IN THE UPPER TRIBUNAL **Appeal No**: **UA-2021-001493-CSM**
ADMINISTRATIVE APPEALS CHAMBER (formerly CCS/906/2021)

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

Between:

BK

Appellant

– v –

Secretary of State for Work and Pensions

First Respondent

– and –

LB

Second Respondent

Before: Deputy Upper Tribunal Judge Rowland

Decided on 27 October 2022 on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 12 November 2020 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remake it as follows:

> The Appellant's liability for child support maintenance from 29 January 2020 is to be calculated on the basis that his gross weekly income, based on his historic income in 2018-19, was £878.11. If there is any dispute over the calculation, it should be referred back to the Upper Tribunal.

REASONS FOR DECISION

1. This is an appeal, brought with permission given by Upper Tribunal Judge Wright, from a decision of the First-tier Tribunal given as long ago as 12 November 2020. None of the parties has asked for a hearing and, as the case turns solely on a short point of law, I am satisfied that I can properly decide the appeal without a hearing. The Secretary of State supports the appeal, albeit on different grounds and originally suggesting a different disposal. The Second Respondent has not opposed the appeal but has not given her consent to a decision being given without reasons. Both for that reason and also because I do not entirely accept either of the other parties' arguments,

I now give my reasons for allowing the appeal. Although the Appellant and the Second Respondent have been provided with copies of the additional submission made by a second representative of the Secretary of State in response to my Direction dated 30 June 2022, they have not explicitly been given an opportunity to comment on it. Giving them such an opportunity would cause further delay and I do not consider it to be necessary, because the new "HMRC figure" is what the father has always argued it should be (save for a few pence) and the mother has not opposed his appeal, and also because I do not suppose that either of them is particularly interested in the other issues that I raised. (If, because they have not had that opportunity, either of them has suffered any practical injustice, he or she may apply for my decision to be set aside.)

2. There is no dispute as to the facts and little as to the law relevant to this case. The Appellant and Second Respondent are, respectively, the father and mother of the four qualifying children, and I will refer to them as such. They share the care of the children but, in the language of the legislation, the father is a "non-resident parent" and the mother is the "person with care". The father was first required to pay child support maintenance with effect from 29 January 2019. However, that decision was superseded with effect from 5 July 2019, when he was required to pay £144.02 per week. That second decision was in turn superseded with effect from 29 January 2020, following a periodic review.

3. The father's liability was assessed at £146.29 per week from that date. That was on the basis that his gross weekly income was, under regulation 34 of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677 – hereinafter "the 2012 Regulations"), to be based on his "historic income" and that he had had a gross income of £48,203.59 in the last complete tax year which was 2018/19, and thus an average weekly income of £924.45. The figure of £48,203.59 had been supplied to the Secretary of State by Her Majesty's Revenue and Customs (now, of course, His Majesty's Revenue and Customs and hereinafter "HMRC").

4. The father sought a revision of that decision ("mandatory reconsideration"), on the ground that the figure was wrong and should have been £45,787 (strictly, £45,787.41), based on the earnings recorded on his P60 (£39,569.29) and the benefits recorded on his P11D (£6,218.12). However, the decision was not revised, apparently on the ground that a "25% tolerance" would not be breached (see pages 22 and 23) rather than because the Secretary of State did not accept that the figure was wrong. Indeed, the PAYE "Real Time Information" available to the Secretary of State at that time appears to have confirmed the father's submission as to the amount of his earnings.

