IN THE UPPER TRIBUNAL **Case No.** CCS/2082/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal, sitting at Derby on 15th May 2015 (tribunal ref: *SC 034/14/00886*), involved an error of law. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I set aside the Tribunal's decision and re-make the First-tier Tribunal's decision as follows:

1. Mr B's appeal against the Secretary of State's child maintenance calculation decision of 3rd June 2014 is allowed.

2. I set aside the Secretary of State's decision and remit the case to the Secretary of State.

3. I direct the Secretary of State to make a fresh request for a HMRC figure (within the meaning of regulation 36(1) of the Child Support Maintenance Regulations 2012).

4. Unless regulation 34(2) of the 2012 Regulations requires Mr B's current income to be used, I direct the Secretary of State to determine Mr B's "historic income", and determine his child maintenance calculation, on the basis of that HMRC figure.

5. The effective date for that calculation is 25th May 2014.

REASONS FOR DECISION

Introduction and summary

1. I believe this case is the Upper Tribunal's first opportunity to consider the new legislative scheme for determining child support maintenance liabilities. That new scheme comprises the Child Support Act 1991, as amended by the Child Maintenance and Other Payments Act 2008, and the Child Support Maintenance Regulations 2012 ("2012 Regulations")

2. Under the new scheme, the amount of a parent's child support maintenance liability depends on the parent's gross weekly income. The 2012 Regulations confer an important function on H.M. Revenue & Customs (HMRC) in the fixing of a parent's gross weekly income. This involves HMRC supplying what is referred to by the 2012 Regulations as a "HMRC figure".

3. In this case, the figure supplied by HMRC was out-of-date. It related to the tax year 2008/09 even though HMRC held income data for tax year 2013/14. The 2008/09 figure supplied is said to be some £4,000 more than that for tax year 2013/14.

4. Child support officials tried to obtain another HMRC figure using a computer 'interface' developed for this purpose. But the system refused to accept the command to do so. It seems it was configured to permit only one request for a HMRC figure per maintenance application. Before the First-tier Tribunal, the Secretary of State argued the computer system was simply operating in accordance with the 2012 Regulations. They permitted only a single request for a HMRC figure. If that figure was wrong, it was, in effect, tough luck.

5. The First-tier Tribunal reluctantly refused the non-resident parent's appeal, agreeing with the Secretary of State that the 2012 Regulations operated as he had argued. The Tribunal described this state of affairs as "Kafkaesque" and granted permission to appeal to the Upper Tribunal.

6. Before the Upper Tribunal, the Secretary of State withdrew his previous argument about the effect of the 2012 Regulations. I agree with the Secretary of State that the 2012 Regulations do not embed inaccurate HMRC income data in the child support maintenance calculation. Further requests for HMRC income data are permitted where the data initially provided is out-of-date or inaccurate.

Factual background

7. Using the terminology of the Child Support Act 1991, Mr B is the "non-resident parent" and Mrs B the "parent with care".

8. On 22nd May 2014, Mrs B applied to the Secretary of State, under section 4 of the Child Support Act 1991, for a maintenance calculation in respect of Mr B. This was a new application and it fell to be dealt with under the new child support regime.

9. On 2nd June 2014, the Secretary of State electronically requested Mr B's income data from HMRC. This is known as a "HMRC figure" under the 2012 Regulations. HMRC provided a "HMRC figure" forthwith. However, it concerned tax year 2008/09 and gave an annual income of around £34,000. Mr B was aggrieved with this because he said his current annual income was only some £30,000.

10. Mr B took the matter up with HMRC. He obtained from them written confirmation (dated 3rd June 2014) that their records showed his income for 2013/14 was indeed around £30,000. Mr B informed the Secretary of State's child support officials.

11. In response to Mr B's information, a child support official tried to "re-trigger HMRC button, but it still only pulls through 2009 income", according to a decision-maker's note at p.18 of the First-tier appeal papers.

12. Before the First-tier Tribunal, the Secretary of State argued the law only allowed a single request for a HMRC figure in respect of a particular application for a child maintenance calculation. This was because regulation 35(2) of the Child Support Maintenance Regulations 2012 provides "a request" is to be made which means "there is no provision within legislation for a further drawdown to be attempted at this time".

