IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2023-001675-CSM
UA-2023-001678-CSM
[2024] UKUT 343 (AAC)

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

Between:

DB

Appellant

- v –

1. SECRETARY OF STATE FOR WORK AND PENSIONS

2. CE

Respondents

Before: Judge Markus KC

Decision date: 31 October 2024
Decided on consideration of the papers

Representation:
Appellant: Mr J. Atkinson (counsel)
1st Respondent: Decision Making and Appeals, Leeds
2nd Respondent: In person

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. In these appeals, the Appellant and Second Respondent are respectively the father and mother of three children. The children live with the Second Respondent who is therefore the Parent with Care ("PWC") and the Appellant is the Non-Resident Parent ("NRP").

2. The NRP had originally been assessed as liable to pay child support on the basis that all three children were qualifying children ("QCs"). I do not need to refer to the entire history of the child support decisions and start the chronology at 18 September 2020 when the Secretary of State decided, by way of supersession of a previous decision, that from 7 September 2020 there were only two QCs.

3. When the second QC turned 18, the CMS superseded the maintenance calculation on the basis that there was only one QC but on 20 January 2021 revised

that decision to calculate maintenance on the basis of 2 QCs with effect from 7 September 2020. The NRP appealed against that decision. I refer to this as "the QC appeal".

4. In the meantime, following an annual review on 8 November 2020 and with effect from that date, the Secretary of State superseded the assessment of the amount of child maintenance, on the basis of the NRP's historic income in the tax year ending April 2019. The NRP sought mandatory reconsideration which was refused on 8 February 2021 and the NRP appealed against the 8 November decision. This is referred to as the "historic income appeal".

5. The FtT consolidated the two appeals.

6. In responding to the historic income appeal, the PWC submitted that there was a diversion of income from the NRP to his wife. This in essence repeated the substance of an application that the PWC had made in 2019 for a variation of the child maintenance assessment on the basis that the NRP was diverting his income to his wife. That application had been rejected, mandatory reconsideration was refused and the PWC did not appeal.

7. The FtT judge made directions on 24 November 2021. The FtT observed:

> "The PWC's[1] variation request is relevant to the level of income to be determined by the Tribunal and should be considered as she is a party to the NRP's appeal and it would be undesirable for a differently constituted tribunal to make different findings on the same facts in a future appeal."

8. The FtT's directions included that the Secretary of State

> "make a preliminary consideration of the PWC's variation application… pursuant to section 26B Child Support Act 1991 and determine the application or refer it to the Tribunal under section 28D(1)(b) Child Support Act 1991…"
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> and that the Secretary of State provide a supplementary submission on that matter.

9. The Secretary of State responded on 3 December 2021 as follows:

> "In accordance with Section 28B of the Child Support Act 1991 where an application for a variation has been duly made to the Secretary of State the Secretary of State may give it a preliminary consideration. The Secretary of State may on completing such a preliminary consideration, reject the application (and proceed to make decision on the application for a maintenance calculation without any variation) if it appears to the Secretary of State that there are no grounds on which a variation could be agreed to or that the Secretary of State has insufficient information to make a decision on the application for the maintenance calculation.
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> The Secretary of State has considered the PWC's request for a variation on the ground of diversion of income. However, the PWC has not been able to provide the Secretary of State with sufficient evidence to depict whether the NRP is diverting income and to who or for what purpose income, if any is being diverted.

[1] In this and all other citations from the documentation, I have substituted "the PWC" and "the NRP" for the names of the mother and father respectively.

> In this case the Secretary of state has decided to refuse the application for a variation on the ground of diversion of income and this is notification to all parties of the refusal on that ground.
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> With regard to the issue of the variation refusal, the Tribunal are respectfully requested to consider and decide if the Secretary of State is correct to refuse the variation application and to confirm or replace the decision as they consider appropriate…."

10. On 28 April 2022 the FtT judge noted that the Secretary of State had considered and rejected the variation application and made further directions for the progress of the appeals including for disclosure of documents relevant to the variation application and directed that the appeals should be listed for a 2 day hearing.

