

[2019] AACR 25
AR v SSWP, HMRC and LR (No.2)
[2019] UKUT 151 (AAC)

Judge Wikeley
8 May 2019

CCS/1263/2018

Child support case under 2012 Scheme - Meaning of ‘latest available tax year’ – Whether regulation 4 and 36 of the Child Support Maintenance Calculations Regulations 2012 are in conflict – Application in cases where NRP subject to Pay As You Earn (PAYE) real time information procedures but also required to lodge P11D and self-assessment return (SAR) but where no tax liability following such lodgement

The father was a company director and the sole employee of his company. Following a Child Maintenance Service (CMS) request on 25 April 2017, Her Majesty’s Revenue and Customs (HMRC) supplied a historic income figure for the 2015/16 tax year ie using data not from the tax year just ended (2016/17), but rather from the preceding tax year. Using that information, on 9 May 2017 the CMS calculated the father’s child support liability as being £173.91 a week. The father challenged the decision on the basis that CMS was not using up to date information. The First-tier Tribunal (F-tT) allowed the father’s appeal and set aside the CMS decision directing that the father’s child support liability should be calculated by reference to his historic income figure for the (most recent) 2016/17 tax year. The appellant appealed to the Upper Tribunal (UT). The issues before the UT were the proper meaning of the expression “the latest available tax year”; the interpretation and application of regulations 4 and 36 of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) and how those two provisions can be read together; and whether the father’s child support liability in May 2015 had been assessed on the basis of HMRC data drawn from the correct tax year.

Held, dismissing the appeal, that:

1. “gross weekly income” means (in most cases) “historic income” (regulation 34), while “historic income” in turn means taking as a base line the non-resident parent’s “HMRC figure” (regulation 35). But the “HMRC figure” does not mean simply ‘information in the hands of HMRC’. Rather, it 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” (regulation 36(1)). Thus, the regulation refers to “the amount identified by HMRC from information provided...” and not “the amount held by HMRC from information provided...”. The use of the expression “identified by HMRC” demonstrates that some form of active engagement with and manipulation of the relevant information by HMRC is required (paragraph 44);
2. regulation 36(1) does not define the “HMRC figure” by reference just to what is in the PAYE Real Time Information returns. Rather, it is the “sum of the income on which the non-resident parent was charged to tax for the latest available tax year” once the component elements set out in regulation 36(1)(a)-(d) inclusive have been aggregated by HMRC (paragraph 45);
3. this construction of regulation 36(1) is not overridden by the wording of regulation 4(1). This provision defines the “latest available tax year” as meaning “the tax year which... is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return” (paragraphs 46);
4. where both sources of information exist for the same tax year then information provided in a SAR takes priority over information provided in PAYE Real Time Information and the former is to be used as the basis for the HMRC figure identified for the purposes of regulation 36(1) (paragraph 47);
5. regulation 4 is merely a subsidiary definition provision. It follows that regulation 4(1) must be read in such a way that it is consistent with the purpose of regulation 36(1), namely the focus on all sources of income charged to tax for the same “latest available tax year” (paragraph 54).

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant (“the father”).

The decision of the Norwich First-tier Tribunal dated 7 March 2018 under file reference SC142/17/01515 stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The question that arises for decision in this Upper Tribunal appeal

1. This appeal is about the interpretation and application of regulations 4 and 36 of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) and how those two provisions can be read together. It therefore concerns the proper meaning of the expression “the latest available tax year” in the context of the provision by Her Majesty’s Revenue and Customs (HMRC) of information about a non-resident parent’s income in response to a request by the Department for Work and Pensions’ Child Maintenance Service (CMS).

The context

2. It is relevant to note at the outset that the appellant in the present appeal was also the appellant in the earlier Upper Tribunal case of *AR v Secretary of State for Work and Pensions (SSWP) and LR (CSM)* [2017] UKUT 69 (AAC); [2017] AACR 23. For that reason alone, and to distinguish it from its predecessor, the present case will carry an NCN (neutral case number) with the case name *AR v SSWP, HMRC and LR (CSM) (No.2)*. The original reported 2017 case involved two issues, which I labelled in that decision as “Issue A” and “Issue B”. “Issue A” was whether the father’s child support liability in May 2015 had been assessed on the basis of HMRC data drawn from the correct tax year. “Issue B” was whether the father’s gross income had been correctly identified and concerned the treatment of payments received by the father in respect of certain work-related expenses. In the present appeal “Issue A” is necessarily revisited, albeit in relation to a later annual review. “Issue B”, concerning work-related expenses, which was the principal matter in dispute in the previous appeal, does not arise in the current proceedings.

The original Child Maintenance Service decision now under appeal

3. The Appellant (“the father”) and the Third Respondent (“the mother”) are the parents of two children, a daughter (now aged 21) and a son (now aged 18). From the practical point of view, the present appeal is accordingly of limited value. However, the issue of statutory interpretation raised by the appeal will affect many other cases.

4. The father is a company director and the sole employee of his company, A R Contracting Limited. His child support liability was assessed according to the latest of the three child support regimes, the 2012 scheme, which relies heavily on income data obtained from HMRC. The father's accountant, Mr Delph, has acted as his representative in both these proceedings and in the earlier appeal, and has been assiduous in advancing his client's case. The father's annual review by the CMS was due about a month after the end of the 2016/17 tax year. Following a CMS request on 25 April 2017, HMRC supplied a historic income figure for the 2015/16 tax year – ie using data not from the tax year just ended (2016/17), but rather from the preceding tax year. Using that information, on 9 May 2017 the CMS calculated the father's child support liability as being £173.91 a week.

The father's challenge to the Child Maintenance Service decision

5. Mr Delph's challenge to the CMS decision on behalf of the father was simple. He argued that the CMS, contrary to its claims, was not using up to date information. As at the date of the CMS request (and indeed before that date), HMRC had real time information about the father's earnings for 2016/17, which he said should have been supplied by HMRC and then used by the CMS instead of the data for 2015/16. Accordingly, as Mr Delph put it in the letter of appeal, "there has been an inappropriate application of [regulations] 35 & 36 of the regulations & regulation 4 of the Child Support Maintenance Calculation Regulations 2012" ('the CSMC Regulations 2012').