13. Mr B appealed to the First-tier Tribunal which reluctantly dismissed his appeal. The Tribunal accepted the Secretary of State's argument that one, and only one, 'drawdown' from the HMRC computer system was permitted. Come what may, that figure had to be inputted into the 2012 Regulations' maintenance calculation formula on Mrs B's application for a maintenance calculation.

14. The First-tier Tribunal granted Mr B permission to appeal to the Upper Tribunal. In so doing, it stated "there is a question of law at the heart of the appeal…which relates to the proper extent, if any, to which the Tribunal can go behind the HMRC figure obtained by the Secretary of State (the historic income figure) when making the maintenance calculation for the purposes of the 2012 scheme".

The grounds of appeal

15. In case management directions, I directed that the grounds of appeal were as follows:

(a) whether the Secretary of State and Tribunal wrongly thought reg. 35(2), by referring to "a request", prevents more than a single HMRC request / drawdown on an initial child support application. Arguably, they overlooked section 6 of the Interpretation Act which provides that in any Act (and Statutory Instrument") "unless the contrary intention appears…words in the singular include the plural";

(b) whether there was a valid HMRC figure at all. There appears no obvious legislative provision rendering conclusive the information provided by HMRC. There is a definition of HMRC figure and this refers to income for the "latest available tax year" (reg. 36). If, in fact, the information provided by HMRC is not for the latest available tax year for which they have received the required income information (e.g. HMRC wrongly give information about an earlier tax year), then arguably there is no HMRC figure at all, since the definition of HMRC figure is not satisfied;

(c) whether, on the assumption there was no valid HMRC figure at all, the First-tier Tribunal should have applied reg. 34(2), found that the presumption in favour of historic income was disapplied and so re-made the calculation using current income. To recap, reg. 34(2) refers to cases where "the Secretary of State is unable, for whatever reason, to request or obtain the required information from HMRC".

The arguments

The Secretary of State's position

16. In a helpful submission, the Secretary of State's representative Mr R Whitaker indicates his support for the appeal. Mr Whitaker argues:

(a) when faced with a request for an income figure for child support purposes, HMRC are expected to provide data that is as accurate as they "can reasonably provide". If a non-resident parent has failed to supply HMRC with up-to-date income information, they must bear the consequences of that for child support purposes;

(b) if HMRC mistakenly provide out-of-date income data, that does not constitute a "HMRC figure" for the purposes of the child support maintenance calculation regulations;

(c) the Secretary of State accepts that, when HMRC were requested to provide a "HMRC figure" for Mr B, they did not supply the most recent income data that they held;

(d) there is "good reason" for the regulations referring to the making of HMRC's requests in the singular:

> "the 'drawdown' system…is set up in such a way that only one request can be made per year. This is to prevent that original benchmark 'historic income' figure from being changed over the course of the following year (prior to the next child maintenance review date). This should not normally happen as the 2012 scheme is designed specifically so that there are long term (i.e. of at least a year) assessments in place, except in prescribed circumstances, e.g. where there is a significant change of income (25% or more)."

(e) there must, however, be provision for further requests for HMRC figures where "there is good reason to doubt the validity of the figure provided by HMRC". If, for example, HMRC make a mistake or some technical error results in incorrect data being provided, a further request ought to be permitted. This was such a case;

(f) Mr Whitaker invited the Upper Tribunal to:

> (i) allow this appeal,
> (ii) remit Mr B's appeal against the Secretary of State's maintenance calculation to the First-tier Tribunal for re-hearing,
> (iii) direct HMRC to provide a "valid" response to the Secretary of State's request for an income figure,
> (iv) direct the Secretary of State to re-calculate Mr B's child support maintenance liability based on that valid response and for this to be put to the First-tier Tribunal for its re-hearing of Mr B's appeal.

The parents' position

17. Mrs B is very unhappy. She says "I must express my disgust on how this is being handled" because the First-tier Tribunal judge was "biased" in Mr B's favour and made "quite irrelevant comments" about Mr B's "interesting work". Mrs B did not address the grounds of appeal. Mrs B also made a number of allegations about Mr B's past conduct. I acknowledge Ms B's strength of feeling. However, the allegations made about the First-tier Tribunal judge are groundless. And whatever may, or may not, have happened in this past is not relevant to the issues I have to decide.