11. On 20 May 2022 the NRP wrote to the tribunal to withdraw both appeals. In directions dated 9 June 2022, the FtT noted that the withdrawals were automatically effective. On 28 June 2022 the PWC applied for the appeals to be reinstated, because she wanted the FtT to consider the matter of diversion of income. By directions dated 26 August the FtT reinstated the appeals.

12. On 26 September 2022 the NRP applied for certain information to be disclosed to the PWC. A directions hearing took place on 20 November 2022 at which the NRP and DWP were directed to provide further evidence.

13. The NRP then made an application to the FtT to set aside the directions in regard to the variation application, on the ground that the FtT had no jurisdiction to determine that matter, and to determine the two appeals without a hearing on the available evidence.

14. On 30 May 2023 the FtT decided that the appeals properly included consideration of the variation application, refused the NRP's application to set aside the directions, and made further directions for the progress of the appeal.

15. In addressing the NRP's submissions in regard to the FtT's jurisdiction to determine the variation application, the FtT first addressed what would be the effective date of any variation. It noted that by virtue of section 28G of the Child Support Act 1991 variations take effect as revisions or supersessions. It noted that the PWC had said that the maintenance calculations in this case were always wrong and so the application was for a revision. The application had been made on 5 August 2021 (that being the date of the PWC's submissions to the tribunal in which she sought a variation) and so was made within 13 months of both decisions under appeal. The FtT ruled that a variation would be effective from the date of the decisions being revised, that is 7 September 2020 and 8 November 2020.

16. The FtT then addressed the NRP's submission that the FtT lacked jurisdiction to deal with the variation application. It said:

> "…Where an application for a variation is made by a party during the proceedings, the Tribunal can use its case management powers in Rule 5(1) to regulate its own procedure, by directing the CMS to consider the application, as it is bound to do anyway, having been served with a copy of it. It is not necessary to require the PWC to bring a separate appeal, as the variation issue was an issue raised in the current appeals, to which she was a party."

17. The FtT referred to two Upper Tribunal cases (*DE v SSWP and AE* [2018] UKUT 128, and *AB v SSWP and RS* [2021] UKUT 129), the power in section 20(7) to consider issues not raised in the appeal, and its role to ensure that as far as possible the NRP is assessed as liable to pay the amount of maintenance for which the law provides. The FtT concluded:

> "The NRP's suggestion that the appeals should be shorn of the issue of diversion and the PWC left out of time to appeal would deprive her of a remedy or involve additional procedural hurdles of filing an out of time appeal and asking for time to be extended. Neither approach is in the interests of justice."

18. The FtT gave the NRP permission to appeal that decision and stayed the appeal in the FtT pending the outcome of the appeal to the Upper Tribunal.

19. The NRP and the Secretary of State have filed submissions in the appeal. The PWC has simply stated that she has nothing further to add. All the parties have stated that they do not request an oral hearing. I do not need to make findings of fact, and I am able fairly to determine the issues of law on the basis of the written submissions without an oral hearing. It would be disproportionate to require an oral hearing in those circumstances.

Legislative framework

20. Child support is payable in respect of a "qualifying child", which is defined in the legislation. The amount of child support is calculated on the basis of the NRP's gross weekly income. Either the NRP's 'historic income' or 'current income' is used to calculate the gross weekly income. There are complex rules governing this which I do not need to rehearse for the purpose of this appeal.

21. The Child Support Act 1991 (CSA) and the Child Support Maintenance Calculation Regulations 2012 ("the 2012 Regulations") provide for the calculation of child support to be varied on specified grounds, and variation can reduce or increase the NRP's liability. The grounds are specified in the 2012 Regulations. One of the grounds is "Diversion of income", provided for in regulation 71, which applies where the NRP can control the amount of income they receive or the amount that is taken into account as their gross income and they unreasonable reduce that amount by diverting it to someone else or for some other purpose. Where a variation is agreed under regulation 71, the diverted income is taken into account as the NRP's income.

22. A variation can be made following an application by the PWC, NRP or both. If the application is made before the child maintenance calculation is made, section 28A applies. The application need not be in writing unless the Secretary of State directs it and must state the grounds.