5. The father then appealed to the First-tier Tribunal on two grounds. First, he raised the same point as he had when applying for revision. Secondly, he argued that his gross income should be taken to be only £40,117.41, because £5,670 of the sum shown on his P11D was in respect of a company car and its fuel and he had not had those benefits since 17 December 2018. He also produced salary slips showing that his current income was less than his income had been in 2018-19. However, following a telephone hearing that was attended by the father but by neither a representative of the Secretary of State nor the mother, the appeal was dismissed by the First-tier Tribunal on 12 November 2020, for reasons that were clearly set out in its decision notice and a further statement of reasons (which corrected a figure in paragraph 7 of the decision notice). The father sensibly accepts the First-tier Tribunal's decision insofar as it rejected his second ground of appeal and the argument based on his salary slips on the ground that the "25% tolerance" had not been breached. In relation to his

first ground of appeal, the First-tier Tribunal said in its decision notice that the figure originally supplied by HMRC had to be used, because that represented the amount on which the father had been "charged for tax" for the purpose of regulation 36 of the 2012 Regulations. In paragraph 25 of its statement of reasons, it recorded that the father had said that "HMRC had agreed to update their figures to show the lower figure from the P60, but the Tribunal considered that this change did not have retrospective effect on the amount on which [the father] had actually been taxed in 2018/19, and that was the relevant amount for the purpose of regulation 36".

6. When the father applied to the First-tier Tribunal for permission to appeal, he provided a copy of HMRC's tax calculation, dated 14 December 2020 (although whether the date is reliable I am not sure), which clearly shows the father's income for the year 2018/19 to have been £45,787.29, just as the father has always claimed (save for a few pence, the pence in his total salary having been retained but the P11D benefits having been rounded down to the nearest pound). He also referred to regulations 14(1)(e) and (f) and 20(1) of the 2012 Regulations and submitted that *AR v Secretary of State for Work and Pensions (CSM) (No.2)* [2019] UKUT 151 (AAC); [2019] AACR 25 (hereinafter "*AR (No.2)*"), upon which the First-tier Tribunal had relied, in fact supported his argument that the Secretary of State and the First-tier Tribunal should have used the "corrected" figure, rather than the wrong one. When refusing permission to appeal, the First-tier Tribunal addressed those arguments and rejected them on the basis that the Secretary of State had not received "official notification of the change from HMRC" and that there was no "documentary evidence before the Tribunal that HMRC had made a retrospective change to the amount on which the Appellant had been assessed to tax in 2018/19", pointing out that the document supplied by the father "came into existence and was supplied to the Tribunal, after the Tribunal made its decision". However, it suggested that that document might provide the father with a ground for asking the Secretary of State to revise her decision.

7. When the father renewed his application to the Upper Tribunal, he said that he had been told that the Secretary of State was "unable to retrospectively look at the annual review again" because her decision had been confirmed by the First-tier Tribunal, and that that was why he was still seeking permission to appeal. Judge Wright gave permission to appeal broadly on the ground that it was arguable that the First-tier Tribunal had misapplied the Upper Tribunal's decision in *AR*.

8. The Secretary of State has raised a point on the First-tier Tribunal's refusal of permission to appeal, submitting that it erred in law because it considered that the tax calculation dated 14 December 2020 was not relevant to the father's circumstances as they had been at the date of the decision that had been under appeal to it. Quite apart from the fact that an error of law made in a refusal of permission to appeal is not relevant if it was not made in the substantive decision under appeal, I do not accept that the First-tier Tribunal made the particular error alleged when it refused permission to appeal. In my judgment, the point it was making in paragraph 10 of its reasons for refusing permission to appeal was clearly not made with section 20(7)(b) of the 1991 Act in mind (as seems to be implied by the Secretary of State) but was merely that it could not be said to have erred in law in not taking account of evidence that was not even in existence at the time it made its own substantive decision. That may not be universally correct, but in this case it was related to the point that it had made about the lack of documentary evidence before it showing that HMRC had made a retrospective change to the amount on which the Appellant had been assessed to tax in the relevant year. Indeed, it seems to me quite clear that the First-tier Tribunal well

understood that an HMRC figure has retrospective effect and so the fact that it is provided after the Secretary of State has made her decision does not mean that it is not relevant to the facts obtaining at the date of that decision.