18. Mr B disputed Ms B's allegations and noted that, in any event, they were "inappropriate to this case".

19. No party requested a hearing of this appeal. Then parents made no representations about the Secretary of State's suggested disposal of these proceedings.

Legislative framework

Child Support Act 1991, as amended by the Child Maintenance and Other Payments Act 2008

20. Section 11(6) of the Act provides that the "child support maintenance to be fixed by a maintenance calculation shall be determined in accordance with Part I of Schedule 1".

21. As amended by the Child Maintenance and Other Payments Act 2008, Schedule 1.1(1) to the 1991 enacts a "general rule" that "the weekly rate of child support maintenance is the basic rate unless a reduced rate, a flat rate or the nil rate applies". Ignoring the nil rate, where the basic, reduced or flat rate applies, the amount payable is the "applicable rate". Provision is also made for apportionment cases (para. 6) and adjustment in shared care cases (para. 7 & 8) but those are not relevant in this appeal.

22. Where a non-resident parent's gross weekly income is less than £801, the "applicable rate" is simply a percentage of that income. For one qualifying child, for example, the percentage is 12%. For parents with weekly incomes over £800, for one qualifying child the basic rate is 12% of £800 plus 9% of the additional weekly income. Whatever Mr B's gross weekly income is, on the evidence I have seen this is a "basic rate" case where the higher income formula will not apply. Similarly, on the evidence I have seen, the reduced rate (generally, this is for gross weekly incomes that are less than £200 but more than £100), flat rate and nil rate will not be applicable.

23. It can be seen that "gross weekly income" is the crux of the matter. Schedule 1.10 provides that "gross weekly income is to be determined in such manner as is provided for in regulations". Sub-paragraph (2) authorises regulations to provide for the determination to

proceed on an unreal historical basis in that regulations may "provide for determination in prescribed circumstances by reference to income of a prescribed description in a prescribed past period".

The Child Support Maintenance Calculation Regulations 2012 (S.I. 2012/2677)

24. Dates are important in the 2012 scheme for calculating income. When the Secretary of State gave his decision in Mr B's case, regulation 12 of the 2012 Regulations provided that the "initial effective date" for the purposes of section 11 of the 1991 Act was the date on which written notice was given to the non-resident parent under regulation 11. A regulation 11 notice was required to be given to the non-resident parent "as soon as is reasonably practicable" after the application for a child maintenance calculation was made.

25. I note that, with effect from 30th June 2014, regulation 12 was amended by the Child Support (Consequential and Miscellaneous Provisions) Regulations 2014 (S.I. 2014/1386). As amended, regulation 12(2) requires the non-resident parent to be notified of the initial effective date "(a) by written notice posted to the last known address of the non-resident parent at least two days prior to the initial effective date; or (b) by telephone on or before the initial effective date and by written notice sent by post to the last known address of the non-resident parent". And new regulation 12(1) also requires the regulation 11 notice to specify the initial effective date. This set of amendments also requires the regulation 11 notice to advise the non-resident parent that an application for a child maintenance calculation has been made.

26. Chapter 1 of Part 4 of the Regulations contains rules for determining gross weekly income. This Chapter begins with regulation 34, entitled "The general rule for determining gross weekly income". Regulation 34(1) provides that "the gross weekly income of a non-resident parent…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". The presumption, however, is that historic income will be used because regulation 34 provides:

> "(2) The non-resident parent's gross weekly income is to be based on historic income unless—
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> (a) current income differs from historic income by an amount that is at least 25% of historic income; or
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> (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.

> …(3) For the purposes of paragraph (2)(b) no historic income is available if HMRC did not, when a request was last made by the Secretary of State for the purposes of regulation 35, have the required information in relation to a relevant tax year".

26. What, then, is 'historic' income? This is dealt with by regulation 35(1):

> "(1) Historic income is determined by-
>
> (a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent;
>
> (b) adjusting that figure where required in accordance with paragraph (3) [which concerns "relievable pension contributions"]; and
>
> (c) dividing by 365 and multiplying by 7."

27. This determination will not work without a HMRC figure being requested and, accordingly, regulation 35(2) obliges the Secretary of State to make such requests:

> "A request for the HMRC figure is to be made by the Secretary of State-
>
> (a) for the purposes of a decision under section 11 of the 1991 Act (the initial maintenance calculation) no more than 30 days before the initial effective date; and
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> (b) for the purposes of updating that figure, no more than 30 days before the review date."