The Child Maintenance Service's response to the father's challenge

6. The CMS response to the father's challenge, prepared for the First-tier Tribunal ('the F-tT) explained that the Upper Tribunal's decision in *AR v SSWP and LR (CSM)* [2017] UKUT 69 (AAC); [2017] AACR 23 had been followed as regards Issue B, the treatment of work-related expenses. So, although the father's total income from all sources before any deductions, and as provided by HMRC, was £70,893 (for 2015/16), the CMS used the total income liable to tax figure, namely £67,745, thus disregarding the father's allowable work-related expenses totalling £3,508. Issue B was accordingly no longer a live issue.

7. However, the CMS response to the appeal made no reference to the earlier Upper Tribunal decision's finding as regard the appropriate tax year to be used in the annual review (Issue A). Instead, the CMS response to the new appeal relied on an explanation obtained from HMRC, which read as follows:

"When the annual review was triggered on 25/04/2017 the tax year was not complete. HMRC were waiting for the P11D. As [the father] was required to complete a Self-Assessment Tax Return [SAR] for 2016/17 the PAYE income would not have pulled through via the interface had it been available. [The father] did not file his 2016/17 [SAR] until 24/11/2017 and it was not processed until 27/11/2017, therefore the income would not have been available until 27/11/2017."

8. This explanation calls for two HMRC forms to be explained, if only in outline.

9. The P11D, as required by regulation 85 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682), is a form that all employers have to complete and return to HMRC for every director or employee for each tax year detailing the cash equivalents of any expenses and benefits provided. The P11D has to be returned by 6 July after the close of the relevant tax year.

10. The Self-Assessment Tax Return (or ‘SAR’) is the annual return that must be made by those who are self-employed as a ‘sole trader’, earning more than £1,000 per annum, and those who are partners in a business partnership. Individuals with untaxed income (eg from savings or dividends) may also need to file a SAR. The deadline for making a SAR is the 31 October after the end of the previous tax year (for paper returns) or 31 January after the end of the tax year (for on-line returns) – see section 8 of the Taxes Management Act 1970 (as amended).

The First-tier Tribunal’s decision on the new appeal

11. Following a hearing in Norwich on 7 March 2018, the F-tT allowed the father’s appeal. The F-tT set aside the CMS decision dated 9 May 2017 and directed that the father’s child support liability be calculated by reference to his historic income figure for the (most recent) 2016/17 tax year. To that end, the F-tT remitted the case to the CMS for it to request the appropriate 2016/17 figure from HMRC. In doing so, the F-tT issued a detailed 3-page decision notice, setting out its understanding of the issues, the relevant legislative requirements and its reasons for finding that the 2016/17 tax year data should be used.

12. Not content with his client’s success at the F-tT, Mr Delph subsequently wrote requesting a full statement of reasons, explaining that “we ourselves wish to appeal so that the case is considered and confirmed at a hearing of an Upper Tribunal... The issue on which we succeeded is a technical one, and we believe is needing Upper Tribunal consideration and ratification, and can lead to a precedent being set, helping for future years”. It is fair to say that by this time Mr Delph was already encountering a similar problem with his client’s 2018 CMS annual review (see paragraph 49 below).

The grant of permission to appeal

13. The District Tribunal Judge who had heard the case sensibly directed that the F-tT’s detailed decision notice should stand as its statement of reasons. The Judge went on to point out that the specific ground of appeal relied on by Mr Delph was not articulated (unsurprisingly, as at that stage he had on one possible reading not as yet actually made an application for permission, merely indicated that he was intending to make such an application – and indeed that he anticipated the Secretary of State would also be seeking permission to appeal). However, the Judge of his own motion identified an arguable error of law, namely as to whether the F-tT had been entitled to find that HMRC had received the required information for the relevant tax year. In particular, the F-tT Judge ruled, “there is a clearly arguable issue as to the application of regulations 36(1) and 4” (of the CSMC Regulations 2012).

14. The District Tribunal Judge also helpfully set out the statutory conundrum in the following way, having detailed by way of a comparison the terms of both regulation 4 and regulation 36(1):

“This gives rise to difficulties in that if, for example in the case of the Appellant, PAYE information is provided pretty much in real time, but a Self-Assessment Tax Return may not need to be provided until a later date, in the intervening period, HMRC may have received the information to be required under the PAYE Regulations and have all the information needed to calculate his liability to tax, but may still be waiting to see whether he files a P11D or what comes up in a Self-Assessment Tax Return that may say nothing. There is an issue as to whether ‘or’ in Regulation 4 should be read conjunctively or disjunctively and a PAYE taxpayer may, for the purposes of Regulation 36, have already been charged to tax on all of his income long before the Return, which may be a formality for a company director, has to be filed. It may, therefore, be a more pragmatic approach to understand the latest available tax year as meaning the most recent relevant tax year for which HMRC have received [*all the necessary*] information required to be provided. However, this may sit uncomfortably with a scheme which relies upon figures that are provided by HMRC and may result in chaos if the income upon which a party is charged to tax changes after the filing of a P11D or a Tax Return. Who is to decide, applying the approach set out above, that all the necessary information required to be provided has been provided?”

15. Before grappling with the inter-section of regulations 4 and 36 of the CSMC Regulations 2012, it is relevant to consider whether, as Mr Delph argued, the question of the relevant tax year to use had been conclusively determined by the earlier Upper Tribunal appeal involving the same parties.

The Upper Tribunal’s conclusion on Issue A in AR v SSWP and LR (CSM)

16. The question of the relevant tax year to use was dealt with as follows in my earlier decision (at paragraphs 14-18), in a passage which conveniently includes the text of both regulations 4(1) and 36(1) of the CSMC Regulations 2012:

“Issue A: the ‘latest available tax year’

14. Regulation 4 of the CSMC Regulations 2012 provides as follows:

Meaning of ‘latest available tax year’

4. – (1) In these Regulations ‘latest available tax year’ means the tax year which, on the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income) or regulation 69 (non-resident parent with unearned income), is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return.

