[2023] UKUT 238 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2019-002667-CSM**
[Formerly CCS/155/2019]

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

DG

Appellant

-v-

Secretary of State for Work and Pensions

First Respondent

-and-

EG

Second Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 23 October 2023
Hearing date: 14 May 2021

Representation

Appellant:	Rachel Spicer of counsel
First Respondent	Shakil Najib of counsel instructed by the Government Legal Department
Second Respondent	In person

DECISION

This decision is given pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007 and section 27 of the Judicial Pensions and Retirement Act 1993.

The appeal to the Upper Tribunal does not succeed.

The First-tier Tribunal did not make any material legal mistake in relation to the claimant's appeal (ref. SC242/16/01259) which was decided at Fox Court on 23 January 2018.

Therefore, that decision stands and the appellant is liable to pay child support maintenance for the five qualifying children that are identified in the appeal papers on the

basis that, from the effective date of 30 December 2015, his gross weekly income—as varied under section 28F of, and paragraph 4 of Schedule 4B to, the Child Support Act 1991, and regulation 69 of the Child Support Maintenance Calculations Regulations 2012—was £1,202.70.

REASONS

Summary

1. This appeal is about the circumstances in which the Secretary of State or, on appeal, the First-tier Tribunal ("FTT"),[1] may agree a variation under regulation 69 of the Child Support Maintenance Calculations Regulations 2012 ("the Regulations") on the ground that the non-resident parent has “unearned income”.

2. “Unearned income” is defined for the purposes of regulation 69 as being income that is chargeable to tax under three specified Parts of the Income Tax (Trading and Other Income Act) 2005 ("ITTOIA").

3. The only issue is whether, when the amount of any unearned income is determined, the Secretary of State must accept the information provided by HMRC as to the amount of the non-resident parent’s income that is so taxable or whether she[2] is free to take into account evidence showing that figure may be incorrect.

4. I have decided that, subject to one exception, the latter is the case.

5. In reaching that decision, I regret that I been unable to persuade myself that the decision of Judge Wikeley in *PP v Secretary of State for Work and Pensions and SP (CSM)* [2022] UKUT 286 (AAC) is correct on this issue, and—to that extent—I have declined to follow it.

---

1 On appeal, the FTT stands in the shoes of the Secretary of State and has power to make any decision the Secretary of State could have made. In the interests of concision all further references to the Secretary of State in her capacity as a decision maker in individual cases should be taken as also being to the FTT when deciding an appeal.

2 A number of people, both men and women, have held the office as the Secretary of State for Work and Pensions during the currency of these proceedings. Although the current Secretary of State is a man, the office was held by a woman at the time the decision ultimately under appeal was made, and at the times when the various submissions were written and of the hearings. In the interests of consistency, I have therefore used female pronouns to refer to the Secretary of State throughout this decision.

Background and procedural history

6. The appellant (from now on "the Father") has five qualifying children.

7. By a decision made on 18 January 2016 and revised on 20 April 2016, the Secretary of State decided that the Father was liable to pay child support maintenance for those children at the weekly rate of £180.01 from the effective date of 30 December 2015.

8. That calculation was based on the Father's gross weekly income being £986.71 which is equivalent to £51,450 per annum. It did not include any additional income from a variation. The liability of £180.01 was calculated by applying taking 19% of the first £800 of the gross weekly income (£152) and adding 15% of the remaining £186.71 (£128.01).

9. The second respondent ("the Mother") appealed to the FTT against the Secretary of State's decision on 15 February 2016.

10. On 23 January 2018, the Tribunal (which included a financially-qualified member) allowed the appeal and held that the Father's gross annual income was £62,712 (£22,941 in self-employed income plus £39,771 in unearned income that was to be taken into account under a variation).

11. As £62,711 per annum is equivalent to a gross weekly income of £1,202.70, the effect of the Tribunal's decision was to increase the Father's weekly liability.

12. The Father applied for permission to appeal to the Upper Tribunal, which was refused at first instance by District Tribunal Judge Hindley.

13. On renewal of the application to the Upper Tribunal, and following a hearing, I gave the Father permission to appeal limited to the following issues:

> "(a) What is meant by the phrase "by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year" in regulation 69(3) of the Child Support Maintenance Calculations Regulations 2012; and
>
> (b) Can the amount of [the Father's] unearned income, as determined in accordance with above decision of the First-tier Tribunal, be said to have been correctly determined on that basis?"

14. I held an online hearing of the appeal on 14 May 2021. I must offer the parties my apologies for the fact that my long-term ill-health has led to such a long and unacceptable delay between that hearing and the promulgation of this decision. I should stress,

however, that the hearing was recorded and therefore my recollection of the oral submissions that were made has not faded with time.

Regulation 69

15. At all relevant times, regulation 69 of the Child Support Maintenance Calculations Regulations 2012 (the 2012 Regulations) has been in the following terms:

> "**Non-resident parent with unearned income**
>
> **69.**—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where the non-resident parent has unearned income equal to or exceeding £2,500 per annum.
>
> (2) For the purposes of this regulation unearned income is income of a kind that is chargeable to tax under—
>
> (a) Part 3 of ITTOIA (property income);
>
> (b) Part 4 of ITTOIA (savings and investment income); or
>
> (c) Part 5 of ITTOIA (miscellaneous income).
>
> (3) Subject to paragraphs (5) and (6), the amount of the non-resident parent's unearned income is to be determined by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year and, where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil.
>
> (4) For the purposes of paragraph (2), the information in relation to property income is to be taken after deduction of relief under section 118 of the Income Tax Act 2007 (carry forward against subsequent property business profits).
>
> (5) Where—
>
> (a) the latest available tax year is not the most recent tax year; or
>
> (b) the information provided by HMRC in relation to the latest available tax year does not include any information from a self-assessment return, or

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

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

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

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

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

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

The possible interpretations of regulation 69(3)

16. When I gave permission to appeal, I made the following observations (among others):

"The words "by reference to" [*i.e.*, in regulation 69(3)] have a number of different possible meanings:

(a) First, they could mean that the amount of the non-resident parent's unearned income is to be assessed as being the figure provided by HMRC.

(b) Second, they could (perhaps) mean that the amount of the non-resident parent's unearned income is to be assessed as being the figure provided by HMRC in the absence of clear (and [the Father] would say, immediately available) evidence to the contrary.

(c) Third, they could (perhaps, just) mean that the amount of the non-resident parent's unearned income is to be assessed under the same rules as are applied by HMRC when assessing unearned income to tax.

(d) Fourth, they may have nothing to do with the outcome of the assessment at all but, rather, impose a procedural requirement that the decision maker should refer to the HMRC information when reaching a decision and (possibly) should explain why he or she has assessed the non-resident parent's unearned income at a different figure from HMRC (if that is the case). This interpretation is consistent with the commentary by Upper Tribunal Judge Jacobs (writing extra-judicially) in *Child Support: The Legislation* (13th ed., Child Poverty Action Group, London, 2018, p.579)"

I shall refer to those possible interpretations respectively as the "First", "Second", "Third", and "Fourth" Interpretations.

17. The passage from *Child Support: The Legislation*, referred to in (d) immediately above read as follows:

> "This regulation provides for a variation if the non-resident parent has unearned income of at least £2.500 a year.
> In applying this regulation it is important to distinguish between the type of income and its amount. It must be of a type that is chargeable to tax under the provisions listed in in para (2). If HMRC does not hold information to show that the parent has any income of that type, the parent has no unearned income para [(3)].[3] The amount of the unearned income is fixed *by reference* to information provided under para (3) or by other sufficient evidence under para [(5)].[4] The regulation does not provide that the Secretary of State or the tribunal must accept the calculation of the amount by HMRC, allowing the Secretary of State or the tribunal to make a different assessment of the available evidence. See also reg 21."

[3] At this point, the original text says "para (2)" but that must be a misprint.
[4] At this point, the original text said "para (4)". Again that was a misprint, and it has been corrected in subsequent editions.

(When a variation under regulation 69 is in place, regulation 21 allows the Secretary of State to request HMRC to provide updated information about the non-resident parent's unearned income for the purposes of an annual review.)

18. Although I made it clear that my list of possible interpretations was not prescriptive and the parties were free to submit other possible interpretations, none did so.

19. The Secretary of State (who had originally opposed the grant of permission to appeal) changed her position and has argued for the First Interpretation, under which the HMRC figure is conclusive: see paragraph 16 above.

20. The Father has argued that both the First Interpretation and Second Interpretation are possible, but—on balance—prefers the Second, under which the HMRC figure is conclusive in the absence of clear and immediately available evidence to the contrary.

21. The Mother, who is neither a lawyer nor legally represented, and who has therefore not analysed the words of the law in her submissions, supports the decision made by the FTT and therefore, effectively, favours the Third Interpretation (in which the Secretary of State must apply the same rules as HMRC) or the Fourth Interpretation (in which the words "by reference to" impose a procedural requirement). She emphasises that any interpretation that required the Secretary of State or the Tribunal to accept the HMRC figure without question would give *carte blanche* to those fathers who wish to evade their responsibility to maintain their children.

