IN THE UPPER TRIBUNAL **Appeal No. UA-2021-000743-CSM**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

KB

Appellant

- v –

1. Secretary of State for Work and Pensions

2. RK

Respondents

Before: Judge Markus KC

Decision date: 26th October 2022
Decided on consideration of the papers

Representation:
Appellant: James Pirrie (Solicitor)
1st Respondent: Eliott Verity, Decision Making and Appeals Leeds
2nd Respondent: Eleri Jones (Counsel)

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 30th July 2021 under numbers **SC242/19/03112** was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with directions to be made by a District Tribunal Judge of the First-tier Tribunal.

REASONS FOR DECISION

Introduction and background

1. The mother (M) appealed to the First-tier Tribunal ("the FTT") against two decisions of the Secretary of State ("the SSWP") concerning the liability of the father (F) to pay child support in respect of the child of M and F. In the statutory language of the Child Support Scheme, M is the "person with care" and F is the "non-resident parent". The first

decision related to F's liability with effect from 4 February 2019 and the second decision was made on the annual review and was effective from 4 February 2020.

2. At all relevant times F was a national of the United States of America, resident in the United Kingdom. He was classed as non-domiciled for tax purposes but he completed tax returns and paid tax in the UK. He also paid tax in the USA. It is not necessary for present purposes to set out the details of F's financial circumstances. I will explain any relevant matters in the course of my decision below.

3. A two day hearing of the appeals took place remotely on 26 and 27 May 2001. In its decision dated 30 July 2021, the FTT allowed M's appeals and set aside the SSWP's decision. The FTT determined F's gross income figure and three variations (unearned income, diversion of income and assets), and directed the SSWP to recalculate the amount of the maintenance payable in accordance with those figures.

4. M sought permission to appeal on 9 grounds. The FTT gave her permission on one ground described in M's application as the "Hierarchy of Regulation 69 vs Regulation 69A".

5. F sought a correction or alternatively permission to appeal on the basis that the FTT had double-counted monies in a bank account. The FTT said that it was unable to review the decision as the financially qualified tribunal member had retired and gave permission to appeal on that ground. The FTT did not address a second ground of appeal advanced by F.

6. M submitted a notice of appeal on the ground on which permission had been given and also applied to the Upper Tribunal (UT) for permission to appeal on the remaining 8 grounds. The application came before Upper Tribunal Judge Wright on 18th March 2022. On consideration of the papers Judge Wright did not determine whether to give permission on those other grounds, directed the parties to make written submissions on the appeal and on the merits of the other grounds, and to state whether they were content for their submissions on the other grounds to stand as their submission on the appeal on those grounds should he give permission on any of them. The parties have all made submissions accordingly.

7. F lodged his appeal with the UT on the ground on which he was given permission to appeal, but did so after the expiry of the applicable time limit. In directions issued on 18th July under a separate UT case reference assigned to that application (UA-2022-00736-CSM) Judge Wright stayed consideration of whether to admit the late appeal until M's appeal had been finally decided.

The parties' positions

8. The SSWP supports M's appeal on the regulation 69/69A issue and invites the UT to set aside the FTT's decision and remit it to be reheard by a different FTT, without reasons from the UT. In addition the SSWP submits that, if M's appeal is allowed, there is no need for the UT to consider the remaining grounds of appeal is they will be subsumed by the rehearing.

9. F opposes M's appeal but asks that the UT give reasons for its decision on her appeal for the guidance of the next FTT. He also resists permission on the other 8 grounds. He does not consent to his submissions on those grounds standing as his submission on the appeal if permission is granted on any of those grounds. He invites the UT to: lift the stay on F's appeal and consolidate it with M's; direct the SSWP to

address M's 8 other grounds of appeal and to respond to F's appeal; direct M to respond to F's appeal; decide whether to give M permission to appeal on the 8 other grounds; and list an oral hearing on the permitted grounds of appeal.

10. M agrees with F that the UT should give reasons for its decision on her appeal. She maintains her application for permission to appeal on the other 8 grounds and asks that, if the UT gives permission, the UT should give guidance to the FTT on the matters raised in those grounds.

