THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2023-000122-CSM

[2024] UKUT 136 (AAC)

LF v SECRETARY OF STATE FOR WORK AND PENSIONS & LF

DECISION OF UPPER TRIBUNAL JUDGE BRUNNER KC

On appeal from the First-tier Tribunal (Social Entitlement Chamber)
Reference: SC328/18/00998
Decision date: 18 May 2022
Hearing: Teeside

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal issued on 18 May 2022 under number SC328/18/00998 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake the decision as follows.

Standing in the shoes of the Secretary of State remaking the decision of 7 March 2018 as revised on 22 May 2018, I make an anytime revision of a previous decision for official error. The decision I revise is the decision of 30 March 2017. The decision of 30 March 2017 as revised is a supersession on the basis that the maintenance calculation of 13 February 2017 was made in ignorance of a material fact. The Appellant is liable to pay child maintenance at the rate of £137.03 from 30 March 2017 to 17 January 2018 inclusive.

REASONS FOR DECISION

A. The Background

1. This is an appeal against the decision of the Teeside First-Tier Tribunal (F-tT). Mr LF is the Appellant in these proceedings and the non-resident person for the purposes of the child maintenance regime. Mrs LF is the Second Respondent and the person with care within that regime. The First Respondent is the Secretary of State for Work and Pensions who is responsible for the Child Maintenance Service (CMS). Child maintenance was payable by the Appellant in relation to two children, born in January 2000 and July 2001.

2. The case relates to decisions of the Child Maintenance Service on 7 March 2018 and 22 May 2018. The issue in the case is the date on which an increase in weekly child maintenance liability to £137.03 should take effect. That increase was the result of CMS using the Appellant's current income, rather than his historic income. The Respondents say that the increase should take effect from the effective date of the initial maintenance calculation (the date that any child maintenance was first due), **18 January 2017**. The Appellant's position has varied over time, but his position now is that the increase should take effect from some months later, **30 August 2017.** The legal issues which arise include: the date on which a revision for official error takes effect, whether decisions by the Secretary of State were nullities, and whether a refusal to supersede can be revised or official error.

3. CMS calculates weekly maintenance on the basis of either historic or current income, applying the Child Support Act 1991 ('the 1991 Act') and the Child Support Maintenance Calculation Regulations 2012 ('the 2012 Regulations'). Regulations 34(1) & (2) set out the following:

   34.—*(1) The gross weekly income of a non-resident parent for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter.*

   (2) The non-resident parent's gross weekly income is to be based on historic income unless—

   (a)current income differs from historic income by an amount that is at least 25% of historic income; or

   (b) no historic income is available; or

   (c) the Secretary of State is unable, for whatever reason, to request or obtain the required information from HMRC

4. The central dates are :

   a. Decision of **13 February 2017**: initial maintenance calculation on the basis of historic income. CMS determined that a weekly amount of £46.96 was due from the effective date of 18 January 2017, based on figures provided by HMRC of historic income.

b. There is no dispute that in fact at that time of this first decision the Appellant's current income was more than 25% higher than his historic income. CMS was not aware of that.

c. The Second Respondent made a request for mandatory reconsideration on 13 February 2017, referring to the Appellant's higher current income. On **14 March 2017** CMS determined that application, making no change. CMS had requested information from the Appellant about his current income before 14 March, but had not received it. The Second Respondent did not appeal.

d. On 21 March 2017 CMS received information as requested from the Appellant about his current income, showing that it was more than 25% higher than his historic income. CMS took no action.

e. Decision of **7 March 2018**. CMS superseded the decision of 13 February 2017. The Appellant had gross income of £45,639 ('the higher income figure'). That was over 25% more than the figures provided by HMRC. CMS determined that the weekly payment amount was £137.03, with effect from the 30 August 2017 (which appears to be the date CMS treated the Second Respondent as applying for the supersession). That decision was not notified to the parties via a written decision letter.

f. Decision of **22 May 2018**. CMS revised the decision of 7 March 2018 by changing the effective date. CMS determined that the increased weekly amount of £137.03 was due from 18 January 2017, which was the first date that child maintenance had been payable under the initial maintenance calculation.

g. An annual review was carried out on 19 January 2018. The Appellant was liable to pay £135.44 per week from 18 January 2018. That is not under appeal.

5. This case has had a lengthy and unfortunate journey through the tribunals thus far. After two adjourned hearings in the F-tT the case was heard on 18 June 2019. An appeal against the decision was allowed by the Upper Tribunal (CCS/70/2020) and the case was remitted to the F-tT in May 2021. For various reasons that rehearing was not heard until 18 May 2022, almost three years after the first F-tT decision.

6. The F-tT in May 2022 was invited by the Secretary of State to find that the decisions of 7 March 2018 and 22 May 2018 were nullities, and did so.

7. The F-tT's Decision Notice following the 18 May 2022 hearing said that the Appellant was liable to pay £137.03 weekly child maintenance from 21 March 2017.