22. For the reasons I will give, I have concluded that the Fourth Interpretation is largely correct and that, in any event, this is a case in which regulation 69(5) applies. The FTT's decision therefore contains no material error.

23. It is therefore unnecessary for me to set out further details of the Mother's submissions, although I will mention them as appropriate in the *Discussion* section below. I will set out the detail of the Secretary of State's and the Father's submissions below.

24. Before I do so, however, it will be convenient to give an outline of how child support scheme relates to the rules about self-assessment to income tax.

Self-assessment and child support

Assessment of income under the child support scheme: an overview

25. There are currently three child support schemes. The Father's liability to pay child support maintenance arises under the "2012 Scheme", that is, the scheme established by the Child Support Act 1991 ("the Act") (as amended by the Child Support, Pensions

and Social Security Act 2000 and Child Maintenance and Other Payments Act 2008) and by the 2012 Regulations.

26. Under that Scheme, the Father's liability is a function of his own income: see generally Schedule 1 to the Act ("Schedule 1"). The Mother's income is irrelevant. The policy underlying the Scheme is that non-resident parents should pay a percentage of their income to support their children, irrespective of the financial circumstances of the parent with care.

27. The first step is to ascertain the Father's "gross weekly income" as defined in paragraph 10 of Schedule 1 (see page vii of the Appendix) and regulations 34-39 of the 2012 Regulations (see pages x-xiv). The weekly liability to pay child support maintenance is then calculated by applying the "basic rate", namely the percentages specified in paragraph 2 of Schedule 1.[5]

28. By regulation 34(1), the gross weekly income is "a weekly amount to be determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter".

29. Under regulation 35, the calculation of historic income begins with the "HMRC figure last requested from HMRC": That figure is then adjusted to reflect any pension contributions made by the non-resident parent during the tax year in question and then divided by 365 and multiplied by 7: see page xi of the Appendix.

30. Unlike the phrase "information provided by HMRC to the Secretary of State", which is used in regulation 69(3), the phrase "HMRC figure" is a defined term. Regulation 36 defines it as:

> "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" …

under specified provisions of the Income Tax (Earnings and Pensions) Act 2003 relating to earned income, pension income and social security income, and of the Income Tax (Trading and Other Income Act) 2005 relating to trading income: see page xi of the Appendix.

---

[5] In some circumstances, the reduced rate, the flat rate, or the nil rate will apply instead of the basic rate. However, those circumstances do not arise in this case. In appropriate cases, a non-resident parent's basic rate liability may be apportioned if there is more than one parent with care and reduced if a non-resident parent has shared care of the qualifying children. However, it is unnecessary to discuss those possibilities in this decision.

31. The emphasis on the phrase “was charged” in that definition is mine. The historic income figure is a primary fact about the past. HMRC is required to provide the actual earned income figure on which a non-resident parent was charged tax in relation to a tax year that has concluded: not the amount on which he *should have been* charged, but the amount on which he *was* charged.

32. HMRC are well-placed to know how much income tax they actually charged the non-resident parent in relation to any past period. It is therefore unsurprising that the “HMRC figure” is conclusive for the purposes of determining his historic income.

33. That, however, is not the end of the matter. As indicated in paragraph 28 above, gross weekly income is sometimes determined on the basis of “current income”, namely “the sum of the non-resident parent's income … as an employee or office-holder; … from self-employment; and … from a pension, calculated or estimated as a weekly amount at the effective date of the relevant calculation decision”: see regulation 37 at page xii of the Appendix.

34. That occurs in a number of circumstances but, most importantly, when current income differs from historic income by an amount that is at least 25% of historic income: see regulation 34(2)(a) at page x of the Appendix.

35. So the HMRC figure, whilst conclusive for the calculation of historic income is not determinative as to “gross weekly income”. If there is a dispute as to whether the non-resident parent’s current income differs from the historic income by at least 25%, then the Secretary of State must investigate the non-resident parent’s financial circumstances in order to resolve it.

36. Finally, if a “case” for doing so exists and she considers it “just and equitable” to do so, the Secretary of State may agree to a “variation”: see section 28F of, and Schedule 4B to, the Act, pages vii-ix of the Appendix. In other words, she may agree to vary the amount of gross weekly income as determined on the basis of either historic or current income.

37. A case for a variation will exist if a non-resident parent is paying certain, prescribed, “special expenses”, or if he has “additional income”, in this case, unearned income of at least £2,500 per annum.

Assessment of income for the purposes of income tax

38. The amount of a taxpayer’s liability to income tax on self-employed and unearned income is calculated through a system of self-assessment. That system is governed by Part II of the Taxes Management Act 1970 ("TMA 1970").

39. Omitting aspects that are irrelevant to this appeal, and paraphrasing the statutory language (except where it appears in quotation marks), self-assessment operates as follows:

(a) Under section 8 TMA 1970, HMRC may require a person to make a tax return.

(b) Under section 9, that return must include a self-assessment of the amount the person is chargeable to income tax and the amount payable by him (*i.e.*, the amount so chargeable, less any payments of tax that have already been made, e.g. under PAYE).

(c) Under section 9ZA, a person may amend his or her return within 12 months of the deadline for filing it.

(d) Under section 9ZB, HMRC may amend a return:

> "so as to correct—
>
> (a) obvious errors or omissions in the return (whether errors of principle, arithmetical mistakes or otherwise), and
>
> (b) anything else in the return that [HMRC have] reason to believe is incorrect in the light of information available to the officer."

(e) Under section 9A, HMRC may enquire into a return by giving the taxpayer notice of their intention to do so within a specified time (which differs according to the circumstances of the case).

(f) If no enquiry is made, HMRC processes the tax return (as corrected, if applicable). In practice that means that HMRC treats income tax as being chargeable and payable in the sums specified in the self-assessment.

40. It follows that, unless there has been an enquiry,[6] HMRC will not have had any evidence—or exercised their own judgment—as to the accuracy or otherwise of the return.

---

[6] If HMRC has amended the return under section 9ZB, then they will have exercised their own judgment about it. But only in a very limited sense. The power to amend can only be used if the return is incorrect on its face ("obvious errors or omissions") or if it is inconsistent with other information that is available to HMRC; which will often be derived from earlier self-assessment returns or PAYE records. In particular, the requirement that the inconsistent information "is available" to HMRC means that the power to amend does not include a power to demand supporting evidence.

41. In such cases HMRC cannot therefore be said to have "accepted" or "approved" a non-resident parent's self-assessment. They have processed the return, recorded the resulting figures, and collected the income tax that the non-resident parent has assessed as due. That is all. The assessed figure is not an *HMRC* assessment but a *self*-assessment: the clue is in the name.

42. It follows that, in the majority of cases—including this one—"the information provided by HMRC" for the purposes of regulation 69(3) will at best[7] be *the information provided by the non-resident parent*.

How self-assessment operated in this case

43. For an effective date of 30 December 2015, the most recent "relevant tax year" (see page ix of the Appendix) was that ending 5 April 2015. At the time of the Secretary of State's decision, the most recent information provided by HMRC was that the Father had £12,208 in earned income and *no unearned income*.

44. In fairness to the Father, the information that he had no unearned income did not accurately reflect his tax return for the relevant tax year.[8] He had in fact declared income totalling £63,658 as follows:

(a) earned income from employment by a named company of £12,208;

(b) taxable profit from UK property of £35,631; and

(c) other UK income not otherwise declared (described as property management income) of (£17,020 less expenses of £1,201).

45. In fairness to HMRC, it is also possible that the information they gave the Secretary of State accurately reflected what was on their computer system at the time. It is consistent with their knowing the Father's earned income from PAYE records and either not having received, or not having processed, the self-assessment tax return.

---

7 "At best" because—as may have happened here—HMRC may record the information given by the non-resident parent incorrectly.

8 In case this matter goes further, it should be noted that there was a related appeal before the First-tier Tribunal (ref. SC242/15/06217). I refused the Father permission to appeal against the decision on that appeal on 17 June 2019 (Upper Tribunal ref. CCS/154/2019). Many of the papers relevant to this appeal, including the Father's 2014/15 tax return from which the figures in paragraph 43 have been taken, and the copy of the information from HMRC's computer system that the father had no unearned income are on the file for CCS/154/2019, rather than the file for this appeal.

46. The father notified the Secretary of State that the information provided by HMRC was wrong in a letter dated 13 November 2015. A copy of the summary page of the relevant tax return, with manuscript annotations, was enclosed with that letter.

47. Further, at least according to the records of the Child Maintenance Service, the Father told them in a telephone conversation on 9 December 2015 and 6 January 2016 that he had earned income of £51,450[9] and that he did not have any other income.

