[2019] UKUT 34 (AAC)

IN THE UPPER TRIBUNAL **Application No. CCS/1453/2019**

ADMINISTRATIVE APPEALS CHAMBER

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

Decision date: 1 May 2018

Between:

WO'C

Applicant

-v-

Secretary of State for Work and Pensions

First Respondent

and

JW

Second Respondent

RULING

These proceedings are struck out.

REASONS

Summary

1. On 8 March 2017, the Child Maintenance Service ("CMS") decided, on behalf of the Secretary of State, that the father of two boys was liable to pay child support maintenance in respect of them at the weekly rate of £45.40 from the effective date of 29 March 2016.

2. The boys' mother appealed against that decision and, on 1 May 2018, the First-tier Tribunal set it aside and directed the CMS to re-calculate the father's liability on a basis that was disadvantageous to him.

3. These proceedings consist of an application by the father for permission to appeal to the Upper Tribunal against that decision. The Secretary of State is the first respondent to that application and the mother is the second respondent.

4. I have struck out the proceedings because I consider that, for procedural reasons, the application is invalid; that it would not be fair and just for me to take the steps required to validate it; and that the Upper Tribunal is therefore without jurisdiction. The father has relied on incorrect advice from the First-tier Tribunal and this decision restores him to the position he would have been in if that advice had not been given. To validate the application would put him in a better position, which would be procedurally unfair to the mother.

References

5. The primary legislation about the jurisdiction of the First-tier Tribunal and Upper Tribunal is to be found in the Tribunals, Courts and Enforcement Act 2007, to which I will refer as "the Act".

6. It will also be necessary for me to refer to the procedural rules of the First-tier Tribunal and Upper Tribunal. Those are set out in, respectively, the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and the Tribunal Procedure (Upper Tribunal) Rules 2008. I will refer to those Rules as, again respectively, "the SEC Rules" and "the UT Rules".

Introduction and procedural history

7. The issue that has led me to strike out these proceedings arises from the procedural history of the appeal before the First-tier Tribunal, which, so far as is relevant, is as follows. I have not set out the issues in dispute before the First-tier Tribunal as they are not relevant to the question of the Upper Tribunal's jurisdiction.

8. It is convenient to begin on 1 May 2018, when a the First-tier Tribunal allowed the mother's appeal in the father's absence.

9. Then, on 30 August 2018, the father sent the Appeals Service Centre in Birmingham an email in the following terms:

> "I have called your office today and have been advised to email you. I have recently discovered that my new address details haven't been uploaded on to your system despite me receiving a call back on numerals 26.2.18 after speaking with Andrea. My new address is [redacted].

> As a result of me not receiving any notification from you, I did not attend court on the requested date which I wouldn't have done as it is me that has brought the appeal in the first place. I have been advised to ask the judge for a set aside so that this situation can be resolved. The reason for my delay in asking for this is that I have only just been made aware of the situation by a deduction order being place [*sic*] on a company bank account.
>
> Last week I discovered that a deduction order had been put on to a company bank account, as the enforcement team at the CMS appear to believe that I am a sole trader which is incorrect. My status is that I am a partner in [redacted] and a director of [redacted]. I spoke with Tom Begg at the CMS enforcement team and he is now aware of my situation. Tom also advised me that the court has said that my income is £81,000 per year. I have attached my most recent P60 which states what my actual income is, and I would like the necessary adjustment to be made. If you require any more P60's or any other information so that you can determine my income is [*sic*] please let me know what information you require and I will send it to you.
>
> I would prefer email contact but can also be called on [redacted] if you need to speak with me.
>
> I await your reply."

I note in passing that the papers before me indicate that the appeal to the First-tier Tribunal had been the mother's appeal and that the father's statement that he had "brought the appeal in the first place" does not appear to be accurate.

10. The District Tribunal Judge who had given the decision on 1 May 2018 ("the Judge") interpreted the father's email as an application to set that decision aside under rule 37 of the SEC Rules 2008. In my judgment, he was correct to do so: it is what the second paragraph of the email expressly asked him to do. At paragraphs 66 to 77 below I discuss whether the Judge should also have treated the email as a request for a written statement of reasons.