(2) In this regulation a ‘relevant tax year’ is any one of the 6 tax years immediately preceding the date of the request for information referred to in paragraph (1).”

15. Regulation 36(1) and (2) of the CSMC Regulations 2012 is also relevant (‘ITEPA’, of course, is a reference to the Income Tax (Earnings and Pensions) Act 2003; see the definition in regulation 2):

Historic income – the HMRC figure

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).

(2) The amount identified as income for the purposes of paragraph (1)(a) is to be taken –

- (a) after any deduction for relievable pension contributions made by the non-resident parent’s employer in accordance with net pay arrangements; and
- (b) before any deductions under Part 5 of ITEPA (deductions allowed from earnings).

16. It is not in dispute that in May 2015, when CMS made its request to the tax authorities, HMRC had in its possession income information for the father for the 2014/15 tax year, namely the latest available tax year, and should have provided that information to the CMS (rather than the 2013/14 data). In the light of the decision by Upper Tribunal Judge Mitchell in *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] UKUT 84 (AAC), the Secretary of State accepts that in the present appeal the F-tT should have directed the CMS to request the data for the 2014/15 tax year from HMRC and then accordingly recalculate and revise the decision notified on 11 May 2015. Put another way, the F-tT was not ‘bound’ to accept the figures erroneously supplied by HMRC, and so it had erred in law in so proceeding. Mr Delph, for the father, agrees with that analysis, as do I.

17. It follows that the father’s appeal succeeds on Issue A. As a result, the F-tT’s decision must be set aside. Ms Leventhal invited me to adopt the same course of action thereafter as Upper Tribunal Judge Mitchell took in *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] UKUT 84 (AAC), rather than remit the appeal to a new tribunal for a fresh hearing. I agree that the approach adopted in *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] UKUT 84 (AAC) is also appropriate here.

18. I therefore re-make the F-tT’s decision as follows. The father’s appeal against the Secretary of State’s decision dated 11 May 2015 is allowed. I set aside the Secretary of State’s decision of that date and remit the case to the Secretary of State for fresh determination. I also direct the Secretary of State to make a fresh request for a HMRC figure (within the meaning of regulation 36(1) of the CSMC Regulations 2012). Unless regulation 34(2) of those regulations requires the father’s current income to be used, I direct the Secretary of State to determine the

father's 'historic income' and determine his child support liability on the basis of that HMRC figure for 2014/15. The effective date for that calculation is 9 May 2015."

17. For present purposes the key extract from that passage is paragraph 16. It is clear from that extract that the issue relating to the correct tax year's data was not contested in that appeal before the Upper Tribunal. In reality that appeal was about Issue Band the treatment of expenses. The Secretary of State conceded that HMRC had the father's tax information for the most recent year to hand when the request was made in May 2015 (i.e. the data for 2014/15, not the information for 2013/14 which was supplied by HMRC). I note that HMRC was not a party to the earlier Upper Tribunal appeal. I also note that the decision was seen as no more than a straightforward application of the principle established by Upper Tribunal Judge Mitchell in *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] UKUT 84 (AAC).

18. On the facts in *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] UKUT 84 (AAC) and in response to a CMS request in June 2014, HMRC supplied an out-of-date figure relating to the tax year 2008/09, when the father's income was £34,000 per annum, even though it subsequently transpired that HMRC held income data for the tax year 2013/14. The appellant in that case was aggrieved as his current annual income was only some £30,000. The F-tT there reluctantly accepted the Secretary of State's argument that one, and only one, 'drawdown' from the HMRC computer system was permitted, meaning the appellant was 'stuck' with the 2008/09 data. On appeal to the Upper Tribunal, the Secretary of State abandoned that argument and supported the appellant's appeal (see paragraph 14 of that decision).

19. Judge Mitchell, having referred to regulation 36(1) of the CSMC Regulations 2012 and then, in particular, regulation 4(1), set out his conclusions as follows:

"32. I note that:

- (a) this definition operates by reference to the date on which the HMRC request is made;
- (b) this definition may or may result in income data being obtained for what is in fact the most recent tax year (although only the previous six tax years can count);
- (c) what matters is the most recent tax year for which HMRC 'have received' the specified tax-related information. The calculation of income for child support purposes therefore depends on a question of fact that may bear little relation to a parent's current income. What matters is the state of HMRC's records at the date the request is made.

33. To recap, regulation 34 enacts a presumption in favour of using historic income, rather than current income, in the calculation. That will probably not be the same as current income given the way most incomes fluctuate to some degree. That is of no consequence unless current income differs from historic income by an amount that is at least 25% of historic income. In child support

jargon, this is known as the 25% tolerance. Regulation 37 sets out how to determine current income but, for present purposes, I need not go into it.

34. I should also note that, after the Secretary of State's decision in this case was given on 3rd June 2014, on 23rd March 2015 the 2012 Regulations were amended so as to insert a new regulation 27A under which the Secretary is given power at any time to correct accidental errors in decisions taken under the 1991 Act. The amending instrument is Statutory Instrument 2015/338.

Conclusions

35. On this appeal's undisputed facts, the Secretary of State had never determined Mr B's historic income in accordance with the 2012 Regulations. Determination of historic income begins by 'taking the HMRC figure last requested from HMRC'. Due to the statutory definitions used, the HMRC figure is not simply the figure supplied by HMRC. The 2012 Regulations do not contain a deeming provision that requires whatever figure is supplied to stand as the 'HMRC figure'.

36. For the figure supplied by HMRC to count (to fall within the definition of 'HMRC figure'), it must be based on information for the 'latest available tax year'. The definition of 'latest available tax year' operates by reference to the state of HMRC's records as a matter of fact when the request is made. It is the most recent tax year for which HMRC 'have received' the relevant tax-related income information. If HMRC make a mistake and supply an earlier year's data, they have not supplied a 'HMRC figure' as defined.