The maintenance calculation

48. The Secretary of State calculated the Father's liability on the basis of an annual income of £51,450, presumably on the basis that the resulting weekly figure was his current income and exceeded the historic income calculated on an annual income of £12,208 by more than 25%. It does not seem to have been appreciated that the Father's letter and enclosure of 13 November 2015 showed that not all of the £51,450 comprised earnings.

49. Both the Secretary of State and the Father have submitted that I should set aside the FTT's decision and reinstate that of the Secretary of State.

50. That submission underestimates the complexity of the problem.

51. Whatever might have been the case for unearned income, the Mother was within her rights to challenge the figure for current income and the FTT was entitled—and bound—to use its inquisitorial powers to the full extent that is necessary to achieve the overriding objective of dealing with the case fairly and justly. The Father has complained about the extent of the disclosure required of him, but directions to disclose will inevitably weigh more heavily on the non-resident parent than the person with care. The relevant information will be known to the former, but not necessarily the latter, and (except possibly to the issue of whether it is just an equitable to agree a variation) the circumstances of the latter are irrelevant: see paragraph 26 above.

52. The documents disclosed to the FTT demonstrated that (on a current income basis) the Father's earned income was not £51,450 but only £22,941. In those circumstances, it had no alternative but to set aside the Secretary of State's decision and the submission that I should reinstate that decision cannot be correct.

---

[9] That figure is derived by adding together the figures in paragraph 44(b) and (c) above (£35,631 + £15,819 = £51,450). It appears from manuscript annotations referred to in paragraph 45 that the father felt the £12,208 earnings from employment in paragraph 44(a) should not be included in the calculation of his liability to pay child support maintenance because he was no longer employed.

53. Rather, the question is what decision the FTT should have substituted for that decision.

54. Should it have directed the Secretary of State to recalculate the Father's liability on the basis that his gross annual income was only £22,941?

55. Or, given that in the course of reaching its decision, the FTT had become aware that the Father also had unearned income of at least £35,631,[10] should it have gone on to consider whether to agree an unearned income variation?

56. On the Secretary of State's submissions, the First Interpretation is correct. The FTT was therefore obliged to accept that the Father's unearned income was nil because that is what HMRC had told the Secretary of State and even though everyone concerned, including the Father, knew and agreed that the nil figure was wrong. Neither the Secretary of State nor the Father accepts that regulation 69(5) has any role to play in this case.

57. The logic of that submission is not that the FTT should have confirmed the Secretary of State's decision but that it should have held that the Father's gross weekly income was £439.96 (£22,941 ÷ 365 x 7), thereby reducing the maintenance payable for five children from £180.01 to £82.84 (19% of £439.96).

58. Indeed, if it is the case that regulation 69(5) has no role, that is the outcome that is required by any interpretation of regulation 69(3). The information from HMRC brought into play the "is to be treated as nil" part of that regulation. It therefore does not matter way "by reference to" means.

UK income not otherwise declared

59. I should add for the sake of completeness that the Father appears to have been wrong to categorise his income from property management as "other UK income not otherwise declared". As I understand the position:

(a) if the properties managed belonged to another person or company and were managed by him as a business—or if he carried out the management as an employee or as the officer of a limited company—then the income was *earned* income from either self-employment or employment and should have been declared as such;

[10] The FTT held that the unearned income was £39,771—see paragraph 10 above—but there was no dispute that it was at least £35,631.

(b) if, on the other hand, the income came from the management of his own investment properties without more, the income fell to be treated as *unearned* and again should have been declared as such.

In short, the Father's income from property management cannot be neither earned nor unearned.

60. There is no evidence to suggest that this mischaracterisation was anything other than an innocent error. It nevertheless affected the figures reported by HMRC to the Secretary of State and would have done so even if—which the FTT decided was not the case—those figures were correct. HMRC did not treat the property management income as earned income: had it done so, the reported figure for earned income would have been higher than £12,208. If they had treated it as unearned income, the unearned income should not have been nil. And if the income really had been "other UK income", it would have been chargeable to tax under section 687 of ITTOIA, which is in Part 5 of that Act. It would therefore have fallen within the definition of unearned income in regulation 69(2) and HMRC should informed the Secretary of State accordingly.

61. The point is that, for anyone with income that is not taxed under PAYE, the completion of a tax return can seem complex and difficult. The information provided to the Secretary of State by HMRC may be incorrect not merely because the non-resident parent has—for whatever reason—misstated the total amount of his income, or because HMRC has either misread the return or entered the figures on its computer system incorrectly. The non-resident parent's allocation of his income between the various categories under which income tax is chargeable may also be incorrect.

The Secretary of State's submissions

62. As mentioned above, the Secretary of State's position is that the First Interpretation is correct: she is bound by the "information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year".

The decision in SB

63. As a preliminary observation, Mr Najib refers me to the decision of Upper Tribunal in *SB v Secretary of State for Work and Pensions and TB (CSM)* [2016] 84 (AAC), in which Upper Tribunal Judge Mitchell stated:

> "2. Under the new scheme, the amount of a parent's child support maintenance liability depends on the parent's gross weekly income. The 2012 Regulations confer an important function on H.M. Revenue & Customs (HMRC) in the fixing of a parent's gross weekly income. This

> involves HMRC supplying what is referred to by the 2012 Regulations as a "HMRC figure"."

64. The "HMRC figure" is a defined term used in the calculation of a non-resident parent's *earned* income. Earned income is to be the figure (provided by HMRC) as "historic income"—the income on which the non-resident parent was charged income tax during the last relevant tax year—unless the rules permit the Secretary of State to assess it on the alternative, "current income" basis: see further paragraphs 28 *et seq*. below.

65. The Secretary of State's submission is that her interpretation provides consistency between the treatment of earned an unearned income. Why should information from HMRC be taken as conclusive in the former case, but not the latter?

The decision in Gray

66. *Gray v Secretary of State for Work and Pensions & James* [2012] EWCA Civ 1412, was a decision of the Court of Appeal under the original child support scheme. Mr Najib drew my attention to it for two reasons.

67. The first was that the decision set out the law as it stood immediately before the introduction of the 2012 Scheme (the equivalent rules under the second child support scheme being very similar). Mr Najib submitted that it therefore provided the background against which the "mischief" that the third scheme sought to address could be identified.

68. Unlike this appeal, *Gray* was not concerned with a variation (which did not exist under the original scheme) but with the calculation of the net income of the father (who was the "absent parent" [11] in that case) as part of the main—or "formula"—calculation. The issue in the case nevertheless had some similarities to the question I have to decide. Giving the judgment of the Court, Ward LJ set out that issue as follows:

> "1. … The issue, as defined by Black L.J. when granting permission to appeal, is whether, in a case where the Commission for Child Maintenance and Enforcement (the "CMEC"),[12] or, as applicable, a Tribunal, have been provided with details of the figures submitted by a parent to Her Majesty's Revenue and Customs ("HMRC") relating to his profits from self-employment in the relevant period, the CMEC or Tribunal are entitled to rely upon their own evaluation of his "actual" profits for the purpose of calculating his earnings from self-employment, or, to put it

11 "Absent parent" was the phrase used in the original scheme to describe those who are now known as "non-resident parents".

12 The Child Maintenance and Enforcement Commission ("CMEC") exercised what are now the functions of the Secretary of State in relation to child support between 1 November 2008 and 31 July 2012 (both dates included).

> another way, whether the decision maker is bound by the applicable legislation, namely, paragraphs 2A of Schedule 1 of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 ("the 1992 MASC Regulations") to accept that the liable parent's gross income is as stated in the information provided by him to HMRC, or whether the decision maker is entitled to go behind those notices and make his own findings of fact as to the parent's actual …income."

69. The relevant law was set out in paragraphs 2A and 2C of Schedule 1 to the 1992 MASC Regulations. So far as relevant, those paragraphs were in the following terms (see paragraph 9 of the judgment):

> "2A—(1) Subject to paragraphs 2C, 4 and 5A, "earnings" in the case of employment as a self-employed earner shall have the meaning given by the following provisions of this paragraph.
>
> (2) "Earnings" means the taxable profits from self-employment of that earner, less the following amounts—
>
> (a) any income tax relating to the taxable profits from the self-employment determined in accordance with sub-paragraph (3):
>
> (b) any National Insurance Contributions relating to the taxable profits from the self-employment determined in accordance with sub-paragraph (4):
>
> (c) one half of any premium paid in respect of a retirement annuity contract or a personal pension scheme or, where that scheme is intended partly to provide a capital sum to discharge a mortgage or charge secured upon the self-employed earner's home, 37.5 per centum of the contributions payable.
>
> (3) For the purposes of sub-paragraph (2)(a) the income tax to be deducted from the taxable profits shall be determined in accordance with the following provisions—
>
> (a) subject to head (d), an amount of earnings [calculated as if it were equivalent to any personal allowance which would be] applicable to the earner by virtue of the provisions of Chapter 1 of Part VII of the Income and Corporation Taxes Act 1988 (personal reliefs) shall be disregarded:
>
> (b) subject to head (c), an amount equivalent to income tax shall be calculated in relation to the earnings remaining following the application of head (a) (the "remaining earnings"):

(c) the tax rate applicable at the effective date shall be applied to all the remaining earnings, where necessary increasing or reducing the amount payable to take account of the fact that the earnings relate to a period greater or less than one year:

(d) the amount to be disregarded by virtue of head (a) shall be calculated by reference to the yearly rate applicable at the effective date, that amount being reduced or increased in the same proportion to that which the period represented by the taxable profits bears to the period of one year.