11. On 15 October 2018 the Judge gave directions and then, on 23 January 2019, refused to set aside the decision. There was a conflict of evidence about whether the father had known about the hearing on 1 May 2018 and the Judge did not accept the father's account.

12. In the meantime, on 18 April 2019, the father had sent the First-tier Tribunal a letter, which was interpreted as an application for permission to appeal to the Upper Tribunal.

13. At that time, no application had been made under rule 34 for a written statement of reasons.

14. In those circumstances, the Judge treated the father's letter as being an application for a written statement of reasons. The time limit for making such an application had expired a month after the decision notice had been sent to the father (*i.e.,* on or about 1 June 2018). The father's application was therefore over six months late. In the absence of an extension of time, the application was invalid.

15. On 3 June 2019, the Judge refused to extend the father's time for making an application for a statement.

16. The notice informing the parties of that refusal contained the following passages:

(a) The second paragraph of the direction refusing to extend time stated:

> "The Second Respondent [i.e., the father] may apply to the Upper Tribunal for permission to appeal, as notified in the information enclosed with this notice."

(b) A note at the very end of the notice stated:

> "*The appellant has the right to make an application direct to the Upper Tribunal itself for permission to appeal. Such an application must be made in writing so that it is received* ***within one month*** *after the date of the issue of this notice. The application is to be made to the office identified in the notes which accompany this decision."*

17. The father made an application to the Upper Tribunal for permission to appeal on 19 June 2018. It stated that the decision he wished to appeal against was the decision dated 1 May 2018 (*i.e.,* the substantive decision to refuse his appeal).

The relevant law

18. To explain why those two quoted passages create a problem, it is necessary for me to set out the relevant law.

The Act

19. Section 11(1)-(4) of the Act reads as follows:

"**Right to appeal to Upper Tribunal**

11.—(1) For the purposes of subsection (2), the reference to a right of appeal is to a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

(3) That a right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by—

(a) the First-Tier Tribunal, or

(b) the Upper Tribunal,

on an application by the party."

None of the decisions in this case is an "excluded decision" within subsection (1). And subsection (8), which is referred to in subsection (2), does not apply to this application.

The UT Rules

20. The right of appeal to the Upper Tribunal granted by section 11(2), subject to section 11(3) must be exercised in accordance with the Rules.

21. In particular, rule 21 of the UT Rules states as follows (as far as is relevant to this appeal):

"**Application to the Upper Tribunal for permission to appeal**

21.—(1) …

(2) A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if—

(a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and

(b) that application has been refused or has not been admitted or has been granted only on limited grounds

> (3) An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than—
>
> (a)–(ab) …
>
> (b) … a month after the date on which the tribunal that made the decision under challenge sent notice of its refusal of permission to appeal, or refusal to admit the application for permission to appeal, to the appellant.
>
> (3)–(5) …
>
> (6) If the appellant provides the application to the Upper Tribunal later than the time required by paragraph (3) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—
>
> (a) the application must include a request for an extension of time and the reason why the application was not provided in time; and
>
> (b) unless the Upper Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Upper Tribunal must not admit the application.
>
> (7) If the appellant makes an application to the Upper Tribunal for permission to appeal against the decision of another tribunal and that other tribunal refused to admit the appellant's application for permission to appeal because the application for permission or for a written statement of reasons was not made in time—
>
> (a) the application to the Upper Tribunal for permission to appeal must include the reason why the application to the other tribunal for permission to appeal or for a written statement of reasons, as the case may be, was not made in time; and
>
> (b) the Upper Tribunal must only admit the application if the Upper Tribunal considers that is in the interests of justice for it to do so.
>
> (8) In this rule, a reference to notice of a refusal of permission to appeal is to be taken to include a reference to notice of a grant of permission to appeal on limited grounds."

22. It is unnecessary for me to set out rule 5(3)(a) in full. As the text of rule 21 suggests, it contains a general power to extend time. However, I do need to set out parts of rules 7 and 8 as follows:

"**Failure to comply with rules etc.**

7.—(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case); or

(d) … restricting a party's participation in the proceedings.

(3)–(4) …"

"**Striking out a party's case**

8.—(1) …

(2) The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) …

(4) The Upper Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant or applicant an opportunity to make representations in relation to the proposed striking out.