37. The 2012 Regulations do not prevent more than one HMRC request from being made in respect of a particular application for a child support maintenance calculation. I acknowledge that regulation 35 provides that 'a request' is to be made. However, section 6(c) of the Interpretation Act 1978 provides that 'in any Act, unless the contrary intention appears...words in the singular include the plural'. Section 23(1) of the 1978 Act applies section 6 to subordinate legislation, such as the 2012 Regulations.

...

41. The configuration of the computer systems used to support the Secretary of State's child support operations is neither here nor there. The software programmer does not make the law, Parliament does. If there is a technical impediment to using the 'drawdown' interface more than once during a particular period, the Secretary of State will need to make a request by some other means, by letter or email for example.

42. And so the First-tier Tribunal therefore erred in law. It misconstrued the 2012 Regulations by holding that the first, and only the first, income data supplied by HMRC had to be inputted into the child support calculation as the HMRC figure. That was an error of law. On the undisputed facts, no HMRC figure had been supplied at all and that meant Mr B's 'historic income' had not been determined in accordance with the 2012 Regulations."

20. A number of observations are in order about *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] UKUT 84 (AAC). First, as with the earlier appeal involving the present appellant, the Secretary of State supported the appeal to the Upper Tribunal. Second, again as with the earlier appeal (but not with this present appeal), HMRC was not a party to the appeal. Third, it was accepted on the facts that HMRC held the taxpayer's data for the most recent tax year but had supplied a much earlier year's information in error. Fourth, it is not clear from the case report whether the taxpayer was a 'straightforward' PAYE employee or whether his tax affairs were more complicated e.g. by his status as a company director or as being self-employed. That said, the implication is that he was an ordinary PAYE employee.

21. Given the cumulative impact of the factors identified in paragraphs 17 and 20 above, I do not accept Mr Delph's argument that the outcome of Issue 1 of the decision in *AR v SSWP and LR (CSM)* [2017] UKUT 69 (AAC); [2017] AACR 23 necessarily determines the result of the present appeal. I therefore need to consider the parties' competing submissions.

The Upper Tribunal proceedings in the present appeal

Introduction

22. Three of the parties to the present appeal have made a series of detailed written submissions on the appeal. There has been no request from any party for an oral hearing of this appeal. Given the parties' careful written submissions, I am satisfied that the appeal can be dealt with fairly, justly and proportionately by way of consideration 'on the papers' and without an oral hearing. The fourth party, the mother, has not made a substantive written response. She has indicated she appreciates the opportunity to do so but has nothing material to add on the issues raised by the father's appeal. That is understandable, as although she obviously has a very real interest in ensuring that the father's proper child support liability is assessed, she does not have a dog in this particular fight.

23. For the present it is sufficient to set out the parties' competing arguments in broad outline.

The father's submissions

24. Mr Delph's submissions on behalf of the father can be summarised as follows. First, the father's case is governed by the previous Upper Tribunal decision's ruling on Issue A in the earlier appeal (I deal with that submission above). Secondly, Mr Delph argues that the CMS has repeatedly (not just for the assessment in the earlier Upper Tribunal appeal, or for the assessment in the current appeal) used the wrong HMRC data, rather than the information for the latest available tax year – each Spring, he complains, they rely on the data not for the tax year just ended, but the one before that (i.e. the tax year that ended some 12-15 months or so previously). Third, Mr Delph reiterates that at the time in question for this appeal (i.e. when the CMS request was made in late April 2017, HMRC had all the relevant information about the father's tax position for the most recent tax year (2016/17)). This was because all such information had been supplied to HMRC using the Real Time Information system in place since April 2014 for PAYE. In short, there was going to be nothing new in the P11D (due in July 2017) or the SAR (due in later 2017 or by 31 January

2018 at the very latest) which would affect those figures. In particular, there was nothing in the wording of regulations 4 or 36(1) that prioritised SAR data over PAYE data. Mr Delph accordingly urged that I uphold both the outcome and the reasoning of the F-tT.

The Secretary of State's submissions

25. Mrs Beverley Massie has made a written submission on behalf of the Secretary of State, who holds overall responsibility for the CMS. She notes that as the father is a company director, HMRC require him to file a SAR, notwithstanding that PAYE Real Time Information has been provided to HMRC regularly throughout the tax year. Her primary submission is that in those circumstances the F-tT erred in law in finding that HMRC could identify the 'HMRC figure' (being the total income charged to tax) exclusively from information supplied under the PAYE Regulations. She contended that the effect of regulation 36(5) was that SAR data necessarily took priority over PAYE information. It followed that HMRC could not be expected to provide an 'HMRC figure' in respect of a tax year for which a SAR was due but had not yet been actually filed. Her second submission is that in any event it is for HMRC to agree and finalise the figures provided and to determine they are satisfied that they have the 'HMRC figure' for the relevant tax year. On the facts of the present appeal, the father's SAR was not lodged with HMRC until 24 November 2017, well after the date of the father's CMS annual review, and so the HMRC figure supplied to the CMS (for 2015/16) did indeed relate to the "latest available tax year", as data for 2016/17 had yet to be finalised as at the date of the request. Mrs Massie invites me to dismiss the appeal and to confirm the reasoning set out in her written submission.

HMRC's submissions and evidence

26. Ms Galina Ward of counsel has made a written response on behalf of HMRC. In similar vein to the Secretary of State, HMRC do not agree with the F-tT's interpretation of regulations 4 and 36. Ms Ward identifies the key phrase in regulation 4(1) as being "... the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return". Accordingly, she identifies the issue in the present appeal as follows:

"The issue in this case is whether it can be said that HMRC have received the information required by the underlined words in circumstances where (a) PAYE information has been provided in real time during the tax year; (b) no form P11D or self-assessment return ('SAR') has been provided for that tax year; but (c) those documents will not in fact provide any further information relevant to the assessment of the appellant's tax liability for the year."

