THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CCS/1119/2020
[2021] UKUT 139 (AAC)
NA V SECRETARY OF STATE FOR WORK AND PENSIONS AND AA

Decided without a hearing

Representatives

NA	Represented himself
Secretary of State	DMA Leeds
AA	Could not be contacted and took no part

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference:	SC320/17/00879
Decision date:	20 January 2021
Venue:	East London

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This appeal is about the child support maintenance payable in respect of Nicholson. He lives with his mother. The Secretary of State made a calculation of child support payable by his father. This led to an appeal to the First-tier Tribunal, which was decided in the father's favour, but not to his entire satisfaction. The mother neither attended the hearing nor sent a representative. The Secretary of State was represented by a presenting officer. The First-tier Tribunal gave the father permission to appeal to the Upper Tribunal.

A. The case in the First-tier Tribunal

2. I can conveniently summarise the case by setting out the issues dealt with by the First-tier Tribunal. The father had appealed against the Secretary of State's decision of 11 November 2018 that he was liable to pay child support maintenance in

respect of Nicholson from and including the effective date of 18 October 2016. The mother had applied for a calculation by telephone on 11 October 2016.

3. The first issue was jurisdiction. The father argued that no child support was payable, because the mother had not made an application in accordance with the Child Support Maintenance Calculation Regulations 2012. His argument was that an application had to be made in writing, whereas the mother had made her application by telephone. The tribunal rejected that argument.

4. The second issue was the father's income. His gross income was calculated at £38,318.77. He argued that this failed to take account of an overpayment that was recovered by his employer. He had not provided the Secretary of State with evidence to support this claim, but at the hearing, he produced a pay slip showing the recovery, which the presenting officer accepted as genuine. The tribunal decided that the father's income should be reduced accordingly.

5. The third issue was contact costs. This arose by way of an application for a variation under regulation 63. The father's contact costs were calculated on the basis of his evidence with the agreement of the presenting officer. The tribunal agreed to a variation accordingly.

6. The fourth issue was other relevant children. This related to five children of deceased relatives of the father. They live in Ghana. The issue was how, if at all, regulation 52 applied. The tribunal decided that it did not.

7. The fifth issue was arrears. The tribunal decided that it had no jurisdiction over arrears. That was correct.

8. The sixth issue was the just and equitable condition. This was relevant to the variation for contact costs. The tribunal decided that it was just and equitable to agree to a variation.

B. The case in the Upper Tribunal

9. The grounds of appeal to the Upper Tribunal are at pages 692-693. Their content raises serious questions only on the first and fourth issues dealt with by the First-tier Tribunal. I need say no more about the others.

C. Jurisdiction

10. The First-tier Tribunal did not make an error of law on this ground.

11. There are two issues. One: is an application valid if it is not made in writing? Two: did the mother actually make an application?

12. A child support calculation has to be initiated by an application. Section 4(1) of the Child Support Act 1991 provides: 'the person with care or the non-resident parent may apply to the Secretary of State for a maintenance calculation to be made'. Section 51(1) authorises the Secretary of State to make 'incidental, supplemental or transitional provision as he considers appropriate in connection with any provision made by or under this Act.'

13. Regulation 9 is made under the authority of section 51(1) and is incidental or supplemental to section 4(1).

9 Applications under section 4 or 7 of the 1991 Act

(1) The Secretary of State may determine the form in which an application for a maintenance calculation is to be made and may require the applicant to provide such information or evidence as the Secretary of State reasonably requires in order to process the application (including, in the case of an application by a person with care, information sufficient to enable the person named as the non-resident parent to be identified).

(2) The application is to be taken to have been made when the application has been submitted to the Secretary of State in the required form and the information required under paragraph (1) has been provided.

14. On the first issue, I accept the argument for the Secretary of State that an application need not be in writing. Section 4(1) merely provides that there must be an application. It says nothing about its form. This is dealt with in regulation 9. It merely provides that the application must be in a form 'determined' by the Secretary of State. It does not require that form to be specified in advance; if that were so, I would have expected regulation 9 to say that the Secretary of State may 'prescribe' or 'stipulate' the form of an application. The word 'determined' is more consistent with decision-making in respect of an individual case and, if necessary, on a case by case basis. I notice also that regulation 9(2) refers to an application being 'submitted'. That is in contrast to regulation 7, which refers to a 'document' being 'given or sent'. Those words are more apposite to a physical document. The word 'submitted' allows for a wider range of forms of communication.

