[2021] UKUT 129 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CCS/2096/2019**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

AB

Appellant

-v-

Secretary of State for Work and Pensions

First Respondent

-and-

RS

Second Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 21 May 2021
Decided on consideration of the papers

Representation

Appellant:	Roger Bickerdike of counsel instructed by North Family Law, Leeds
First Respondent	DWP Decision-Making and Appeals, Leeds
Second Respondent	Durham Legal Services

DECISION

This appeal to the Upper Tribunal does not succeed.

The First-tier Tribunal did not make any material legal mistake in relation to the claimant's appeal (ref. SC007/17/02988) which was decided at Leeds on 6 June 2019, following a hearing on 8 May 2019.

Therefore, that decision stands and the appellant's liability to pay child support maintenance for Arthur from the effective date of 4 December 2016 is to be calculated on the basis that his gross weekly income is £3000.

REASONS

Introduction

1. This appeal is about Arthur and how much his father, the appellant (and, from now on, "the Father"), must pay to support him.

2. The first respondent to the appeal is the Secretary of State who made the decision that the First-tier Tribunal was considering. The second respondent is Arthur's mother (from now on, "the Mother").

3. On 29 November 2016, the Secretary of State notified the Father and the Mother of her decision that the Father was liable to pay child support maintenance for Arthur at the weekly rate of £68.76 from the effective date of 4 December 2016. I will call that decision "Decision 1".

4. On 13 December 2016, the Mother's representative applied for Decision 1 to be revised and for a variation to be agreed on the ground that the Father had unearned income. Specifically, the application stated:

> "On behalf of [the Mother], we request a mandatory reconsideration of [Decision 1] on the grounds that there is additional unearned income. We also apply for a variation to have additional unearned income taken into account."

5. On 4 August 2017, the Secretary of State notified the Father and the Mother that she had agreed a variation and had therefore revised Decision 1. In consequence, the Father became liable to pay child support maintenance for Arthur at the weekly rate of £108.24 from the effective date of 4 December 2016. I will call that decision "Decision 2".

6. On 8 August 2017, the Mother applied for Decision 1 to be further revised and, on 15 September 2017, the Secretary of State refused to do so ("Decision 3").

7. On 22 September 2017, the Mother appealed to the First-tier Tribunal against Decision 1 (as revised by Decision 2 and as not further revised by Decision 3).

8. On 6 June 2019—following a hearing on 8 May 2019 at which the Father was represented by counsel but was not present himself—a tribunal consisting of a District Tribunal Judge and a financially-qualified panel member allowed that appeal.

9. The Tribunal calculated that the Father's gross annual income was £156,428. That figure was calculated as the sum of what the Tribunal found to be:

(a) the Father's earned income (calculated on the historic income basis) of £29,877.82;

(b) his unearned income (pursuant to a variation under regulation 69: see paragraph 5 above) of £18,927.34; and

(c) his diverted income (pursuant to a variation under regulation 71 of the 2012 Regulations) of £107,622.84. That figure was limited by the rules about the "capped amount": see paragraph 25 below.

10. The Father now appeals to the Upper Tribunal with my permission.

The hearing on 8 May 2019

11. The events that preceded, and occurred at, the hearing on 8 May 2019 are set out in paragraphs 7-9 of the Tribunal's statement as follows:

> "7. The parties were asked to provide dates when they were unable to attend in the months of January and February. There was no response from [the Father] and on 19/11/2018 the appeal was listed for 28/02/19. On 04/12/2018, [the Father] requested a postponement because of business commitments. This was reluctantly accepted, his solicitors stating that they had not received the Direction to inform the Tribunal of dates to avoid. A further Direction was issued asking for dates to avoid in April and May and 08/05/2019 was agreed. On 07/05/2019, the Tribunal received a letter from [the Father's] solicitors informing the Tribunal that he would not be attending the hearing, apologising for his non-attendance, acknowledging that the hearing had been listed in accordance with his availability and agreeing that the appeal should proceed in his absence.
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> 8. [The Mother] attended the Tribunal accompanied by her friend, … and represented by Mr Smith. Mr Bickerdike of Counsel attended representing [the Father]. Mr Preston from solicitors North Law also attended. The Secretary of State was represented by [a presenting officer]. The hearing started at 11.00am and adjourned at 12.35pm. On resumption at 1.50pm, the Tribunal put forward a preliminary decision, subject to representations on the issue of reasonableness as set out in Regulation 71(1)(b) and any representations on the issue of just and equitable as set out in

Section 28F(1)(b). Both Mr Bickerdike and Mr Smith had little further to add to their earlier submissions. Mr Bickerdike stated that it was not fair for the Tribunal to draw inferences or fair to expect the [father] to anticipate that the 'goal posts' would be moved. [The presenting officer] said that, considering the level of profits made by [the Father's] companies the award was just and equitable. Mr Smith agreed with this and added that the rules setting out a maximum liability supported a finding that it was just and equitable and he could not see how the diversion of income could be anything but reasonable [a clear typographical error for "unreasonable"].

9. For the avoidance of doubt, the provisional decision of the Tribunal was as follows:

> "a. The Tribunal has reached a provisional decision. It is provisional because there are two issues [on] which we invite further submissions.
>
> b. The first concerns the application of Regulation 71(1)(b) and the consideration of whether the diversion of income was unreasonable. The second concerns any submission about just and equitable under Section 28F(1)(b) Child Support Act 1991.
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> c. The Tribunal finds that the application for variation and the consideration by the Secretary of State and the Tribunal includes a variation under Regulation 71 (Diversion of Income).
>
> d. The Tribunal finds that [the Father's] income, including unearned income under Regulation 69 is £48,805.16. The maximum considered income for Child Support purposes is £156,428.
>
> e. The issue for the Tribunal is whether there has been a diversion of income under Regulation 71 of a sum equal [to] or in excess of £107,622.84.
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> f. From the accounts, the Tribunal finds that the 4 most significant trading companies made a profit after tax of £2.8 million in the year ending 31/12/2015 and £2.2 million in the year ending 31/12/2016. The cash on the balance sheets is recorded as £2.4 million. If the Director's loans were repaid this would increase to £3.6 million. Shareholders' Funds stand at £13.5 million.

> g. These 4 companies show considerable profits and cash balance.
>
> h. On the accounts of one company, … There were Director's loans to [the Father] of £129,526 in the year ending 31/12/2015 and £175,233 [in the] year ending 30/12/2016. The evidence of these loans shows that the company could have made dividends equating to at least the amount of these loans. This, in the opinion of the Tribunal is a diversion of income and [the Father] has unreasonably reduced his income for The child Support purposes and therefore [the Father] should be assessed as having the maximum income."
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> 10. Since that provisional decision was announced at the end of the hearing, the figures used have been rechecked and an error found. The trading profits, after tax of the 4 companies, … in the year ending 31/12/2015 [were], £2,072,183 … and in the year ending 31/12/2016 [they were] £1,480,719 …. The Shareholders Funds at 31/12/2016 were £9.4m. This arithmetic error does not affect the decision."

12. At this point, it is worth putting that decision in context. The papers do not contain sufficient information to allow me to calculate the Father's weekly liability on a gross weekly income of £3,000. But the maximum that *any* non-resident parent could lawfully be required to pay for a single qualifying child on such an income (*i.e.*, assuming no relevant other children, no shared care and no pension payments) is £294 per week.[1] As the Father was already liable to pay £108.24 by virtue of Decision 2, the effect of the Tribunal's decision was to increase his liability by *at most* £185.76 per week. That sum is equivalent to £9,686.06 per year.

13. Moreover, as maintenance calculations under the 2012 Scheme are subject to annual review under Chapter 4 of Part 3 of the 2012 Regulations, the Tribunal's decision only had effect for a single year. The father's subsequent liability would be calculated by reference to his circumstances as at the review date.