27. In terms of the overall time-line, Ms Ward sets out HMRC's position in general terms as follows:

"(i) In most cases, including this one, PAYE information is provided in real time by employers under the Real Time Information provisions in regulations 67B-72G of the Income Tax (Pay As You Earn) Regulations 2003 ('the PAYE Regulations'); (ii) Other information may be provided after the end of the tax

year, for example in an annual return of other earnings (form P11D) under regulation 85 of the PAYE Regulations, or under regulation 91 in relation to a termination award;

(iii) The deadline for providing such information is 6 July after the end of the tax year in question;

(iv) If a tax payer is required to complete a SAR, the deadline for doing so is 31 October after the end of the tax year, or 31 January in the next year if the SAR is completed online;

(v) HMRC will reconcile the information received from these various sources once it has received all of them, or the time for providing those that are only required if relevant has passed.”

28. Citing Upper Tribunal Judge Jacobs’s dicta in *SH v Secretary of State for Work and Pensions, CH and Her Majesty's Revenue and Customs (CSM)*: [2018] UKUT 157 (AAC) ; [2019] AACR 1, to the effect that legislation should be interpreted in a way that is rational, coherent and workable, Ms Ward concludes as follows:

“9. In a case in which a SAR is required, therefore, HMRC are not able to provide the ‘sum of the income on which the non-resident parent was charged to tax’ until the SAR has been received and processed. In a case in which no SAR is required, they will be able to provide that figure once it is clear whether any further information is to be provided in relation to the tax year in question: this will not be until 6 July unless either the information is provided earlier, or confirmation is received that there is no information to provide.

10. HMRC submit that this is the only sensible approach to the provision of information under the 2012 Regulations. Regulation 35 in particular requires the provision of the sum on which the NRP has been charged to tax, and this will not be known until HMRC is in a position to calculate it. The information ‘required to be provided’ within the meaning of regulation 4 is not simply the figures contained in the various sources of information, but the documents themselves that confirm that those figures are the only relevant ones.”

29. On the facts of the present case, Ms Ward submits that HMRC correctly provided 2015/16 data in response to the request made on 25 April 2017, as by that date HMRC had not received either a PD11 or a SAR for the 2016/17 tax year. As regards disposal of the present appeal, Ms Ward invites me to adopt her construction of regulation 4. She does not consider it appropriate for HMRC to make any submissions on the issue of the father’s liability to pay child maintenance.

30. Ms Ward’s written submission is supported by a witness statement from Mr Ian Conley, a senior manager in HMRC’s Individuals Policy Directorate Technical Team. Mr Conley’s witness statement sets out the mechanics of the process by which HMRC supply tax information to the CMS under the CSMC Regulations 2012. He helpfully appended to his witness statement a number of background documents, including an HMRC document setting out the business requirements for that process (*Child Maintenance and Enforcement Commission and HMRC Delivery Partnership and Interface Project: High Level Business Requirement*, Version 3.2 8 July 2011), along with the relevant *Memorandum of Understanding between HMRC and the DWP* (dated 7 February 2017) and *CMEC Business Rules* (dated 10 March 2016).

31. In terms of the mechanics by which HMRC provide the CMS with personal tax data, Mr Conley's witness statement explains as follows:

“8. Income information provided by HMRC is broken down into ‘earned’ income and ‘unearned’ income: see section 6.4 [IC/16-21]. ‘Earned’ income includes: employment income; trading income; taxable pension income; and taxable state benefits. ‘Unearned’ income includes: savings and investment income (including dividends and interest earned from bank and building society accounts); property income; and any other miscellaneous taxable income. In general, DWP CMG will make a request for details of an earned income figure, but if they become aware that the NRP has other sources of income, an additional request can be made for an ‘unearned’ income figure.

9. DWP CMG can make income requests under the 2012 scheme to HMRC in relation to any live case where they require that information. A DWP CMG user completes a template which provides the National insurance Number (‘NINO’) surname and date of birth for the NRP; that states the tax year for which the income is required and whether the income is ‘earned’ or ‘unearned’. Both types of income can be requested at the same time, on separate templates. HMRC then matches all the data held for that particular customer (the NRP) which is held in its Corporate Data Warehouse and returns the relevant information to DWP CMG.

10. The data supplied by HMRC to DWP CMG comprises the following pieces of information:-

- a. A single taxable income figure for the most up to date complete tax year record available for that person;
- b. The source indicator that the income figure is based on (i.e. PAYE or Self-Assessment; however, if a person has employment and self-employment income, the indicator will be ‘SA’ and the reported income will include both as the customer is asked to complete their income figure to the SA tax return;
- c. Dates of employment for the tax year upon which the income figure is based if the person is in PAYE and dates are held. No employment dates if the person is in the SA scheme);
- d. The tax year which the income figure is derived from; and
- e. The currency indicator.
- f. If unearned income has been requested, HMRC also advises separately whether income is held for Savings Investment Income; Property Income and/ or Miscellaneous Income.

11. DWP CMG view all data provided by HMRC using an on-line portal; so the data exchange process does not take place by individuals, meaning that there is no human interaction in the process between members of each department.

12. Exchange of data for the purposes of child maintenance calculation between HMRC and DWP CMG takes place four times per day, 7 days per week as part of an automated process. The most recent Memorandum of Understanding ('MoU') in place between HMRC and DWP CMG in relation to the 2012 scheme of child maintenance is at [IC/48-84].

13. It is possible for DWP CMG to make second or further requests for a historic income figure from HMRC in relation to the same person and the same tax year. DWP CMG can request data from HMRC as many times as necessary in relation to a particular customer, as long as there is a business need to do so. There is no limit on the number of times that a request can be made through the information gateway."

32. The final point in that extract (see paragraph 13) demonstrates that there was no operational or technical reason for the 'one request only' assertion that was made to the F-tT in *SB v Secretary of State for Work and Pensions and TB (CSM)* (see paragraphs 18 and 19 above).