(5)–(8) …"

The SEC Rules

23. It is also necessary to set out rule 38 of the SEC Rules (which governs the procedure for making an application to the Social Entitlement Chamber of the First-tier Tribunal for permission to appeal to the Upper Tribunal). Again, so far as is relevant, it is as follows:

> "**Application for permission to appeal**
>
> **38.**—(1) …
>
> (2) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.
>
> (3) An application under paragraph (2) must be sent or delivered to the Tribunal so that it is received no later than 1 month after the latest of the dates that the Tribunal sends to the person making the application—
>
> (za) the relevant decision notice;
>
> (a) written reasons for the decision, if the decision disposes of—
>
> (i) all the issues in the proceedings; or
>
> (ii) …
>
> (b) notification of amended reasons for, or correction of, the decision following a review; or
>
> (c) notification that an application for the decision to be set aside has been unsuccessful.
>
> (3A) The Tribunal may direct that the 1 month within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings.
>
> (4) The date in paragraph (3)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 37 (setting aside a decision which disposes of proceedings) or any extension of that time granted by the Tribunal.
>
> (5) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (3) or by any extension of time under rule 5(3)(a) (power to extend time)—
>
> (a) the application must include a request for an extension of time and the reason why the application was not provided in time; and
>
> (b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.
>
> (6) …

> (7) If that person makes an application under paragraph (2) in respect of a decision that disposes of proceedings … when the Tribunal has not given a written statement of reasons for its decision—
>
> (a) if no application for a written statement of reasons has been made to the Tribunal, the application for permission must be treated as such an application;
>
> (b) unless the Tribunal decides to give permission and direct that this sub- paragraph does not apply, the application is not to be treated as an application for permission to appeal; and
>
> (c) if an application for a written statement of reasons has been, or is, refused because of a delay in making the application, the Tribunal must only admit the application for permission if the Tribunal considers that it is in the interests of justice to do so."

As with the UT Rules, rule 5(3)(a) of the SEC Rules contains a general power to extend time.

24. Finally, rule 41 of the SEC Rules states:

> "**Power to treat an application as a different type of application**
>
> **41.** The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."

How the law applies in this case

Summary

25. In this application, the key point is section 11(4) of the Act only gives the First-tier Tribunal and the Upper Tribunal power to give permission to appeal "on an application by the party".

26. The corollary is that the power does not exist in the absence of an application. Neither tribunal has any power to give (or refuse) permission to appeal on its own initiative.

27. That principle also applies in cases where an application for permission to appeal has been made but is ineffective or is no longer extant: for example, because the application has not been admitted, or has been treated as instead being an application for a different remedy, or has already been decided.

28. In this case, given the procedural history set out above, I judge that there has not yet been a valid application to the First-tier Tribunal for permission to appeal to the Upper Tribunal and therefore, the First-tier Tribunal has neither refused such an application, nor not admitted it, nor granted it on limited grounds.

29. It follows that, rule 21(2)(a) and (b) of the UT Rules is not satisfied and the application to the Upper Tribunal for permission to appeal is irregular. Unless I waive the requirements of those rules under rule 7(2)(a), then the application is invalid and I have no jurisdiction over it.

30. I have decided not to waive those requirements.

31. In the absence of jurisdiction, and given that there is no other court or tribunal to which I can transfer them, rule 8(2)(a) requires me to strike out these proceedings.

Rule 21(2)(a)

32. When the father made his application for permission to appeal on 18 April 2019, the First-tier Tribunal had not issued a written statement of reasons for its decision. Neither had any application for such a statement been made.

33. Those circumstances engaged rule 38(7)(a) of the SEC Rules, with the effect that the application automatically fell to be treated as an application for a written statement of reasons.

34. The next question is whether, having been treated as being for a written statement of reasons, the application thereby ceased to be an application for permission to appeal.

35. The answer to that question is yes.

36. When the First-tier Tribunal decides to treat an application for remedy A as being an application for remedy B, then, in my judgment, it can usually do so either:

(a) in the alternative, in which case the application is treated as being for remedy B *as well as* remedy A; or

(b) on an exclusive basis, in which case the application is treated as being for remedy B *instead of* remedy A.

Which of those courses is taken will normally depend on which better furthers the overriding objective in the particular case.