28. The present case concerns an initial maintenance calculation and so only (a) is relevant. As noted above, the "initial effective date" was the date on which Mr B was given his regulation 11 notice. That meant (and still does mean) the Secretary of State had to plan his child support operations to ensure that, if he requested a HMRC figure before issuing a regulation 11 notice, the notice rapidly followed the request.

29. The "HMRC figure" is the cornerstone of historic income as determined under regulation 35. It is defined by regulation 36. Regulation 36(1) provides:

> "The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year-
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> (a) under Part 2 of ITEPA (employment income);
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> (b) under Part 9 of ITEPA (pension income);

(c) under Part 10 of ITEPA (social security income) but only in so far as that income comprises the following taxable UK benefits listed in Table A in Chapter 3 of that Part-
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(i) incapacity benefit;
(ii) contributory employment and support allowance;
(iii) jobseeker's allowance; and
(iv) income support; and
(d) under Part 2 of ITTOIA (trading income)."

30. Subsequent provisions of regulation 36 clarify how the amounts in paragraphs (1)(a), (b) and (d) are to be identified but, for present purposes, I need not go into the detail.

31. The concept of the "latest available tax year" is an important part of the definition of "HMRC figure". It has its own definition in regulation 4:

> **"**(1) In these Regulations "latest available tax year" means the tax year which, on the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income)…is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return.
>
> (2) In this regulation a "relevant tax year" is any one of the 6 tax years immediately preceding the date of the request for information referred to in paragraph (1)."

32. I note that:

(a) this definition operates by reference to the date on which the HMRC request is made;

(b) this definition may or may result in income data being obtained for what is in fact the most recent tax year (although only the previous six tax years can count);

(c) what matters is the most recent tax year for which HMRC "have received" the specified tax-related information. The calculation of income for child support purposes therefore depends on a question of fact that may bear little relation to a parent's current income. What matters is the state of HMRC's records at the date the request is made.

33. To recap, regulation 34 enacts a presumption in favour of using historic income, rather than current income, in the calculation. That will probably not be the same as current income given the way most incomes fluctuate to some degree. That is of no consequence unless current income differs from historic income by an amount that is at least 25% of historic

income. In child support jargon, this is known as the 25% tolerance. Regulation 37 sets out how to determine current income but, for present purposes, I need not go into it.

34. I should also note that, after the Secretary of State's decision in this case was given on 3rd June 2014, on 23rd March 2015 the 2012 Regulations were amended so as to insert a new regulation 27A under which the Secretary is given power at any time to correct accidental errors in decisions taken under the 1991 Act. The amending instrument is Statutory Instrument 2015/338.

Conclusions

35. On this appeal's undisputed facts, the Secretary of State had never determined Mr B's historic income in accordance with the 2012 Regulations. Determination of historic income begins by "taking the HMRC figure last requested from HMRC". Due to the statutory definitions used, the HMRC figure is not simply the figure supplied by HMRC. The 2012 Regulations do not contain a deeming provision that requires whatever figure is supplied to stand as the "HMRC figure".

36. For the figure supplied by HMRC to count (to fall within the definition of "HMRC figure"), it must be based on information for the "latest available tax year". The definition of "latest available tax year" operates by reference to the state of HMRC's records as a matter of fact when the request is made. It is the most recent tax year for which HMRC "have received" the relevant tax-related income information. If HMRC make a mistake and supply an earlier year's data, they have not supplied a "HMRC figure" as defined.

37. The 2012 Regulations do not prevent more than one HMRC request from being made in respect of a particular application for a child support maintenance calculation. I acknowledge that regulation 35 provides that "a request" is to be made. However, section 6(c) of the Interpretation Act 1978 provides that "in any Act, unless the contrary intention appears…words in the singular include the plural". Section 23(1) of the 1978 Act applies section 6 to subordinate legislation, such as the 2012 Regulations.

38. I can identify no such contrary intention within the 2012 Regulations. As the Secretary of State's argument implies, it would be absurd if he had to rely on income data that was clearly wrong, artificially inflating or deflating a parent's child support maintenance liability. I see nothing in the 2012 Regulations to prevent subsequent requests for a HMRC figure from being made if there is a reasonable doubt as to the accuracy of the information initially supplied.