The grounds of appeal

14. The Father's stated grounds of appeal to the Upper Tribunal can, I hope, be summarised as follows.

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1 The calculation is set out in paragraph 2 of Schedule 1 to the Act. The father's weekly liability on the first £800 of his gross weekly income is calculated at 12% and is therefore £96. A reduced percentage of 9% is applied to the remaining £2,200 of gross weekly income and gives £198. The sum of £96 and £198 is £294.

15. First, it is said that the Tribunal:

> "erred in law/conducted itself in a highly irregular, inappropriate and manifestly unfair manner in that, far from determining [the appeal] fairly and impartially, instead it stood in [the Mother's] shoes and in effect "prosecuted" or "made the running" or "ran the show" on her behalf; in so doing the Tribunal deprived the father of any semblance of a fair hearing".

Particular reference is made to the fact that the Mother's notice of appeal against Decision 1 (as revised by Decision 2) only stated one ground of appeal, namely that:

> "We are appealing the Child Maintenance Service decision made on 21 July 2017, effective from 4 December 2016 and notified on 18 September 2017 to refuse to allow the additional income variation.
>
> [The Father] as [*sic*] a director of three companies …. He is the major shareholder in all three and able to take a dividend. We submit, however, that [the Father] is taking income by way of Director's Loan and this additional income should be considered for the purposes of child support."

and that the Tribunal had not confined its deliberations to the consideration of that one ground (which the grounds of appeal describe as "conspicuously hopeless") but had allowed the appeal on an issue that had not been raised. It is said that to have done so was contrary to the decision of the Upper Tribunal (Judge Mitchell) in *DE v Secretary of State for Work and Pensions and AE* [2008] UKUT 128 (AAC).

16. It is also said that the Tribunal had made a number of (specified) findings that were unsupported by any evidence.

17. On 6 August 2019, the District Tribunal Judge who had presided over the Tribunal, refused the Father's application for permission to appeal.

18. On 20 December 2019, however, I granted the renewed application for permission. Without limiting the grant of permission, I expressed the provisional view that those grounds of appeal that went to the breadth of the issues considered by the Tribunal and to the Tribunal's case management were wide of the mark. However, I regarded it as arguable with realistic prospects of success that the way in which the Tribunal handled the emergence of diversion of income as an issue at a late stage may have been unfair to the Father. In reaching that conclusion, I took into account that the Tribunal's inquisitorial powers must be exercised in such a way that all the parties have an opportunity to address the issues Tribunal which is to consider and are not unfairly taken by surprise by point that is taken at a late stage by the Tribunal or another party.

19. That having been said, I also raised whether any such error by the Tribunal might be immaterial. What I said was as follows. I have taken the opportunity to correct a few minor typographical errors:

> "12. However, although the appeal has realistic prospects of success, I do not as presently advised regard such success as inevitable.
>
> 13. It should have been obvious from the case management directions given by the Tribunal that it was not going to limit itself to the single point that appeared in the original notice of appeal. Given that, it will be necessary to consider whether [the Father] was responsible for his own misfortune by absenting himself from the hearing. I acknowledge that he is busy, but so are many people. And even very busy people are expected to give a high priority to attendance at judicial hearings. That is as much the case before a tribunal as it is before a court. It may be that, had [the Father] been present at the hearing, the issues that were raised could have been dealt with.
>
> 14. Moreover, the Tribunal was entitled to deal robustly with [the Father's] absence: non-attendance at hearings is a familiar and illegitimate tactic used by non-resident parents to delay the resolution of appeals brought by persons with care, although whether or not the absence in this appeal was tactical remains to be decided.
>
> 15. Further, even if it was an error of law for the Tribunal to proceed in [the Father's] absence when a new point arose, that error was only material if there is an answer to the Tribunal's substantive decision on the diversion issue."

The responses

20. The Secretary of State's representative does not support the appeal. As I am not allowing the appeal, it is unnecessary to set out her arguments in detail. Mr Bickerdike is correct to say that the response misstates his grounds of appeal. Nevertheless, it contains much that is relevant to the issues and I agree with it to the extent set out below.

21. The Mother's response expresses agreement with the position of the Secretary of State and adds nothing further.

The relevant law.

Which scheme

22. There are three child support schemes.

23. The father's liability is governed by the 2012 Scheme (i.e., the scheme established by the Child Support Act 1991 ("the Act") as amended by the Child Support, Pensions and Social Security Act 2000 and the Child Maintenance and Other Payments Act 2008). That is because the effective date of the initial maintenance assessment was after 25 November 2013, when Schedule 4 of the 2008 Act came into force for the purposes of cases in which there is a single qualifying child.

Gross weekly income

24. Under the 2012 scheme, the liability of a non-resident parent is a function of his "gross weekly income": see Part 1 (and, in particular, paragraph 10) of Schedule 1 to the Act and Chapter 1 of Part 4 of the Child Support Maintenance Calculations Regulations 2012 ("the 2012 Regulations").

25. By paragraph 10(3) of Schedule 1, any amount of gross weekly income over £3,000 is ignored for the purposes of the calculation. That figure is defined as the "capped amount" for the purposes of the 2012 Regulations by regulation 2 of those Regulations. By regulation 73, it is not possible to agree a variation that raises the non-resident parent's gross weekly income above the capped amount.

26. The level of the Father's unvaried gross weekly income is not in dispute in this appeal.

Variations

27. However, under section 28A(1) of the 1991 Act, a person with care or a non-resident parent may apply to the Secretary of State "for the rules by which the calculation is made [*i.e.*, the rules specified in paragraph 24 above] to be varied in accordance with this Act".

28. Section 28A and the detailed rules governing the circumstances in which the Secretary of State (and, on appeal, a tribunal) may agree a variation are set out the Appendix to this decision, together with a number of other provisions that are discussed below.

Diversion—A summary of the case law

29. The possibility that a variation might be agreed in a case where income had been diverted was not a new feature of the 2012 Scheme. The wording of regulation 19(4) of the Child Support (Variations) Regulations 2000 (part of the second, 2003, Scheme) is similar to that of regulation 71 of the 2012 Regs. Before that, diversion of income was a ground on which a departure could be directed under regulation 24 of Child Support Departure Direction and Consequential Amendment Regulations 1996, which—from 2 December 1996—formed part of the original Scheme.

30. As a result, what does, and does not, amount to diversion of income has been the subject of a number of decided cases. It is unnecessary for me to review those authorities in depth but I will summarise a number of key points that can be derived from them.

31. First, retention of distributable income in a company is capable of amounting to diversion. Moreover, there can be a diversion of income without any positive decision or conduct on the part of the non-resident parent. Inaction—omitting to take income that is available—will suffice: *CCS/3006/2007* at [26].

32. Second, "[i]t is no … part of the conditions for the application of regulation 19(4) [equivalent to regulation 71 of the 2012 Regulations] that the parent's motive or purpose should be to reduce the amount of his child support liability: *TB v SSWP and SB (CSM)* [2014] UKUT 301 (AAC) at [32]. It is sufficient if the non-resident parent's actions—or inaction—have that effect as a matter of fact.

33. Third, it does not automatically follow from the fact that a decision to retain profits in a company or to spend them on the expansion of the business may be reasonable from a commercial or financial point of view, that it is reasonable for the purposes of the child support scheme:

> "… although the judgment of what is reasonable or unreasonable … is a broad one for the good sense of the tribunal, and the legislation places no restriction on the circumstances that may be taken into account, it is a judgment to be made in the context of the child support legislation and the purpose of the variation provisions themselves. As [the representative of the Child Maintenance and Enforcement Commission] says:
>
> > 'In my submission the question as to whether a diversion was unreasonable has to be seen in the context of the regulation … and the overall purpose of the Child Support Schemes including the terms of section 1(1) of the Child Support Act

> which sets out that parents are responsible for maintaining their children.
>
> In making financial decisions a parent will obviously have a number of factors to take into account *but providing maintenance for his or her children must be very high up on the list of priorities*.
>
> In my submission the tribunal was both entitled and required to decide as a question of fact whether the choices made by the NRP were 'unreasonable' given the context as I describe it above."