37. However, the circumstances of this case fall within rule 38(7)(b), which produces a different outcome. As set out above, the rule provides that if an application for permission to appeal is made at a time when no written statement of reasons has been given, then "the application is **not** to be treated as an application for permission to appeal" (my emphasis) unless the Tribunal takes two positive steps, namely *both*:

(a) deciding to give permission to appeal; *and*

(b) directing that rule 38(7)(b) should not apply.

38. Therefore, the father's application was not an application for permission to appeal when it was received. At most—apart from being treated by operation of law as an application for a statement—the application was inchoate. It was a document that might in due course be treated as an application for permission to appeal, if the Tribunal took the two positive steps necessary to disapply the general rule in rule 38(7)(b).

39. However, the Judge did not take either of those positive steps. And, as the father did not subsequently send or deliver any other document to the First-tier Tribunal that could have been interpreted as, or treated as, being an application for permission to appeal, I judge that rule 21(2)(a) of the UT Rules is not satisfied.

40. I appreciate that all this may seem unduly technical and bureaucratic. It may therefore be worth making the point that rule 38(7)(b) of the SEC Rules exists for the benefit of the party seeking permission to appeal.

41. Remember that the First-tier Tribunal cannot give or refuse permission to appeal without an application from a party. By requiring the Tribunal to treat an application for permission to appeal that is made before the issue of a written statement of reasons as if it were not such an application, the rule removes the Tribunal's power to *refuse* permission to appeal before the statement has been issued and the party seeking to appeal has been able to comment on it.

42. If, on the other hand, the Tribunal takes the view that permission should be *given* without waiting for the statement, then it is free to do so as long as it directs <u>expressly</u> that the rule is not to apply.

Rule 21(2)(b)

43. This can be dealt with more briefly. The only decision made by the Judge was not to extend the father's time for requesting a written statement of reasons.

44. The Judge did not decide not to admit the father's application for permission to appeal: he could only have made such a decision if there had been an extant

application for permission to appeal and—for the reasons I have given—there was no not.

45. Neither did the Judge refuse permission to appeal or grant it on limited terms. That is also unsurprising given that there was no application for permission to appeal before him.

46. Therefore rule 21(2)(b) of the UT Rules is not satisfied either.

The advice in the notice dated 3 June 2019

47. It follows that the advice given to the father in the notice given by the First-tier Tribunal on 3 June 2019 (and quoted under paragraph 16 above) was incorrect.

48. The father did not have "the right to make an application direct to the Upper Tribunal itself for permission to appeal".

49. Rather, if he wished to pursue an appeal to the Upper Tribunal, he first needed to make a valid application for permission to appeal to the First-tier Tribunal. The First-tier Tribunal would then have decided either to give permission; or to refuse it; or to refuse to admit the application either because it was late or under rule 38(7)(c).

50. Once such a decision had been made—and on the assumption that permission was not given—the father would then have been free to renew the application to the Upper Tribunal.

Waiving the requirements of rule 21(2)(a) and (b)

51. Of course, the father's failure to comply with the requirements of rule 21(2)(a) and (b) does not of itself render the application for permission to appeal void: see rule 7(1) of the UT Rules. I have power under rule 7(2)(a) to waive those requirements, thereby validating the application for permission to appeal and conferring jurisdiction on the Upper Tribunal.

52. However, the rule 7(2)(a) power must be exercised to promote the overriding objective of dealing with the matter fairly and justly and I do not consider that waiving the requirements of rule 21(2)(a) and (b) would be fair or just to the mother, who was not responsible for the incorrect advice that was given.

53. The only circumstance that favours waiving the requirements is that, had the father been given the correct advice, he would probably have followed it.

54. However, fairness and justice only require that the father should be put back in the position that he would have been in if the correct advice had been given. It does not require me to put him in any better position.

55. If the father had applied for permission to appeal to the First-tier Tribunal on the day he made that application to the Upper Tribunal, the Judge would first have had to consider, under rule 38(7)(c) of the SEC Rules, whether it was in the interests of justice to admit the application. If he decided that it was not, rule 21(7) of the UT Rules would then have required me to consider whether it was in the interests of justice to admit any subsequent application to the Upper Tribunal.

56. If, on the other hand, I waive the requirements of regulation 21(2)(a) and (b), the father's application to the Upper Tribunal would not be out of time[1] and I would have to consider the merits of that application without the father having to establish that it was in the interests of justice for me to do so.