39. I note that Chapter 4 of Part 2 of the 2012 Regulations provides for automatic annual reviews, using updated HMRC figures, of a parent's gross weekly income. However, the existence of those provisions does not indicate a "contrary intention" for the purposes of section 6(c) of the Interpretation Act 1978. Why would Parliament intend that a non-resident parent should pay an artificially inflated amount of child maintenance liability, or a parent with

care receive artificially deflated payments, for a whole year? Moreover, a supersession decision to give effect to an updated HMRC figure, provided as part of the annual review process, only takes effect as from the review date (regulation 20(2) of the 2012 Regulations).

40. I also note that a child maintenance calculation decision may be revised on the ground of official error and that "official error" is defined by regulation 14(4) of the 2012 Regulations to include an error made by an officer of HMRC. Generally, a revision decision takes effect as from the date of the decision that is revised (section 16(3) of the 1991 Act). However, the revision provisions provide no support for an argument that regulation 35 needs to be read so that only one HMRC figure may be requested for the purposes of a child maintenance calculation applied for under section 4 of the 1991 Act. If it is shown that a HMRC figure was wrong because it was not in fact based on income data for the latest available tax year, what happens next? The maintenance calculation exercise will be re-done and that will involve re-applying regulation 34. On the face of it, that calls for a fresh request for a HMRC figure or, if the view is taken that the required information is not available, using current income instead. Either way, the availability of revision does not require regulation 35 to be read as preventing a fresh HMRC request from being made. I do not see how it is relevant to that issue.

41. The configuration of the computer systems used to support the Secretary of State's child support operations is neither here nor there. The software programmer does not make the law, Parliament does. If there is a technical impediment to using the 'drawdown' interface more than once during a particular period, the Secretary of State will need to make a request by some other means, by letter or email for example.

42. And so the First-tier Tribunal therefore erred in law. It misconstrued the 2012 Regulations by holding that the first, and only the first, income data supplied by HMRC had to be inputted into the child support calculation as the HMRC figure. That was an error of law. On the undisputed facts, no HMRC figure had been supplied at all and that meant Mr B's "historic income" had not been determined in accordance with the 2012 Regulations.

Disposal of the appeal

43. The Secretary of State suggests that I direct HMRC to supply an updated HMRC figure. The fact that HMRC are not a party to the appeal does not preclude them being directed to do something. However, I have doubts whether such a direction would be compatible with the scheme of the 2012 Regulations which confers on the Secretary of State the function of requesting HMRC figures from HMRC. Without hearing argument from HMRC, I decline to make the direction sought.

44. In granting permission to appeal, I posed the question whether, in the present circumstances, Mr B's current income should have been used to fix his gross weekly income. Amongst the cases in which regulation 34(2) of the 2012 Regulations provides that current, instead of historic, income is to be used is where "the Secretary of State is unable, for

whatever reason, to request or obtain the required information from HMRC". On the evidence I have seen, it is not clear whether it can properly be said that the Secretary of State was unable to obtain the required information from HMRC. Other means of requesting a HMRC figure could have been attempted but were not. I do not therefore think it is open to me to set aside the First-tier Tribunal's decision and re-make it on the basis that Mr B's current income is to be used to determine his child support maintenance calculation.

45. Section 20(8) of the Child Support Act 1991 provides:

> "If an appeal under this section is allowed, the First-tier Tribunal may—
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> (a) itself make such decision as it considers appropriate; or
>
> (b) remit the case to the Secretary of State, together with such directions (if any) as it considers appropriate."

46. Those powers are available to me in the event that I set aside the First-tier Tribunal's decision and re-make the appeal that was before it.

47. I set aside the First-tier Tribunal's decision because it involved an error on a point of law. The Tribunal misdirected itself in law by concluding that the flawed income data supplied by HMRC had to be used to determine Mr B's historic income.

48. I re-make the appeal that was before the First-tier Tribunal. I allow Mr B's appeal against the Secretary of State's determination of his child support maintenance calculation. I remit the case to the Secretary of State and direct that he make a fresh request for a HMRC figure and determine Mr B's gross weekly income, and his child support maintenance calculation, on the basis of that figure. The effective date for that calculation remains 25th May 2014.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
12th February 2016