(per Upper Tribunal Judge Howell QC in *GO'B v CMEC (CSM)* [2010] UKUT 6 (AAC) quoted by Upper Tribunal Judge Mesher in *TB* (above) at [33], my emphasis).

34. Finally, as noted by Upper Tribunal Judge Jacobs writing extrajudicially in *Child Support: The Legislation* (14th edition, Child Poverty Action Group, London, 2019) at p.459. It is potentially relevant to issue of reasonableness that "retained profits are not the only source of funds" to help a company grow.

The issues

35. On the facts set out above and the law set out in the Appendix, there are four issues for me to decide:

(a) was it open to the Tribunal to determine issues not raised in the notice of appeal; and, if so

(b) did it adopt a fair procedure when it did so;

(c) did it make findings of fact that were unsupported by the evidence; and if the answer to (b) is no or the answer to (c) is yes,

(d) was any error material?

Issues not raised in the notice of appeal

36. Mr Bickerdike's reply to the responses of the Secretary of State and the Mother does not address this issue further, choosing instead—understandably—to concentrate on the possible breach of the duty to act fairly that I had identified as having reasonable

prospects of success. However, the point has not been formally abandoned and it is therefore necessary for me to set out my concluded views, which follow closely the provisional views I expressed when giving permission to appeal.

When is an issue raised by the appeal?

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.

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).

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]).

41. One of the practical problems that the First-tier Tribunal needs to take into account in the exercise of its inquisitorial and enabling jurisdiction is that—at least under the second and third child support schemes, where the liability of a non-resident parent is solely a function of his own financial and other circumstances, rather than the circumstances of both parents—the relevant evidence will usually be in the possession of the non-resident parent.

42. When that is the case, it is difficult for the person with care, and anyone representing her, to formulate full grounds of appeal before that evidence is disclosed. And such disclosure will often not be forthcoming without directions from the First-tier Tribunal.

43. Evidence disclosed as a result of such directions often raises further issues. If so, then in keeping with that Tribunal's overriding objective which includes "avoiding unnecessary formality" (see rule 2(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules")), nothing in those Rules requires the amendment of the original notice of appeal. The only obligation is that the Tribunal must treat the parties fairly by giving all of them an adequate opportunity to address all the issues before the Tribunal makes the final decision.

WO'C v Secretary of State for Work and Pensions and JW

44. In saying that the FTT's jurisdiction in child support cases is inquisitorial and enabling, I am conscious that in *WO'C v Secretary of State for Work and Pensions and JW (CSM)*, [2020] UKUT 34 (AAC), I made observations that might seem to support the opposite view in the context of an application to extend the appellant's time for filing a notice of appeal:

45. What I said was:

> "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.

46. With hindsight, however, I now consider that I should have worded paragraph 58 more cautiously. The interests of the parents in a child support appeal will inevitably conflict in the sense that, if the appeal is allowed, the paying parent will have to pay more and—to exactly the same extent—the receiving parent will receive more. Or *vice versa*, if the appeal is dismissed.

47. However, *the process by which the appeal is to be decided* remains an inquisitorial one. The interests of the parents cannot be taken to be adverse to those of their children, particularly when rule 2(4) of the SEC Rules imposes a duty on them to co-operate with the Tribunal generally. And whatever may have been the case in the past, the interests of the Secretary of State are no longer adverse to either parent: her only interest lies in helping the Tribunal reach the correct decision.

48. The point I was struggling to make in *WO'C* was better expressed in paragraph 59 (which I need not quote here) namely that the public interest in finality needs to be given greater weight in child support appeals than in social security appeals because, unless child support decisions are timeously challenged, it is legitimate for a parent to arrange his or her affairs on the basis that what has been decided is final. That consideration

does not, of course, arise in this case: I mention it merely because, taken on its own, paragraph 58 of *WO'C* might otherwise have caused confusion.

Regulation 56(4) of the 2012 Regulations

49. The Secretary of State's representative has referred me to regulation 56(4) of the 2012 Regulations which empowers the Secretary of State to treat an application for a variation made on one ground as made on another ground "if that other ground is more appropriate to the facts alleged in that case." That provision has been made under the Secretary of State's power to make regulations as to the procedure to be followed in considering an application for a variation that is conferred by paragraph 2(a) of Schedule 4A to the Act.

50. I accept that, formally, the First-tier Tribunal stands in the shoes of the Secretary of State and therefore may exercise the regulation 56(4) power. In my judgment, however, that power exists to deal with a particular issue that may arise on consideration of an application for a variation by the Secretary of State and has little, if any, practical function by the time an appeal reaches a tribunal.

51. Under section 28A(4)(a) of the Act an applicant for a variation "must say upon what grounds the application is made".

52. To a lawyer the word "grounds" suggests a closely argued written document similar in form to the grounds of appeal to the Court of Appeal in adversarial litigation. And, (very) occasionally, a represented applicant—or an applicant who is herself a lawyer—may submit an application for a variation in that form.

53. It is far more common, however, that applicants are unrepresented and understand neither the child support scheme in general nor the rules about variations in particular. For example, misunderstandings about what is meant by "diversion" are very common.

54. In such cases, the grounds may be no more than bald statements that "When we were together, he received rent from three properties" or "His sister told me he's reducing his income by arranging for his company to pay his new partner a high salary, even though she works full-time elsewhere". For the reasons given in paragraph 41 above, it may be difficult for an applicant to give further particulars at that stage of the application.

55. The word "grounds" is sufficiently wide to include such statements. Section 28A(4)(a) provides that an application—which must, by section 28(4)(b), include "grounds"—need not be in writing. An application that is made by word of mouth will

almost inevitably include fewer particulars than a formal written document. The application must include some reasoning or assert some facts in support. So, for example, "I apply for a variation because I think your decision is wrong" will not suffice. But the hurdle imposed by section 28A(4)(a) is not much higher than that.

56. Moreover, the Act draws a clear distinction between the "cases" in which a variation may be agreed (see section 28F(1)(a) on page ii of the Appendix) and the grounds that must exist for an individual application to fall within one of those "cases". Nothing in section 28A(4)(a) requires an applicant to specify either all the "cases" she says are applicable, or even a single such "case".

57. In short, the function of the initial application for a variation is not to provide an "oven-ready" case fit for an immediate final decision by the Secretary of State. It is merely the beginning of a process of preliminary consideration, notification to the other parent, and collection of information and evidence that will eventually lead to such a decision. If, at any time before the final decision on the application is made the Secretary of State forms the view that that "the facts alleged" mean that another ground is more appropriate to a ground that has not been set out in the application, regulation 56(4) empowers her to treat the application as having been made on that other ground.

58. In my judgment the phrase "the facts alleged" must be interpreted as referring to all the facts alleged by both parents and also the facts appearing from the evidence as it exists at the time the Secretary of State is considering the application. A narrower interpretation—for example, one that construed the phrase as referring only to the facts alleged in the original application—would deprive the provision—and potentially also the information-gathering procedures in regulation 59 of the 2012 Regulations—of much of its utility.

59. The power conferred by regulation 56(4) is therefore important when the Secretary of State decides whether to agree a variation. It allows a fair result to be reached in individual cases without unnecessary formality. An unrepresented parent is able lay her case as she sees it before the Secretary of State and to ask that the legally appropriate decision be made.

60. Importantly, however, regulation 56(4) only empowers the Secretary of State to deal with issues that are apparent from the evidence: she may only treat the application as raising a different ground to the extent that it is "appropriate" to do so, given "the facts alleged". It is not a power to deal with issues that are not raised by the application for a variation taken as a whole.