11. F has requested an oral hearing of the appeal but the SSWP and M have not. I have decided to determine M's appeal without an oral hearing. I am able to determine the sole ground in M's appeal on the basis of the written materials which are before me. I have decided not to address the other grounds of appeal nor to remake the decision. To do so would require me to direct further written submissions and possibly require an oral hearing. It would not be proportionate to do this rather than for all relevant matters to be considered by the FTT to which this appeal is remitted.

Regulation 69/69A - hierarchy

The legislative framework

12. The amount of child support which the non-resident parent (in this case, F) is required to pay is calculated on the basis of that person's income as provided by the Child Support Act 1991 and regulations made under it. The child support calculation can be varied in specified circumstances, including that the non-resident parent has income that has not been taken into account in the main calculation. The effect of such a variation is to increase the non-resident parent's income that is used to calculate the child support liability.

13. Sections 28A-G of the Child Support Act 1991 provide for the making of applications for variation, determination of applications by the SSWP and by the FTT, and other related matters. Section 28E specifies general principles to be taken into account in deciding whether to agree to a variation, including that "parents should be responsible for maintaining their children whenever they can afford to do so". Section 28F sets out the circumstances in which the SSWP may agree to a variation. It provides:

> 28F. (1) The Secretary of State may agree to a variation if–
> (a) the Secretary of State is satisfied that the case is one which falls within one or more of the cases set out in Part I of Schedule 4B or in regulations made under that Part; and
> (b) it is the Secretary of State's opinion that, in all the circumstances of the case, it would be just and equitable to agree to a variation.
>
> (2) In considering whether it would be just and equitable in any case to agree to a variation, the Secretary of State –
> (a) must have regard, in particular, to the welfare of any child likely to be affected if the Secretary of State did agree to a variation; and
> (b) must, or as the case may be must not, take any prescribed factors into account, or must take them into account (or not) in prescribed circumstances.
>
> …"

14. The Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) have been made under Part 1 of Schedule 4B. They include the following:

> 69.—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where the non-resident parent has unearned income equal to or exceeding £2,500 per annum.
>
> (2) For the purposes of this regulation unearned income is income of a kind that is chargeable to tax under—
>
> (a) Part 3 of ITTOIA[1] (property income);
>
> (b) Part 4 of ITTOIA (savings and investment income); or
>
> (c) Part 5 of ITTOIA (miscellaneous income).
>
> (3) Subject to paragraphs (5) and (6), the amount of the non-resident parent's unearned income is to be determined by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year and, where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil. …
>
> (5) Where—
>
> (a) the latest available tax year is not the most recent tax year; or
>
> (b) the information provided by HMRC in relation to the latest available tax year does not include any information from a self-assessment return;
>
> (c) the Secretary of State is unable, for whatever reason, to request or obtain the information from HMRC,
>
> the Secretary of State may, if satisfied that there is sufficient evidence to do so, determine the amount of the non-resident parent's unearned income by reference to the most recent tax year; and any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return.
>
> (6) Where the Secretary of State is satisfied that, by reason of the non-resident parent no longer having any property or assets from which unearned income was derived in a past tax year and having no current source from which unearned income may be derived, the non-resident parent will have no unearned income for the current tax year, the amount of the non-resident parent's unearned income for the purposes of this regulation is to be treated as nil.
>
> (7) Where a variation is agreed to under this regulation, the non-resident parent is to be treated as having additional weekly income of the amount determined in accordance with paragraph (3) or (5) divided by 365 and multiplied by 7.
>
> …
>
> 69A.—(1) Where this paragraph applies, the other cases prescribed under paragraph 4(1) of Schedule 4B to the 1991 Act are cases where the Secretary of State is satisfied that there is an asset in which the non-resident parent has a legal or beneficial interest and the value of that interest exceeds the prescribed value.

[1] Regulation 2 provides that "ITTOIA" means the Income Tax (Trading and Other Income) Act 2005.

(2) In this regulation "asset" means—

(a) money, whether in cash or on deposit, including any money which is due to a non-resident parent where the Secretary of State is satisfied that requiring payment of the monies to the non-resident parent immediately would be reasonable; …

(5) The "prescribed value" is £31,250. …

(7) The Secretary of State shall calculate the weekly value of an asset by applying the statutory rate of interest to the value of the asset and dividing by 52.