9. The principal issue in this case is simply whether, in the light of the 2012 Regulations, as interpreted in *AR (No.2)* and the earlier case involving the same parties, *AR v Secretary of State for Work and Pensions (CSM)* [2017] UKUT 69 (AAC); [2017] AACR 23 (hereinafter "*AR (No.1)*"), the First-tier Tribunal was right to dismiss the father's appeal in the light of the evidence that the father had produced before it made its decision, even though that evidence did not prove conclusively that the HMRC was no longer correct. However, while the father submits that the First-tier Tribunal should have accepted the evidence that he provided as to his "historic income" and should have allowed his appeal on that basis, the Secretary of State argues that it should have adjourned and directed the Secretary of State to request a new figure from HMRC.

10. It is not disputed that the father's gross weekly income was, under regulation 34 of the 2012 Regulations, to be based on his "historic income" and that the relevant tax year was 2018/19. Insofar as is material, regulations 35 and 36 then provide –

> "**35.**—(1) Historic income is determined by—
>
> (a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent;
>
> (b) adjusting that figure where required in accordance with paragraph (3); and
>
> (c) dividing by 365 and multiplying by 7.
>
> (2) A request for the HMRC figure is to be made by the Secretary of State—
>
> (a) for the purposes of a decision under section 11 of the 1991 Act (the initial maintenance calculation) no more than 30 days before the initial effective date; and
>
> (b) for the purposes of updating that figure, no more than 30 days before the review date.
>
> (3) ….
>
> **36.**—(1) The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year—
>
> (a) under Part 2 of ITEPA (employment income);
>
> (b) under Part 9 of ITEPA (pension income);
>
> (c) under Part 10 of ITEPA (social security income) but only in so far as that income comprises the following taxable UK benefits listed in Table A in Chapter 3 of that Part—
>
> (i) incapacity benefit;
>
> (ii) contributory employment and support allowance;
>
> (iii) jobseeker's allowance; and
>
> (iv) income support; and
>
> (d) under Part 2 of ITTOIA (trading income).
>
> …"

11. These regulations have the effect of making "the HMRC figure" of central importance. *AR (No.2)* was concerned with a slightly different issue from that arising in the present case, because in that case the non-resident parent was required to file

a self-assessment return and a P11D and had not yet done so and therefore there was a dispute as to "the latest available tax year", whereas that appears not to be so in the present case. Nonetheless, its reasoning is relevant because it is apparent that what is required by regulation 36 is the figure that HMRC accepts was the amount charged to tax, after the information it has received, and expects to receive, has been reconciled (see [44] et seq.). Real Time Information is not necessarily enough. It is at least partly for that reason that it is inappropriate for the Secretary of State, and therefore a tribunal, to rely solely on information provided by a non-resident parent. However, as this case illustrates, HMRC may occasionally provide the wrong information or information that appeared correct at the time may subsequently be updated with retrospective effect and, in *AR (No.1)* at [16], the Upper Tribunal followed *SB v Secretary of State for Work and Pensions (CSM)* [2016] UKUT 84 (AAC) and accepted that the Secretary of State could make more than one request for an "HMRC figure" under regulation 35(2). Indeed, this seems to me to be apparent from the terms of regulation 20(1). A non-resident parent may, of course, also take up with HMRC any error that he or she considers there to be in the figure.

12. Accordingly, I do not accept the father's argument that the First-tier Tribunal ought simply to have substituted the figures that he had provided, even though it had copies of the P60 and P11D. The First-tier Tribunal was correct to take the view that it was bound to accept the figure previously supplied in response to a request for the HMRC figure. However, I do accept the Secretary of State's submission to me that the First-tier Tribunal ought to have adjourned and required the Secretary of State to make a new request for the HMRC figure. I am satisfied that it erred in law in not seeking a current HMRC figure, because there was cogent, albeit not conclusive, evidence before it that HMRC's figure was not consistent with information supplied by the father's employer under PAYE regulations.