61. It is for that reason that the regulation 56(4) power makes little practical difference if the Secretary of State's decision is appealed to a tribunal. Any issue that could

legitimately lead a tribunal to exercise that power would inevitably be "clearly apparent from the evidence" (see paragraph 39 above) and—following the decisions in *Mongan* and *Hooper*—would be an issue that is raised by the appeal. The tribunal would therefore be *obliged* to consider that issue and not merely *empowered* to do so by regulation 56(4).

Issues not raised by the appeal

62. Although what I am about to say may seem counter-intuitive to those more accustomed to adversarial proceedings, the First-tier Tribunal also has a statutory power to consider issues that are **not** raised by the appeal under the *Mongan* and *Hooper* test. Section 20(7)(a) of the 1991 Act provides that in deciding a child support appeal, the Tribunal "need not consider any issue that is not raised by the appeal". The corollary is that it *may* consider issues not raised by the appeal if it decides to do so.

63. Section 20(7)(a) confers a judicial discretion, so there are rules about how it must be exercised and the formalities that must be observed: see *R(IB) 2/04* at [192] on the equivalent discretion conferred by section 12(8)(a) of the Social Security Act 1998. It is only necessary for me to mention one. The discretion must be exercised consciously and expressly, in the sense that if a statement of reasons is requested, then the fact that the exercise of the discretion was considered should be recorded and the reasons for the exercise of the discretion should be set out.

64. That is not this case. There is no record that the Tribunal exercised the section 20(7)(a) discretion and I have no reason to suppose that it did so. It formed, and recorded, the clear view that diversion of income was an issue that was raised by the appeal. To have considered section 20(7)(a) would have been inconsistent with that view.

65. For those reasons, I need not consider section 20(7)(a) further.

Was the issue of diversion raised by the appeal?

66. All of which is a long-winded way of saying that the Tribunal was both entitled and bound to deal with the diversion issue if that issue was "clearly apparent from the evidence".

67. In my judgment, the Tribunal was correct to conclude that it was.

68. First, although "unearned income" and "diversion of income" are undoubtedly separate "cases" for the purposes of Schedule 4B to the Act, the Secretary of State's representative is correct to suggest that, at least in cases where the non-resident parent

is the owner, or majority owner, of an incorporated business, there will often be a link between them. Indeed, the unreasonable reduction of "income which would otherwise fall to be taken into account as … unearned income under regulation 69" is expressly identified by regulation 71(1)(b) as behaviour that—subject to the matters set out in regulation 71(1)(a)—will give rise to a case for a variation.

69. In short, where a company has distributable income and a non-resident parent is able to control the amount of income he receives from the company (or is able to arrange for such income to be paid in a form that does not fall within the definition of "gross weekly income") then:

(a) if the income is paid as a dividend it potentially counts as unearned income within regulation 69; or

(b) if the income is retained in the company, or paid to someone other than the non-resident parent, or for purposes other than providing him with an income, then the circumstances potentially amount to diversion of income within regulation 71.

Subject to the question of reasonableness, the retention of undistributed funds in a company controlled by the non-resident parent is the one of the most common examples of circumstances that fall within regulation 71.

70. Second, the stated ground of appeal to the First-tier Tribunal (paragraph 15 above) was not expressly limited to the case arising under regulation 69 of the 2012 Regulations. That regulation was not mentioned. On the contrary, the ground refers to "the *additional* income variation" and not the "*unearned* income variation". That wording was in contrast to the Mother's grounds for mandatory reconsideration (which referred to "additional unearned income") and was apt to cover any case arising under Chapter 3 of Part 5 of those Regulations (see the headings to that Chapter and to regulation 73).

71. It would certainly have been helpful if the opening paragraph of the ground of appeal had been clearer. But, particularly in the light of the discussion at paragraphs 68-69 above, the Tribunal needed to have regard to the facts alleged to decide what issues were raised by the appeal.

72. Even if one were to accept (as I do not) that the issues were defined by the grounds of appeal rather than the evidence as a whole, the ground asserts:

(a) that the father is a director of, and the majority shareholder in, three companies;

(b) that he was able to take a dividend from those companies;

(c) that he had not taken such a dividend; and

(d) that he was taking income by way of a director's loan.

Given those assertions, the grounds ask for "this additional income" to be "considered for the purposes of child support".

73. In my judgment, the first three of those assertions—on their own—raised the issue of whether the Father had diverted income. If one paraphrases the fourth assertion as being that the Father had taken a director's loan instead of a dividend, that would be even clearer. Subject to the issue of reasonableness, omitting to take income out of a company by way of dividend and using it for other purposes is diversion: see paragraph 31 above.

74. I do not consider that the facts that (1) the grounds do not use the word "diversion" and that (2) the description of the benefit to the Father of the director's loan as "income" may be erroneous[2], affect that judgment.

75. As to (1), I judge that it was unnecessary to use the word "diversion" in the grounds of appeal for reasons that are similar to those set out in my discussion of regulation 56(4) of the 2012 Regulations (paragraphs 51-59 above). Proceedings before the First-tier Tribunal are informal and enabling in nature. An appellant is entitled to lay the circumstances of her case before the Tribunal in non-legal terms and rely on the Tribunal to give the appropriate remedy (or to refuse a remedy if none is appropriate).

76. As to (2), it is certainly arguable that—at least where both the borrower and lender intend that it should be repaid—a loan is not "income". And even if any loan in this case had amounted to income, it would not have been *unearned* income either within the normal meaning of that word, or within the meaning as defined in regulation 69(2). The value of the loan to the Father would have fallen to be taxed (if at all) as a benefit in kind under Chapter 7 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003, rather than under Parts 3, 4 or 5 of the Income Tax (Trading and Other Income) Act 2005 as is required by that definition

77. However, in the context of regulation 71, a director's loan can *represent* diverted "income" even if it is not income itself. So, although the sentence may have been clumsily worded, I judge that any clumsiness is not sufficient to change the meaning of the grounds of appeal which would otherwise raise the issue of diversion.

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[2] The request to have "additional income" taken into account for child support purposes is not erroneous but correctly describes the effect of agreeing a variation under regulation 71: see regulation 73(1).

78. Third, and in case my construction of the grounds of appeal should be held to be incorrect, it is necessary to repeat that the issues raised by an appeal are not identified by construing the original notice of appeal but by whether they are clearly apparent from the totality of the evidence available when the decision is made.

79. In this appeal, that evidence showed that—as the Tribunal found—the Father had a controlling interest in four companies with undistributed profits. Post-tax trading profits had been £2,072,183 in the last complete year before the effective date and £1,480,719 in the year that included that date. In the latter year, shareholders funds amounted to £9.4 million, a figure that included £2.4 million in cash (and would have been £3.6 million but for the loan to the Father).

80. As noted at paragraph 31 above, the mere fact that distributable income has been retained in a company can amount to a diversion of income to that company irrespective of the motives of those entitled to take that income. I therefore judge that evidence to have been more than sufficient to raise the issue of diversion of income even though the question of whether the resulting reduction in the Father's income was reasonable remained to be resolved.

Was the Tribunal's procedure fair?

81. Notwithstanding my conclusion in the previous paragraph, I accept that the Father and those advising him did not, in fact, appreciate that diversion of income was an issue in the appeal until that issue emerged at the hearing on 8 May 2019 and that they were therefore taken by surprise when the Tribunal announced a preliminary decision agreeing a variation on that ground. My concern about that circumstance was the reason I gave permission to appeal.

82. I have, however, come to the view that my concern was misplaced.

83. That is for three reasons.

Opportunity to make representations

84. First, as set out in paragraph 7 of the written statement of reasons (see paragraph 11 above), the Tribunal offered all the parties the opportunity to make representations on "the issue of reasonableness as set out in Regulation 71(1)(b) and any representations on the issue of just and equitable as set out in Section 28F(1)(b)".

85. My original concern was that, not realising that diversion was an issue, those representing the Father may have failed to address the issue of control under regulation

71(1)(a) and the issue of whether the Father's income had been reduced under regulation 71(1)(b).

