IN THE UPPER TRIBUNAL **Case No: CCS/361/2018**
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Oxford on 20 July 2017 under reference SC303/16/00395 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision as follows:

The appeal by the non-resident parent is allowed to the following extent. The maintenance calculation is closed with effect from 6 September 2015 and he has no liability for child support thereafter.

REASONS FOR DECISION

1. There were effectively two decisions (in a broad sense) by the Secretary of State ("SSWP") in this case.

2. On 13 January 2016 a refusal to supersede decision was issued. Only a summary is in evidence (p17) but it appears that an application by the non-resident parent (father of A, the child concerned, born on a date in March 1998) for supersession on the basis that A had ceased to be a qualifying "child", being no longer in full-time non-advanced education, was refused on the ground that child benefit was still in payment. If that application had succeeded, the supersession would have taken effect from the beginning of the maintenance period in which (on such a hypothesis) A ceased to be a "qualifying child": see Social Security and Child Support (Decisions and Appeals) Regulations 1999, sch 3D, para 3(a).

3. On 22 February 2016 a further decision was issued. That was a decision in in connection with the migration of old cases to the 2012 scheme. The legal basis for that is s.19 and Schedule 5 of the Child Maintenance and Other Payments Act 2008, pursuant to which the Child Support (Ending Liability in Existing Cases and Transition to New Calculation Rules) Regulations 2014/614 ("the 2014 Regulations") were made. The substantive power is in para 1(1) of Schedule 5 to the 2008 Act, under which SSWP may require the parties to existing child support arrangements to elect whether or not to stay in the statutory scheme (which would be the 2012 scheme). Reg 5 of the 2014 Regulations requires the SSWP to give a notice to the parties which specifies, among other matters, the "liability end date". There are parameters specified but general terms the liability end date is left to a substantial degree to the SSWP to determine.

4. The right of appeal in a child support case arises under s.20(1) of the Child Support Act 1991 ("the 1991 Act"). The reaching of the liability end date in accordance with the 2008 Act and 2014 Regulations does not fall within any of the category of cases in respect of which a right of appeal to the FtT arises

at all. That is SSWP's position and I agree with it; none of the other parties have sought to suggest otherwise.

5. What is plain is that A's father would have had a right of appeal to the First-tier tribunal ("FtT") against the 13 January decision refusing to supersede for change of circumstances: see s.20(1)(b) of the 1991 Act, provided that (if the decision, not directly in evidence, had said on its face he was required to) he had gone through mandatory reconsideration.

6. He contacted the SSWP on 17 February 2016 to express disagreement in relation to what was, and remains, the essence of the dispute. That was not treated as a (slightly late) application for mandatory reconsideration of the 13 January decision refusing to supersede: it should have been. In any event, on 15 April 2016 a letter from him was received which was treated as a request for mandatory reconsideration. (It was late, but time appears to have been extended without much thought to allow it to be considered). However, the reconsideration (p19) took the line, correct as far as it went, that "the case actually closed due to Case Closure Scheme that is happening through all agency cases". What it did not do was engage with the substance of what A's father was complaining about, but merely referred him to the FtT.

7. The decision of 22 February 2016 was not an appealable decision and the FtT could not have varied the "liability end date" in the circumstances of this case. However, I put it to the parties (and SSWP agrees and the others have expressed no view), that the case was in reality an appeal against the earlier refusal to supersede and either the contact on 17 February ought to have been recognised as a request for mandatory reconsideration or, in any event, the letter received on 15 April 2016 and accepted as a valid mandatory reconsideration request was in reality a request for mandatory reconsideration of the decision of 16 January 2016, albeit not acted upon by SSWP's representative.

8. In the light of the position set out in paragraph 7, the FtT had jurisdiction to consider what was actually an appeal against the decision of 16 January 2016, although not expressed as such by A's father and not recognised as such by the FtT. Nonetheless, the issues the FtT determined (albeit in a way which, for the reasons below, I consider legally flawed) were those applicable to an appeal against the 16 January decision.

9. Did the FtT err in law in its approach to deciding whether A remained a "child" for the purposes of the child support legislation after 29 June 2015? The dispute was essentially one of fact, concerning what she had been doing after that date.

