21A) are not relevant because they apply where the change in circumstances has the effect that a person ceases to be a person with care in relation to a qualifying child or the absent parent, person with care or qualifying child cease to be habitually resident in the United Kingdom.

102. Paragraph (21B) is not relevant because it applies where there is a "stepped assessment" under paragraph 15 of the Schedule.

103. Paragraph (22) is not directly relevant because it does not specify an effective date. It does, however, disapply the "tolerances" provisions of regulation 21 in when paragraph (19) applies.

104. Paragraph (23) is not relevant because it supplements paragraph (2).

105. Paragraphs (25) and (26) are not relevant because they apply when either the absent parent or the parent with care has been awarded universal credit.

106. Therefore, the potentially relevant paragraphs of regulation 23 were in the following terms:

> "**Date from which a decision is superseded**
>
> 23.—(1) …
>
> (4) Subject to paragraph (19), where a superseding decision is made in a case to which regulation 20(3)(a)(i), (4) or (5)(b) applies, the decision shall take effect as from the first day of the maintenance period in which the application for a supersession was made.
>
> (5) Where a superseding decision is made in a case to which regulation 20(3)(a)(ii) applies, the decision shall take effect as from the first day of the maintenance period in which the change of circumstances is due to occur.
>
> (6) Subject to paragraphs (1), (3) and (14), in a case to which regulation 24 applies, a superseding decision shall take effect as from the first day of the maintenance period in which falls the date which is 28 days after the date on which the Secretary of State gave notice to the relevant persons under that regulation.

(7) For the purposes of paragraph (6), where the relevant persons are notified on different dates, the period of 28 days shall be counted from the date of the latest notification.

(8) For the purposes of paragraphs (6) and (7)–

(a) notification includes oral and written notification;

(b) where a person is notified in more than one way, the date on which he is notified is the date on which he was first given notification; and

(c) the date of written notification is the date on which it was handed or sent to the person.

(9) Regulation 1(6) shall not apply in a case to which paragraph (8)(c) applies.

…

(19) Where a superseding decision is made in a case to which regulation 20(2)(a) or (3) applies and the material circumstance is—

(a) a qualifying child dies or ceases to be a qualifying child;

(b) a relevant child dies or ceases to be a relevant child; or

(c) a child who is a member of the family of the absent parent for the purposes of regulation 11(1)(g) of the [Maintenance Assessments and Special Cases Regulations], dies or ceases to be a member of the family of the absent parent for those purposes,

the decision shall take effect as from the first day of the maintenance period in which the change occurred.

…

(22) Regulation 21 shall not apply where a superseding decision is made under regulation 20(3) in the circumstances set out in paragraph (19) or (21).

…

> (24) In paragraph (19), (relevant child) has the same meaning as in regulation 1(2) of the Maintenance Assessments and Special Cases regulations.
>
> …"

107. Finally it is necessary for me to reproduce regulation 24 of the Maintenance Assessment Procedure Regulations which, at the relevant time, was in the following terms:

> "**Procedure where the Secretary of State proposes to supersede a decision on his own initiative**
>
> **24.** Where the Secretary of State on his own initiative proposes to make a decision superseding a decision other than in consequence of a decision with respect to a departure direction or a revision or supersession of such a decision he shall notify the relevant persons who could be materially affected by the decision of that intention."

**The absence of a notice under regulation 24**

108. When I gave permission to appeal, my provisional reasoning was:

> "3. …that the superseding maintenance assessment that was notified on 7 December 2016 (which purported to supersede the maintenance assessment calculated on 19 April 2000, with effect from 27 August 2014) was calculated on the Secretary of State's own initiative and not on any application made by any party.
>
> 4. Therefore, before he superseded the earlier maintenance assessment, regulation 24 of the Child Support (Maintenance Assessment Procedure) Regulations 1992 required the Secretary of State to "notify the relevant persons who could be materially affected by the [proposed] decision" of his intention to do so.
>
> 5 I can see nothing in the papers to suggest that the Secretary of State did serve such a notice. If that is correct, then in practice he had no power to supersede the earlier decision. In the absence of a regulation 24 notice, it is not possible to establish any effective date for the superseding decision other than the beginning of the maintenance period in which the superseding assessment is made. By that time, the decision to be superseded was no longer in effect."