13. Moreover, this is something that should have been addressed on "mandatory reconsideration". It is possible that the officer deciding whether to revise the initial decision considered that he or she was bound by the figure that had been provided by HMRC and could not make another request and that that is why he or she considered the "25% toleration". However, the "25% toleration" was, in my view, wholly irrelevant at that stage, when the father was not seeking to rely on "current income" and the decision under consideration was to be effective from the "review date". (It might have been relevant later, on the father's appeal, when he had, at least implicitly, sought to rely on his "current income".) If the officer had made a new request for an HMRC figure, the issue before me would have been sorted out over two years ago.

14. I am not entirely sure what the Secretary of State's first representative means by saying in paragraph 13 of her submission that "the Tribunal may use discretion as to an interpretive approach around the HMRC figure provided", but paragraph [47] of *AR (No.2)* to which she refers does not suggest that the First-tier Tribunal has any broader discretion than the power to adjourn. What was being emphasised in paragraph [47] is that the HMRC figure should not be based only on PAYE Real Time Information in a case where more information, which would be contained in a self-assessment return or in subsequent correspondence, is required in order to fix the final tax liability for the year. It was pointed out that, were it otherwise, there would need to be some provision in the 2012 Regulations for HMRC to update the figure without awaiting a further request from the Secretary of State, which there is not.

15. In her additional submission, the Secretary of State's second representative accepts that the point made in *AR (No.2)* – that HMRC cannot provide the HMRC figure

until the potentially relevant documents have been provided (or the time for doing so has expired) and those forms have been processed – remains valid in a PAYE case where a taxpayer is not required to submit a self-assessment return, but she was unable to say what would mark the processing if only PAYE documents were involved. However, in this case, even though the father did not, and may not have been able to, produce a tax calculation in the proceedings before the First-tier Tribunal, he did provide copies of relevant PAYE documents that contradicted the HMRC figure but which appear to have been consistent with the later Real Time Information, suggesting that there had been some further processing and that the original HMRC figure was wrong. That is why there should have been a new request.

16. Moreover, the need for a request required the First-tier Tribunal to adjourn the proceedings before it. It was not sufficient to rely on the Secretary of State to make a request after the First-tier Tribunal had made a final decision. It is necessary to recall some fundamental points of procedural law relating to child support maintenance. First, section 46A of the Child Support Act 1991 (hereinafter "the 1991 Act") has the effect that decisions of the Secretary of State or a tribunal are final, subject to any revision, supersession, review (in the case of a decision of a tribunal) or appeal. Secondly, on an appeal, the First-tier Tribunal is not entitled to have regard to any change of circumstances since the date of the decision against which the appeal has been brought (section 20(7)(b)). Thirdly, revision under section 16 of that Act and supersession under section 17 are both ways in which the Secretary of State may alter an earlier decision in circumstances prescribed in the 2012 Regulations, but there are three important distinctions between the two processes. The Secretary of State may supersede not only her own decisions but also a decision of a Tribunal in specified circumstances, but she may revise only her own decisions. There is a right of appeal under section 20 against a supersession, but not against a revision, although a revision and, sometimes, a refusal to revise extends the time for appealing against the decision that has, or has not, been revised. A revision is effective from the same date as the decision being revised, unless the revision corrects an error in that date, whereas a supersession is effective from the date the supersession was made or the date of the application for supersession (as appropriate), subject to exceptions that are not relevant to this case. Regulation 17(4) of the 2012 Regulations provides that –

> "(4) A decision may not be superseded in circumstances where it may be revised."

17. Regulations 14 and 20 of the 2012 Regulations are among the provisions prescribing circumstances in which a decision may be, respectively, revised under section 16 of the 1991 Act or superseded under section 17.