33. Mr Conley's witness statement also deals with the joint HMRC/CMG understanding of what is meant in practical terms by tax information for "the latest available tax year":

"15. The 'CMEC Business Rules' [IC/85-104] is a series of rules to explain various issues in relation to HMRC's role in the child maintenance process. The most recent version sets out at paragraph 1.7 [IC/90] that the information to be provided is that for the latest complete tax year, which is defined as:

- For Self-Assessment Returns – the most recent year for which a SA return is held; and
- For PAYE – the most recent year for which all P14s have been received (P14s have now been superseded by the provision of real time PAYE information as explained in paragraph 17 below)."

34. The reference to paragraph 17 of the witness statement is a reference to the PAYE regulations noted at paragraph 9 above. Moreover, as Judge Mitchell observed, "The configuration of the computer systems used to support the Secretary of State's child support operations is neither here nor there" (*SB v SSWP and TB (CSM)* at paragraph 41, see paragraph 19 above). What matters is what the law says and whether the departmental systems in place comply with those requirements, rather than the other way around.

35. Mr Conley goes on to explain HMRC working practices in the context of the annual time-line referred to at paragraph 27 above relating to the submission of PAYE data in real time, especially the P11D and SARs (where appropriate). The process of reconciliation is, as he puts it, a matter for internal HMRC processes:

"21. The information received from these various sources is automatically reconciled once HMRC has received all of them, or the time for providing those that are relevant has passed. This may not be instantaneous but is likely to take place soon after the information is collated.

22. The reconciliation will take place on or shortly after the due date for the last of the information that is expected to be provided. A taxpayer could ask for this to be carried out sooner if there is no such information to provide, but otherwise the automated process – which applies to all of the millions of cases processed by HMRC each year – will not take place until the last date for submitting information has passed. Until that reconciliation has taken place, my understanding is that the figure provided by the system to DWP CMG will be the figure for the last year for which such a reconciliation has taken place.”

36. In the father’s case, Mr Conley confirms, HMRC received the CMS request on 25 April 2017 and replied on the same day by the automated process outlined in his witness statement. As the father was required to submit a SAR for 2016/17, and that was not submitted until 24 November 2017, HMRC provided the 2015/16 tax year data in response to the April 2017 request.

The Upper Tribunal’s analysis

The legislation

37. Regulation 34 of the CSMC Regulations 2012 sets out the general rule for determining a non-resident parent’s gross weekly income for the purposes of a child maintenance assessment. Regulation 34(1) indicates that such income is to be assessed on either “historic income” or “current income”, but the default position is that “historic income” prevails, unless one of the exceptions in regulation 34(2) applies:

“The general rule for determining gross weekly income

34.—(1) The gross weekly income of a non-resident parent for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter.

(2) The non-resident parent's gross weekly income is to be based on historic income unless—

(a) current income differs from historic income by an amount that is at least 25% of historic income; or

(b) the amount of historic income is nil or no historic income is available.

(3) For the purposes of paragraph (2)(b) no historic income is available if HMRC did not, when a request was last made by the Secretary of State for the purposes of regulation 35, have the required information in relation to a relevant tax year.

(4) “Relevant tax year” has the meaning given in regulation 4(2).

(5) This regulation is subject to regulation 23(4) (change to current income outside the annual review or periodic current income check).”

38. Regulation 35 then explains how the default position of “historic income” is arrived at:

“Historic income – general

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) Where the non-resident parent has made relievable pension contributions during the tax year to which the HMRC figure relates and those contributions have not been deducted under net pay arrangements, the HMRC figure is, if the non-resident parent so requests and provides such information as the Secretary of State requires, to be adjusted by deducting the amount of those contributions.”

39. According to regulation 2, the expression “the HMRC figure” as deployed in regulation 35 (and elsewhere in the CSMC Regulations 2012) “has the meaning given in regulation 36”. For present purposes the only material parts of regulation 36 are as follows:

“Historic income – the HMRC figure

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).

...

(5) Where, for the latest available tax year, HMRC has both information provided in a self-assessment return and information provided under the PAYE Regulations, the amount identified for the purposes of paragraph (1) is to be taken from the former.”

40. The last part of the legislative jigsaw is regulation 4, which bears repetition here:

“Meaning of ‘latest available tax year’

4.—(1) In these Regulations “latest available tax year” means the tax year which, on the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income) or regulation 69 (non-resident parent with unearned income), is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return.

(2) In this regulation a ‘relevant tax year’ is any one of the 6 tax years immediately preceding the date of the request for information referred to in paragraph (1).”

The issue that arises under that legislation

41. There is no argument over the question itself that arises for determination when applying the legislation set out above. It has been neatly summarised by Ms Ward in her response to the appeal on behalf of HMRC (see paragraph 26 above). Her answer to that question, in which she is supported by Mrs Massie on behalf of the Secretary of State, is that (emphasis added) in “*a case in which a SAR is required ... HMRC are not able to provide the ‘sum of the income on which the non-resident parent was charged to tax’ until the SAR has been received and processed*” (see paragraph 28 above). Mr Delph, on the other hand, contends that the answer is otherwise – in short, the CSMC Regulations 2012 do not prioritise the SAR over PAYE Real Time Information and at the time of the April 2017 data request HMRC was already in possession of the data underpinning the “sum of the income on which the non-resident parent was charged to tax” for 2016/17 and should have provided that most recent tax year’s data to the CMS.

Interpreting the legislation

42. There is an attractive simplicity to Mr Delph’s principal submissions, which found favour with the F-tT. Child support liabilities should be assessed on the basis of the most recent tax year data to hand. In the present case, he contends, HMRC had all the relevant data for 2016/17 by the time it received the CMS request in April 2017. There is no suggestion that this data would be in any way subject to variation following the submission of the father’s P11D and the SAR later in 2017. The legislation refers respectively to “information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return” (regulation 4(1)) and to “information provided in a self-assessment return or under the PAYE regulations” (regulation 36(1)). In a nutshell, the “or” in both regulations 4(1) and 36(1) is disjunctive and means “one or the other” source of information.