109. On further consideration, however, I have come to the view that the position is more complex.

110. The problem is that there is a direct conflict between regulation 23(6) and regulation 23(19).

111. The Superseding Assessment was clearly made by the Secretary of State on his own initiative. The ground for supersession was—as the First-tier Tribunal correctly identified—that specified in regulation 20(2)(a), namely that:

> "(2) A decision may be superseded by a decision made by the Secretary of State acting on his own initiative—
>
> (a) where he is satisfied that the decision is one in respect of which there has been a material change of circumstances since the decision was made;".

112. That being the case, regulation 24 required the Secretary of State to "notify the relevant persons who could be materially affected by the decision of that intention" before making the decision. He did not do so.

113. Normally, that would have the result I spelled out when giving permission to appeal. Whether or not a regulation 24 notice was actually issued, this is nevertheless "a case to which regulation 24 applies" within regulation 23(6). Therefore any superseding decision "shall take effect as from the first day of the maintenance period in which falls the date which is 28 days after the date on which the Secretary of State gave notice to the relevant persons under [regulation 24]".

114. On the facts of this appeal there is no such date and therefore there cannot be a date 28 days after it. In short, if the position is governed by regulation 23(6), the Superseding Assessment could never take effect.

115. Regulation 23(6) states that it is "[s]ubject to paragraphs (1), (3) and (14)". It does not say that it is subject to paragraph (19).

116. Nevertheless, paragraph (19) is directly inconsistent with it. It states expressly that it operates "[w]here a superseding decision is made in a case to which regulation 20(2)(a) … applies"—*i.e.*, in a case where the superseding decision is made on the Secretary of State's own initiative—and the material [change of] circumstance is that "a relevant child dies or ceases to be a relevant child".

117. To summarise (and ignoring irrelevant exceptions):

(a) all superseding decisions made by the Secretary of State on his own initiative take effect 28 days after the date on which he gave notice under regulation 24; and

(b) all superseding decisions made on the ground that a relevant child ceases to be a relevant child take effect as from the first day of the maintenance period in which that change occurred.

Neither of those provisions is subject to the other. Nevertheless, where a relevant child ceases to be a relevant child and the Secretary of State therefore decides on his own initiative to supersede an earlier maintenance assessment, it is self-evidently impossible to give effect to both.

118. Were it necessary to decide the point, I would have held that the general wording in regulation 23(6) must yield to the specific wording in regulation 23(19).

119. If that is correct, then the preliminary view I expressed when giving permission to appeal was not.

*What was the material change of circumstances*

120. I am, however, satisfied that this appeal must succeed on the alternative ground that the First-tier Tribunal misidentified the material change of circumstances that has occurred in this case

121. The fundamental point is that the grounds for supersession establish “outcome” criteria, not “threshold” criteria.

122. If it were the case that the grounds for supersession established *threshold* criteria, then a change of circumstances would be “material” if it *might* make a difference to the earlier decision. Such a change would get the maker of a superseding decision over the “threshold” of being able to look again at the decision even though it is final. He could then look again at all the aspects of the decision and supersede it even if it turned out that the change he relied on to get over the threshold did not in fact make a difference, but other changes did.

123. As the mother’s representative correctly submits, however, the law is that the grounds for supersession establish *outcome* criteria. That was established, in the analogous context of social security law, by 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*).

124. On that basis—and by contrast—a change of circumstances is only “material” if it *actually does* make a difference to the earlier “outcome” decision: see the decision of

Upper Tribunal Judge Jacobs in *CIS/3655/2007* at [29]. In short it must cause, or make a non-trivial contribution, to a change in either:

(a) the rate at which the absent parent is liable to pay child support maintenance; or

(b) the period for which he is so liable; or

(c) both.

In order to establish whether that is the case, it will—of course—be necessary to apply the formula to the circumstances following the change. But unless the changed circumstance makes a difference to the final outcome, it cannot be relied on as a ground for supersession.

125. It also follows that the change in the outcome decision must follow from the ground for supersession relied on. As was said by a Tribunal of Commissioners in *R(IB) 2/04*:

> "186. A decision can only be superseded under section 10 if there is a ground for supersession and that ground forms the basis of the supersession decision in the sense that the original decision can only be altered in a way which follows from that ground …."

Given the calculations at paragraphs 33-61 above, the Superseding Assessment does not follow from the circumstance that Laura had ceased to be a relevant child: see paragraphs 131-137 below.

126. Although the above decisions all relate to social security, I judge that the same principles also apply to child support. So, for example, a "material fact" for the purposes of (say) regulation 20(2)(b) of the Maintenance Assessment Procedure Regulations must also be "a fact that makes a difference". On that basis, it is inconceivable that the word "material" has a different meaning as part of the phrase "material change of circumstances" in regulation 20(2)(a).

