

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

The **DECISION** of the Upper Tribunal is to allow the appeal by the appellant (“the father”).

The decision of the Manchester First-tier Tribunal dated 18 November 2016 under file reference SC946/13/11825 involves an error on a point of law. The Tribunal’s decision is therefore set aside.

The Upper Tribunal is not in a position to re-make the decision on the original appeal by the father against the decision of the Secretary of State dated 12 July 2013. It therefore follows that the original appeal against the Secretary of State’s decision is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

- (1) The re-hearing should be at an oral hearing.
- (2) The new tribunal should not involve the tribunal judge or financially qualified panel member who sat on the last tribunal on 18 November 2016.
- (3) If either parent has any further written evidence to put before the tribunal, this should be sent to the regional office of HM Courts and Tribunals Service in Liverpool within one month of the issue of this decision.
- (4) The Secretary of State should be represented at the new hearing by a presenting officer.
- (5) The new tribunal must consider all the evidence afresh and is not bound in any way by the decision of the previous tribunal.

These directions may be supplemented as appropriate by later directions by a Tribunal Case Worker, Tribunal Registrar or Tribunal Judge in the First-tier Tribunal (Social Entitlement Chamber).

REASONS FOR DECISION

The Upper Tribunal's decision in summary

1. The father's appeal to the Upper Tribunal is allowed. The decision of the Manchester First-tier Tribunal ("the Tribunal") on 18 November 2016 (as confirmed on 29 November 2017) involves an error on a point of law. The Tribunal's decision is therefore set aside. There will have to be a re-hearing before a new Tribunal at a suitable local venue. I am not holding an Upper Tribunal oral hearing for the reasons that follow.

The request for an oral hearing of the appeal to the Upper Tribunal

2. The Secretary of State's representative has not requested an oral hearing before the Upper Tribunal.

3. The mother, however, has asked for an oral hearing of this appeal before the Upper Tribunal. She points out (p.358) that it has been a long time since the previous hearing and there is a large bundle of papers to try and digest. She understandably wishes to have the opportunity to "have her say".

4. The father would initially have been content for me to decide the case on the papers, but repeats the mother's request.

5. I have considered all parties' views as I am required to do under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I refuse the application for an oral hearing of the appeal before the Upper Tribunal for the following main reasons.

6. First, it is important to realise that the Upper Tribunal's role is confined to correcting the tribunal below on issues of law. It is not the job of the Upper Tribunal to embark on a further investigation of the facts of the case. That is the job of the First-tier Tribunal (FTT), which has the advantage that it may include an accountant member with financial expertise.

7. Second, an oral hearing before the Upper Tribunal is both unnecessary and disproportionate. It would actually cause further delay and inconvenience to the parties, in a case which has certainly suffered more than its fair share of delays (this case has already been to the Upper Tribunal on a previous occasion).

8. For both these reasons, and applying the overriding objective of a fair and just procedure, I refuse the request for an Upper Tribunal oral hearing.

The First-tier Tribunal's decision

9. Regrettably this is a case which goes right back to 2013. The mother's frustration is therefore quite understandable. The CSA decided on 12 July 2013 that the father was liable to pay child support of just £6 a week as from 23 May 2013. The father appealed. On 18 November 2016 the FTT allowed the appeal but directed the CSA (now CMS) to recalculate the maintenance assessment on the basis of chargeable income of £5,534 plus variation income of £4,783.68. A further hearing was held on 29 November 2017 (as well be seen, the basis for this hearing is opaque) and the FTT issued a statement of reasons dated 4 December 2017.

The grant of permission to the Upper Tribunal

10. The father then applied for permission to appeal to the Upper Tribunal against the FTT's decision. When giving the father permission to appeal, I commented in part as follows:

“This case and the Appellant’s application for permission to appeal

5. This is the father’s application for permission to appeal. The case has had a rather complicated and somewhat troubled procedural history. A brief account follows.

6. In July 2012 a First-tier Tribunal (FTT) allowed what was then the mother’s appeal, finding on the documentary evidence for 2010/11 that the father’s lifestyle was inconsistent with his declared income. The FTT found the figure for unfunded expenditure as being £14,361 p.a. (see p.132 at para 14(e); note also that although this FTT statement of reasons seems to be paginated correctly, it is unclear whether paras 6-8 are missing from the document). The father’s application for permission to appeal that decision was refused by Judge Williams in April 2013.

7. In July 2013 the CMS reassessed the father’s income, apparently ignoring the variation (why that is however is unclear to me), and arrived at a liability of just £6 a week (p.12). The father seems to have challenged the effective date – his appeal went to the FTT on 10 February 2014 (p.50). The FTT said his liability should be reassessed from August 2012 on the basis of the 2011/12 accounts. I gave the mother permission to appeal from that decision on the basis that the FTT had gone ahead in her absence without explaining why (p.69). On 20 March 2015 I allowed her appeal for that reason and remitted the case for rehearing (CCS/3029/2014, p.120).

8. The present application is in relation to the outcome of that remitted appeal. But it took quite a long time to be re-heard at the FTT level, largely due to repeated postponements.

9. The first stage of the re-hearing was on 13 January 2016 before a judge and financial member (p.153). That hearing resulted in the directions at p.155. In response the father provided a huge raft of further financial evidence (pp.156-282). The financial member seems to have undertaken an analysis of this paperwork – see pp.312-314 and also the 4 sheets appended (as documents A-D), which were on the FTT administrative file but do not seem to have found their way to the main file previously. The financial member calculated the variation figure as £4,783.68.