(8) For the purposes of this regulation—

"statutory rate of interest" means interest at the statutory rate prescribed for a judgment debt or, in Scotland, the statutory rate of interest included in or payable under a decree in the Court of Sessions applicable on the date upon which the variation takes effect;…"

The FTT's decision

15. The FTT noted that F held a number of investment accounts in the USA amounting to $382,852. The investments produced a dividend. The FTT considered whether the dividend income attracted a variation under either regulation 69 or regulation 69A, and that logically consideration should be given first to whether a variation could arise pursuant to regulation 69 and, if not, whether a variation could arise under Regulation 69A.

16. As to regulation 69, the FTT noted that under ITTOIA income tax is charged on dividends of a non-UK resident company. F had declared dividends paid in his US tax return for the year ended December 2019 (In the USA tax years run from 1 January to 31 December). Using HMRC yearly average and spot rates the FTT decided that the declared dividends of $12,882 amounted to £9760 which was to be taken into account as additional income. The FTT also decided that it was just and equitable to grant such a variation but did not give reasons for doing so.

17. The FTT went on to consider whether to grant a variation under regulation 69A. The FTT noted that F held money in bank accounts in both the USA and the UK. The assets were identified by the FTT as being money in a Lloyds bank account of £95,154 and money in a US account of $400,064 (conversion value £303,124.71).

18. The FTT reminded itself of the requirement that it must be just and equitable to grant a variation. It mentioned some comments by the father about the Children Act proceedings but did not say what those comments were nor what the FTT concluded in regard to them. As an aside, I note that it appears from F's submissions to the UT that those comments related to payments made by F pursuant to Children Act proceedings. The FTT considered whether the rate of interest should be reduced from 8%, noting the figures that would be produced applying that rate. The FTT decided that the variation was unlikely to jeopardise the qualify and amount of money F could spend on the child when he stayed with him nor would it cause F to cease work and concluded that it was just and equitable to grant the variation.

The parties' submissions to the UT

19. On behalf of M it is submitted that there is no automatic hierarchy whereby regulation 69 is considered first and regulation 69A is only considered if a variation is not made under regulation 69. She submits that the tribunal must exercise a discretion as to the appropriate order in the circumstances of each case, applying the general principles in sections 28E and F of the 1991 Act. The example was given of a £1 milllion chalet which is let only for one week per year, generating an income of (say) £4k, and it was submitted it would not be appropriate to make a variation under regulation 69 rather than regulation 69A where the latter would lead to a very much greater amount of additional income (£80,000).

20. The SSWP points out that there is nothing in the legislation to show how the two regulations interact with each other but submits that the policy intention was not to use the same assets under both. The SSWP relies on the Explanatory Memorandum to the Child Support (Miscellaneous Amendment) Regulations 2018 (SI 2018/1279) which introduced regulation 69A. The Memorandum stated at paragraph 7.7 "An asset already producing an income stream captured by the standard calculation or other variation provisions is disregarded. This is to prevent income being generated twice for an asset". The SSWP submits that the intention was only to use regulation 69A where regulation 69 does not apply and that the requirement for a variation to be "just and equitable" prevents the same asset or income being taken into account under both regulations.

21. Although the SSWP agrees with the FTT's approach to the hierarchy of the regulations, the SSWP supports the appeal because the FTT (by its own admission) had double counted the assets in F's US account and had not been able to rectify the error.

22. On behalf of F it is submitted that regulation 69 should be considered before regulation 69A. Regulation 69(2)(b) specifically applies to savings and investment income. Regulation 69A applies to assets which do not generate income, and so is concerned with notional income. The ordering of the regulations is relevant. It would be unjust to grant a variation under both regulations in relation to the same asset. It is easy to assess the financial benefit from savings and investments by looking at the income generated, but it is much harder to fix their value as an "asset" as additions and withdrawals may be made and financial markets rise and fall in value, as occurred in this case.

23. F also refers to the requirement that it is just and equitable to make a variation.

24. Both F and M advance detailed arguments about the tax consequences of considering the funds under either regulation 69 or 69A. I do not have sufficient information to determine those matters and it is not necessary for me to do so in order to determine the hierarchy question.