23. Section 28G allows an application for a variation to be made when a maintenance calculation is in force. The Child Support (Variations)(Modification of Statutory Provisions) Regulations 2000 modify sections 28A to 28F where an application for a variation is made under section 28G.

24. Section 28B (as modified in regard to section 28G applications) permits the Secretary of State to give preliminary consideration to an application, and to reject the application and proceed to revise or supersede a maintenance calculation decision without taking the variation into account, or not to revise or supersede a

maintenance calculation. The grounds for rejection are set out in section 28B(2) and in regulations. One of the grounds, set out in Regulation 57 of the 2012 Regulations, is that the applicant does not provide sufficient information to enable a ground to be identified, or the facts alleged do not bring the case within the ground or do not support the ground.

25. By section 28D (as modified), where an application for variation has not failed (which includes where it has not been rejected under section 28B) the Secretary of State shall either agree or not to a variation and decide whether to revise or supersede the maintenance calculation, or refer the application to the FtT for the tribunal to determine what if variation if any is to be made.

The parties' submissions

26. Mr Atkinson on behalf of the NRP submits that the FtT in effect turned the respondent into the appellant contrary to the principle in *DE* (referred to above). The FtT had been seized of two appeals brought by the NRP. Neither concerned a variation. The variation application was raised by the PWC who was the respondent to the appeals but was now making the case.

27. He further submits that section 28A requires an application to be made to the Secretary of State by a parent. It cannot be made to the Tribunal or by the Secretary of State or on the Tribunal's own motion. The FtT had no power under the Tribunal's rules of procedure to direct to the Secretary of State to make a preliminary consideration of the application and either determine it or refer it to the FtT and, in any event, the Secretary of State refused the application but did not refer it to the FtT so the application was not before the Tribunal and was not an issue in the appeal. Further section 20(8) allows the Tribunal to remit the case to the Secretary of State only where the appeal is allowed.

28. Mr Atkinson submits that the FtT wrongly relied on *AB* (referred to above). In that case, a variation application was the subject of the appeal and the FtT allowed the appeal but on a different ground of variation to that relied on by the appellant. This was a straightforward application of the regulation 56(4) which permits a variation made on one ground to be treated as a variation made on another ground.

29. He further submits that it is clear that there is no power for the Secretary of State to consider an application of their own initiative because the legislation requires an application to be made setting out the grounds, and because the effective date is fixed by reference to the date of the application.

30. In response, the Secretary of State submits that one issue in the appeal before the FtT was the amount of the NRP's child maintenance liability. The PWC raised the issue of the NRP having additional income and this would affect the amount of the child maintenance liability. It was open to the FtT to consider this issue during the appeal. Applying the reasoning in *AB*, the PWC raised an issue which was material to the decision the FtT was considering and, in the exercise of its inquisitorial function, the FtT was bound to consider the additional income to ensure, as far as it could within its rules of procedure, that the NRP was being assessed as liable to pay the correct amount of child maintenance. The FtT's decision was consistent with the overriding objective. It did not turn the respondent into the appellant, but merely enabled the FtT to exercise its inquisitorial function to reach the correct decision.

Discussion and conclusion

31. I agree with Mr Atkinson's submission that the FtT did not have power to direct the Secretary of State to make a decision under the Child Support Act. The judge relied on rule 5(1) of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) 2008 which allows the Tribunal to regulate its own procedure. However, procedural powers cannot authorise a direction to a party to exercise a substantive statutory function. The FtT's only power to require the Secretary of State to make a decision under the Child Support Act is that contained in section 20(8)(b) of the Act and that power is exercisable only when the FtT has allowed an appeal.

32. However, that is not the end of the matter. Where a party raises an issue in the course of an appeal, the FtT may invite another party to consider that issue. Doing so carries no peremptory force. If the tribunal had invited the Secretary of State to consider a variation, it would have been open to the Secretary of State to refuse to do so and the tribunal could have done nothing about it.

33. Although the FtT overstepped its powers in making a direction to exercise a statutory function, the effect was to invite the Secretary of State to consider the matter. In any event, the Secretary of State did not need to be invited to consider the matter. Regardless of whether the FtT had power to do what it did, the Secretary of State could at any time have considered a variation if an application was made. That is what occurred here.