86. However, I now take the view that there was nothing more that could have been said on those issues. The objective evidence of the companies' accounts established that the Father controlled the amount of income he received from them. That is because they all had distributable funds and, by virtue of his majority shareholding in them, the Father could have required them to pay a dividend from those funds. The Father did not in fact do so and—as a matter of law—that amounted, irrespective of his motivation or lack of it, to a reduction of income that would otherwise have been taken into account under regulation 69.

87. In those circumstances, the only issues on which fairness required the parties to be given an opportunity to make further representations were the two issues on which the Tribunal in fact gave that opportunity.

The Father's non-attendance at the hearing

88. Second, the Father had absented himself from a hearing that had been listed to suit his convenience and did not give an adequate explanation for his absence. Had he been present, he might well have been able to explain why he had left the retained profits in the companies. At the very least, he might have been able to assist the Tribunal identify any issues on which further, possibly written, evidence may have been required.

89. The Father's reply says this on the issue:

> "6. So far as the Appellant's lack of attendance on 8th May 2019 is concerned, it was made clear in correspondence sent by his solicitors shortly in advance of the hearing that whilst he was no longer able to attend, he had no objection whatsoever to the matter proceeding in his absence; leaving aside that the Appellant had an unexpected but very pressing commitment which prevented his attendance, it is respectfully suggested that in such circumstances it would be grossly unfair to characterise him as having been "responsible for his own misfortune by absenting himself and/or to consider his absence as an reflective [*sic*] of "a familiar and illegitimate tactic to delay the resolution of appeals", as are contemplated as possibilities by Judge Poynter at paragraphs 13 and 14 of the "Notice of Decision in Relation to Permission to Appeal".
>
> 7. The stark truth is that no difficulty whatsoever, and certainly no prejudice to either Respondent, arose or was likely to arise from the Appellant's absence until, through no fault of his and indeed for reasons entirely beyond his control, the Tribunal elected without any prior notice

> to alter fundamentally the basis of the Second Respondent's appeal, advancing it on a very different footing to the manner in which, up to that point, it had been presented; it is respectfully submitted that at that juncture basic principles of natural justice required that the Appellant be given a proper opportunity to respond to the case he was now having to meet, even if that necessitated an adjournment, an opportunity inappropriately denied him (and despite his representative having, in the changed circumstances, requested it)."

90. I do not accept the characterisation of the Tribunal's conduct that appears before the semi-colon in paragraph 7 of that quotation. It was apparent from the directions given by the Tribunal, and the evidence produced in response to those directions that the Tribunal did not regard the scope of its jurisdiction as limited by the terms of the Notice of Appeal and, for the reasons I have already given, its jurisdiction was not so limited.

91. Moreover, the provisions of the 2012 Regulations that deal with variations include in regulation 56(4) an express provision permitting the Secretary of State to treat an application for a variation made on one ground as made on another ground. It is trite law that, on appeal, the Tribunal stands in the shoes of the Secretary of State. Even if those advising the Father were unfamiliar with the *Mongan* and *Hooper* cases that establish the "clearly apparent from the evidence" test. It was always going to be a possibility that the Tribunal might decide that the Secretary of State should have exercised that power. I do not accept that when the Father made the decision that the "unexpected but very pressing commitment" was more urgent than attending a hearing about the maintenance of his son, he was legitimately entitled to take the view that the only issue raised by the appeal arose under regulation 69.

92. In any event, it is always in the interests of the parties to attend hearings before the First-tier Tribunal because appeals are on both fact and law and informal. One cannot always know from the papers that are circulated in advance quite how the other parent's case will be put and what evidence will be given. Absenting oneself from the hearing always runs the risk that of depriving oneself of the opportunity to answer any unexpected evidence or address additional issues.

93. It is striking that, so far as I can discern, the First-tier Tribunal was not given particulars of the allegedly pressing commitment which prevented the Father's attendance. Neither have I, even though I expressly raised the issue when I gave permission to appeal.

94. That is not satisfactory. Whether a commitment is sufficiently pressing to justify non-attendance at a judicial hearing is an issue on which, during my years as a District Tribunal Judge, the views of non-resident parents did not always coincide with my own.

I suspect other judges of the Social Entitlement Chamber who hear child support appeals would say the same. But that issue does not fall to be decided by any individual party but by the Tribunal. If proper particulars of conflicting commitments are not given, it becomes difficult for the Tribunal to make that decision because it will not know where the case comes on what I have described elsewhere as "the hairdressing/cancer treatment spectrum" (*BV v Secretary of State for Work and Pensions (PIP)* [2019] 1 WLR 3185, [2018] UKUT 444 (AAC) at [12] and [37]).

95. I acknowledge that the appellant in *BV* had applied for an adjournment and that—at least at the start of the hearing on 8 May 2019—the Father had not. I do not, however, regard that as a relevant distinction. Whether or not the Father wished for an adjournment, he was absent from the hearing and rule 31 of the SEC Rules prevents a tribunal from proceeding with a hearing in a party's absence unless (among other things) it considers that it is in the interests of justice to do so. The Tribunal was therefore required to address that issue.

96. The reason for a party's absence will always be a relevant factor when deciding what is in the interests of justice and the fact that a party is content for the hearing to proceed, though also relevant, will not always be determinative. The evidence relevant to the calculation of a non-resident parent's gross weekly income and the potential existence of an "additional income" ground for variation will usually be in that parent's sole knowledge. And even where some of it is known to the person with care, it will often require further explanation that only the non-resident parent can give. The interests of justice may therefore be furthered by the presence of the non-resident parent to answer questions, even if—and sometimes, especially if—he does not wish to attend. However, it is also in the interests of justice to avoid delay. Rule 31 therefore requires tribunals to strike what can be a delicate balance. The reason for the absence of a non-resident parent will often determine the side on which that balance comes down.

97. While I stand by my observation that non-attendance at hearings by non-resident parents is a familiar and illegitimate delaying tactic, I accept that that is not true of every such non-attendance. In this case, it is unnecessary for me to make any finding that the Father's absence from the hearing of 8 May 2019 either was, or was not, tactical.

98. When judging whether the procedure adopted by the Tribunal was fair, however, I can, and do, take into account that the Father took a deliberate decision not to attend the hearing—and therefore assumed the risk identified in the final sentence of paragraph 92 above—and that, in the absence of a more detailed explanation, he has not established any circumstances that might suggest it would be unfair for him to bear the consequences of the eventuation of that risk.

Was there an application to adjourn?

99. Had I been satisfied that those representing the Father made an application to adjourn following the Tribunal's announcement of its preliminary decision and that that application had been refused, I would probably[3] have allowed this appeal and set aside the Tribunal's decision (although I would have remitted the case to the same tribunal with directions to reconsider only the issues of reasonableness and whether it would be just and equitable to agree any variation, rather than to a new tribunal for a rehearing of all issues).

100. But my third reason for concluding that the Tribunal did not adopt an unfair procedure is that on balance and notwithstanding the assertion to the contrary in the passage following the semi-colon in paragraph 7 of the Father's reply (see paragraph 89 above), I am not satisfied that any such application was made.

101. Although I accept that the First-tier Tribunal's papers could be in better order and, on occasion, more legible, I can see no contemporaneous record of any such application or of any ruling on it.

102. On the contrary, the District Tribunal Judge who presided over the hearing, writing only a month and a day afterwards, recorded that following the announcement of the preliminary decision:

> "Both Mr Bickerdike and Mr Smith had little further to add to their earlier submissions. Mr Bickerdike stated that it was not fair for the Tribunal to draw inferences or fair to expect the [Father] to anticipate that the 'goal posts' would be moved." (see paragraph 8 of the written statement of reasons quoted in paragraph 11 above).

There is no mention of any application for an adjournment.