Discussion and conclusion on the hierarchy issue

25. The Act and the regulations are silent about the relationship between regulations 69 and 69A. There is nothing in the statutory wording to provide a clue as to the order in which the grounds for variation should be considered.

26. There are two authorities which are relevant to this question. The first is a decision of the Social Security Commissioner in *CCS/1047/2006*. The Commissioner considered

variations under regulations 18, 19 and 20 of the Child Support (Variations) Regulations 2000 (SI 2001/156). Those variations were, respectively, for assets, income not taken into account and diversion of income, and lifestyle inconsistent with declared income. At the effective date of the decision in that case, the regulations were silent as to their ranking. However, the substantive content of the regulations enabled the Commissioner to decide that the lifestyle variation should be considered after the others. The regulatory provisions presupposed that both income and assets were addressed prior to lifestyle, for reasons which the Commissioner explained at paragraphs 22 and 23 of the decision.

27. The Commissioner's conclusion that regulation 20 fell to be considered after regulations 18 or 19 was supported by the substance and language of the statutory provisions. There is no equivalent in the 2012 regulations.

28. The Commissioner went on to consider the relationship between regulations 18 and 19 – respectively, assets and diverted income. As the Commissioner said at paragraph 24, there is an obvious overlap between the two and it would be wrong to double count income which is diverted into an asset under both regulations. To do so would not be consistent with justice and equity. The Commissioner noted that, after the effective date of the decision in question, the regulations had been amended so as to provide for that overlap in part. However, the Commissioner had to consider how to approach the overlap in the variations without the assistance provided by those amendments.

29. The Commissioner decided as follows:

> "26. The structure of the provisions for these variations in the Variations Regulations allows the Secretary of State or a tribunal to consider all grounds raised. It does not define a specific order for consideration. The minimum threshold value of assets of £65,000 in Regulation 18 removes many cases from consideration, when read with the assets to be excluded from that total. That provides a practical answer in many cases. Beyond that, and where there are assets other than those potentially caught by any overlap with regulation 19, then regulation 18 should be examined. It may also be necessary to look at regulation 19 and the overlap. If there is an overlap then the overriding test of justice and equity will apply to stop double counting."

30. The Commissioner then considered the evidence in the case before him, and the sequence for considering the grounds of variation. He repeated that the lifestyle ground should be considered last and then said (paragraph 71) that, in that case, the order should be – assets, income not taken into account, diversion of income and, finally, lifestyle. He did not explain why he ordered the first three variations in the way that he did.

31. The only other case I have been able to find in which this question was considered is *HB v SSWP* [2009] UKUT 66 (AAC). At paragraphs 70 and 71 the UT noted that the lifestyle variation should be considered last and that the FTT in that case should consider the variation grounds in the same order as that decided in *CCS/1047/2006*. No reasoning was given.

32. Although there is no lifestyle ground in the 2012 regulations, the Commissioner's decision regarding the relationship between regulations 18 and 19 is relevant here. There is some similarity in the character of the variations there and those in regulations 69 and 69A, in both cases there is potential for overlap and yet the regulations are silent as to the order of consideration, and there is no inherent hierarchy within the pairs of regulations. Moreover, both sets of regulations required a variation to be just and equitable.

33. I conclude that I should follow the approach of the Commissioner in *CCS/1047/2006.* Although I am able to reach that conclusion without reference to any extraneous materials, the extract from the Explanatory Memorandum to the 2018 regulations (see paragraph 20 above) tends to support the view that this approach is consistent with the legislative intention.

34. Where there is no overlap between the grounds for variation, it does not matter in which order they are considered. In some cases the threshold in regulation 69A will preclude that ground. Where there is an overlap the tribunal must consider the order in which to address the grounds and that will depend on all relevant factors in the case. The overriding consideration is that no variation can be made unless it is just and equitable to do so. This means that the ranking of the grounds will be dictated by considerations of justice and equity. The FTT has a broad discretion in that regard which is supplemented by the provisions of section 28F(2). It is likely to be relevant for the FTT to consider what the outcome of the application of either ground would be in deciding what is just and equitable.