34. In *R(CS) 2/06* the PWC appealed against the calculation of the NRP's maintenance liability. The PWC had not sought a variation until she appealed. In her letter of appeal, she referred to the NRP having rental income. The Secretary of State invited her to apply for a variation, she did so, the Secretary of State rejected it on preliminary consideration and the tribunal allowed the appeal by making a variation. Commissioner Jacobs, as he then was, considered whether the PWC's letter of appeal could be treated as a variation application (paragraphs 25-29).

35. Commissioner Jacobs referred to the approach by the Commissioners in the social security jurisdiction to allow letters to be treated as applications for whatever course of action is most appropriate in the circumstances of the case, and that letters from claimants should be dealt with by reference to their substance rather than form. He said the same considerations apply in child support, but taking into account that in child support there will usually be contentions involvement by the two parties in addition to the Secretary of State and that an interpretation of a letter that works to the benefit of one of the parties may be to the detriment of the other. Therefore a greater degree of restraint is appropriate. He went on to say:

> "26. … I suggest that in applying this approach in child support two qualifications are appropriate.
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> *27. First qualification:* It is appropriate to interpret letters by reference to their substance rather than their form. This is especially so if the writer is not represented and is not familiar with the child support adjudication procedures. However, it is not appropriate simply to treat any point of contact as an application just because that will be advantageous to the person concerned. To do so may operate to the disadvantage of the other party.

> *28. Second qualification:* The approach can only be applied within the limits allowed by the legislation. In the case of an application for a variation, that means that it must be applied consistently with the Variations Regulations…
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> 29. Bearing that in mind, it is possible that the Secretary of State could have treated the letter of appeal as an application for a variation."

36. In the present case, the PWC had asserted that there should be a variation on the ground of diversion of income and provided submissions as to this. She did not do this by making an application to the Secretary of State. She did it by way of submissions in the appeal which were directed to the tribunal and the other parties, including to the Secretary of State. The submissions stated the grounds of the application and so were consistent with the legislative requirements of a variation application. It was appropriate for the Secretary of State to treat these submissions as an application for a variation.

37. The Secretary of State provided a supplementary submission to the FtT addressing the variation application. The submission stated that the Secretary of State had been requested to make preliminary consideration of the application and referred to section 28B and summarised the grounds upon which the application could be rejected. The submission then stated that the Secretary of State had decided to "refuse" the application for variation. As this was a decision under section 28B(2), the decision should have been expressed as one to "reject" the application. Nonetheless it is clear from the content of the supplementary submission that the Secretary of State had made a decision under section 28B(2). Furthermore, although the Secretary of State did not frame the decision in the terms of the statutory grounds for rejection, the finding that the PWC had not provided sufficient evidence of a diversion amounted to a finding that the facts alleged did not bring the case within the ground or did not support the ground.

38. Having decided to reject the application, the Secretary of State had no power to refer the application to the FtT. That power is found in section 28D. It only arises if the application has not "failed". Failure is defined in section 28D(2) as including where an application has been rejected under section 28B. In this case, the application had been rejected and therefore had failed and so it follows that the power to refer the application to the FtT did not arise.

39. However, that error by the Secretary of State (and the corresponding error by the FtT in accepting that the Secretary of State had made a valid referral) was not material if the FtT was in any event entitled to consider the variation application. This brings me to the nub of the issue in this appeal: in this appeal by the NRP against the assessment of his income, did the FtT have jurisdiction to consider the PWC's case regarding a variation?

40. *R(CS) 2/06* assists in this regard. As Commissioner Jacobs observed at paragraph 12, a variation decision is not freestanding but takes effect as a decision on the calculation. If the Secretary of State rejects the application, the tribunal is entitled to decide whether that was correct (paragraph 32). However, there is then a question as to what the tribunal can do if it decides that the rejection was not correct. The Commissioner explained at paragraphs 33 to 36 that section 28D can only apply if the application has not "failed" and so cannot apply if the application has been rejected under section 28B. As the Commissioner said, "there can be no determination if an application is rejected".