8. The F-tT said in the Decision Notice that:

'The decision of the Child Maintenance Service on 07/03/2018 should have been that [the Appellant] *is liable to pay £137.03 child maintenance in respect of* [the children] *from effective date 21/03/2017 superseding the initial maintenance decision made on 13/02/2017 on the grounds of a change of circumstances (change in income) based on the income declaration form*

submitted by [the Appellant] *and received by the Child Maintenance Service ("CMS") on that date.'*

9. The F-tT changed its position in the Statement of Reasons. That records: '*The decision that should have been made is that* [the Appellant] *was liable to child maintenance from effective date 18/01/2017 based on gross income of £45,639.12 leading to a liability of child maintenance of £137.03 per week from effective date 18/01/2017.*' The F-tT's new position was more adverse to the Appellant than the Decision Notice, backdating the increase in child maintenance for a further two months.

10. The F-tT invited either party to apply for its decision to be set aside on the basis that its Statement of Reasons was not in accordance with the Decision Notice. Neither party made that application. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by District Tribunal Judge Mahil on 25 November 2022 on the basis of that accepted error in the F-tT's findings. The notice of permission was not issued to the parties until 4 January 2023.

B. Submissions to the Upper Tribunal

Written Submissions

11. Upper Tribunal Judge Hemingway admitted the appeal on 8 June 2023, extending time.

12. The Appellant's initial grounds of appeal were:

    A. There ought to be a correction of Judge Mahil's Decision Notice that states that the Appellant did not comply with the duty to submit evidence of earnings, despite evidence confirming otherwise.

    B. The FtT should have directed CMS to make a decision regarding the issue of shared care.

    C. The FtT did not address the issue raised by the Appellant regarding incorrect, missing or false information from CMS.

13. The Secretary of State made submissions dated 14 July 2023 which supported the appeal on ground C alone, and invited me to remit the case to the F-tT. The Secretary of State's position has subsequently changed.

14. The Appellant made further submissions dated 26 November 2023. He said that the appeal is against the decision made on 7 March 2018, and he expanded on his argument in relation to inaccurate information. The Appellant raised further issues in relation to CMS's management of the mandatory reconsideration process and raises a number of factual matters. The Appellant sought an oral appeal hearing.

15. The Second Respondent made submissions received on 26 October 2023; these are factual submissions which do not relate to the points of law under consideration although it is clear that the Second Respondent does not agree that there has been any error of law and, understandably, seeks certainty and a fast resolution.

16. I made directions on 13 March 2024 in which I set out my provisional view relating to errors of law and directed an oral hearing. I noted that '*the quality of SSWP's engagement with the case to date has not been adequate. Written submissions have often been erroneous and/or incomplete. These further written submissions, and oral submissions at the hearing, must be of a better quality in order to properly assist the Upper Tribunal, and must be closely tethered to the statutory framework and statutory language.*'

17. I directed submissions on the following points. The Secretary of State was required to make submissions on these points, and other parties were permitted to:

    a. The Secretary of State's position about the matters which I identified as arguable errors of law in my directions.
    b. Whether the Secretary of State seeks to persuade me to remit the case to the F-tT, and if so on what basis.
    c. Whether the Secretary of State maintains that the CMS decisions of 7 March 2018 and 22 May 2018 are 'nullities', and if so, on what basis, and to what effect.
    d. The Secretary of State's position as to whether this is an appeal against a decision of 22 May 2018, and what decision should have been made by CMS.
    e. The Secretary of State's position about potential bases for remaking the decision including consideration of potential bases set out in my directions, and whether the Secretary of State invites me to remake the decision or remit to the F-tT.

Further submissions to the Upper Tribunal

18. I received written submissions as directed from the First Respondent. I received further submissions from the Appellant. I did not receive further submissions from the Second Respondent.

19. I held a hearing on 23 April 2024 at Field House, London. The Appellant represented himself. The Secretary of State was represented by Mr Simpson of counsel. I had expedited the hearing, given the previous delays in the case, and am grateful to the parties for facilitating the tight timetable which I put in place.

20. The Appellant's position remained that the F-tT had made errors of law. The Appellant invited me to remit the case to the F-tT for a further decision. The Appellant submitted that the correct decision was that the increased payment should be backdated to 30 August 2017; in other words that CMS had made the correct decision on 7 March 2018, and wrongly changed that decision on 22 May 2018. The Appellant maintained that some of the decisions made by CMS in this case were nullities, but (and I mean no criticism by this) was not clear about what he meant by that, nor what the result would be.

21. The Secretary of State's position was also that the F-tT had made errors of law. The Secretary of State invited me to remake the F-tT's decision. The Secretary of State submitted that the correct decision was that the increased payment should be backdated to the start of child maintenance payments,18 January 2017. The Secretary of State no longer maintains that any of the decisions in this case were nullities.

C. The First-tier Tribunal's errors of law

Error (1): Two conflicting decisions

22. The F-tT made an error of law in the procedure it adopted when it changed its mind on the key issue at the point of drafting the Statement of Reasons. The resulting position is that there is a conflict on the key issue between the Decision Notice (which records that the F-tT's decision is a supersession with an effective date of 21 March 2017) and the Statement of Reasons (which records that the F-tT's decision is a revision with an effective date of 18 January 2017).