(4) For the purposes of sub-paragraph (2)(b) above, the amount to be deducted in respect of National Insurance Contributions shall be the total of—

(a) the amount of Class 2 contributions (if any) payable under section 11(1) or, as the case may be, (3), of the Contributions and Benefits Act; and

(b) the amount of Class 4 contributions (if any) payable under section 15(2) of that Act, at the rates applicable at the effective date.

(5) For the purposes of this paragraph, "taxable profits" means profits calculated in accordance with Part 2 of the Income Tax (Trading and Other Income) Act 2005.

(6) A self-employed earner who is a person with care or an absent parent shall provide to the Secretary of State on demand a copy of—

(a) any tax calculation notice issued to him by Her Majesty's Revenue and Customs; and

(b) any revised notice issued to him by Her Majesty's Revenue and Customs.

…

2C—Where the Secretary of State accepts that it is not reasonably practicable for a self-employed earner to provide any of the information specified in paragraph 2A(6), "earnings" in relation to that earner shall be calculated in accordance with paragraph 3."

70. The decision in *Gray* turned on the wording of paragraph 2A(5). The Court of Appeal agreed with counsel for the Secretary of State that the ordinary meaning of those words allowed decision makers to have regard to the absent father's actual profits calculated in

accordance with Part 2 of ITTOIA, and that they were not bound by the figures that he had declared to HMRC in his tax return.

71. The original child support scheme therefore required the Secretary of State to carry out a calculation of the absent parent's self-employed income.

72. The second reason, which is related to the first, is what was said by Ward LJ about the proper approach to statutory interpretation:

> "23. One must pay some attention to the purpose which the legislation is intended to serve. One cannot escape the conclusion that the intention since 1995 has been to simplify the maintenance calculation process so as to eliminate delays and get the right amount of money as soon as possible into the hands of the children whose interests the Act has to serve. The Act was supposed to remove the antagonism so frequently generated by a separation of the parents. The sad experience of this Act is that algebra may be a source of happiness for mathematicians but it is not much of a panacea for angry parents. The hopes of 1991 and 2005 may not have been fully realized."

Criteria for assessment

73. Mr Najib further drew my attention to the fact that in paragraph 3 (see pages iii-vi of the Appendix), the original scheme provided detailed criteria against which the calculation required by paragraph 2C was to be carried out. These were summarised by Ward LJ as follows:

> "10. I need not set out paragraph 3 in full, but in summary it provides that where paragraph 2C applies then earnings mean the gross receipts of the employment. Paragraph 3(3) provides for deductions from the gross receipts of any expenses reasonably incurred and wholly and exclusively defrayed for the purposes of the business, any value added tax, income tax, National Insurance and one half of any retirement annuity payment or personal pension scheme premium. Business expenses are further defined in sub- paragraph (4) sub-paragraph (5) providing how income tax is to be determined and sub- paragraph (6) how National Insurance is to be calculated. The point to note is that the net income figure thus derived is not necessarily the same as the net figure which would be reached under paragraph 2A."

74. Mr Najib submits that neither regulation 69, nor any other provision of the 2012 regulations, contains such criteria. I am asked to conclude that, in the absence of criteria, it cannot have been intended that the calculation required by the previous two schemes was still required by the 2012 scheme. Acceptance of that submission would mean that the Second, Third and Fourth Interpretations cannot be correct.

The Explanatory Memorandum

75. Mr Najib submits that the Explanatory Memorandum to the 2012 Regulations demonstrates that the legislator intended the First Interpretation of regulation 69(3). In particular, he relies on the following paragraphs of that Memorandum (and the emphasis is his):

> "**Policy Background**
>
> - **What is being done and why?**
>
> 7.1 Child maintenance legislation is based on the general principle that all parents take financial responsibility for all of their children. The main objective of child maintenance legislation is to maximise the number of effective maintenance arrangements for children who live apart from one or both of their parents. This is supported by two further objectives:
>
> **1.** To encourage parents to make and keep effective voluntary maintenance arrangements, to be known as family-based arrangements.
>
> **2.** To support parents in making applications for statutory child maintenance.
>
> 7.2 The 2003 scheme of child support was introduced to provide a radically simpler system than the highly complex system of calculation in the 1993 scheme.
>
> 7.3 **Once the 2003 scheme had been in operation for some time it became evident that although there had been improvements from the 1993 scheme, the gathering of income information to calculate child maintenance was cumbersome and time consuming and did not allow for a quick and effective method of getting money to the children who need it.**
>
> 7.4 These instruments (together with the 2008 Act) **make changes in order to simplify the statutory child support scheme, improve service to customers, reduce costs to the taxpayer and increase the flow of child maintenance payments to children.**
>
> 7.4.1 **The majority of maintenance calculations in the new scheme will be based on gross weekly income obtained from income information provided by HMRC. Using income information provided by HMRC via an automated system request will avoid**

> **many of the delays experienced currently as a result of relying on non-resident parents to provide net income information**.
>
> …
>
> 7.4.2 A non-resident parent's gross weekly income will be reviewed on an annual basis **using income figures supplied by HMRC. This means calculations will be more cost-effective** with fewer manual in-year changes being required.
>
> 7.4.3 …
>
> 7.4.4 Child maintenance legislation allows for additional financial factors to be taken into account which are not captured in the maintenance calculation; this is known as a variation to the maintenance calculation. The new statutory scheme will bring about changes to the types of variation that parents with care can claim. **The intention is that grounds available to parents with care will focus on capturing a non-resident parent's actual unearned income, such as income from savings, property and or investments rather than establishing a notional income, which is the current method of calculating unearned income. Parents with care will no longer be required to provide evidence to support a variation, as they must do currently, as in most cases information will be available from HMRC**."

76. In that context, Mr Najib submits that the mischief that the 2012 Regulations sought to remedy was that the need to carry out assessments in each case caused delays and that the aim behind the changes was to eliminate such delays. Reliance on information provided by HMRC enabled cases to be dealt with expeditiously and without seeking evidence from the parents. It also means that a person with care does not need to supply evidence—which she may not have—to support a variation on the ground of unearned income. The Third and Fourth Interpretations, which both require the Secretary of State to carry out her own assessment, are (it is submitted) incompatible with that policy goal and with the avoidance of disputes, which themselves cause delays.

77. Further, if the Secretary of State is obliged to assess in every case, what (it is asked) is the point of obtaining information from HMRC?

78. Rather, Mr Najib submits, the legislator has carried out a balancing act and concluded that the aims of the scheme as a whole are best achieved by accepting the information provided by HMRC in every case. He accepts that that approach will result in anomalous cases but someone in the Mother's position has the remedy of approaching HMRC with any evidence she may have that the information provided to the Secretary of

State is incorrect and asking them to give the Child Maintenance Service the correct information.

Interpretation of regulation 69(3)

79. Mr Najib accepts that regulation 69(3) could have been better drafted.

80. In particular, if the words "is to be determined by reference to information provided by HMRC" are to be interpreted as the Secretary of State submits, then it is arguable that the words "the amount of the non-resident parent's unearned income is to be treated as nil" are otiose. Why provide for a non-resident parent's income to be treated as nil if that would result would follow in any event from the application of the "by reference to" test?

81. On the other hand, if the "by reference to" test allows the Secretary of State to take information that has not been provided by HMRC into account, a question arises as to why should there be an exception where the non-resident parent has declared that his unearned income is nil?

82. Moreover, the plain wording of regulation 69(3) provides that where the information provided by HMRC shows no unearned income, then that information is conclusive: subject to regulation 69(5), the Secretary of State *must* treat the non-resident parent's unearned income as nil.

83. "That being the case," submits Mr Najib, "there is no proper basis upon which it can be said that it is not similarly conclusive where the information provided by HMRC shows a greater than nil figure for unearned income. There is no logical basis/rationale for such a distinction and Parliament could not have intended one."

84. Mr Najib's suggested solution is that the words at the end of regulation 69(3) have been added for emphasis. In effect, the regulation means that the Secretary of State must determine the non-resident parent's unearned income as being what HMRC say it is *and that is the case even when HMRC say that there is no such income*.

Relationship between regulation 69(3) and (5)

85. Mr Najib submits that, as a matter of construction, paragraph (3) of regulation 69 establishes the general rule for the determination of unearned income and paragraph (5) sets out the exceptions to it. "Having done so," he submits, "there is no scope to say that Parliament intended yet further exceptions - but for some reason chose not to set them out expressly".