127. In other words, a "material" change of circumstances must be a change of circumstances that makes a difference.

128. And it is necessary to identify which change makes the difference because, where the ground for supersession is a material change of circumstances, regulation 23 fixes the effective date by reference to the context in which the change occurred or was notified.

129. In other words, unless they are clear about which change was material (in the sense of making a difference), decision makers and tribunals risk superseding the earlier decision from the wrong effective date.

130. Unfortunately, that is what has happened here. In my respectful view, the learned judge fell into error of law when he said:

> "21. … The particular change of circumstances is that Laura has ceased to be a dependent child of [the mother] and Child Benefit for her has ceased. The further question arises of course as to whether this is a "material" change of circumstances as required by the regulation. Again, I think this is self-evident. The implementation of the change of circumstances has led to a change in the Maintenance Assessment calculation and indeed to an overpayment of Child Support to [the mother]. That is why we are here at all in this appeal discussing this matter. If the change of circumstance was not material it would not have had the effect that it does.
>
> 22. Laura is not part of the maintenance assessment calculation per se but, because of the effect that her presence in [the mother's] household has on the Maintenance Assessment, changes in her status are material."

131. I would agree to the extent that—at least in the context of this case—the fact that there was now a different outcome decision must mean that there had been *a* material change of circumstances.

132. But the Superseding Assessment reflected a number of other changes too. Laura ceasing to be a relevant child was the change that originally led the Secretary of State to reconsider the Earlier Assessment. But that did not necessarily mean that it was the change that made the difference to the outcome.

133. The analysis of the Earlier and Superseding Assessments at paragraphs 33-61 above shows that—as the mother's representative has maintained throughout—the fact that Laura was no longer a relevant child had no effect whatsoever on the change in the outcome decision.

134. The only effect that Laura's status as a relevant child had on the Earlier Assessment was as one element among others in the calculation of the mother's exempt income. That exempt income, in turn, was only relevant to the level of the mother's assessable income. And in both Assessments, the mother's assessable income was nil: it made no difference whether an allowance for Laura was included in the calculation or not.

135. What did make a difference, however, was that, in the Superseding Assessment, the large increase in the father's protected income wiped out his notional liability to pay child support.

136. That increase occurred because the father and his partner had reached pensionable age, rather than because of any change concerning Laura.

137. It follows by analogy with *CIS/3655/2007* (see paragraph 124 above) that—as a matter of law—Laura ceasing to be a relevant child, while it was a change of circumstances, was not a *material* change of circumstances.

138. The only material changes—the only changes that contributed to the different level of liability in the Superseding Assessment—were the fact that the father and his partner had attained pensionable age and the changes in the standard allowances used to calculate the maintenance requirement, the mother's and father's exempt income, and the father's protected income.

139. Once that is appreciated, the Secretary of State's decision and the First-tier Tribunal's decision confirming it, must be set aside because the effective date is incorrect.

140. The Superseding Assessment was given retrospective effect because it was thought that the material change was that "a relevant child … ceases to be a relevant child" with regulation 23(19)(b) so that the effective date was the first day of the maintenance period in which that change occurred.

141. However, as that was not in fact the material change, regulation 23(19) did not apply. And, as the Superseding Assessment was made on the Secretary of State's own initiative, the correct effective date was the first day of the maintenance period which included the day 28 days after the date on which the Secretary of State gave notice under regulation 24.

142. As the Secretary of State did not in fact give a regulation 24 notice, no effective date can be fixed and, as at 29 November 2016, the Secretary of State could not in practice supersede the Earlier Assessment at all, let alone supersede it with retrospective effect.

**Conclusion**

143. It follows that the First-tier Tribunal's decision was wrong in law and must be set aside. I have done so.

144. The Superseding Assessment must also be set aside. The effective date was incorrect and, in the absence of a section 24 notice, the Secretary of State had no legal power to set any other effective date.

145. I have therefore re-made the First-tier Tribunal's decision by allowing the mother's appeal and setting aside the Superseding Assessment.

146. It follows that the father continued to be liable to pay child support maintenance for James at the weekly rate of £73.01 from the effective date of Wednesday 12 April 2000 until the effective date from which the Earlier Assessment was subsequently superseded on other grounds.

**Coda**

*Further supersessions*

147. I am told by the Secretary of State's representative that the Earlier Assessment was superseded on other grounds from the effective date of Wednesday 30 November 2016. If that is correct, then these proceedings are dealing with a closed period from Wednesday 27 August 2014 to Tuesday 29 November 2016.