23. A First-tier Tribunal may set aside a decision if it is in the interests of justice to do so (Rule 37 Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008) or undertake a review of a decision on an application for permission to appeal where it is satisfied that there was an error of law in the decision (Rule 40 Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008). A review can lead to amended reasons or correction of a decision, which must then be notified to the parties under Rule 40.

24. In this case, although the F-tT identified an error at the stage of producing a Statement of Reasons, the F-tT did not set aside its decision under Rule 37, nor undertake a review of its decision on receipt of the appeal notice. There was therefore no amendment to the initial decision notice within the procedure allowed for by Rule 40.

25. The result is that there are two conflicting decisions made by the same F-tT, and both are in existence. Both the Appellant and the Secretary of State submit that an error of law arises. The Secretary of State helpfully draws my attention to *LA v Secretary of State for Work and Pensions (ESA) [2014] UKUT 0482 (AAC) 11* in which Tribunal Judge Mitchell stated that:

    '*The Tribunal's statement of reasons and its decision notice are to be read as one. That follows from the statement's declaration that it is to be read with the decision notice. There is nothing wrong with this approach. The Tribunal in seeking to comply with its duty to produce a written statement of reasons for its decision is entitled to incorporate an earlier partial expression of its reasons (the duty is found in rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008). While there may be two documents involved, there can only ever have been a single reasoning process. Therefore, if the contents of the two documents are inconsistent, the Tribunal will not have given adequate reasons. No one can know exactly what the reasons were. In fact, the need for consistency applies even if the two documents are not unified by a statement that they are to be read together (see the decision of Social Security Commissioner Jacobs, as he then was, in CCR/3396/2000).'*

26. I agree with Judge Mitchell's approach. The inconsistency between the Notice and the Statement amounts to a material error of law.

(ii) ***Error 2: Revision for error of law of a decision preceding the error.***

27. The F-tT found that there had been an official error on 21 March 2017, the date on which CMS received current earnings figures from the Appellant, in that the information was not considered and applied to the calculation of child maintenance liability. The F-tT then revised a decision which pre-dated the official error, being the decision of 13 February 2017. The F-tT's decision was summarised this way at [88] Statement of Reasons: '*the Tribunal considers that there was a official error by CMS i.e. a failure to consider the current earnings figures received from the Appellant on 21 March 2017. Therefore, CMS was empowered to make an anytime revision of the decision dated 13 February 2017*'.

28. Regulation 14 of the 2012 Regulations sets out various grounds for revision of certain child support decision. One of the grounds is 14(1)(e): *'If the decision arose from official error'.* An official error is defined as '*an error made by an officer of the Department for Work and Pensions or HMRC acting as such to which no person outside the Department or HMRC materially contributed, but excludes any error of law which is shown to have been an error by virtue of a subsequent decision of the Upper Tribunal or the court*.' Where there has been an official error, regulation 14(1) permits revision of '*A decision to which section 16(1A) of the 1991 Act applies*'. Subsection 16(1A) of the 1991 Act lists '*a decision of the Secretary of State under section 11,12 or 17'.* Those sections in turn relate to maintenance calculations (s11), default and interim maintenance decisions (s12) and supersession (s17).

29. I am not satisfied that there was an official error on 21 March 2017. The purported error was that CMS did not act on information which it received that day about current income. There is no obligation for CMS to act on new information on the same day that it receives it, and so a failure to act immediately does not amount to official error.

30. Even if there was an official error on 21 March, it did not empower the F-tT, standing in the shoes of the Secretary of State, to revise a decision which was made a few weeks previously. At one point in the oral hearing, Mr Simpson seemed to be suggesting that the 2012 Regulations should be read as permitting revision of a decision which pre-dated the official error, as otherwise unfairness would arise. I cannot accept that. The wording of the 2012 Regulations is plain, and decisions can be revised if '*the decision arose from official error*'. A finding of official error does not open a magic portal through which all decisions in a case can be changed; it is only the decision which *arose from* the official error which can be revised.

31. If there was an official error on 21 March 2017, the decision of 13 February 2017 did not arise from that official error and could not have done because it occurred before the official error. It was a material error of law for the F-tT to revise the decision of 13 February 2017 on the basis of an official error on 21 March 2017.

(iii) Error 3: Treatment of the decisions of 7 March 2018 and 22 May 2018 as nullities

32. The F-tT determined that the decision of 7 March 2018 was a nullity because that decision had not been notified to the parties in a written decision letter. The F-tT determined that the decision of 22 May 2018 was also a nullity because it purported to revise the decision of 7 March 2018.

33. The F-tT reached their conclusion with the agreement of all parties. Upper Tribunal Judge Sutherland Williams had raised the possibility in his decision of 4 May 2021 (relating to a previous appeal in this case) that the parties might think regulation 14A of the 2012 Regulations 2012 affected the validity of the decision dated 7 March 2018.

34. The F-tT gave limited reasons at paragraph 66 and 67 of the Statement of Reasons for finding that two decisions were nullities:

'*There was no dispute at the hearing that the decision dated 7 March 2018 had not been notified to the parties. All parties agreed with the Tribunal that this decision therefore had to be treated as a nullity.*

The later decision dated 22 May 2018 sought to revise this decision dated 7 March 2018 (now found by this Tribunal to be a nullity). The decision made on 22 May 2018 is also therefore invalid'.