10. As to this question I received a submission from SSWP supporting the appeal and inviting me to remit the case to a fresh FtT (a later submission concurred that the decision should be remade in the Upper Tribunal), a submission from HMRC which is factual in nature, neither supporting nor opposing the appeal, no submission from A's mother and a submission in reply to the others from A's father in which he asks the Upper Tribunal to hold

an oral hearing so that there is clarity about the facts in respect of the period in question.

11. I am satisfied that all parties have had a chance to state their position on the point of law if they wish. In view of the conclusion I have reached below that the FtT's decision was in error of law, if I thought that further evidence needed to be given, I would remit the case to the FtT. However, I do not consider that such a step is necessary. A's mother previously failed to reply to directions given by the FtT. A's father points out that she

> "has failed to provide any evidence whatsoever that my daughter has ever continued her further education after the 29th June 2015, despite having numerous opportunities to do so."

Subject to a point, immaterial for the reasons given in [26], about whether A continued in education into August to finish off course requirements, I agree with that statement. Provided I am sufficiently clear on the evidence available to me what the facts were, it is appropriate to decide the case on the papers and to remake the decision.

12. The issue before the FtT was whether A's father's liability should cease at 23 February 2016 (as, by a decision dated 22 February 2016, the Child Support Agency, now represented by the SSWP, had decided) or from the earlier dates of 29 June 2015 or 6 September 2015.

13. By s.55(1) of the Child Support Act 1991:

> "(1) In this Act, *"child"* means (subject to subsection (2)) a person who—
> (a) has not attained the age of 16, or
> (b) has not attained the age of 20 and satisfies such conditions as may be prescribed."

14. The relevant prescribed conditions are to be found in Schedule 1 to the Child Support (Maintenance Calculation Procedure) Regulations 2001 SI 2001/157:

> "1(1) A person satisfies such conditions as may be prescribed for the purposes of section 55(1) of the Act if that person satisfies any of the conditions in sub-paragraphs (2) and (3).
>
> (2) The person is receiving full-time education (which is not advanced education)—
> (a) by attendance at a recognised educational establishment; or
> (b) elsewhere, if the education is recognised by the Secretary of State.
>
> (3) The person is a person in respect of whom child benefit is payable."

15. The conditions in sub-paras (2) and (3) are expressed as alternatives. As to (3), the FtT noted the decision in *JF v SSWP and DB (CSM)* [2013] UKUT 209 (AAC) that "payable" in sub-para (3) meant "properly or lawfully payable".

16. The FtT relied on the following factors to conclude that child benefit was properly and lawfully payable:

> (a) A's father had reported his concerns that child benefit was being claimed fraudulently to the child benefit fraud hotline but HMRC in their submission to the FtT had made no mention of this;
>
> (b) the fact that A was working was not inconsistent if she returned to college between September 2015 and December 2015 and then worked in seasonal employment in the Christmas holiday.

17. Evidence provided by A's father which was before the FtT included the following:

> (a) a letter from College 1 confirming that A last attended on 29 June 2015 (p28);
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> (b) an email from College 2 (which A had told her father she had been attending between September and December 2015) confirming they had no record of her on their system (p29); and
>
> (c) a Facebook post by A dated 30 November 2015 confirming she had been accepted for two jobs (p31).

18. Although A's mother wrote on 30 June 2016 to indicate that one of the jobs mentioned at [17(c)] was a seasonal job with only very limited hours and that the other one did not start until 22 March 2016, all she wrote about her daughter's education following completion of the course at College 1 was that

> "In September she decided that she no longer wanted to continue studying Beauty Therapy and looked to pursue a course in Public Services".

(I observe at this point that (a) "looking to pursue" something is very different from being enrolled on, and following, a course to do it and (b) at p43 A's mother refers not to a course in public services but to a "public relation" *(sic)* course: her apparent uncertainty as to the course A was supposed to be studying does nothing to enhance the probative value of her evidence).