148. For the sake of completeness, I should make it clear that nothing in this decision prevents the Secretary of State from now superseding the Earlier Assessment from an earlier date than Wednesday 30 November 2016 if he considers there are grounds upon which to do so and those grounds fall within the circumstances in which regulation 23 of the Maintenance Assessment Procedure Regulations permits a retrospective supersession. On the information that is available to me, I do not think it probable that such grounds exist but—at least at present—that is a matter for the Secretary of State, not me.

*The failure to reassess the parents net income, housing costs and council tax*

149. When I explained how the Superseding Assessment was calculated, I pointed out on a number of occasions that the figures for the parents' earnings and housing costs, and the figure for the father's council tax, had not been reassessed but had rather been carried forward from the Earlier Assessment. That was so even though more than sixteen years had elapsed between the dates on which the two maintenance assessments were made and even though the scale rates in the calculation of the maintenance requirement, the parents' exempt incomes, and the father's protected income had been brought up to date.

150. At one point, the Secretary of State's representative supported the appeal on the basis that the First-tier Tribunal had erred by not either seeking evidence of the up-to-date figures for net income etc., or by not remitting the case to the Secretary of State to do so.

151. I have considerable sympathy with that submission but, in my judgment, the law does not permit me to accept it.

152. The starting point has to be that, as worded in relation to the first and second child support schemes, section 17(2) of the Act provides that:

> "(2) In making a decision under subsection (1), 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 him to act on his own initiative"

The discretion conferred by section 17(2) exists to promote administrative convenience and speedy decision-making. It is not difficult to see the advantages for the Secretary of State of being able to implement a change of circumstances without having to call for new evidence and re-calculate every other item in the formula, some of which may have been assessed or re-assessed only months, or even weeks earlier.

153. Section 17(2) does not contain any limits on the length of time for which issues need not be considered, so the makers of the Superseding Assessment in 2016 had power to ignore the fact that the figures for earnings, housing costs and council tax reflected the circumstances that had been current in April 2000 even though they were applying the scale rates that were applicable in 2016/17.

154. Strictly-speaking, they would have been entitled to ignore the increase in the scale rates as well, although I suspect that their computer software might have caused difficulties had they tried to do so.

155. As over 16 years had elapsed since the Earlier Assessment, it would have been better decision-making for the decision makers to have asked for up-to-date figures for earnings, housing costs and council tax liability and re-assessed the father's liability on that basis. But, I do not think I can hold that the omission amounts to an error of law, particularly as I do not know whether the outcome would have been any different had a full re-assessment taken place. The decision makers might have been entitled to take the view that the increase in the father's protected income was so large that a more recent assessment of the parents' assessable incomes was unlikely to affect matters.

156. That position changed, however, when the case came before the First-tier Tribunal. Section 20 of the Act confers a full right of appeal on both fact and law. The

Judge was therefore standing in the shoes of the decision makers and the discretion conferred on them by section 17(2) was also conferred on him.

157. The difference was that it had become a *judicial* discretion. It was no longer enough that the discretion be exercised in accordance with the general principles of administrative law. It also had to be exercised judicially; *i.e.*, consciously, impartially, and with express reasons given for the resulting decision.

158. I am not saying that it is never correct for the First-tier Tribunal to exercise the discretion to recalculate—or to direct the Secretary of State to re-calculate—on figures that have been carried forward from an earlier assessment. For example, one parent may be refusing to co-operate with the process and the carried-forward figures may be the best available. Or it may be a reasonable judgment that, on the facts of the case, re-assessment is unlikely to make any significant difference to the outcome and is therefore disproportionate. However, where that is done, it needs be the result of a conscious decision rather than an oversight. It will often be necessary to give the parties an opportunity to comment. And if a written statement of reasons is requested, it will always be necessary to explain why the Tribunal exercised its discretion as it did.

159. In this case, the statement did not even mention the issue. I would therefore have acceded to the Secretary of State's submission that the omission was an error of law, if it were not for one important circumstance. The Judge had no reason to suppose that he needed to consider the exercise of the section 17(2) discretion because the Secretary of State's response did not either tell him that that was the case or include the information that was necessary for him to ascertain for himself that it was the case.

160. Although the Secretary of State's response explained in detail how the Superseding Assessment was calculated, equivalent details were not given of the Earlier Assessment. The response did not identify any of the figures in the Superseding Assessment as having been carried forward and the absence of figures for the Earlier Assessment meant that the Judge had no way of knowing that they were the same in both calculations, and therefore no reason to suppose that he needed to consider the exercise of the section 17(2) discretion.