35. The Secretary of State now submits to the Upper Tribunal that the decisions were not nullities, saying in written submissions: *'although the 7th March 2018 decision was invalid until notified to the parties, it was not a nullity. The genesis of the 22nd May 2018 decision appears to have been a late recognition that the 7th March 2018 decision had not been notified to the parties and that the more efficient remedial step was not to send the 7th March 2018 decision (amended as necessary to preserve e.g. appeal rights) but to give effect to the original 7th March 2018 decision by sending it to the parties as if a decision made afresh on 22nd May 2018. On the face of it, there is no obvious basis upon which the 22nd May 2018 might be regarded as invalid, much less a nullity.'*

36. The Appellant's position did not change: he submitted at the oral hearing that the decisions were nullities. When I explored at the hearing what the Appellant meant by that, the Appellant submitted that I should find that the decision of 22 May 2018 should not stand, and the decision of 7 March 2018 was correct, although it was not properly notified.

37. The phraseology 'nullity' does not appear in the relevant legislation and it is not clear what the F-tT meant by using that phrase: did it mean that the decisions had no legal effect, were wrong, were not enforceable, were null before the F-tT had deemed them so, were null as a result of the F-tT deeming them so, or something else? Although it is not spelled out, it appears that the F-tT meant that the decisions were null or invalid per se, rather than being decisions which became invalid as a result of the F-tT ruling.

38. The general usage of the term 'nullity' in law is to mean a decision which does not exist and has no effect in law. It carries a hard edge: as Lord Reid said in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 170, '*there are no degrees of nullity*'. A logical consequence of the F-tT treating both the 7 March 2018 decision and the 22 May 2018 decisions as nullities would be that they did not exist as decisions under the 1991 Act. If that was the true position then the Appellant would not have had any rights of appeal against the Secretary of State's determinations on those dates. The right to appeal to the F-tT in child support cases lies against decisions of the Secretary of State under various provisions (and against imposition of penalties and fees) under section 20 of the 1991 Act. No party has suggested at any stage that the Appellant does not have a right of appeal.

39. The F-tT appears to have made its finding about nullity on the basis that written notice of the 7 March 2018 decision was not given under regulation 14A of the 2012 Regulations, which in turn tainted the later decision. The F-tT was not invited to analyse regulation 14A of the 2012 Regulations which includes:

> *14A(1) This regulation applies in a case where –*
>
> *(a) The Secretary of State gives a person written notice of a decision; and*
>
> *(b) That notice incudes a statement to the effect that there is a right of appeal to the First-tier Tribunal against the decision only if the Secretary of State has considered an application for a revision of the decision.*
>
> *(2) In a case to which this regulation applies, a person has a right of appeal against the decision only if the secretary of State has considered on an application whether to revise the decision under section 16 of the 1991 Act. ……...*

40. That regulation applies where a written notice has been given. It says nothing about the effects of not giving notice of a decision. It is not a basis for finding that lack of a notice makes a decision null.

41. The F-tT was not directed to relevant case law, including *R(U) 7/81* where a Tribunal of Commissioners held that a failure to notify a decision in accordance with a statutory requirement did not render the decision invalid, and *R(SB) 41/83* which followed the same course.

42. I agree with the approach taken in those cases. The decision of 7 March 2018 was not properly communicated, but it existed as a decision for various purposes including as a decision which could be appealed; it was not a nullity.

43. Given that the word 'nullity' has appeared in a number of F-tT decisions, and that the applicability of the term in this case was endorsed by the Secretary of State (until Mr Simpson came on board) it may be of assistance to make some more general comments about the concept.

44. The Supreme Court, in *R (Majera) v Secretary of State for the Home Department [2021] UKSC 46* made the observations below about terms such as 'nullity'. The case involved a bail order which the Court of Appeal had held to be a nullity, in part because the order failed to require the detained person to present themselves to an officer as required by the relevant legislation. The

judgment is relevant to administrative decisions as well as court orders. Extracts are set out below.

> *27. …. Although judges have commonly used expressions such as "null" and "void" to describe unlawful administrative acts and decisions, it has nevertheless been recognised that the notion that such acts and decisions are utterly destitute of legal effect, as if they had never existed at all, is subject to important qualifications.*
>
> *28. …. A significant point was made by Lord Radcliffe in Smith v East Elloe Rural District Council [1956] AC 736, 769-770, where he considered an argument that an ouster clause preventing a compulsory purchase order from being challenged after the expiry of a time limit must be construed as applying only to orders made in good faith, since an order made in bad faith was a nullity and therefore had no legal existence. Describing the argument as "in reality a play on the meaning of the word nullity", Lord Radcliffe observed:*
>
> *"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*
>
> *29. Accordingly, if an unlawful administrative act or decision is not challenged before a court of competent jurisdiction, or if permission to bring an application for judicial review is refused, the act or decision will remain in effect….*
>
> *30. The courts have long been aware of this point. In Calvin v Carr [1980] AC 574, for example, Lord Wilberforce observed at pp 589-590, in relation to a contention that an appeal could not lie against a decision which was void, that until a decision was declared to be void by a competent body or court, "it may have some effect, or existence, in law". He added that "[t]his condition might be better expressed by saying that the decision is invalid or vitiated". In the context of a question as to whether an appeal lay, "the impugned decision cannot be considered as totally void, in the sense of being legally non-existent". So to hold, he said, "would be wholly unreal". .....*
>
> *31. Even where a court has decided that an act or decision was legally defective, that does not necessarily imply that it must be held to have had no legal effect. ..*
>
> *32. These considerations have led judges to be critical of the description of unlawful administrative acts or decisions as "null" or "void", and have sometimes led them to speak of voidness as a "relative" concept (see, for example,* R (New London College Ltd) v Secretary of State for the Home Department (Migrants' Rights Network intervening) [2013] UKSC 51; [2013] 1 WLR 2358, paras 45-46*). The language of voidness and nullity, drawn from the law of contract, can be useful for some purposes in administrative law, but it depends upon an analogy between defective contracts and defective administrative acts which is inexact. The complexity and variability of the practical consequences of unlawful*