86. He further submits that:

> "Regulation 69(5) not only sets out the specific scenarios in which the SSWP may determine the unearned income herself, it also sets out the rules as to when and how she is to do so - namely (a) she may decide to determine the unearned income herself "if satisfied that there is sufficient evidence to do so" and (b) if she decides to do so "and any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return". No such rules are set out in regulation 69(3). This clearly indicates that Parliament did not intend for the SSWP to ever determine the unearned income herself under regulation 69(3). This would and could only ever happen under regulation 69(5)."

Put another way, if regulation 69(3) allowed the Secretary of State to determine the unearned income of a non-resident parent for herself, regulation 69(5) would be otiose: Anything that could be done under regulation 69(5) could be done under regulation 69(3).

87. It is largely for these reasons that the Secretary of State does not accept the Second Interpretation. If the legislator had intended that the Secretary of State could disregard the information provided by HMRC if there was clear evidence that it was incorrect, then, it is submitted, regulation 69(5) would have said so. Even if that objection were to be overcome, regulation 69(3) would still provide no criteria for the assessment to be carried out. Further, a judgment would need to be formed as to just how "clear" the contrary evidence was.

Inconsistency

88. As a subsidiary point, Mr Najib submits that any interpretation under which the information from HMRC is not conclusive entails the risk that, in respect of the same year, different government departments will arrive at different figures for the non-resident parent's unearned income and that there may then be two separate appeals to different chambers of the FTT with different outcome. He points out that in *Gray*,[13] Ward LJ described that risk as an "unfortunate consequence" and "not a good thing" and expressed the view that "[t]he two arms of Government should speak with one voice".

The Father's submissions

89. When the Father first made his appeal, the Secretary of State's position was that the FTT had reached the correct result by a permissible method. That, however, was an error by the original submission writer and the Secretary of State's submissions have changed accordingly, which, in turn, means that Ms Spicer's submissions on behalf of the

[13] At paragraph 26 of the judgment

Father have had to develop in response to that *volte face*. It is therefore convenient to summarise them by reference to her final skeleton argument as follows:

> "**Introduction**
>
> 1. The Appellant is grateful to note that the First Respondent has changed her position, and now supports the appeal.
>
> 2. She submits that the appeal should be allowed on the basis that pursuant to regulation 69(3) the Appellant's unearned income figure as provided by HMRC should be the figure which is used for the purposes of calculating additional weekly income where a variation is agreed to under this regulation - ie the first of the possible interpretations identified by Judge Poynter in paragraph 15 of his directions dated 27 June 2019.
>
> 3. However, she also agrees that if the Upper Tribunal concludes that the second interpretation is correct, the appeal should be allowed - broadly speaking for the reasons set out in the Appellant's earlier submission.
>
> 4. The Appellant remains of the view that the wording of regulation 69(3) fits marginally more naturally with the second interpretation; however if the Upper Tribunal prefers the submissions of the Secretary of State in support of the first interpretation, he would be content for the appeal to be allowed on that basis. In either case, it is clear that his unearned income was not determined correctly and the First-tier Tribunal's decision will need to be set aside.
>
> **Observations on how regulation 69(3) of the Child Support Maintenance Calculation Regulations 2012 - and in particular the closing words - interact with regulation 69(5)**
>
> 5. The Appellant agrees with the Secretary of State that regulation 69 (3) provides the "default" or "general" method for calculating the amount of any unearned income to be treated as additional weekly income in the maintenance calculation, which must be used except where one of the scenarios at regulation 69(5) (a) - (c) applies.
>
> 6. The Appellant also agrees that the closing words of regulation 69(3) make it mandatory for the non-resident parent's unearned income to be calculated as nil where the information provided by HMRC does not identify any income which is of one of the types defined in regulation 69 (2), and assuming regulation 69(5) does not apply.
>
> 7. More open to question is the submission that because the HMRC information is conclusive where no income is identified, it should also be conclusive where some income is identified. If this is correct it not wholly clear why Parliament felt the need to address both scenarios in this

> paragraph. That is, if the HMRC figure is conclusive it would be conclusive even if it were nil, thus rendering the closing words otiose. 8. Furthermore, it could be argued that ordinarily the use of the words "by reference to" suggest that it would at least be permissible to have regard to matters other than solely the criterion specified. Were the HMRC figure to be only criterion to be considered for determining the amount of unearned income, the regulation could, it suggested, easily have been drafted in a way that mirrored the drafting of regulation 35(1) (notwithstanding the points made by the Secretary of State at 19 (xii) of her Counsel's submissions)."

90. Ms Spicer adds that the Father continues to maintain that the figures in his tax return were correct,[14] even though HMRC made an error in reporting those figures to the Secretary of State; that he himself had pointed out that error; and that the Secretary of State could have made a fresh request to HMRC for a corrected figure. The Tribunal should therefore have accepted that his unearned income was £35,631 rather than carry out a fresh assessment leading to an unearned income figure of £39,717.

91. The carrying out of such an assessment, Ms Spicer submitted, was only consistent with the Third or Fourth Interpretations, which—for the reasons given by Mr Najib—could not represent the law. Further, any simplification of a system is inevitably going to involve cases in which absolute accuracy will be sacrificed to speed and administrative convenience. That is not a reason to adopt either the Third or Fourth Interpretations. It is important that the Regulations should be clear and easy to apply.

92. Ms Spicer further submits that failure to declare income is a matter for HMRC not the Secretary of State and it is not for the Child Maintenance Service to do HMRC's job for them.

The decision in *PP*

93. I regret that the delay between the hearing in this case and the promulgation of this decision has meant that the issue has been decided by the Upper Tribunal in other proceedings.

94. In *PP v Secretary of State for Work and Pensions and SP* [2022] UKUT 286 (AAC), Judge Wikeley decided that the First Interpretation was correct. So far as is relevant (and does not repeat legislation already set out in this decision), what Judge Wikeley said was as follows:

---

[14] Whilst I record this submission, the limit I placed on the grant of permission to appeal means that it is not open to the Father to argue that the FFT's calculations were wrong; only that it was not legally entitled to make those calculations.

"**Ground C: unearned income variation**

Introduction

58. Ground C is that there was a plain error of law on the face of the Decision Notice, in that the First-tier Tribunal was not entitled, irrespective of any factual findings it might make, to go behind the HMRC figure for the father's unearned income. This ground of appeal is supported by the Secretary of State.

What the law says

59…

What the evidence said

60. The screen-print of the HMRC data supplied to the CMS stated that the total amount of the father's unearned income was £30,000 (p.75). The father's SATR for 2014/15 confirmed a payment of a dividend of £30,000 (p.178). Additionally, the property pages of the SATR included details in respect of two properties. First, the income from a furnished caravan holiday let was £7,573 but with allowable expenses of £9,251, resulting in a loss for the year on that venture (after making provision for capital allowances of £27,063) of £28,741 (p.191). Second, another rental property had a taxable profit of £4,191 (£6,900 in rent minus £2,709 in loan interest) (p.192).

What the First-tier Tribunal found

61. The First-tier Tribunal decided that the father's unearned income for the purpose of regulation 69 was £34,191, and not just the dividend payment of £30,000. In its summary reasons it explained that the father had no taxable income from the caravan furnished holiday let. However, it noted he had a profit of £4,191 declared on his SATR from the other rental property. The Tribunal stated that this taxable income could not be set off against the loss from the caravan holiday let (citing section 127ZA of the Income Tax Act 2007). The Tribunal added that "it was not clear why the figure from HMRC had not included the property income of £4,191.00", so concluding that the father's total unearned income for 2014/15 was not £30,000 but rather £34,191.

The Upper Tribunal's analysis of Ground C

62. This ground of appeal turns on the proper interpretation of regulation 69(3). Paragraphs (5) and (6) of regulation 69 are not relevant to the facts of the present case. It follows that the material part of regulation 69(3) reads as follows: the amount of the non-resident parent's

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

63. In effect, the First-tier Tribunal read the key phrase "is to be determined by reference to information provided by HMRC" as meaning "is to be informed by reference to information provided by HMRC", rather than as being conclusively decided by such information. It is right to say the Tribunal's approach is supported by the learned commentary in E. Jacobs, *Child Support: The Legislation* (15th edition, 2021), p.591, which states…:

> [see paragraph 17 above]

64. In disagreeing with that passage, [Counsel for the Secretary of State], in her skeleton argument, described the wording of regulation 69(3) as "unambiguous". I beg to differ. It positively reeks of ambiguity. It could mean that the figure provided by HMRC is determinative. Or the phrase could mean, as the learned commentary suggests, that the HMRC figure is simply the starting point for the CMS or the Tribunal's enquiry. If the former and conclusive meaning was intended, it is certainly arguable that the statutory language could have been made much clearer. It could, for example, have simply said that "the amount of the non-resident parent's unearned income is the figure provided by HMRC" or (echoing regulation 36 on the meaning of "historic income") "the amount of the non- resident parent's unearned income is the amount identified by HMRC". However, the process of statutory interpretation is not just about the words used. Those words must be read in a purposive manner and in the context of the relevant provision as a whole.