41. Commissioner Jacobs went on to consider the tribunal's powers on appeal. He said that the tribunal's powers depend on the form of the Secretary of State's decision. If the application was made under section 28G(1), the Secretary of State must revise or not revise or supersede or not supersede the maintenance calculation decision. In that case, the Secretary of State had decided not to revise the decision and there was no appeal against that decision, but the PWC had already made an appeal against the decision as originally notified and so was not required to add to it.

42. Commissioner Jacobs noted that the appeal had not been updated to take into account the rejection of the variation application and that section 20(7)(a) entitles a tribunal to limits its consideration to issues that are raised in the appeal. So he said that the Secretary of State may wish to consider whether to allow an appeal to be supplemented before it is forwarded to the Appeals Service. I note that that is no longer an option as appeals are now lodged with the tribunal and so the correct approach now would be for the FtT to consider whether to allow an appeal to be supplemented.

43. Finally, the Commissioner said that once the appeal is before the tribunal, it can substitute a determination under section 28D for a rejection under section 28B, and it can substitute a supersession for a revision. This is because section 20(8)(a) authorises a tribunal to make such a decision as it considers appropriate and because, as decided by the Tribunal of Commissioners in *R(IB) 2/04,* a tribunal stands in the shoes of the Secretary of State and can make any decision that the Secretary of State could have made.

44. How does the Commissioner's reasoning in *R(CS) 2/06* assist in the present case? *R(CS) 2/06* was a case where the variation application had been made by the appellant. But the reasoning is not limited to such a situation. The position is the same where the variation application has been made by the respondent. This is because the tribunal is seized of the maintenance calculation that is under appeal, and any variation would affect that calculation.

45. The FtT in the present case was considering an appeal against a maintenance calculation. The NRP set out grounds for arguing that the calculation was wrong. The PWC was also entitled to argue that the calculation was wrong. She was not limited to the grounds set out by the NRP. She could raise any issue which was relevant to the maintenance calculation decision. As I have set out, a variation is relevant to a maintenance calculation.

46. Section 20(7)(a) provides that the tribunal need not consider any issue that is not raised in the appeal. An issue is raised in an appeal if it is raised by one of the parties at or before the appeal tribunal's decision: see *SC v CMEC (CSM)* [2011] UKUT 458 (AAC) at paragraph 13. So in the present case the issue of the variation raised by the PWC in her submissions and addressed by the Secretary of State under section 28B was an issue raised in the appeal even though it was raised after the appeal was commenced.

47. I do not consider that *DE v SSWP* assists Mr Atkinson. In that case, the tribunal had, "out of the blue", ignored the variation issue raised in the appeal and instead addressed the income calculation under the usual rules. Due to that decision being set aside by the FtT and the next decision being set aside by the Upper Tribunal on appeal, there were two further decisions by the FtT, the second of which came before the Upper Tribunal in *DE*. The Upper Tribunal allowed the appeal on undisputed

grounds. In the course of re-making the decision, the Upper Tribunal commented on the approach taken in the FtT. Upper Tribunal Judge Mitchell said as follows:

> "46. …I should record that I am not comfortable, taking into account the proceedings on all three First-tier Tribunal decisions, with the way in which the proceedings were conducted, or to put it another way the dynamics of that process. The tribunal was dealing with an appeal brought by Mrs E yet the papers give the impression that it was Mr E who was being required to make good his case. During the First-tier Tribunal proceedings, Mr E supplied, in response to First-tier Tribunal directions, some 1,000 pages of documentary evidence and submissions. By contrast, Mrs E' s documentary input was limited to no more than 10 pages or so comprising vaguely expressed arguments and assertions, much of which concerned the non-issue of shared care, and a handful of receipts for meals purchased during Mr E' s holiday in West Wales (which Mr E claimed were improperly obtained).
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> 47. Now I am fully aware that the First-tier Tribunal has an inquisitorial function but that does not permit it to transform a respondent into a de facto appellant. I am concerned that this may have happened in this case. At no point did the First-tier Tribunal require Mrs E, nor for that matter the Secretary of State, to set out a case concerning the correct calculation of Mr E' s income for the purposes of his child maintenance calculation."