> *administrative acts necessitate a more flexible approach than is afforded by a binary distinction between what is valid and what is void. Judges have therefore expressed reservations not only about the use of words such as "void" and "null", but more importantly about reasoning in the field of administrative law which allows the logic of those concepts to override important values underpinning the court's supervisory jurisdiction, such as the public interest in legal certainty, orderly administration, and respect for the rule of law.*
>
> *33. In that regard, the speech of Lord Hailsham of St Marylebone LC in* London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182, 189-190*, has been particularly influential. The Lord Chancellor noted that in reported decisions in the field of administrative law "there is much language presupposing the existence of stark categories such as 'mandatory' and 'directory', 'void' and 'voidable', a 'nullity', and 'purely regulatory'." He accepted that such language was useful, but observed that "I am not at all clear that the language itself may not be misleading in so far as it may be supposed to present a court with the necessity of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments, compartments which in some cases (eg 'void' and 'voidable') are borrowed from the language of contract or status, and are not easily fitted to the requirements of administrative law"….*

45. A three-judge panel of the Upper Tribunal in *Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC)* considered that the term 'nullity' may apply where the Information Commissioner acted entirely outside the statutory framework, but doubted the applicability of the term in other scenarios. The judges observed at [100] that :

> '*Mr Lockley suggested other instances of nullity as, for instance, where the decision was tainted by bias or where the person holding the office of Commissioner had not been properly appointed. But in those instances the F-tT would have jurisdiction to determine the appeal – see Boddington and also Chief Adjudication Officer v Foster [1993] AC 754 and Howker v Secretary of State for Work and Pensions [2002] EWCA Civ 1623 – and, if the F-tT were to find such a flaw, the correct response would simply be to find that the decision notice was not in accordance with the law and to substitute another notice.'*

46. It follows that the term 'nullity' will rarely be of use to the First-tier Tribunal (Social Security and Child Support). As observed above, it is a term of more obvious applicability in contract law than in this jurisdiction. It does not appear in relevant legislation or procedural rules.

47. In broad terms, it is unlikely to be appropriate to describe a social security or child support decision as 'null' on the basis that it was wrong, or was not notified, or was made on inapplicable grounds, or was made in error of law or was made without due process. Such a decision generally exists (and therefore cannot sensibly be called 'null') unless and until set aside by a tribunal or court. Even when such a decision is set aside by a tribunal or court, terminology such as 'nullity' and 'invalidity' is likely to lead to confusion rather than clarity.

48. In the context of this case, it was an error of law for the F-tT to label either decision as a nullity. The failure to notify parties of the 7 March 2018 decision

did not make that decision null. Similarly, the later decision of 22 May 2018 was not rendered null as a result of being infected by the procedural failings in the March decision.

Given that the F-tT proceeded to determine the appeal in a normal way, this error of law had no material effect on proceedings. If this had been the only error of law then I would not set aside the F-tT ruling.

D. Matters which are not errors of law

49. Other matters raised by the Appellant are not material errors of law.

50. Ground A relates to Judge Mahil's statement that the Appellant did not comply with his duty to submit evidence of earnings. The basis for that finding is not clear, but if it was an error it was not material to the F-tT's decision; the date on which the current income information was sent by the Appellant is not a date on which the F-tT based its decision. I note that the Secretary of State does not assert now that the Appellant had failed to comply with any requirements to submit information.

51. Ground B relates to the F-tT not directing CMS to make a decision regarding the issue of shared care. The Appellant's position in relation to shared care remains unclear to me. It is not submitted to me that the F-tT should have made a determination about shared care, and the F-tT was not asked to make such a determination. It follows that the Appellant's criticism of the F-tT in this regard is not relevant to whether the F-tT made a material error of law.

52. Ground C related to the F-tT not addressing the issue raised by the Appellant regarding incorrect, missing or false information from CMS. I note that the Secretary of State's first written submissions to the Upper Tribunal submitted that the F-tT did not engage sufficiently and explicitly with this issue and invited me to set aside and remit on that basis. The Secretary of State did not consider whether any such error was material. By the time of the oral hearing, the Secretary of State was no longer maintaining that this was an error of law.