19. A's mother did not attend the first FtT hearing, on 8 September 2016. The FtT adjourned giving directions (p50) for her to provide specified details of what A was doing, whether by way of work, study or otherwise, after 29 June 2015. Her answer on 29 September (p52) was evasive, confirming that A had attended college until 29 June 2015 "and in September 2015 she decided to embark on a different course after deciding to take a different career path". Since the FtT's directions had required her to provide, in respect of any

college at which A had started in September 2015, "details of the course and any supporting documentation", either (as was consistent with the evasive language used) A had not actually started a course then, or (if she had) there was a blatant failure to comply with the FtT's directions. She further provided evidence that A had a further job, described as a "holiday and weekend job", with company M, with start date unknown, in which she had earned £3102.30 up to 1 November 2015 when she left.

20. The FtT's directions had also required an explanation from HMRC as to the basis on which child benefit continued to be paid in respect of A. By a submission dated 23 December 2016 (and so much nearer the events in question and at a time when if HMRC had had material documents they were unlikely to have already been subject to a routine destruction policy), the best that HMRC could say was to set out the rules about continuing child benefit after a child turns 16 and its procedures and to submit that "Further notification must then have been received from [A's mother] that A was to continue in full-time non-advanced education as child benefit continued to be paid beyond 7 September 2015." There was, accordingly, no indication at all of what evidence A's mother did provide to HMRC, nor even direct evidence that she provided any at all.

21. A's father provided a submission to the FtT in the form of a letter dated 29 January 2017 (p60) in which he drew attention to the lack of evidence that A had attended any college from September 2015 and submitted that the evidence showed A had been working for company M from around 29 June 2015, possibly for 24 hours a week or more, thus making it unlikely that she was attending any course from September. He then reiterated these points orally at the resumed hearing.

22. Reg 3 of the Child Benefit (General) Regulations 2006 ("the 2006 Regulations") enables a person to remain as a "qualifying young person" for child benefit purposes if "the person is undertaking a course of full-time education, which is not advanced education and which is not provided by virtue of his employment or any office held by them" and which is provided at a school or college or at an approved location elsewhere. (There are detailed provisions supplementing this basic rule, but it is not necessary to go into them here.)

23. In my judgment, the FtT's decision was in error of law. The error may be viewed in a number of overlapping ways. The only evidence that A might actually have attended college from September (rather than thought about it) was (a) A's father's report of what A had told him, subsequently negated by his own enquiries; and (b) HMRC's evidence that there must have been something which had caused them to continue to pay child benefit even though they could not produce it or even say what it was. Against that was (a) the information from College 2 that they had no record of A attending; (b) the repeated failure by A's mother when given the opportunity and when required by Directions to do so, to provide the simple information what course it was said A attended from September; and (c) the substantial earnings from company M which at least up to a point raised a question how much time A

would have had left to study. In my view one may on a generous view possibly avoid the conclusion that there was no evidence to support the tribunal's finding. If however the minimal evidence that there was was enough to avoid that, then in my view the total lack of positive evidence which ought to have been readily capable of being provided made the FtT's conclusion one that no reasonable tribunal could have reached on the material before it. I say that, mindful of the high threshold for a perversity challenge.

24. Were I to be wrong in that, I consider that the tribunal erred by failing to give sufficient reasons. It failed to explain what it made of the evidence from College 2 that A had never attended, when that was the only college that there was any suggestion from any source that she had attended from September 2015. It failed to deal sufficiently or at all with the evidence of work with company M. That could not have been within the work described in para 25 of the FtT's reasons as "seasonal employment in the Christmas holiday" given that it is known from Form P45 to have finished on 1 November 2015. Nor did it deal adequately with the submission that there was no evidence of A's attendance from September.

25. Consequently I set the tribunal's decision aside. I find as fact that A was not undertaking any course of full-time education from such date as she left College 1.

26. There is then a satellite issue as to the date on which entitlement to child benefit should cease. It is not in dispute that A was following a qualifying course until (as a minimum) 29 June 2015. A's mother's evidence was that she had to complete work after the end of term, in August, in order to complete the course. I do not need to make any findings on that as the effect of reg 7, Case 1 of the 2006 Regulations is that with or without the work in August, the terminal date for qualifying for child benefit would be the end of the week in which 31 August fell, i.e. 6 September 2015.

CG Ward
Judge of the Upper Tribunal
27 February 2019