161. There is a passing mention in the notice of appeal that "[i]t appears the reason for the minimum assessment is that the CSA introduced updated IS premiums in the protected income but made no other change", but no further details are given and, two paragraphs later, the statement that "[h]owever this appeal is solely on a point of law", (*i.e.*, that the Secretary of State had no power to supersede or, at any rate to supersede retrospectively) disavowed any reliance on the Secretary of State having "made no other change" as a ground of appeal.

162. In summary, the section 17(2) issue was not raised by the appeal and the information available to the Judge was insufficient to alert him to the fact that he should have taken the point in the exercise of his inquisitorial jurisdiction under section 20(7)(a) of the Act.

163. Which brings me to the next question.

*Should the response have included the calculations for the Earlier Assessment?*

164. This is not an issue I have to decide, and I have not heard argument on it, but as presently advised, I believe the answer to be yes.

165. So, far as relevant, rule 24(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules") states:

> "(4) The decision maker must provide with the response—
>
> (a) …
>
> (b) copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise; and
>
> (c) …."

Once it is appreciated that, in a change of circumstances supersession, a material change is one that makes a difference, rather than one that might make a difference, it follows that the details of the calculation of the maintenance assessment that is being superseded will be "relevant to the case" within rule 24(4)(b). If the Tribunal does not have those details, it cannot compare them with those for the superseding decision and form a view as to whether any given change is material.

166. This case is a good example of the problem, The lack of detail in the response meant that the Judge did not have the necessary information to work out which change of circumstances actually made a difference to the outcome and so, almost inevitably, took a "threshold criteria" approach to the appeal. It also made it more difficult for the mother's representative—who, if not necessarily right in every detail, has had the right end of the stick from the outset—to present her case. Without the numbers, he was not able to demonstrate that what changed the outcome was the father and his partner reaching pensionable age, rather than Laura being excluded from child benefit.

167. I therefore suggest that, in every child support appeal against a decision that supersedes an earlier maintenance assessment on the ground that there has been a material change of circumstances:

(a) the Secretary of State's response should include details of the calculation of the decision that was superseded, as well as of the superseding decision; and that

(b) if it does not, any judge of the First-tier Tribunal who gives pre-hearing case management directions, should normally direct the Secretary of State to provide those details; and that

(c) representatives who consider their clients to be disadvantaged by the absence of those details should apply under rule 6(2)(a) of the SEC Rules for such directions to be given.

*Does a failure to comply with regulation 24 of the Maintenance Assessment Procedure Regulations invalidate the subsequent superseding decision?*

168. On the law as I have held it to be, I do not need to decide this issue either. In case this appeal should go further, however, I should mention that a failure by the Secretary of State to follow regulation 24 and give notice to the parents when he intends to supersede an earlier decision on his own initiative, may—at least in some cases—invalidate the subsequent superseding decision even in those exceptional cases in which it is nevertheless possible to set an effective date.

169. The fact that in cases governed by regulation 23(19) (and some other paragraphs of that regulation, *e.g.*, paragraph (2)), the effective date is not determined by reference to a notice under rule 24, does not mean that it is unnecessary for the Secretary of State to give such a notice.

170. The main purpose of the notice is to allow "the relevant persons who could be materially affected by" the proposed supersession to make representations about the proposal. And the fact that the regulation 24 duty is unqualified,[3] shows that the opportunity to make representations does not depend on the ground of the proposed supersession. Whether, and if so when, a child has ceased to be a relevant child will often depend on information held on the child benefit computer system administered by HM Revenue & Customs. The information held on such computer systems is not always accurate and there is no reason why a person who might be materially affected by a supersession based on such information should not be given an opportunity to correct it,

[3] Except in relation to departure directions, which are subject to their own procedure that allows the parents to comment on what is proposed.

in just the same way as he or she would in relation to a superseding decision that is proposed on any other basis.

171. There is therefore a real question about whether the intention of the legislator was that a failure to serve a regulation 24 notice should invalidate the subsequent supersession even in cases where that failure does not prevent the setting of an effective date. The answer to that question may depend on whether—on the facts of the individual case—either parent has been prejudiced by the failure to give the required notice—see *R. v Soneji* [2005] UKHL 49; [2006] 1 AC 340. But it will not necessarily be no.

14 April 2020

Richard Poynter
Judge of the Upper Tribunal

Corrected on 18 June 2020 prior to publication on the website of the Administrative Appeals Chamber.