53. I have examined the Appellant's documentation regarding material which is said to be incomplete, or missing, or inaccurate. Much of that information has since been provided. Some of the Appellant's claims of inaccuracy are in reality factual disputes, or identify minor errors in paperwork. The Appellant has, however, identified a number of areas where material provided by the Secretary of State is inaccurate in significant respects.

54. The F-tT acknowledged that there was inaccurate material. The Statement of Reasons shows that in order to establish facts the F-tT went through the chronology of events with great care, eliciting appropriate information from the parties to fill any gaps and resolve uncertainties. The F-tT identified that material from the Secretary of State was at times inaccurate; for example in paragraph 29 of the Statement of Reasons the F-tT identified a CMS note which could not be relied on because of internally conflicting dates. In paragraph 34 of the Statement of Reasons, the F-tT noted that a significant event had been left out of a chronology provided by the Secretary of State. The F-tT said '*The Tribunal agrees with* [the Appellant] *that this is one of numerous errors and omissions made by CMS in the appeal papers. This has consequently had an*

adverse effect on the clarity of the decision-making by CMS on this case.' There was no requirement for the F-tT to engage with each line of the Appellant's lengthy submissions about missing and incomplete documentation. The F-tT engaged with the issue entirely appropriately, and plainly bore those difficulties in mind when reaching decisions about the chronology of events. This ground of appeal is not an error of law, and in any event had no material bearing on the outcome of the appeal, given that the F-tT's decision rested on a limited number of events which it was able to make clear findings about.

55. Other matters raised by the Appellant in submissions to this tribunal relating to the CMS's handling of the mandatory reconsideration process, and factual matters, are also not errors of law.

E. Set aside, and whether to remit or remake the decision

56. As there were material errors of law in the F-tT's decision, I set that decision aside.

57. The Secretary of State's initial submissions to the Upper Tribunal asked for the case to be remitted to the First-tier Tribunal, without any reasons given. The Secretary of State's position now is that I should remake the decision, given that findings of fact have been made, that the specialist jurisdiction of the F-tT is not required, and given the overriding objective. The Appellant submitted that the case should be remitted to the F-tT so that his appeal rights could be preserved.

58. I have determined that I will remake the decision. I have taken that course in line with the overriding objective. Although the chronology is complex, the matter in issue is limited to determining the date of an increase in child maintenance, and many areas of disputed fact are not relevant to that issue. The central facts which are relevant to this case are all agreed. There is no need to use the specialist knowledge of the First-tier Tribunal to determine the relevant facts. There is already sufficient evidence on all relevant points, there are full submissions from all parties, and this case is extremely old. The fair and just course is to remake the decision.

F. The remade decision

59. This appeal is allowed. I remake the decision which the Secretary of State should have made on 7 March 2018 as revised on 22 May.

    I remake the decision in the following terms:

    Standing in the shoes of the Secretary of State remaking the decision of 7 March 2018 as revised on 22 May 2018, I make an anytime revision of a previous decision for official error. The decision I revise is the decision of 30 March 2017. The decision of 30 March 2017 as revised is a supersession on the basis that the maintenance calculation of 13 February 2017 was made in ignorance of a material fact. The Appellant is liable to pay child maintenance at the rate of £137.03 from 30 March 2017 to 17 January 2018 inclusive.

60. Subsequent decisions by CMS which govern the period after 18 January 2018 are not affected by this appeal.

61. This is an appeal against a decision by the Secretary of State on 7 March 2018 as revised on 22 May 2018. The Appellant seeks to persuade me that it is an appeal against a decision by the Secretary of State on 7 March 2018, without reference to 22 May 2018. That cannot be right, as the Appellant agreed with the decision which was taken on 7 March 2018, which was that the increase in payments should take effect from 30 August 2017. The decision which the Appellant disagrees with is the revision of the 7 March 2018 decision, taken on 22 May 2018, to backdate those payments to the very start of child maintenance liability in January 2017.

Findings of fact

62. I make the following findings of fact.

    a. The first calculation of child maintenance in this case was made on 13 February 2017 with an effective date of 18 January 2017 and was based on historic income, giving a weekly liability of £46.96. That is not disputed.

    b. The Appellant had gross income of £45,639 from a date prior to that first calculation. That is not in dispute and is based on material provided by the Appellant. That was over 25% more than the figures provided by HMRC. The weekly child maintenance figure based on that current income would be £137.03 per week.

    c. The Appellant was asked to provide updated earnings information on around 24 February 2017. It is apparent on the face of the documentation and not disputed that the Appellant's updated earnings information form was dated 8 March 2017 but stamped in the mailroom at CMS on 21 March 2017 (p28 and 425) and I find it was received on 21 March 2017.

    d. Meanwhile, the Second Respondent applied for mandatory reconsideration of the £46.96 calculation. On 14 March 2017 CMS noted (p370) that '*with no evidence on the system to update PP's income, Mandatory Reconsideration has been rejected'*, and the figure of £46.96 was confirmed.