65. As to context, the closing phrasing of regulation 69(3) is instructive. This provides that where the HMRC information "does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil." As both counsel pointed out, it would be both bizarre and illogical if the Secretary of State and the First-tier Tribunal could go behind a positive non-nil unearned income figure but not go behind a nil figure. Such an approach would mean that the taxpayer who fraudulently failed to declare any unearned income at all would actually be in a better position in the child support scheme than the negligent taxpayer who had carelessly under-stated the amount of their unearned income.

66. As to purpose, and as [counsel for the appellant] rightly reminded me, it is plain that one of the objectives of the 2012 child support reforms was, so far as possible, to streamline the process of information gathering by enabling the CMS to rely on HMRC data, provided by a direct IT link,

> without the need for further investigation. This represented a conscious shift in policy from the earlier 1993 and 2003 schemes, under which tribunals were empowered to make their own assessment of a non-resident parent's income and were not bound by the figures accepted by HMRC (see Gray v Secretary of State for Work and Pensions and James [2012] EWCA Civ 1412; [2013] AACR 5 and DA v Secretary of State for Work and Pensions [2014] UKUT 142; [2014] AACR 36).
>
> 67. If the First-tier Tribunal considers that the HMRC figure contains a mistake then, as the grounds of appeal suggest, the correct approach is to accept the figure in question but to set out the Tribunal's concerns and direct that the Tribunal's Decision Notice (and, where relevant Statement of Reasons) should be sent to HMRC. Should HMRC agree with the Tribunal and amend the figure in question, this would permit an 'any time' revision of the maintenance calculation under regulation 14(1)(f).
>
> 68. Finally, I should simply add that I am not at all sure that section 127ZA of the Income Tax Act 2007 has the effect in this case that the First-tier Tribunal found it did. However, I heard no argument from counsel on the point and indeed it does not arise for decision given the construction that I have found properly applies to regulation 69(3).
>
> Conclusion on Ground C
>
> 69. I therefore agree with both [counsel for the appellant and the Secretary of State] that the First-tier Tribunal erred in law and so Ground C is made out. If this were the only matter on which the Tribunal went wrong, I could simply re-make the decision to the effect that the father's unearned income for the 2014/15 tax year was £30,000 (and not £34,191). However, the matter is going to have to be remitted to a new tribunal in the light of Ground B succeeding. I therefore leave the matter to be determined by the new tribunal but that should not take it too long, barring the appearance of some compelling new evidence to the contrary."

95. I agree with much of that passage. For the reasons I give in paragraphs 253 to 264 below, however, and with unfeigned respect, I do not believe "ambiguous" is the correct word to describe regulation 69(3) and I am unable to agree with the analysis in paragraphs 65-67 or the conclusion in paragraph 69.

Discussion

Preliminary: the Second and Third Interpretations

96. This discussion will concentrate on the First and Fourth Interpretations of regulation 69(3).

97. No party has actively argued for the Third Interpretation and when I raised it as a possibility, I did so tentatively. My concluded view is that it is incompatible with the wording of regulation 69(3) which is about what is to be taken into account when determining the unearned income of a non-resident parent and not about what rules should be followed when doing so.

98. The Second Interpretation is attractive to a certain extent. In this case, it would have avoided the absurdity created by the First Interpretation: see paragraphs 51 – 57 above.

99. The facts of other cases, however, are often less clear cut. And accepting that the amount of the non-resident parent's unearned income is to be assessed as being the figure provided by HMRC in the absence of clear evidence to the contrary is also incompatible with the actual wording of regulation 69(3), which—if the Secretary of State is not required to accept the information from HMRC in cases to which the "by reference to" test applies—provides no basis other than relevance for limiting the evidence that should be considered.

100. I also accept the Secretary of State's submission that the Second Interpretation would give rise to impossible questions about whether individual items of evidence were sufficiently "clear" to be taken into account.

101. For example, the word does presumably does not imply that the evidence should satisfy a higher standard of proof than the usual civil standard. But if it does not mean that what does it mean?

102. If it means evidence that is immediately available to the Secretary of State or FTT without having to delay matters by directing its production, then that would turn important decisions about how much non-resident parents must pay to support their children into a lottery based what evidence had been produced at earlier stages of the case. A lottery, moreover, that non-resident parents would almost always win because persons with care often cannot access the relevant evidence without the assistance of the Secretary of State or the Tribunal.

103. I therefore also reject the Second Interpretation. Either the First or the Fourth interpretation is correct.

Interpretation of regulation 69

104. I hope it is uncontroversial that regulation 69(3) must be interpreted in the light of regulation 69 as a whole and that that regulation must be interpreted as part of the 2012 child support scheme as a whole.

105. My analysis of regulation 69 is as follows.

106. Paragraph (1) provides that there is a case for a variation "where the non-resident parent *has* unearned income equal to or exceeding £2,500 per annum".

107. Two aspects of that paragraph require comment.

108. First, I have emphasised the word "has" because it makes the existence, or non-existence, of the Case dependent on the existence or non-existence of a fact, namely whether the non-resident parent has unearned income.

109. If there is a dispute about that, a decision-maker will need to decide on a balance of probabilities whether the fact exists.

110. But, subject to contrary indication elsewhere, that decision depends on evidence about the world, rather than assertion or assessment by someone other than the decision maker. Paragraph (1) does not, for example, say that a Case exists "where the non-resident parent *says he has*", or "where HMRC has *assessed the non-resident parent as having*", unearned income.

111. Second, the amount of the non-resident parent's unearned income forms part of the definition of the Case. It is not sufficient that the non-resident parent "*has* unearned income". The amount of that income must equal or exceed £2,500 per annum.

112. Again, whether unearned income amounts to £2,500 or more is a fact about the world and one that—subject to any contrary indication elsewhere—requires to be determined by evidence, rather than assertion or third-party assessment.

113. The definition of "unearned income" is also important. Regulation 69(2) defines it as "income of a kind that is *chargeable* to tax under" the Parts 3, 4 and 5 of ITTOIA (my emphasis).

114. The test is therefore different from that for earned income. The Regulations do not say, as they do for historic income, that unearned income is the amount on which HMRC actually charged the non-resident parent to tax under those Parts in any particular tax year. Rather unearned income is the amount that is chargeable—*i.e.*, the amount on which the non-resident parent *should have been charged*—under those Parts.

115. To that extent, regulation 69(2) is very similar to paragraph 2A(5) of Schedule 1 of the 1992 MASC Regulations that were under consideration in *Gray*, see paragraphs 69-70 above, and which the Court in that case held to mean that "the decision maker is

entitled to rely on an evaluation of the father's actual profits from self-employment in the relevant period rather than the figures submitted to HMRC in his tax return …".

116. The level of unearned income that is chargeable to tax is *not* a question of primary fact. Rather it is a matter for the exercise of judgment or, in other words, a calculation or assessment, or—as Ward LJ described it in *Gray*—an evaluation. One issue in this case has been whether that assessment should be carried out by the Secretary of State or—given that HMRC are unlikely to have done so: see paragraph 42 above—by the non-resident parent.

117. There is a simple answer to that question. Deciding whether a case for a variation exists is a building block in the outcome decision to make—or to decline to make—a maintenance calculation and, if so, at what rate. Sections 11 and 28F—and, in particular, section 28F(4) of the Act unequivocally assign that decision to the Secretary of State: see pages vi-viii of the Appendix.

118. I therefore reject the Secretary of State's submission that regulation 69 does not require her to carry out an assessment.

119. However, when she carries out that assessment, section 28F(6) of the Act requires her to comply with regulations made under Part II of Schedule 4B: see page viii of the Appendix. So, the Secretary of State as decision-maker is bound by regulations made by the Secretary of State as legislator. The question is what regulation 69, taken as a whole binds her to do.

120. There was a certain amount of discussion in the papers and at the hearing about how regulation 69(3) should have been worded if it meant what another party says it means. I have not found that discussion helpful. If regulation 69(3) does not say unambiguously what it means, a provision that did so would inevitably have involved different wording. Which of the many possible different wordings would have been used, must be a matter for speculation. My task is to interpret the words that actually were used.

121. In doing so, I attach greater significance to the fact that if the legislator wished to achieve the outcome for which the Secretary of State now contends, she could have done so by aligning the definitions of "historic income" and "unearned income". She did not do so and—as regulation 69(1) and (2) does not suffer from any ambiguity that might afflict regulation 69(3)—I infer that a different outcome was intended.

122. Which brings me to regulation 69(3) itself. It says that:

(a) the amount of the non-resident parent's unearned income;

(b) is to be determined by reference to;

(c) information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year"; and that

(d) where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil.