35. It follows that a) the FTT was required to make a judgment as to whether there was an overlap between the grounds and, if so, the order in which the two grounds were to be considered, and b) the same funds should not have been treated as generating income giving rise to a variation under regulation 69 and also as an asset giving rise to a variation under regulation 69A.

36. In the light of the above I conclude that the FTT's decision was in error of law. The potential for overlap between the grounds in the two regulations was plainly in issue in this case, as is implicit in the FTT's statement at paragraph 50 that "The logical approach was to consider whether a variation could arise pursuant to Regulation 69 if not whether a variation could arise under Regulation 69A". The FTT appears to have assumed that the correct ranking of the grounds was regulation 69 followed by 69A rather than making a judgment as to that matter. Alternatively it did not explain why regulation 69 came before regulation 69A in this case. Nor did the FTT consider whether there was in fact overlap in this case.

37. I recognise that the FTT addressed the requirement that each variation must be just and equitable but in doing so it did not address the relevant factors as to the hierarchy of the two grounds. Indeed, the FTT gave no reasons for deciding that it was just and equitable to grant the regulation 69 variation. Although the FTT gave reasons for concluding that it was just and equitable to make the regulation 69A variation, those reasons did not address the actual or potential overlap with regulation 69 and the need to avoid double-counting.

38. This is a sufficient basis on which to allow the appeal and set aside the FTT's decision.

39. I am not in a position to remake the decision in this regard. F's submissions on this issue, and M's to a lesser extent, rely on a number of matters that were ventilated before the FTT over a two day hearing but as to which I have not had the benefit of hearing evidence or argument. I would require further written submissions by reference to the evidence and, possibly, an oral hearing. Findings of fact will be necessary. It is not proportionate or otherwise appropriate for the UT to embark on that course. Moreover, as I now proceed to consider, there are other matters which should be addressed on reconsideration of the appeal and are more appropriately addressed by the FTT.

M's remaining 8 grounds of appeal

40. M has sought permission to appeal on the remaining 8 grounds. I have decided not to determine her permission application. Without actually deciding the point, it does appear to me that a number of the grounds are attempts to reargue the case on the evidence and so do not amount to arguable errors of law. The issues raised in those grounds can however be addressed by the FTT which rehears this appeal. In addition, if and to the extent that any of the grounds involve questions of law, I have concluded that it is not possible for the UT to consider those matters in the abstract, by which I mean without considering the grounds in the context of the relevant facts. In respect of each of the grounds (save possibly for ground 9) M's submissions are founded on her presentation and analysis of the evidence. I cannot evaluate that evidence. The submissions are not cross-referenced to the bundle of over 1000 pages and so I am not able to identify the relevant evidence. I have not had the benefit of oral argument on those matters. F has made it clear that, if I were to give permission to M to advance any of those grounds, he would wish first to make written submissions and seeks an oral hearing. I do not know if I would take the view that an oral hearing was necessary but, on any basis, the Upper Tribunal would be drawn into evaluation of substantial evidence and making judgments which are more appropriately made by the FTT. Moreover, if the UT were to decide these matters (which involve factual as well as legal questions) a party wishing to challenge the decision would be faced with surmounting a high hurdle for obtaining permission to appeal to the Court of Appeal limited route to appeal. Accordingly it is in the interests of justice for these matters to be considered by the FTT which rehears the appeal.

F's appeal and application for permission to appeal

41. These matters fall under a separate UT reference, UA-2022-00736-CSM, but it is convenient for me to deal with them here.

42. F asks that his late appeal and application for permission to appeal are admitted by the UT. The ground of appeal on which the FTT gave permission is solely concerned with his claim that funds were double-counted. That will be addressed by the FTT on the rehearing. F seeks permission to appeal on the other ground, which is that the FTT erred in deciding not to reduce the statutory rate of interest under regulation 69A. Again, that issue will be absorbed on the rehearing in the FTT where it will be open to F to make his submissions as to why a lower rate of interest should apply.

43. In the circumstances, I have not admitted the late appeal and the late application for permission to appeal.

Conclusion

For the above reasons, I allow M's appeal and remit it to another FTT for rehearing.

Authorised for issue
on 26th October 2022

Kate Markus KC
Judge of the Upper Tribunal