    e. On 30 March 2017 the Second Respondent contacted CMS. Based on CMS records (p161) I find that she told CMS that the Appellant was earning more currently than his historic income, that she had been on the online calculator and worked out that he should be paying more, and that she wanted a higher payment 'now'. CMS did not change the calculation.

    f. I do not put any reliance on a note at p155 of a telephone call from the Appellant in March 2017 as the dates are internally inconsistent; I accept the Appellant's submission that the note must be inaccurate.

    g. On 30 August 2017 the Second Respondent again telephoned CMS to give information about the Appellant's income. I make that finding on

the basis of notes at p13 and 161. CMS did not change the calculation, and a note on the file shows that CMS had not taken account of the Appellant's updated earnings information which they had received on 21 March 2017: the note reads '*this is sufficient information to begin a new change to income (person with care disputed non resident person's income at initial but did not provide enough evidence)*'.

h. CMS did not change the calculation until 7 March 2018, when it increased payments to £137.03 per week, backdated to 30 August 2017. That is not in dispute. That was a supersession decision.

i. Although formal decision letters were not sent out relating to the 7 March 2018 decision, I find that both the Appellant and the Second Respondent were aware of that decision by 24 April 2018; on that date the Appellant spoke to CMS, having received a demand for arrears, and the decision of 7 March 2018 was explained to him, as shown in notes (p168). The Second Respondent had already had a discussion about the decision, as shown by notes of a telephone call on 16 March 2018.

j. CMS subsequently, on 22 May 2018, revised the decision of 7 March 2018. Notes record the reason that '*this is the initial effective date of the case and we have received evidence that the current income figure should have been in place at the initial effective date'*. It appears that the time limit for application for revision had been extended, presumably because of the delay in notifying parties of the 7 March decision.

Official Error

63. I invited submissions about whether there had been official error. The Secretary of State submits that there were official errors by the Secretary of State, and I agree. The Secretary of State submits that the official errors empower me to backdate the increased payment to the start of the maintenance liability, 18 January 2017. I do not agree with that effective date.

64. The Secretary of State submits that there were official errors early in CMS's dealings with this case, including:

(i) concluding the mandatory reconsideration process on 14 March 2017 without ascertaining the Appellant's current income, whether by awaiting information from him or obtaining it from his employer (I am told by Mr Simpson of counsel that there was no system for CMS to obtain 'real time' information from HMRC at that point in time);

(ii) not acting immediately on receipt of current income information from the Appellant on 21 March 2017.

65. The first action is arguably an official error; the second inaction is not, for the reasons I have already given. Whether they were official errors or not, I am not persuaded that they were official errors from which a decision arose which falls to be revised. Applying regulation 14 of the 2012 Regulations, only decisions under sections 11,12 and 17 of the 1991 Act which arose from an official error can be revised. There was no decision-making under those sections which

arose from errors on 14 or 21 March. It follows that revision for official error is not permitted, even if there was official error on those days.

66. The Secretary of State also submits that there was an official error on 30 March 2017. I agree. That official error arose once CMS had been in possession of the current income for some days, and was asked by the Second Respondent to revisit its maintenance calculation, but still did nothing. That was the situation on 30 March 2017. There was an error on that day in failing to respond properly to the Second Respondent's request and failing to act upon the updated income information which had been in the hands of CMS for nine days. That was an error made by an officer of Department for Work and Pensions. It was not contributed to by any person outside that Department; in particular, there is no dispute that both the First Respondent and Appellant provided accurate information to the best of their knowledge about the Appellant's income. Neither of them contributed to the failure to investigate. It therefore falls within the definition of 'official error'.

67. A direct result of the error was to refuse the First Respondent's verbal application to increase child maintenance, and to maintain the existing level of child maintenance. That decision 'arose from official error' in the wording of regulation 14 of the 2012 Regulations.

68. What sort of decision was made on 30 March 2017? The Appellant submitted at the oral hearing that the Second Respondent was making a complaint on that day and, by implication, there was no decision. I do not agree. The request by the Second Respondent can properly be characterised as a request for supersession: although she would not have used those words she was plainly asking CMS to increase the maintenance assessment on the basis of current income, after the period for revision had expired.

69. Supersession was available to CMS on 30 March 2017. It was available under Regulation 17(1)(b) of the 2012 Regulations: *'A decision mentioned in section 17(1) of the 1991 Act may be superseded by a decision of the Secretary of State, on an application or on the Secretary of State's own initiate, where – '(b) the decision was made in ignorance of, or was based on a mistake as to, some material fact'*.

70. The CMS official who liaised with the Second Respondent on 30 March 2017 decided not to increase the maintenance assessment. That amounted to a decision not to supersede.

71. Can that refusal to supersede be revised for official error? Where there has been an official error, regulation 14(1) permits revision of '*A decision to which section 16(1A) of the 1991 Act applies*'. Subsection 16(1A) of the 1991 Act refers to '*a decision of the Secretary of State under section 11,12 or 17'.* Judge Jacobs held in *CCS/1282/2010* that a decision not to supersede can be revised because it is a decision under s17 of the 1991 Act. Judge Jacobs said at [9] that '*the power to revise applies to 'a decision…under section…17': section 16(1A)(a). That is wide enough to cover both decisions to supersede and decisions not to supersede.*' The Secretary of State supported that position, submitting at the oral hearing that the power to revise for official error attached to the decision of 30 March 2017 (as well as to earlier decisions). I agree that the power to revise for official error attaches to a refusal to supersede; in order to decide whether to supersede or not, CMS must apply section 17 of the 1991 Act, and

the ensuing decision is one made 'under' section 17 whether it is a 'yes' or a 'no'. It follows that the refusal to supersede can be revised for official error at any time.