48. Mr Atkinson makes too much of these passages. In essence, the Judge was saying no more than that it had been unfair of the tribunal to introduce new issues without giving the parties an adequate opportunity to address them. It is not clear what the judge meant when he talked of transforming a respondent into a de facto appellant and, in any event, those observations are *obiter*.

49. In any event, the position in the present appeals was entirely different to that in *DE*. As I have set out, the variation issue had been clearly set out and the tribunal gave directions enabling all the parties to address it. There was no unfairness in the procedure adopted.

50. In *AB v SSWP and RS,* the mother appealed against the FtT's failure to agree an additional income variation. The FtT allowed the appeal not only on that basis but also on the basis of diverted income. One of the father's grounds of appeal to the Upper Tribunal was that it had not been open to the FtT to determine issues not raised in the notice of appeal and he relied on *DE*.

51. Judge Poynter opened his consideration of this ground of appeal as follows:

> 37. The suggestion that the Tribunal had no jurisdiction other than to deal with the points expressly raised in the Notice of Appeal betrays a fundamental misunderstanding of the nature of an appeal to the Social Entitlement Chamber of the First-tier Tribunal.
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> 38. Such an appeal is not a trial of pleadings. Neither is it adversarial. Rather, the Tribunal's jurisdiction is inquisitorial and enabling. The Tribunal's role is to ensure, as far as it can within its rules of procedure, that non-resident parents are assessed as liable to pay the amount of maintenance for which the law provides, neither more nor less (see *SC v Child Maintenance and Enforcement Commission and JM* (CSM) [2011] UKUT 458 (AAC)).

> 39. In the exercise of its inquisitorial and enabling jurisdiction, the Tribunal has power to give any decision that the Secretary of State could have given when deciding the matter under appeal. It is not merely entitled, but bound, to consider all the issues that are clearly apparent from the evidence and not just those raised by the parties (see, by analogy, *Mongan v Department of Social Development* [2005] NICA 16 reported as *R3/05 (DLA)* and *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495 reported as *R(IB) 4/07*).
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> 40. Furthermore, a party can raise an issue at any time "at or before the hearing": see the decision of a Tribunal of Commissioners in *R(IB) 2/04* at [32] (which was disapproved, but not on the point of timing, in *Mongan* at [15]).

52. He then went on to address regulation 56(4) of the 2012 Regulations which allows the Secretary of State to treat an application for a variation made on one ground as made on another ground. That was pertinent to the case before Judge Poynter, although Judge Poynter observed that the power would have little if any practical function by the time an appeal reaches a tribunal because, by the that time, any issue that would lead the tribunal (standing in the shoes of the Secretary of State) to exercise that power would clearly be apparent from the evidence and so would be an issue raised by the appeal – see *Mongan*. The decision in *AB* did not turn on regulation 56(4).

53. In *SC v CMEC* [2011] UKUT 458*,* referred to by Judge Poynter in *AB*, the father was the appellant but the mother raised additional grounds in regard to the maintenance calculation. Upper Tribunal Judge Poynter said at paragraph 16:

> "If the result of considering the additional mother's grounds was that the maintenance calculation would increase rather than reduce, then that is the decision which the judge, in the exercise of his inquisitorial jurisdiction, should have given even though the Father had appealed and the Mother had not. In *Gillies v SSWP* [2006] UKHL 2 at [41] (a case concerned with the social security system) Baroness Hale of Richmond observed that "the system is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less". In my judgment, the same principle applies to child support. The Tribunal's role is to decide the issues before it in such a way as to ensure, as far as it can, that non-resident parents are assessed as liable to pay the amount of maintenance for which the law provides, neither more nor less.

Conclusion

54. For the above reasons I conclude that the FtT did not err in including the variation issue within the scope of the appeals.

55. The stay on the proceedings in the FtT is lifted as a result of this appeal having been determined, and the appeals may now proceed in the FtT.

Kate Markus KC
Judge of the Upper Tribunal

Authorised for issue on 31 October 2024