15. The father has argued that 'form' in regulation 9(1) is used in the sense of 'format' or 'template'. I see no reason to limit it in that way. He has also argued that it is inappropriate to refer to a telephone call or conversation being 'submitted' under regulation 9(2). I accept that, but it omits a stage in the reasoning. If the Secretary of State decides to accept the contents of a telephone call as an application, it is the application that is submitted not the telephone call in which it was made. Finally, the father has argued that an application can lead to attachment of earnings and salaries. This, he argued, is too serious and sensitive a matter to be based on a telephone call. Again, that omits a stage in the reasoning. A telephone call would not have that result on its own. Regulation 9 also provides for evidence as required. It is the evidence as a whole, including evidence provided by the other parent, that will form the basis of the decision, not merely the call itself.

16. My conclusion is that the Secretary of State may accept an application in any form that is acceptable.

17. On the second issue, I also accept the argument for the Secretary of State. The Secretary of State was satisfied that an application had been made by the mother. It was in contact with her and she wrote to the tribunal explaining why she had applied for child support, so she is aware of the application. The father has denied that these are genuine and suggests that this process is being driven by a social worker. The mother has power to ask the Secretary of State to cease acting under section 4(5). She must be aware of the decisions made by the Secretary of State if nothing else. If this were not in truth her application, I would have expected her to act under section 4(5), but she has not done so. The father's approach is to make assertions without supporting evidence and then demand evidence to rebut them. The law does not

work that way. No one is required to produce evidence to rebut an allegation unless it has sufficient merit to require rebuttal. The father has not met that threshold.

18. My conclusion is that the tribunal was entitled to find that the mother had made an application.

D. Other relevant children

19. The tribunal did not make an error of law on this ground.

20. The issue arises because of the children in Ghana for whom the father claims responsibility. This is governed by regulation 52:

> **52 Non-resident parent liable to maintain a child of the family or a child abroad**
>
> (1) A case is to be treated as a special case for the purposes of the 1991 Act where—
>
> (a) an application for a maintenance calculation has been made or a maintenance calculation is in force with respect to a qualifying child and a non-resident parent;
>
> (b) there is a different child in respect of whom no application for a maintenance calculation may be made but whom the non-resident parent is liable to maintain—
>
> (i) in accordance with a maintenance order made in respect of that child as a child of the non-resident parent's family, or
>
> (ii) in accordance with an order made by a court outside Great Britain or under the legislation of a jurisdiction outside the United Kingdom; and
>
> (c) the weekly rate of child support maintenance, apart from this regulation, would be the basic rate or the reduced rate or would be calculated following agreement to a variation where the rate would otherwise be the flat rate or the nil rate.
>
> (2) In any such case the amount of child support maintenance is to be calculated in accordance with paragraph 5A of Schedule 1 to the 1991 Act as if the child in question were a child with respect to whom the non-resident parent was a party to a qualifying maintenance arrangement.
>
> (3) For the purposes of this regulation "child" includes a person who has not attained the age of 20 whom the non-resident parent is liable to maintain in accordance with paragraph (1)(b)(ii).

21. There are two limbs to regulation 52(1)(b). Head (i) refers to 'a maintenance order'. This is not defined in the Regulations, so the definition in section 54 of the Child Support Act 1991 applies. This provides:

> 'maintenance order' has the meaning given in section 8(11).

And section 8(11) provides that a maintenance order is one made under listed statutes, all of which are British. It follows that head (i) has no application in this case, because there is no British order in respect of the children in Ghana. That leaves head (ii). The father has referred to three documents in support of his argument that this applies. I take them in date order.

22. There is first what the father calls a liability order (page 701), which is dated 16 March 2018. The document comes from the District Director for the North Tongu district of the Department of Social Welfare and Community Development. It records the mandate of the Department and goes on:

> Our investigation has shown that whilst in the United Kingdom, [the father] has been responsible for the up keep of the following children and as such had been remitting them since 2012.

The children are then listed with their ages. The document concludes:

> The agency hopes he will be accorded any assistance he might need.

This is not an order, still less a court order. What it is, is an official document setting out information and asking for assistance. It does not emanate from a court and it does not contain anything that could constitute an order.

23. The next document (pages 412-413) is an affidavit sworn by the head of the father's family in Ghana on 12 July 2019. He explains that:

> … at a family gathering in 2011, it was unanimously agreed that [the father] should assume parental support and provide financial support for Five (5) of his deceased siblings children.

He identifies the children and says that the arrangement has gone well with the money remitted being distributed evenly among the children. He refers to the United Kingdom's child maintenance service and understands

> That they can only support the children if there is a court order that there is evidence that such an arrangement exists.

That is not a court document or an order, and does not purport to be such. Its significance is explained by the final document.