103. Further, the written statement of reasons expressly records (at paragraph 12) that no request for an adjournment was made at any point. Specifically, it says:

> "12. It was the view of [the presenting officer] and Mr Smith that the appeal covered a variation under Regulation 71. [The presenting officer] made reference to Regulation 56(4), it was his view that the Secretary of State and then the Tribunal would look at all available variations. *Despite this, Mr Bickerdike, at no point, requested an adjournment*. He did, however, indicate that, in his view the Tribunal could not proceed to decide whether a diversion

[3] "Probably" because the Tribunal would have been entitled to refuse any adjournment necessitated only by the Father's inadequately explained absence from the hearing.

> of income had taken place because there was no evidence to make a finding whether any reduction of [the Father's] income had been unreasonable. In his view, the inclusion of income was a widening of the grounds of appeal and this would prevent a decision without further evidence and submission on this point." (my emphasis).

104. Mr Bickerdike's account of what occurred does not coincide with that. In the *Application for Permission to Appeal and Notice of Appeal* ("Form UT1"), he states:

> "iv) As reflected in the "Statement of Reasons for the Decision" (at para 12) it had been made clear at the outset of the appeal hearing on behalf of the [F]ather that, should the Tribunal (contrary to the [F]ather's submission as to what it should do) be minded to expand or allow the expansion of the appeal so as to include consideration of Regulation 71, then an adjournment would be necessary so that further evidence could be obtained (including, obviously, from the [F]ather) on the reasonableness or otherwise of the alleged "diversion" of income.
>
> vii) However, in the event, having heard submissions from the parties the Tribunal reached the decision to proceed with expanding the appeal so as to include consideration of Regulation 71 and then went immediately on (without offering or considering an adjournment for the purposes of obtaining evidence relevant to the issue of reasonableness or otherwise of the alleged diversion) to find there to have been an unreasonable diversion."

(I have already explained why I reject the submission that the Tribunal "expanded" the scope of the appeal by considering regulation 71; the Father and his advisers did not appreciate that it was an issue, but that is not the same thing.)

105. I do not accept that paragraph 12 of the written statement of reasons "reflects" what is said at paragraph iv) of the UT1. Paragraph 12 does not mention the word "adjourn" in any of its cognate forms other than to deny expressly that an application to adjourn was made at any point during the hearing.

106. Human beings are fallible and different people who were present at the same event often have different memories of what occurred. How is the contradiction between the accounts of the District Tribunal Judge and Mr Bickerdike to be resolved?

107. In my judgment greater weight is to be attached to what is said in the written statement of reasons.

108. First, it is improbable that if an application for an adjournment had been made, the Tribunal, which has set out what happened at the hearing in more than usual detail, would not have recorded that fact and ruled on the application. This is not conclusive on its own because improbable things do sometimes happen and are alleged to have happened in this case. Nevertheless, it is a factor to be taken into account.

109. Against that, it is also improbable that experienced counsel would not have applied for an adjournment in the circumstances of this case.

110. Second, the District Tribunal Judge has made a specific point of recording that no application to adjourn had been made. The written statement of reasons reads as if the Tribunal was expecting such an application—which it probably was: see the previous paragraph—and was surprised not to have received one. It is probable that the Tribunal would have noticed if an application that it was expecting had been made.

111. Third, and importantly, what those representing the Father have said—and not said—about this issue following the hearing has not been consistent. Rather it has become perceptibly more favourable to their client:

(a) The application to the First-tier Tribunal for permission to appeal was made by a letter dated 5 July 2019 from North Family Law. That letter makes no mention of any application for adjournment nor of the refusal of any such application. Had such an application been made and refused I would have expected that to feature prominently as a ground of appeal. It does not. Moreover, even if those representing the Father had taken a decision to advance the proposed appeal on other grounds, I would still have expected the letter to seek to correct what, from the Father's point of view, would have amounted to two major errors of fact in paragraphs 8 and 12 of the written statement of reasons. It did not.

(b) I have already quoted what was said when that application was renewed to the Upper Tribunal at paragraph 104 above. What is alleged there is a general submission at the outset of the hearing that an adjournment would be necessary if regulation 71 were to be considered followed by a criticism that the Tribunal based its decision on that regulation "without offering or considering an adjournment".

(c) Finally, in the Father's reply (paragraph 89 above), the assertion has become one of an inappropriate denial of an adjournment "despite his representative having, in the changed circumstances, requested it". The words "in the changed circumstances" can only mean that the alleged request was made after the announcement of the preliminary decision.

112. In those circumstances, I prefer the account given by the District Tribunal Judge in the written statement of reasons, particularly at paragraph 12. During the hearing, before the announcement of the preliminary decision, there was discussion about the proper scope of the appeal. Mr Bickerdike submitted, without making a formal application for an adjournment (which I acknowledge would not have been appropriate at that point in the proceedings), that if the Tribunal were to base its decision on regulation 71, further evidence and submission would be necessary on the issue of whether any reduction in the Father's income was "unreasonable". The Tribunal's response to that submission was to announce a preliminary decision and give the parties an opportunity to make representations on it. It is at that point that any formal application to adjourn should have been made but none was: I accept what the District Tribunal Judge says at paragraph 8 of the statement on this point.

Conclusion

113. For all those reasons, I reject the Father's submissions that the procedure followed by the Tribunal was unfair.

Did the Tribunal make findings of fact that were unsupported by evidence?

114. No.

115. Given the law set out in the Appendix, the Tribunal needed to be satisfied of the following before it could agree a variation under regulation 71:

(a) that the Father had the ability to control, whether directly or indirectly, either the amount of income that received or the amount of income that fell to be taken into account as his gross weekly income;

(b) that the Father had reduced the amount of his income which would otherwise fall to be taken into account as gross weekly income or as unearned income under regulation 69 by diverting it to other persons or for purposes other than the provision of such income;

(c) that that reduction was unreasonable; and

(d) that it was just and equitable to agree a variation.

116. The issues arising under (a) and (b) involve questions of primary fact. The Tribunal's findings on those questions were not just adequately supported by evidence of the company accounts; they were the only conclusions that the evidence permitted.

In short, the Father had the ability to control the income he took from the companies because of his controlling shareholding. Any income taken from the companies would have been take into account by the child support scheme either as gross weekly income or unearned income under regulation 69. The father reduced the amount of income that would otherwise be so taken into account by retaining distributable profits in the companies and he thereby diverted income to those companies.

117. The issues arising under (c) and (d) are different. They involve questions of secondary fact, that is, inferences drawn from the primary facts. Any burden of proof applies only to those primary facts. What inference should be drawn from them is a matter for submission, rather than evidence

118. Whether or not the variation to which the Tribunal agreed was just and equitable has not been an issue in this appeal and I will therefore say no more about it.

119. As I shall explain, the submission that the Tribunal made findings of fact for which there was no evidence about whether the reduction in the Fathers income was unreasonable, mistakes the way in which the burden of proof operates in inquisitorial proceedings.

120. Before I do so, however, it is worth noting that, even if the proceedings before the Tribunal had been adversarial and the legal burden of proof on the appellant, the evidence from the company accounts would have placed the Father under an evidential burden as to reasonableness.

121. It is unnecessary for me to repeat the figures, but the father's companies were profitable and had considerable shareholders funds. They also had a large amount of cash and would have had more but for the loans to the Father. On the face of that evidence, the companies could have paid the necessary dividend to the Father and his fellow shareholders from the cash they had at the bank. Moreover, the calculation is a notional one. The Father would not in fact have to finance any variation by withdrawing money from the companies: it was only necessary for him to find (at most) slightly less than £10,000 to finance the actual amount of additional maintenance that would become due during the year to the next annual review. Given the high priority that is accorded to maintaining one's children when reasonableness is considered, the inference of unreasonableness would be compelling in the absence of further evidence from the father. It was not the Tribunal's fault that no such evidence was forthcoming. The Father did not attend the hearing and, as I have found, no application for adjournment was made.