123. I will take those out of order.

124. First, the requirement to determine "the amount of the non-resident parent's unearned income" can only mean the amount—that is to say, the *correct* amount—of unearned income that is chargeable to income tax under Parts 3 to 5 of ITTOIA. The reference to regulation 69(2) in the concluding words puts that interpretation beyond doubt.

125. Second, and as I have already observed, the phrase "information provided by HMRC" is not a defined term. It therefore does not have the same meaning as "HMRC figure", which is. Rather, the phrase must be interpreted as having the meaning it bears in ordinary English usage.

126. However, that meaning must make sense in the context in which the phrase is used. I therefore infer that, for the purposes of regulation 69, "information" means information that bears at least some relevance to the determination of the non-resident parent's unearned income.

127. What I mean can perhaps be best explained by a quick thought experiment.

128. Suppose, for the sake of argument, that in response to a request from the Secretary of State about a non-resident parent's unearned income, HMRC were to provide the Secretary of State with his telephone number.

129. That number would be information in the broad sense of that word, but it would be irrelevant to the level of the non-resident parent's unearned income and, therefore, not "information" for the purposes of regulation 69(3). If the Secretary of State were to convert the telephone number to an amount in pounds and then determine that to be the amount of the non-resident parent's unearned income, the decision would not be sustainable. The Secretary of State would instead be obliged to consider proceeding under regulation 69(5)(c) or, if the non-resident parent's self-assessment tax return did not include his telephone number, regulation 69(5)(b).

130. For the avoidance of doubt, I do not hold that to amount to information within regulation 69(3) must be 100% accurate; only that it must have some relevance to the question with which that regulation is concerned.

131. Third, and crucially, what is meant by "by reference to"?

132. The purpose of regulation 69(3) is to prescribe how "the amount of the non-resident parent's unearned income" is to be determined. For the reasons I have given in paragraph 124 above, that means the amount of unearned income that is properly chargeable to income tax under Parts 3 to 5 of ITTOIA.

133. In that context, the natural meaning of the first part of regulation 69(3) is that it is about the *process* of decision making. The requirement to decide the amount of unearned income "by reference to" the information provided by HMRC is a requirement to consciously take that information into account as a factor in the decision-making process and to attach proper weight to it. In most cases,[15] the mandatory nature of the requirement will mean that the information provided by HMRC should be the starting point of that process.

134. But the phrase does not exclude other relevant factors or require that the HMRC information should also be the end point. If that had been intended, regulation 69(2) would have been worded differently. And if the legislator had intended the information from HMRC to be conclusive in all cases—and not just when that information shows no unearned income—then she could have used the same language throughout regulation 69(3).

135. By contrast, the concluding words impose an outcome rather than a procedural requirement. In the prescribed circumstances—and exceptionally—the unearned income "is to be treated as nil".

136. The difference in language between the main part of the regulation and the concluding words is striking and is only explicable on the basis that the two parts were intended to mean different things. Contrary to the submissions of the Secretary of State and the appellant, determining an amount "by reference to" information and deeming it to be a specific amount—in this case, nil—on the basis of the same information are not the same thing, The former phrase is not apt to produce the latter outcome.

137. That conclusion is not, however, sufficient to decide the appeal in favour of the Mother. HMRC informed the Secretary of State—albeit incorrectly—that the Father had

[15] There may be exceptions and a case such as the present, in which the information from HMRC is agreed by all parties to be incorrect, might well be one of them.

no unearned income. That information did not "identify any income of a kind referred to in [regulation 69(2)]" and therefore, if regulation 69(3) is taken on its own, the amount of the Father's unearned income must be treated as nil and the FTT was wrong to substitute its own figure.

138. However, regulation 69(3) is not to be taken on its own. It is subject to regulation 69(5) which empowers the Secretary of State to carry out an assessment other than by reference to information provided by HMRC.

139. That power arises if the latest available tax year is not the most recent tax year; or the information provided by HMRC in relation to the latest available tax year does not include any information from a self-assessment return, or the Secretary of State is unable, *for whatever reason*, to request or obtain the information from HMRC (my emphasis).

140. I therefore do not accept the submissions from the Secretary of State and the Father that regulation 69(5) provides a list of exceptions to regulation 69(3). Rather the two paragraphs deal with different circumstances. In broad terms, regulation 69(3) governs cases where relevant information from HMRC is available and regulation 69(5) governs those where it is not.

141. In this case, regulation 69(5) applies and I reject the submissions from the Secretary of State and the Father to the contrary.

142. The information provided by HMRC in relation to the non-resident parent's unearned income did **not** include any information from a self-assessment tax return. The relevant self-assessment tax return said that the Father had unearned income of £35,631. It did not say anywhere that the amount of his unearned income was nil.

143. In my judgment, that is sufficient to dismiss the appeal. Even if—contrary to what I have held—regulation 69(3) meant exactly what the Secretary of State submits it means, *and* "information" has the broad meaning it bears in everyday English, regulation 69(5)(b) entitled the FTT to do as it did.

144. I would, however, go further. Even if regulation 69(5)(b) did not exist, the FTT would also have been entitled to do as it did under regulation 69(5)(c).

145. As discussed in paragraphs 125-130 above, not all information (in the broad sense of that term) is "information" for the purposes of regulation 69(3). That is only the case if it bears some relevance to the amount of the non-resident parent's unearned income (as defined in regulation 69(2)). That was not the case here. The information that the Father's unearned income was nil was no more relevant to the correct level of his unearned income than the hypothetical telephone number discussed in paragraph 128 above.

146. That conclusion is easy to understand on the unusual facts of this case. Other cases may be less clear, and it will be a matter of judgment whether any given item of information is so incorrect that it is irrelevant and therefore is not “information” within the meaning of regulation 69(3).

147. In practice, however, the issue is only likely to arise where HMRC informs the Secretary of State that the non-resident parent has no unearned income. In all other cases, the “by reference to” test applies, and the information provided by HMRC is only the starting point of the assessment: see paragraph 133 above.

148. Moreover, in those cases where HMRC has informed the Secretary of State that the non-resident parent’s unearned income was nil when that is demonstrably not the case, it is difficult to see how that information would ever be relevant. It would follow that;

(a) the information was not “information” within regulation 69(3); and that therefore

(b) the Secretary of State was unable to obtain “information” within regulation 69(3); and that therefore

(c) regulation 69(5)(c) applied.

The Secretary of State’s submissions

149. In so deciding, I have rejected almost all of the Secretary of State’s submissions. This section explains why.

<u>The decision in *SB*</u>

150. I have no doubts that the decision in *SB* was correct. I accept that, at least in the context of determining the level of "historic income" for the purposes of calculating a non-resident parent's "gross weekly income", the "HMRC figure" is of much greater significance than was the case under either of the two previous child support schemes.

151. Nevertheless, I derive little assistance from that decision. In particular, though it is impossible to disagree with the passage quoted at paragraph 63 above, that passage is in very general terms. Moreover it refers to the HMRC supplying the “HMRC figure”—which is a defined phrase and refers to the figure used in the main calculation (see paragraph 64 above)—and not to the undefined “information provided by HMRC” that provides (at least) a reference point for the determination required by regulation 69(3). All of which is unsurprising. *SB* was not an appeal about a variation but, rather, about the determination of “historic income” for the purposes of the main calculation.

152. Moreover, the general tenor of the decision in *SB* does not assist the Secretary of State. The appeal to the Upper Tribunal was allowed with the support of the Secretary of State. The Secretary of State's position before the FTT—described by Judge Mitchell as being that, if the HMRC figure was wrong, "it was, in effect, tough luck"—was disapproved. Moreover, the Judge also held (albeit in a different context) that:

> "34. …As the Secretary of State's argument implies, it would be absurd if he had to rely on income data that was clearly wrong, artificially inflating or deflating a parent's child support maintenance liability."

Criteria for assessment

153. The Secretary of State submits that, if the phrase "by reference to" in regulation 69(3) does not mean that she must determine the level of a non-resident parent's unearned income in the amount identified by HMRC, the law does not identify any other criteria against which she can reach a decision.

154. I reject that submission.

155. I accept that paragraph 3 of Schedule 1 to the 1992 MASC Regulations (see pages iii-vi of the Appendix) did set out such criteria and, with one exception, regulation 69 does not.

156. There is, however, no need for it to do so. Unlike the original child support scheme, the 2012 scheme seeks to identify the non-resident parent's *gross* weekly income rather than his *net* income. It follows that the deductions for income tax and national insurance contributions in paragraphs 3(5) and (6) have no equivalent in the latter scheme.

157. Further, the aim of regulation 69(3) is to determine the level of income that was chargeable under Parts 3 to 5 of ITTOIA: see regulation 69(2). The criteria that are relevant to that determination are—with two exceptions—set out in those Parts and in Part 6.

158. For example, Part 3 of ITTOIA contains detailed provisions setting out what is property income, the basis on which it is to be taxed and what exemptions apply. Further exemptions are set out in Part 6, to which Part 3 is expressly subject. The effect is that where a Part 6 exemption applies, the exempted income is not chargeable to income tax under Part 3.