72. Standing in the shoes of the Secretary of State, I revise the decision of 30 March 2017. I revise the decision on 30 March 2017, changing it from a decision not to supersede into a decision to supersede, on the basis that the initial decision (13 February 2017) was made in ignorance of the material fact of the Appellant's current income. Current income differed from historic income by an amount that was at least 25% of the historic income. The maintenance calculation based on that current income has not been disputed; the figure is £137.03 per week.

73. The effective date of the revision and supersession decisions which I have made is governed by the 1991 Act and the 2012 Regulations. The higher level decision which I have made is a revision for official error, which revises the decision dated 30 March 2017. A revision generally takes effect on the date of the original decision which it is revising (unless the original decision had an incorrect effective date). The subsidiary decision which I have made is the changed decision of 30 March 2017; changed from a refusal to supersede into a supersession. A supersession effective date is governed by regulation 18 of the 2012 Regulations. It was a supersession made on application by one of the parties, and so under regulation 18(6)(a) it takes effect on the date of the application, which I have found to be 30 March 2017.

Supersession

74. I also invited submissions on whether the Secretary of State should have taken a new supersession decision in March and May 2018. Standing in the Secretary of State's shoes in March and May 2018 supersession was arguably available under regulation 17(1)(b) of the 2012 Regulations: '*A decision mentioned in section 17(1) of the 1991 Act may be superseded by a decision of the Secretary of State, on an application or on the Secretary of State's own initiate, where – '(b) the decision was made in ignorance of, or was based on a mistake as to, some material fact'*. However, as revision for official error was also available in March and May 2018, supersession is barred under regulation 17(4).

75. The Appellant invites me to proceed on the basis of supersession. The Appellant invites me to make the same decision that the Secretary of State took on 7 March 2018: that there was a supersession with an effective date of 30 August 2018. The basis for supersession suggested by the Appellant is that there was a change of circumstances at around that time (change of circumstances being one route to supersession). The Appellant said that activity in August 2018 when the parties had been dealing with financial dispute resolution arising from their divorce, on the back of which the Second Respondent had contacted CMS with further detail about the Appellant's earnings, amounted to a change in circumstances. I do not accept that. Details provided by the Second Respondent in August 2018 were not about anything new; it was simply that she had more evidence about what the Appellant had been earning. CMS already had that evidence, from the Appellant directly, but had not acted on it. The Appellant's earnings had not changed, or at least not changed significantly. The matters described by the Appellant have no bearing

on the maintenance calculation and cannot amount to a change in circumstances for the purposes of child support. In any event, as I have said, supersession is not an available decision in March and May 2018 given that revision for official error is available.

G. Other issues

76. Shared care was not an issue before me, and no party suggested that it was. I understand that the F-tT may be seized of that issue now, but it is not a point for consideration here.

77. The Appellant wished me to consider matters which fall outside the jurisdiction of the Upper Tribunal. In particular, the Appellant wished me to listen to a recording of a call between him and a member of CMS. He asked me to make an order for CMS to deal with the issues he has raised in a document about inaccuracies and inconsistencies. He asked me to make an order for costs in relation to the time he has spent dealing with CMS. I understand why the Appellant asked for me to consider those issues, but none of them fall within this jurisdiction, and so I do not make any orders in relation to them.

78. This is not a forum to handle complaints about CMS. However, it is proper to record that the Secretary of State's actions have caused confusion, delay, and ensuing distress to both parents in this case. Decisions have been communicated with no clarity about their legal bases. It has not been clear whether decisions are supersessions or revisions, on what statutory grounds decisions were made, and on the basis of what facts. It has not been clear why decisions were held to be effective from certain dates. There has been inaccurate paperwork including misdated notes of telephone conversations. There has been incomprehensible correspondence sent to the parties and a failure to notify parties promptly about at least one decision. There has been a lack of clarity and consistency about the position on appeal and a wholesale failure to tether submissions to the statutory framework, with the result that the F-tT was not assisted with accurate submissions, and the first submissions to the Upper Tribunal were entirely unhelpful. Matters improved considerably only when the Upper Tribunal made directions and the Secretary of State instructed counsel, Mr Simpson, who made all efforts to assist the Upper Tribunal to find the correct legal route through the morass created by the Secretary of State.

79. At the best of times is extremely difficult for parties in the child maintenance jurisdiction, who frequently do not have legal representation, to work out what has happened, and whether they have a proper basis for challenging a decision. Those difficulties are compounded by the sort of confusion and inconsistency which arose in this case. That in turn hampers the work of the tribunals which consider these cases. Improved clarity and consistency from CMS would be most welcome.

Kate Brunner KC
Judge of the Upper Tribunal
Authorised for issue on 3 May 2024