122. But, in any event, that is not how the burden of proof works in inquisitorial proceedings before the Social Entitlement Chamber. Rather, as explained by Baroness

Hale QC in *Kerr v Department of Social Development*, [2004] UKHL 23 (also reported as *R 1/04 (SF)*), which related to appeals about social security benefits:

> "56. Ever since the decision of the Divisional Court in *R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble* [1958] 2 QB 228, it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim at p 240:
>
> > "A claim by an insured person to benefit under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds... Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation, the minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action."
>
> 62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
>
> 63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998, "a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself."

In my judgment, the same applies *mutatis mutandis* to appeals about child support, even though there are three parties and the interests of two of those parties will usually conflict. Justice cannot be done otherwise in a jurisdiction where there is no legal aid and the parties (other than the Secretary of State) are usually unrepresented. All parties need to play their part in the co-operative process by providing relevant evidence. Where they do not play their part in that process, then "[i]f there is still ignorance about

a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it".

123. In this case, I do not consider that it was necessary for the Tribunal actively to draw inferences against the Father. He had not provided evidence as to why he had arranged for the companies to retain their profits rather than distribute them and, in the circumstances, the Tribunal was entitled to decide the issue of reasonableness on the evidence it had.

124. This issue therefore collapses into the issue of whether the absence of the Father's evidence arose as a result of the Tribunal following an unfair procedure and, as I have already explained, the Tribunal's procedure was not unfair.

Was any error made by the Tribunal material?

125. Strictly speaking, this question does not arise because I have found that the Tribunal did not make any errors. However, I will deal with it in case this matter should go further.

126. A striking feature of this case is that, even at this stage—and despite the fact that I raised the issue when giving permission to appeal—there is not so much as a hint as to why the Father contends it was reasonable for him to retain profits in his companies that would otherwise fall to be used in part to maintain his son.

127. Rather, the Father's reply states as follows:

> "8. As to the observations set out in paragraph 15 of Judge Poynter's Reasons for granting permission to appeal, in which it is suggested that that any unfairness in the process/error of law is "only material if there is an answer to the Tribunal's substantive decision on the diversion issue", it is respectfully submitted that this is not the correct approach as it results in an effective albeit impermissible reversal of the burden of proof on the critical issue in this case. In particular, it is suggested that it was incumbent on the Tribunal (as it would be on any court or tribunal conducting a fair hearing to receive and take account of the [Father's] case/evidence on the question of whether there was an unreasonable reducing/diversion [*sic*] **before** making a substantive decision on the issue, which it failed conspicuously to do, resulting in the decision/finding being improperly and unfairly made. In such circumstances, it is respectfully submitted that the decision/finding is vitiated, cannot stand (and should be set aside (and the issue reheard by a differently constituted Tribunal) and that it would be wholly wrong for it to be left in place, *i.e.*, for it to be treated as if

> fairly and properly made unless and until the [Father] can provide "an answer" to it."

128. I reject that submission because of what I have said above about the burden of proof and because the Father put it out of the Tribunal's power "to receive and take account of [his] … evidence" by omitting to attend the hearing without an adequate explanation.

129. The submission was, of course, one that Mr Bickerdike was entitled to make. But it was always a possibility that it might not commend itself to me. If the Father had any case on the issue of reasonableness, I would also have expected an alternative submission setting out at least an outline of what that case might be. Instead there is silence.

130. Even when the First-tier Tribunal makes an error of law, section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 confers a discretion on the Upper Tribunal not to set its decision aside. Judicial time is a scarce and valuable resource and, had I accepted that the Tribunal in this case had adopted an unfair procedure as to the issue of reasonableness, I would not have remitted that issue to the Tribunal without some indication that there was a genuine dispute about it.

131. As it is, I am left to speculate about what the Father's case, if any, might be. In the absence of any explanation from the Father and given:

(a) the high level of profits, shareholders' funds and cash in the companies;

(b) the comparatively small level of income that the Tribunal held to have been diverted;

(c) the fact companies have other ways of financing their activities and growth than retaining profits, particularly when they are as profitable as the companies in this case were; and

(d) the high priority that the law attaches to the maintenance of qualifying children when determining whether a reduction in income is unreasonable for the purposes of regulation 71,

I am not persuaded that any error of law that the Tribunal may (contrary to my primary decision) have made might have led to a different outcome.

DE v Secretary of State for Work and Pensions and AE

132. Finally, I must mention the decision of Upper Tribunal Judge Mitchell in *DE v Secretary of State for Work and Pensions and AE* [2018] UKUT 128 (AAC) on which Mr Bickerdike relied to establish that the procedure adopted by the Tribunal in this case was impermissible.

133. Judge Mitchell's introductory comments to his decision were in the following terms:

> "1. After six years, three decisions of the First-tier Tribunal and two appeals to the Upper Tribunal, this child support dispute concludes. Some cases will always take longer to deal with than others and inevitably errors on points of law will be made. Even with the best will in the world, cases will arise that take a frustratingly long time to be resolved. Delay does not necessarily indicate fault. In this case, however, I wish to record my concerns about the dynamics of the First-tier Tribunal proceedings which, in my view, led to unnecessary delay.
>
> 2. The First-tier Tribunal was faced with an appeal brought by a parent with care against the Secretary of State' s refusal to vary the usual child maintenance calculation rules. So it was the parent with care' s appeal. While the First-tier Tribunal has an inquisitorial function, it cannot turn a respondent into an appellant – the appellant makes a case and the respondent responds. In this case, the distinction between appellant and respondent became so blurred that, had I not known the proceedings began as an appeal brought by the parent with care, I would have assumed the non-resident parent was the appellant charged with persuading the tribunal of the merits of his case.
>
> 3. Nor can the First-tier Tribunal's inquisitorial function properly be exercised so as to both introduce and pursue a new issue in a manner akin to a party. In this case, the First-tier Tribunal decided without explanation to turn the appeal into an appeal against the correctness of the child maintenance calculation made in respect of the non-resident parent. No one asked the tribunal to do this. Furthermore, the parent with care was never asked to set out her case on the correctness of the maintenance calculation. The show, as it were, was being run entirely by the tribunal.
>
> 4. In re-making the First-tier Tribunal's decision, I decline to follow the course taken by that tribunal. The parent with care has failed without explanation to comply with Upper Tribunal case management directions requiring her to set out her position in writing. It was made very clear to the parent with care that the Upper Tribunal, if it allowed the appeal, might re-make the First-tier Tribunal' s decision rather than remit to that tribunal for it to give a fourth decision on her appeal against the refusal to agree to a variation. I am not going to construct and prosecute a case

> on behalf of the parent with care. How could I while continuing to appear independent? The parent with care bears the risks associated with the strategy she has adopted."

134. I have no reason to doubt that Judge Mitchell's decision on the facts of *DE* was correct or that his criticisms of the First-tier Tribunal in that case were justified. However, it will be apparent from what I have said above both that I do not consider that the same criticisms can be levelled at the Tribunal in this case and that I do not agree with the breadth of those introductory comments.

135. For the reasons I have given above, inquisitorial proceedings before the Social Entitlement Chamber are a co-operative process. Such appeals are only decided by resorting to the burden of proof when there is insufficient evidence to make a finding on a balance of probabilities. In those circumstances the consequences of the Tribunal's ignorance are born by the party that has failed to co-operate by providing evidence in his or her possession. Therefore, the fact that a party has brought an appeal does not mean that any particular burden of proof attaches to him or her except in the rare circumstances where all parties have co-operated fully but the evidence on a particular issue remains insufficient to support a finding of fact.

136. I therefore do not accept that when the First-tier Tribunal raises an issue of its own motion the effect is to turn an appellant into a respondent or to alter the burden of proof. On the contrary where the issue is clearly apparent from the evidence, the Tribunal is under a duty to pursue it. And it may pursue an issue that is not clearly apparent as long as the discretion conferred by section 20(7)(a) of the 1991 Act is properly exercised and all parties are given a fair opportunity to address the issue. The issue is not so much what the parties have asked the First-tier Tribunal to do but, rather, what is the correct amount of maintenance for this qualifying child.