24. The final document is an order of the Circuit Court of Ho, Volta Region. I will deal first with the form in which the order was presented to the tribunal (page 410). It is dated 22 July 2019, signed by the Registrar and a Circuit Judge, and bears the court's seal. It is headed: Order of Confirmation of Child Maintenance Arrangement. The operative part provides:

> **IT IS HEREBY ORDERED** that [the father] should Assume responsibility of his Deceased siblings children by way of financial support …

The children are then named. This is a court order. Two points are important. First, it is not retrospective and it is not merely declaratory. It is worded in the present tense looking to the future: the father 'should Assume'. This is in line with the application for the order (page 411), which was made on 18 July 2019:

> **MOTION EX-PARTE** by the Applicant herein for an Order granting [the father] … to **Assume responsibility of his deceased siblings children by way of financial support …**

Second, the date is important. It was made on 22 July 2019. Putting those two points together, the order did not exist and does not apply to events at the time when the mother applied for child support or the time when the Secretary of State made the calculation under appeal. This order is a change of circumstances for the purposes of section 20(7)(b) of the Child Support Act 1991, which barred the tribunal from taking

it into account. The order and the related documents may evidence that the father assumed financial responsibility for his relatives, but they do not show that, for the period over which the tribunal had jurisdiction, there was in force a court order within regulation 52(1)(b)(ii).

25. I said that this was the form in which the order was put to the tribunal. Since the hearing, the father has produced an amended version of the order (page 700). It is in the same form as the original order, except that the operative part now reads:

> **IT IS HEREBY ORDERED** that [the father] who has Assumed Parental and Financial responsibility since December 2012 to the following children … shall continue to assume the same responsibility to the aforementioned children.

The analysis now differs, but the result is the same. The order records as a fact that the father assumed responsibility from December 2012, but it does not impose that liability. This provides evidence of what he has done, but it does not impose anything on him. The order then provides for the future that he shall continue to assume the same responsibility. It does not say from when it is imposing that responsibility, but it cannot be earlier than the date of the original order, which was made outside the period of the tribunal's jurisdiction. As with the original form of the order, section 20(7)(b) barred the tribunal from taking it into account.

26. I have proceeded on the basis that the documents I have mentioned are all genuine. I have not referred to the evidence relating to payments in respect of the children in Ghana, because on my analysis they are not relevant.

27. The Secretary of State's representative has referred to the decision of Upper Tribunal Judge Gray in *GC v Secretary of State for Work and Pensions and AE* [2019] UKUT 199 (AAC). That case involved a father who had a child in this country and was supporting another child of his in Denmark. Judge Gray decided that the agreement under which the other child was supported was within regulation 52(1)(b)(ii). She accepted an argument by the Secretary of State that relied on paragraph 7.4.7 of the Explanation Memorandum to the 2012 Regulations and the United Kingdom's responsibilities under the United Nations Convention on the Rights of the Child 1989. In the result, she decided:

> 34. A special case under regulation 52 is made out where a non-resident parent is liable to maintain another child under the legislation of jurisdiction outside the UK. The Secretary of State's investigations confirm that had the parents not made an agreement between themselves, the Danish state legislation would have been invoked. Accordingly, there was liability under the legislation of a jurisdiction outside the UK and such voluntary arrangements are taken into account; however, credible evidence is required to establish the arrangement itself. Mere liability under overseas legislation cannot be sufficient unless it is shown that the liability has been assumed. This reflects the policy intention at paragraph 7.4.7 [I have corrected the error in this reference] of the Explanatory Note. Although I accept that there does not need to be any particular formality of approach, and one cannot be prescriptive as to the level of evidence, some evidence of payment under an agreement would be expected.

28. I do not disagree with Judge Gray's decision, but I do not consider that it applies here. An important factor in the judge's reasoning and the material on which she

relied is that the child in her case was the child of the non-resident parent. That is not the case here. The children are relatives of the father but they are not his children. The Secretary of State's representative has argued that, despite being only an uncle, the father 'has the same liability as that of a father' towards them. I do not accept that argument. The regulation has to be interpreted in the context set out by Judge Gray, but it also has to be interpreted in the context of the child support scheme as a whole. It is a central feature that the scheme's purpose is for parents to support their children. As section 1(1) provides: 'each parent of a qualifying child is responsible for maintaining him.' Applying *GC* in this case would reduce the father's ability to support his own child on account of his responsibility for children that are not his. If the conditions of regulation 52 are met, that is the consequence and it cannot be avoided. But I see no reason to extend the scope of the regulation beyond its language in order to achieve a result that is out of step with the central tenet of the scheme as a whole.

E. Disposal

29. For those reasons, I have dismissed the appeal.

Signed on original
on 15 June 2021

Edward Jacobs
Upper Tribunal Judge