43. However, I prefer the submissions of Mrs Massie and Ms Ward for the Respondents, and for the following four reasons.

44. First, the starting point is that “gross weekly income” means (in most cases) “historic income” (regulation 34), while “historic income” in turn means taking as a base line the non-resident parent’s “HMRC figure” (regulation 35). But the “HMRC figure” does *not* mean simply ‘information in the hands of HMRC’. Rather, it 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” (regulation 36(1)). Thus, the regulation refers to “the amount *identified* by HMRC from information provided...” and not “the amount *held* by HMRC from information provided...”. The use of the expression “identified by HMRC” demonstrates that some form of active engagement with and manipulation of the relevant information by HMRC is required. This can only realistically refer to the process of reconciliation referred to by Mr Conley in his witness statement at paragraphs 21 and 22 (see paragraph 35 above). As Upper Tribunal Judge Jacobs observed in *FQ v Secretary of State for Work and Pensions and MM (CSM)* [2016] UKUT 446 (AAC); [2017] AACR 24 at paragraph 14: “Regulation 36(1) refers to ‘the sum of the income on which the non-resident

parent was charged to tax'. That makes clear that ... in deciding that issue, the approach of the Revenue is determinative; it is not permissible to go behind that.”

45. Secondly, and in any event, plainly regulation 36(1) does not define the “HMRC figure” by reference just to what is in the PAYE Real Time Information returns. Rather, it is the “sum of the income on which the non-resident parent was charged to tax for the latest available tax year” once the component elements set out in regulation 36(1)(a)-(d) inclusive have been aggregated by HMRC. As Mrs Massie submits, this process of aggregation involves the HMRC reconciling information from its various sources and “unless/until HMRC has determined what this figure is, it cannot be said to exist”. In the same way, as Ms Ward put it in HMRC’s response, “Regulation 35 in particular requires the provision of the sum on which the NRP has been charged to tax, and this will not be known until HMRC is in a position to calculate it. The information ‘required to be provided’ within the meaning of regulation 4 is not simply the figures contained in the various sources of information, but the documents themselves that confirm that those figures are the only relevant ones.”

46. Thirdly, I do not accept that this construction of regulation 36(1) can be overridden in some way by the wording of regulation 4(1). This provision certainly defines the “latest available tax year” as meaning “the tax year which ... is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return”. On one reading, that provision may seem to focus simply on the passive question as to whether “HMRC have received the information required”. Certainly, by the date of the CMG request in April 2017, HMRC had “received the information required to be provided in relation to the non-resident parent under the PAYE Regulations” for 2016/17, at least as regards Real Time Information. But HMRC had not received the P11D. Moreover, regulation 4(1) is simply a definition provision that explains a term used in the substantive statutory provisions and is necessarily subject to those principal provisions. It benchmarks the “latest available tax year” by reference to “the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income)...” – and regulation 35 revolves around the “HMRC figure” that links in turn to the definition in regulation 36, which takes us back to “the amount identified by HMRC”.

47. Finally, while it is not determinative, the interpretative approach advocated by Mrs Massie and Ms Ward is consistent with regulation 36(5), which makes it clear beyond any doubt that where both sources of information exist for the same tax year then information provided in a SAR takes priority over information provided in PAYE Real Time Information and the former is to be used as the basis for the HMRC figure identified for the purposes of regulation 36(1). It is true that, on the face of it, regulation 36(5) does not apply in the case of the latest available tax year for which, at the time of the CMS request, HMRC only hold PAYE Real Time Information. However, if it were permissible to proceed purely on the basis of PAYE data, in a case where a SAR was required to be submitted but had yet been filed, then necessarily in some cases the final tax liability for the year in question would need to be recalculated. If that were so, then one would expect some system to be in place whereby HMRC was required to notify the CMS of any such relevant recalculation. No such procedure appears to be in place, implying that it is not necessary – precisely because the “HMRC figure” is not identified until SAR data is to hand, in a case where a SAR is required, and all information sources have been reconciled.

48. Mr Delph has made two further submissions relating to the father's appeal that need to be addressed.

49. First, Mr Delph complains that for the father's 2018 annual review, dated 3 May 2018, the CMS has again relied on tax data for the last tax year but one (i.e. 2016/17) rather than what he argued was the "latest available tax year" (being, he said, 2017/18). Mr Delph advised the CMS that the father wanted his 2017/18 income used in the April 2018 annual review, as it was some £50,000, approximately £17,000 down on his 2016/17 income. According to Mr Delph, this 2018 annual review assessment was made notwithstanding the father's end of year PAYE submission, P11D and SAR for 2017/18 all (on this occasion) having been filed with HMRC by 10 April 2018. Mr Delph also goes into some detail over the difficulties he encountered in then checking that HMRC held the correct information. Regrettably the short answer to this submission is that it is not the 2018 CMS annual review which is the subject matter of the present appeal, but rather the F-tT's decision on the 2017 annual review by the CMS. I readily accept that Mr Delph may have some serious questions about how HMRC goes about the process of reconciling data provided through the various information streams, but those are not questions that the Upper Tribunal is equipped to answer, or indeed has the jurisdiction to consider. Furthermore, and in any event, if the father's income of £50,000 for 2017/18 was £17,000 down on 2016/17 that might well bring into play the possibility of his being able to rely on his current income under regulation 34(2)(a).

50. Second, Mr Delph points out that, on the Respondents' analysis, any non-resident parent who is an ordinary PAYE employee, with no obligation to file a SAR, and who is due an annual review of their child maintenance liability in the period from 6 April through to July each year, will necessarily have that re-assessment based on not the most recent tax year just ended but rather the tax year ending the previous April, 12-15 months earlier. This might only be avoided, Mr Delph suggests, by the non-resident parent asking their employer to file a P11D with HMRC before the due date of 6 July. That may well be the case but appears to be an inevitable consequence of the interaction of CMS and HMRC time-lines and deadlines. There will, moreover, always be winners and losers in any such system. The father in this case may have wanted to rely on the tax year just ended; other non-resident parents, whose incomes have changed in the opposite direction, may well much prefer to rely on the previous tax year. In any event, the following year's review will catch up with the "latest available tax year", subject to the 25 per cent tolerance rule for current income in regulation 34(2)(a).