137. In the original child support scheme, the formula calculation and the direction (or non-direction) of a departure were separate decisions and appeals against them were similarly separate. That is no longer the case. Under the second and third schemes, there is a single outcome decision. The calculation of gross weekly income and whether to agree a variation are merely the building blocks forming that decision. If therefore the evidence in an appeal that is ostensibly about variations makes it clearly apparent that the non-resident parent's gross weekly income may have been calculated incorrectly (which I accept was not the case in *DE*), then the Tribunal not only may, but must, deal with that issue.

138. Finally, I do not accept that by making directions—even very searching directions—that a non-resident parent should make full disclosure of the evidence about his financial circumstances, or by requiring him to explain any issues that arise from that evidence, a tribunal applies a burden of proof against him. Rather, such directions are a

proper exercise of the Tribunal's inquisitorial jurisdiction and enabling role. "Enabling" because such directions often help a non-resident parent make a full answer to the person with care's case and, when they do not, they enable to person with care to establish her case.

Conclusion

139. For all those reasons, my decision is as set out on page 1.

Authorised for issue
on 21 May 2021

Richard Poynter
Judge of the Upper Tribunal

Appendix

Child Support Act 1991

Section 20

Appeals to the First-tier Tribunal

20.—(1) A qualifying person has a right of appeal to the First-tier Tribunal against—

(a) a decision of the Secretary of State 4 under section 11, 12 or 17 (whether as originally made or as revised under section 16); …

(2) In subsection (1), "qualifying person" means—

(a) in relation to paragraphs (a) and (b)—

(i) the person with care, or non-resident parent, with respect to whom the Secretary of State made the decision, …

…

(7) In deciding an appeal under this section, the First-tier Tribunal—

(a) need not consider any issue that is not raised by the appeal; …

Section 28A

Application for variation of usual rules for calculating maintenance.

28A.—(1) Where an application for a maintenance calculation is made under section 4 or 7 the person with care or the non-resident parent or (in the case of an application under section 7) either of them or the child concerned may apply to the Secretary of State for the rules by which the calculation is made to be varied in accordance with this Act.

(2) Such an application is referred to in this Act as an "application for a variation".

(3) An application for a variation may be made at any time before the Secretary of State has reached a decision (under section 11 or 12(1)) on the application for a maintenance calculation.

(4) A person who applies for a variation—

(a) need not make the application in writing unless the Secretary of State directs in any case that he must; and

(b) must say upon what grounds the application is made.

(5) In other respects an application for a variation is to be made in such manner as may be prescribed.

(6) Schedule 4A has effect in relation to applications for a variation.

Section 28F(1)

Agreement to a variation.

28F.—(1) The Secretary of State may agree to a variation if—

(a) he is satisfied that the case is one which falls within one or more of the cases set out in Part I of Schedule 4B or in regulations made under that Part; and

(b) it is the Secretary of State's opinion that, in all the circumstances of the case, it would be just and equitable to agree to a variation.

Schedule 4A

APPLICATIONS FOR A VARIATION

Interpretation

1. In this Schedule, "regulations" means regulations made by the Secretary of State.

Applications for a variation

2. Regulations may make provision—

(a) as to the procedure to be followed in considering an application for a variation;

3.-5. …

Schedule 4B

APPLICATIONS FOR A VARIATION: THE CASES AND CONTROLS

PART I

THE CASES

1.—(1) The cases in which a variation may be agreed are those set out in this Part of this Schedule or in regulations made under this Part.

(2) In this Schedule "applicant" means the person whose application for a variation is being considered.

2.-3. …

4.—(1) The Secretary of State may by regulations prescribe other cases in which a variation may be agreed.

(2) Regulations under this paragraph may, for example, make provision with respect to cases where—

…

(c) a person has income which is not taken into account in such a calculation;

(d) a person has unreasonably reduced the income which is taken into account in such a calculation.

Child Support Maintenance Calculations Regulations 2012

Part 5 – Variations

CHAPTER 1

GENERAL

Application for a variation

56.—(1) Where an application for a variation is made other than in writing it is treated as made on the date on which the applicant notifies the Secretary of State that the applicant wishes to make such an application.

…

(4) The Secretary of State may treat an application for a variation made on one ground as made on another ground if that other ground is more appropriate to the facts alleged in that case.

…

CHAPTER 3

GROUNDS FOR VARIATION: ADDITIONAL INCOME

Non-resident parent with unearned income

69.—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where the non-resident parent has unearned income equal to or exceeding £2,500 per annum.

(2) For the purposes of this regulation unearned income is income of a kind that is chargeable to tax under—

(a) Part 3 of ITTOIA (property income);

(b) Part 4 of ITTOIA (savings and investment income); or

(c) Part 5 of ITTOIA (miscellaneous income).

(3) Subject to paragraphs (5) and (6), the amount of the non-resident parent's unearned income is to be determined by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year and, where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil.

(4) For the purposes of paragraph (2), the information in relation to property income is to be taken after deduction of relief under section 118 of the Income Tax Act 2007 (carry forward against subsequent property business profits).

(5) Where—

(a) the latest available tax year is not the most recent tax year; or

(b) the information provided by HMRC in relation to the latest available tax year does not include any information from a self-assessment return, or

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

the Secretary of State may, if satisfied that there is sufficient evidence to do so, determine the amount of the non-resident parent's unearned income by reference to the most recent tax year; and any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return.

(6) Where the Secretary of State is satisfied that, by reason of the non-resident parent no longer having any property or assets from which unearned income was derived in a past tax year and having no current source from which unearned income may be derived, the non-resident parent will have no unearned income for the current tax year, the amount of the non-resident parent's unearned income for the purposes of this regulation is to be treated as nil.

(7) Where a variation is agreed to under this regulation, the non-resident parent is to be treated as having additional weekly income of the amount determined in accordance with paragraph (3) or (5) divided by 365 and multiplied by 7.

(8) Subject to paragraph (9), where the non-resident parent makes relievable pension contributions, which have not been otherwise taken into account for the purposes of the maintenance calculation, there is to be deducted from the additional weekly income calculated in accordance with paragraph (7) an amount determined by the Secretary of State as representing the weekly average of those contributions.

(9) An amount must only be deducted in accordance with paragraph (8) where the relievable pension contributions referred to in that paragraph relate to the same tax year that has been used for the purposes of determining the additional weekly income.

…

Diversion of income

71.—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where—

(a) the non-resident parent ("P") has the ability to control, whether directly or indirectly, the amount of income that—

(i) P receives, or

(ii) is taken into account as P's gross weekly income; and

(b) the Secretary of State is satisfied that P has unreasonably reduced the amount of P's income which would otherwise fall to be taken into account as gross weekly income or as unearned income under regulation 69 by diverting it to other persons or for purposes other than the provision of such income for P.

(2) Where a variation is agreed to under this regulation, the additional income to be taken into account is the whole of the amount by which the Secretary of State is satisfied that P has reduced the amount that would otherwise be taken into account as P's income.

…

CHAPTER 4

EFFECT OF VARIATION ON THE MAINTENANCE CALCULATION

…

Effect on the maintenance calculation – additional income grounds

73.—(1) Subject to paragraph (2) and regulation 74 (effect on maintenance calculation – general), where the variation agreed to is one falling within Chapter 3 (grounds for variation : additional income) effect is to be given to the variation by increasing the gross weekly income of the non-resident parent which would otherwise be taken into account by the weekly amount of the additional income

except that, where the amount of gross weekly income calculated in this way would exceed the capped amount, the amount of the gross weekly income taken into account is to be the capped amount.

…

Effect on maintenance calculation – general

74.—(1) Subject to paragraph (5), where more than one variation is agreed to in respect of the same period, regulations 72 and 73 apply and the results are to be aggregated as appropriate."