57. That state of affairs would represent a significant procedural injustice to the mother.

58. Despite the formal position, in which it is a challenge to a decision by the Secretary of State, a child support appeal is in substance a dispute between two parents whose interests are adverse. The approach taken by tribunals to the enforcement of time limits in such disputes therefore has to be less flexible than in social security cases, where the interests of the parties are not adverse.

59. The mother had an expectation that, once the limit for the father to apply for a written statement of reasons had expired, the Judge's substantive decision in her favour had become final.

60. Whether it is in the interests of justice to disturb that expectation on the basis of an application made nearly a year after the substantive decision and—even on the father's own version of events, which the Judge did not accept—more than seven months after the father became aware of it, is a very real issue and I do not consider it right for me to exercise the rule 7(2)(a) power so as to enable the father to side-step it.

61. I have therefore decided not to confer jurisdiction on the Upper Tribunal at this stage by waiving the requirements of rule 21(2)(a) and (b). In those circumstances—as there is no other court or tribunal that would have jurisdiction over these proceedings, were I to transfer them—I "must" strike out the application under rule 8(2)(a).

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[1] Technically, time would not even have begun to run: see rule 21(3)(b) of the UT Rules.

62. As a consequence, the father will become free to make a late application to the First-tier Tribunal for permission to appeal. Although it will be a matter for the Judge, I am confident that he will take the view that any delay caused by the father's following the incorrect advice he was given should not be held against him. It is, however, equally important that the father should give a proper account of any other delay.

The father's representations

63. As required by rule 8(4), I gave the father an opportunity to make representations in relation to the proposed striking out before giving the ruling on page 1 above. I must apologise that, when I did so, a succession of unfortunate typographical errors led to my directions referring to rule 21(2)(a) and (b) by various incorrect numbers. I am grateful to Durham Legal Services ("DLS"), who represent the father, for spotting those errors and for not having been put off by them.

64. DLS make a number of points on the father's behalf.

Failure of notice

65. It is said that, as late as 12 April 2019, the First-tier Tribunal was writing to the father at an address he had previously informed them was incorrect. However, the father had clearly received that letter by 18 April 2019 because he replied to it on that date. I do not consider that the account of the procedural history given above, or the legal analysis that flows from it, is affected by any material failure of notice.

Treating the application to set aside as an application for a written statement of reasons

66. DLS also query why the Judge did not treat the email dated 30 August 2018 as being an application for a written statement of reasons as well as an application to set aside the decision. They state:

> "[The father] is a layperson and his request for a set aside should have been sufficient for the more knowledgeable HM Courts & Tribunals staff to realise he was trying to challenge the decision and to grant him the courtesy of interpreting this request in a more holistic fashion. He explained why his application was late. It is not enough that he did not categorically state that he required a Statement of Reasons; neither did he make such a request in his email of 18 April 2019 but nonetheless that has been treated as a Statement of Reasons request, possibly to belatedly try to tie up that loose end in the procedural irregularity."

67. Apart from the fact that the question whether to treat the email of 30 August 2018 as also being a request for a written statement of reasons was a matter for a *judicial*

decision, and not an *administrative* one to be made by HMCTS staff, I have sympathy with that submission.

68. I accept that rule 41 contains no express power to treat an application for a set aside as an application for a statement of reasons. However, before one gets to the stage of using rule 41 to treat an application for something as being an application for something else, one first has to decide what the "something" is.

69. At least where—as is often the case with unrepresented litigants—the application is less than clear, that decision is an exercise in interpretation and one that must be carried out with a view to promoting the overriding objective of dealing with the matter fairly and justly.

70. In *CS v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 509 (AAC) Upper Tribunal Judge Warren stated (at paragraph 18):

> "… Appellants often have difficulty in identifying the decision or decisions which they should appeal.… In my judgement the approach to be adopted is that, once the appellant has expressed a grievance in the letter of appeal, it is then for those more knowledgeable with the process, be they officers of the DWP or tribunal judges to identify the decision of the decisions which are the source of the appellant's grievance and then to treat the letter of appeal accordingly."