> "**14.**—(1) A decision to which section 16(1A) of the 1991 Act applies may be revised by the Secretary of State—
>
> (a) if the Secretary of State receives an application for the revision of a decision under either section 16 or section 28G (application for a variation where a maintenance calculation is in force) of that Act—
>
> (i) within 30 days after the date of notification of the decision;
>
> (ii) within 30 days after the date on which notice of the correction is given under regulation 27A(3) (correction of accidental errors); or
>
> (iii) within such longer time as may be allowed under regulation 15;
>
> (b) …;
>
> (c) …;

(d) …;
(e) if the decision arose from official error;
(f) if the information held by HMRC in relation to a tax year in respect of which the Secretary of State has determined historic income for the purposes of regulation 35, or unearned income for the purposes of regulation 69, has since been amended; or
(g) …
…
(4) In paragraph (1)(e) "official error" means an error made by an officer of the Department for Work and Pensions or HMRC acting as such to which no person outside the Department or HMRC materially contributed, but excludes any error of law which is shown to have been an error by virtue of a subsequent decision of the Upper Tribunal or the court."

"**20.**—(1) Where an updated figure is provided by HMRC for the latest available tax year in accordance with a request under regulation 35(2)(b) (historic income – general), that figure applies, for the purposes of determining historic income, on and after the review date.
(2) If the non-resident parent's gross weekly income, as calculated in accordance with Chapter 1 of Part 4 by reference to that updated figure, has changed, the Secretary of State may make a supersession decision with effect from the review date."

18. As the Secretary of State accepts, the first decision on a periodic review after an HMRC figure has been provided may be a supersession under section 17 of the 1991 Act and regulation 20(2) of the 2012 Regulations, but subsequent decisions, where an updated HMRC figure has been provided on a second or subsequent request, fall to be made by way of revision under section 16 and regulation 14(e) or (f).

19. This has important consequences. In my view, the advice given to the father after the First-tier Tribunal had refused permission to appeal that the Secretary of State was "unable to retrospectively look at the annual review again" because her decision had been confirmed by the First-tier Tribunal was correct. The First-tier Tribunal's decision replaced the Secretary of State's decision and became the one that had to be altered but, as I have said, section 16 of the 1991 Act permits the Secretary of State to revise only her own decisions. In her additional submission, the Secretary of State's present representative submits that the First-tier Tribunal can revise a decision of the First-tier Tribunal under regulation 3(5)(a) of the Social Security and Child Support (decisions and Appeals) Regulations 1999 (SI 1999/991). However, quite apart from the fact that regulation 3 of those Regulations prescribes circumstances in which decision under sections 8 and 10 of the Social Security Act 1998 may be revised under section 9 of that Act and so it does not apply in child support cases, neither that regulation nor regulation 14(1)(e) of the 2012 Regulations, which makes equivalent provision for child support cases, can permit the Secretary of State to revise a decision of the First-tier Tribunal when the primary legislation under which they are made does not do so.

20. Although the Secretary of State may supersede a decision of the First-tier Tribunal under section 17 of the 1991 Act, there is, as far as I am aware, no provision having the effect that such a supersession can, in a case like this, have effect from the same date as the decision being superseded. That is why I agree with the submission of the Secretary of State's first representative that the First-tier Tribunal should have adjourned the proceedings, rather than giving a final decision. It would then have been

open to the Secretary of State to revise the decision under appeal and, had she done so, the appeal would have lapsed under section 16(6) of the 1991 Act. In the circumstances of this case, I accept that the First-tier Tribunal erred in law in not adjourning and I therefore allow this appeal and set aside the First-tier Tribunal's decision.

21. Originally, the Secretary of State suggested that I should remit the appeal to the First-tier Tribunal. However, following my Direction, she provided me with the new "HMRC figure" which is that the father's income assessed for tax in 2018/19 was £45,787.29, based on earnings amounting to £39,569.29 and benefits in kind amounting to £6,218. That produces a weekly figure of £878.11. Accordingly, rather than remitting the case, I can re-make the First-tier Tribunal's decision. I find as a fact that the father's gross weekly income, based on his historic income for 2018/19, was £878.11 and I decide that his liability for child support maintenance from 29 January 2020 is to be calculated on that basis. I leave the Secretary of State to perform the necessary calculations. In the unlikely event that there is a dispute over the calculations, it should be referred to the Upper Tribunal.

Mark Rowland
Deputy Judge of the Upper Tribunal
Signed on the original on 27 October 2022