51. I should also deal with the points raised by the F-tT when granting permission to appeal (see paragraph 14 above). The F-tT was concerned that regulations 4(1) and 36(1), read literally, gave rise to the potential for conflict.

52. On this literal reading, regulation 4(1) defined the "latest available tax year" as the most recent relevant tax year for which HMRC had received information about the father's income from either PAYE or a SAR. For the non-resident parent who is both a PAYE employee and self-employed, then realistically those are very often likely to relate to different tax years – given PAYE data is provided by way of Real Time Information while a SAR is typically lodged at the eleventh hour. So, by way of example, a non-resident parent in such a position may have a CMS annual review in

August 2018. Most likely, as at that date, HMRC will have PAYE information for the last tax year 2017/18 but self-employed income data only for the previous tax year but one, 2016/17 (or even the previous tax year to that, depending on the SAR accounting year). On that literal reading, the “most recent relevant tax year” under regulation 4(1) for which HMRC will have received the required information from one or other source (PAYE or SAR) would be 2017/18, but that would not capture the father’s self-employed income for that same tax year.

53. Regulation 36(1), however, defines the “HMRC figure” by reference to the aggregate sum of “the income on which the non-resident parent was charged to tax for the latest available tax year” including both employed income (regulation 36(1)(a)) and trading income (regulation 36(1)(d)). The only coherent reading of that provision is that all forms of taxable income must relate to one and the same tax year. In the example given in the previous paragraph, a figure based on the information typically available as at August 2018 would only meet the terms of the regulation 36(1) definition if it was confined to 2016/17. By the same token, if the SAR was filed on time (by 31 January 2019), and a CMS request made in March 2019, then the “latest available tax year” should presumably be 2017/18, assuming HMRC’s reconciliation process had taken place reasonably promptly.

54. In my assessment the tension between regulations 4(1) and 36(1) as suggested by the F-tT is more apparent than real. I would accept that the drafting of these provisions is less than crystal clear (this seems to be a recurring theme in the CSMC Regulations 2012: see also *SH v SSWP, CH and HMRC* on the otiose regulation 36(2)(b)). However, as discussed in paragraph 46 above, the key point to remember is that regulation 36 is the primary provision in defining what is meant by the “HMRC figure” – regulation 4 is merely a subsidiary definition provision. It follows that regulation 4(1) must be read in such a way that it is consistent with the purpose of regulation 36(1), namely the focus on all sources of income charged to tax for the same “latest available tax year”.

Disposal of this appeal

55. From a jurisdictional point of view this appeal is not unproblematic. As a general rule, a successful party to court or tribunal proceedings cannot appeal against a decision in their favour and, partly in consequence of that principle, an appeal lies only against the decision itself and not the reasoning behind the decision. On the face of it the present appeal offends against both those axioms. Thus, as a starting point, a successful party should not be able to appeal in order to obtain confirmation or clarification of a favourable decision from a higher court (see the reported decision of a Tribunal of three Industrial Injuries Commissioners in *R(I) 68/53* at paragraphs 3-5).

56. On the other hand, this is a case in which the F-tT identified the issue under appeal as a potential error of law and gave permission to appeal. None of the Respondents has taken any objection to permission having been granted; indeed, had the F-tT not pre-empted the father’s application for permission, it seems highly likely, as Mr Delph himself rightly recognised, that the Secretary of State would have sought permission to appeal in her own right. The point in dispute has been fully argued in the sense that the father on the one hand and the Secretary of State and HMRC on the other have advanced detailed arguments on the proper construction of the CSMC Regulations 2012. Whatever the implications for the instant case, there can be no question but that the proper interpretation of regulations 4(1) and 36(1) is also a

matter of importance for many other child maintenance cases, whether or not they result in any appellate proceedings. Both the Secretary of State and HMRC actively support the need for clarification of the legislation. In those very special circumstances, I consider that it has been right to proceed to determine this appeal.

57. The question then, having reached the conclusions that I have, is how to dispose of the underlying appeal. I could as Mrs Massie proposes, simply dismiss the appeal. Alternatively, having concluded that the F-tT took the wrong approach to regulations 4(1) and 36(1), there are several other options open to me. First, I could leave the F-tT's outcome decision undisturbed. Second, I could set the F-tT's decision aside and remit the case to a fresh tribunal for rehearing. Third, I could set aside the F-tT's decision and remake the decision under appeal (see generally section 12(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act")).

58. It is right to remind myself of the parties' respective submissions on this point. Mr Delph asks that both the F-tT's reasoning and decision be upheld. Mrs Massie invites me to reject the F-tT's reasoning and dismiss the appeal. Ms Ward supports the former submission by Mrs Massie but properly expresses no view on disposal. As noted above, the mother has not expressed a view.

59. I bear in mind that the children who were the subject of this case are now both over the age at which they stop being a "qualifying child" for the purposes of the Child Support Act 1991. In that context there is much to be said for drawing a line under matters. I can see no merit whatsoever in setting aside the F-tT's decision and then either remitting or remaking the underlying CMS decision. Rather, the choice in the present appeal is realistically a binary one – either (1) to dismiss the appeal or (2) to allow the appeal but then decline to set aside the F-tT's decision, an option which is expressly envisaged by section 12(2)(a) of the 2007 Act.

60. The net result of those latter two options is effectively the same. On balance, I consider the better approach is to dismiss the father's appeal on the basis of both (i) the problematic nature of the Upper Tribunal's jurisdiction in these proceedings; and (ii) my conclusion that the main thrust of the father's appeal – that the F-tT's reasoning be endorsed – is misplaced. If I am wrong about that, I would take the view that while the F-tT may have materially erred in law, the proper course to take now is to leave intact the F-tT's decision rather than set it aside.

Conclusion

61. For the reasons explained above, the Upper Tribunal dismisses the father's appeal. The decision (but not the reasoning) of the First-tier Tribunal stands.