That approach was subsequently endorsed by Upper Tribunal Judge Wikeley in *AJ v Secretary of State for Work and Pensions (II)* [2012] UKUT 209 (AAC) at paragraph 34.

71. Although Judge Warren's observations were made in the context of identifying whether a document was an appeal, I judge that his recommended approach is equally applicable when the Social Entitlement Chamber exercises its inquisitorial and enabling jurisdiction in other contexts: the citizen's grievance is identified and the letter is interpreted as making whatever application or applications he or she ought to have made for redress of that grievance, had he or she had a thorough understanding of the Tribunal's procedures.

72. Following that approach, it would certainly have been open to the Judge to interpret the father's email of 30 August 2018 as being for a statement of reasons as well as for the decision to be set aside.

73. The third paragraph disputes the First-tier Tribunal's substantive findings and other District Tribunal Judges might perhaps have interpreted that disagreement as expressing a grievance against the decision itself as well as against the process that led to it. The only remedy for the substantive grievance was an appeal to the Upper

Tribunal against the decision and, under the Tribunal's Rules, the next step the father needed to take to pursue that remedy was to seek a written statement of reasons.

74. However, none of that alters the fact that the Judge did not interpret the email in that way.

75. Moreover, there is another way of reading the email that supports the approach he took. Before a set aside application can be granted, rule 37 of the SEC Rules requires two things to be established. The first is that one of the prescribed circumstances exists. In this case, that was established by the father's absence from the hearing. But that is not enough on its own. It is also necessary for the Judge to be satisfied that it is in the interests of justice to set the decision aside. The third paragraph of the email can be read as addressing that issue. It can be interpreted as saying that, if the decision were set aside the subsequent decision might be different because there was evidence that the first decision may have been incorrect. That is relevant to the interests of justice, and therefore to the set aside application: it is unlikely to be in the interests of justice to set aside a decision if the new tribunal is inevitably going to make the same decision at the next hearing.

76. It is therefore possible to read the email as relating solely to the set aside application, rather than as demonstrating the father's wish to contest the substantive decision even if that application did not succeed.

77. For those reasons, the Judge's approach to the email dated 30 August 2018 was not legally incorrect, even if other judges might have interpreted it differently.

Other points

78. The remainder of DLS's submissions can be dealt with more briefly.

79. Paragraph 4 misstates the nature of the decision the Judge gave on 3 June 2019, which was in fact as set out at paragraphs 15 and 16 above. The Judge did not, as is stated in paragraph 4, give the father permission to appeal. I agree with DLS that the present problem with the Upper Tribunal's jurisdiction was caused by deficiencies in the notice of that decision but the fact that it is not the father's fault that the Upper Tribunal lacks jurisdiction, does not confer that jurisdiction. It is merely a factor for me to consider in the exercise of the Upper Tribunal's powers under rule 7.

80. Rule 7(2)(b) does not, as is submitted at paragraph 6 of the submission, say that failures to comply with the Rules "must be rectified". Rather rule 7(2) as a whole empowers the Upper Tribunal to "take such action as it considers just" when Rules are not followed. "Requiring the failure to be remedied" under rule 7(2)(b) is just one example of those actions. As is striking out the defaulting party's case: see rule 7(2)(c).

81. As explained above, I judge that dealing with this matter fairly and justly favours requires me to refuse to waive the requirements of rule 21(2)(a) and (b) and, instead to strike out the proceedings. Taking that course puts the father back where he would have been if he had not been given incorrect advice on 3 June 2019. He now needs to make a late application to the First-tier Tribunal for permission to appeal to the Upper Tribunal. The strength of his case on the merits—which I have deliberately not assessed at this stage—will be a factor for the First-tier Tribunal to take into account when considering to whether to extend time. However, that will have to be balanced against the delay for which the father was responsible (other than that caused by the incorrect advice) and his explanation for such delay. If I were simply to waive the requirements of rule 21(2)(a) and (b), that balancing exercise would not take place and, in my judgment, that would be procedurally unjust to the mother.

82. I do not consider that anything said by Upper Tribunal Judge Mesher in *KH v Child Maintenance and Enforcement Commission (CSM)* [2012] UKUT 329 (AAC) (in which the facts were materially different) affects that conclusion.

Signed (on the original)
on 30 January 2020

Richard Poynter
Judge of the Upper Tribunal