10. Following more postponements, there was then a final hearing on 18 November 2016 (pp.289-291). It appears the financial member’s analysis was produced to the parties at this hearing (see p.289 entry) and so not before. The hearing itself seems to have been quite short. The FTT allowed the appeal and remitted the case to the CMS to recalculate on the basis set out on p.292, with ‘liberty to apply’.

11. This was followed by various correspondence from the father leading on 20 January 2017 to a FTT ruling not to set aside the decision of 18 November 2016 (see p.293). There is then a puzzling set of directions dated 2 March 2017 (p.295, but which I suspect from other data was a misprint for 2 April 2017). These directions seem to overlook the fact that there had already been a ruling refusing to set aside the FTT’s decision. The directions proposed a reconvening of the hearing – although the basis for that seems to me at best obscure, not least given the ruling of 20 January 2017.

12. Eventually the (rather short) hearing was reconvened on 29 November 2017 (p.298). The decision of 18 November 2016 was not set aside (for a second

time!) – p.300. That was then followed by a statement of reasons dated 4 December 2017, which is as much a statement of reasons for the November 2016 decision as the later November 2017 ‘decision’.

13. The Judge seems to have recognised that perhaps not all had gone smoothly from a procedural point of view (p.306 para. 14).

The Upper Tribunal Judge’s provisional comments

14. The following observations are initial and provisional in nature and should not be taken as expressing a decided view. They are provided simply to help focus the parties’ submissions.

15. *Which is the FTT decision being appealed by the father?* On his UT1 application form the father has stated the decision of 29 November 2017 as being the decision being appealed. For the reasons suggested above I am not at all clear the FTT had jurisdiction to make the decision it did on that date. I think it best to see the father’s application as a request to appeal the substantive decision of 18 November 2016 (as confirmed on 29 November 2017).

16. *Backdating?* It was the backdating issue which originally kicked off this appeal by the father. Perhaps the FTT should have addressed this question. But on balance it seems to me the FTT was probably right to proceed from the effective date of the 2013 supersession decision.

17. *Procedural fairness?* This may perhaps be the father’s best point, even if he has not identified it as such. It seems to me arguable that the financial member’s calculations may have been so complex that it was arguably unreasonable to suppose that they could be presented to the father at the hearing so as to enable him to have a fair chance to respond. It seems to me arguable that there were two possible approaches that the tribunal could have followed. The first – especially given the delays in listing the case – is that the calculations might have been arrived at well before the hearing. They could have been shared with the judge (this might perhaps have involved a preliminary hearing without the parties?) and then the FTT could have issued a direction setting out the calculations and saying that on the face of it they justified a variation on the basis of additional income of £4,783.68 per year. The parties could then have been told that they should come to the hearing ready to put forward arguments relating to this. This would perhaps have been the best procedure, as it would have included a written explanation of the calculations, but may be a counsel of perfection. Alternatively, since the matter was in fact dealt with for the first time at the hearing, the obvious course for the tribunal to take was arguably to adjourn to enable the father to study the calculations. This might not necessarily have involved adjourning until another day, but perhaps he should have been allowed half an hour or so out of the hearing room to work through the figures. If nothing else this might have brought to light the issue of the missing bank statement (as discussed below).

18. *The Watson and Seaston payments?* The paperwork includes credit entries for sums from Watson and Seaston, which the father said were loans (see pp.290-291). If they were indeed loans, then arguably they could not count as income on a variation. The FTT seems to have overlooked (or forgotten?) about this point in its statement of reasons.

19. *The missing bank statement?* This is the father’s principal ground of appeal on form UT1. Although the father provided a considerable body of financial

statements, there is, however, a bank statement missing between pp.204 and 205. The financial member's own analysis seems to have made certain assumptions about this missing sheet (see extra sheet D). It is not clear to me why the father was not simply asked to produce this sheet earlier, which may well have been omitted from the extra evidence supplied simply by oversight rather than due to deliberate subterfuge. This is perhaps an aspect of procedural fairness (see UT1 – "why did it take a year to tell me there was a missing statement?").

20. I have therefore decided give permission to appeal, given the doubts expressed above about the way the FTT handled this appeal."

The proceedings before the Upper Tribunal

11. Mr Kevin O'Kane, on behalf of the Secretary of State has provided a submission on the appeal. He supports the father's appeal to the Upper Tribunal, principally on the grounds of procedural unfairness (relating to paragraphs 17 and 19 of the grant of permission, as noted above)

12. The mother's arguments relate to the wider issues of unfairness which she says are raised by the case. She does not directly address the points about paragraphs 17 and 19 of the grant of permission.

13. The father repeats his grounds of appeal, but now accepts that he made an error with regard to the Watson payment.

14. The parents have understandably focussed on the alleged facts and the respective merits of the dispute between themselves, as they each see it. My role, however, is to decide whether the First-tier Tribunal's decision involved an error of law.

15. My conclusion is that it did, for the two reasons identified in the original grant of permission and supported by Mr O'Kane. In short there was an element of procedural unfairness. The Secretary of State's representative suggests that I allow the father's appeal to the Upper Tribunal and send the matter back for re-hearing before a new Tribunal. I agree. That new Tribunal is the place where the disputed facts must be resolved. That way both parents get to have their say.

Conclusion

16. For the reasons explained above, the Upper Tribunal allows the father's appeal. The decision of the First-tier Tribunal is set aside and the Upper Tribunal directs a re-hearing of the decision under appeal as set out above.

**Signed on the original
on 30 August 2019**

**Nicholas Wikeley
Judge of the Upper Tribunal**