159. The same is true in respect of Part 4, in relation to savings and investment income, and Part 5 in relation to miscellaneous income.

160. On the two occasions when ITTOIA does not provide all the criteria that are necessary, regulation 69 does:

(a) Losses from a property business may be carried forward against subsequent profits. That relief is provided by section 118 of the Income Tax Act 2007 and not by ITTOIA. Regulation 69(4) therefore makes the necessary provision for child support purposes.

(b) Certain pension contributions may be deducted when calculating a non-resident parent's earned income. To the extent that such contributions exceed earned income, they may also be deducted from unearned income. Regulation 69(8) and (9) make the necessary provision.

161. There is therefore no need for the 2012 Regulations to contain any further criteria that are equivalent to those in paragraph 3 of Schedule 1 to the 1992 MASC Regulations.

Inconsistency

162. It is said that anything other than the Secretary of State's preferred interpretation may lead to two different government departments using two different figures for the non-resident parent's unearned income and that the Court of Appeal in *Gray* had said that that was "not a good thing".

163. In my respectful judgment, that part of the Court of Appeal's decision was *obiter*. I am nevertheless happy to accept in principle that, where both HMRC and the Child Maintenance Service are obliged to make decisions based on a figure for the non-resident parent's chargeable unearned income, it is undesirable that the figures should differ.

164. However, there are other things that, in principle, are also "not good".

165. For example, in principle, it is "not a good thing" to perpetuate error. That is particularly so where the effect is to deprive children of maintenance that is properly due because the non-resident parent has—whether negligently, or innocently—understated his unearned income on his tax return or because HMRC have made an error.

166. Neither, in principle is it a "good thing" to provide incentives for fraud. I discuss this aspect of the case at paragraphs 191–199 below.

167. Of course, the Court of Appeal never suggested otherwise. Full context for the observations on which the appellant and the Secretary of State rely is provided by paragraph 26 of the judgment in *Gray*:

> "… The consequence surely is that in the vast majority of cases a trader will be liable to have his accounts scrutinised and rejected whenever there is credible evidence that he has under-declared his income or over declared his expenses. *Now that may be no bad thing. The interests of the children demand that the right sum of money is paid for their maintenance*. But it has two unfortunate consequences:
>
> (1) Two arms of Government may reach different answers for tax purposes as for child support purposes. That cannot be a good thing.
>
> (2) The spectre arises of more and more of these enquiries being undertaken which gave rise to the fear of the evils that beset the original working of the Act resurrecting themselves causing unacceptable complications and delay and so the reforms of 1995 will have been in vain.
>
> So I see much force in the arguments addressed to Judge Howell QC that the remedy for the child support authorities, if unhappy with the tax liability notice, is to seek a variation on lifestyle grounds[16] or refer the matter back to HMRC seeking their scrutiny and if necessary adjustment of the tax return. The two arms of Government should speak with one voice." (my emphasis).

As that passage identifies, the child support schemes have to balance the competing considerations of accuracy, administrative convenience, and consistency across government. It is notable that, despite the misgivings expressed in sub-paragraphs (1) and (2), the decision in *Gray* favoured accuracy, *i.e.*, that the interests of children should be prioritised by ensuring that "the right sum of money is paid for their maintenance".

168. The Court of Appeal reached that conclusion because, correctly interpreted, that is where the wording of the previous regulations required the balance to be struck. I accept, of course, that Parliament is sovereign and can legislate for the balance to be struck elsewhere in future. I also acknowledge that the requirements of administrative convenience are a legitimate factor to be take into account. It is desirable that non-resident parents should pay "the right sum of money" but it is also important that that sum should be calculated as quickly as possible. But whether Parliament has so legislated is a question that can only be decided by looking at the words it has used.

169. It is not necessarily wrong for one arm of government to decide a question one way for purpose A, and another to decide it differently for purpose B. The relevant policy considerations may differ according to the subject matter of the decision.

---

[16] The possibility of a variation on lifestyle grounds does not exist under the 2012 Scheme.

170. For example, entitlement to some social security benefits depends upon a person being "habitually resident" in the UK.[17] At least in some cases, the same test governs whether a person is subject to the matrimonial and child protection jurisdictions of the Family Court. A decision that a person who had been resident in England or Wales for a very short period was habitually resident for the latter purpose but not the former might well be correct and would certainly not be incomprehensible.

171. Mr Najib makes the point that, unless the Secretary of State is bound by the information from HMRC, it might be possible for there to be two appeals about the amount of a non-resident parent's unearned income to two different chambers of the FTT and for each chamber to achieve different results.

172. However, that situation is not unknown. For example, the Immigration and Asylum Chamber ("IAC") and the Social Entitlement Chamber ("SEC") may both have to determine a person's immigration status; the former to decide whether he can stay in the UK and the latter to decide entitlement to benefits that are subject to the right to reside test. Sometimes, different outcomes are reached, not least because proceedings in the SEC are inquisitorial while those in the IAC are adversarial.[18] The resulting situation is untidy but not impossible—or, usually, even difficult—to implement.

173. Moreover, in the child support context, there is the consideration that—unless they have carried out an investigation and reached their own conclusions as to the non-resident parent's unearned income—*HMRC cannot be regarded as speaking at all*. At best,[19] their role is more akin to that of a ventriloquist's dummy operated by the non-resident parent. The information provided to the Secretary of State comes straight from the non-resident parent's tax return. Even if it may be desirable in principle that two arms of government should speak with one voice, the desirability in principle of the Child Maintenance Service and the non-resident parent doing so is less evident.

<u>"Doing HMRC's job for them"</u>

174. Against that background, it is convenient to deal with Ms Spicer's submission that it is not for the Secretary of State to do HMRC's job for them. Whilst that may be literally true, the submission is little more than rhetoric. One might say with equal justice that it is not for HMRC to do the Secretary of State's job for her.

---

17 Strictly, the Common Travel Area.

18 *cf Kerr v Department of Social Development*, [2004] UKHL 23 at [14] and [61], and *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552 at [34].

19 See note 7 above.

175. The submission assumes that all issues relating to the level of a person's taxable income are matters solely for HMRC. That begs the very question at the heart of this appeal. I reject it because, except in cases in which an inquiry is undertaken:

(a) HMRC's job is to process taxpayers' returns in accordance with TMA 1970 and collect the amount of tax that taxpayers themselves have assessed as due: see paragraphs 38-40 above; whereas, by contrast

(b) the Secretary of State's job is to decide for child support purposes whether a case for a variation exists, given the level of the non-resident parent's unearned income properly chargeable to income tax under ITTOIA.

In performing the latter task, the Secretary of State is doing her own job, not HMRC's. Even if she decides that the figure in the non-resident parent's self-assessment return is incorrect, that decision has no effect on the non-resident parent's tax liability unless, doing *their* job, HMRC decides to carry out an investigation and issue their own assessment.

The Explanatory Memorandum and the legislative policy behind the 2012 Regulations

176. I accept much of what Mr Najib and Ms Spicer say about the policy underlying the 2012 changes.

177. In particular, I accept that the law as declared by the Court of Appeal in *Gray* forms the background against which the mischief that those changes sought to address falls to be identified. Given the terms of the Exploratory Memorandum, it is clear that the policy underlying the changes was to simplify the process of calculating child support maintenance and to make that process more convenient from an administrative point of view. It is also clear from the Explanatory Memorandum that that aspect of policy is to be furthered by greater reliance on information provided by HMRC.

178. My problem with the First Interpretation is that it implies that the legislator was faced with a binary choice. Either accept the law as stated in *Gray*—under which the Secretary of State must carry out her own assessment of the non-resident parent's taxable income—or move to a position in which her role in deciding that part of the maintenance calculation is delegated to HMRC and thus to the non-resident parent himself.

179. In my judgment, the position is more nuanced than that.

180. It will always be simpler and more administratively convenient to decide a question if one is not obliged to reach the correct answer; or, indeed, if one can delegate it to someone else. However, there is a middle way between, on the one hand, the Secretary of State carrying out her own assessment in every case and, on the other, having to

accept the information provided by HMRC without question and in all circumstances. In my judgment, the 2012 Regulations do not require the baby of accuracy to be thrown out with the bathwater of complexity and administrative inconvenience.

181. The Exploratory Memorandum expressly confirms that. Paragraph 7.4.4, quoted at paragraph 75 above states:

> "… The intention is that grounds available to parents with care will focus on capturing a non-resident parent's *actual unearned income*, such as income from savings, property and or investments …" (my emphasis).

That aspect of the policy intention is implemented by regulation 69(1) and (2): see paragraphs 113–114 above.

182. Mr Najib questions the point of the Secretary of State obtaining information from HMRC if regulation 69(3) does not oblige her to follow that information. I suspect that question was intended to be rhetorical. There is, however, an answer that differs from that implied by the rhetoric.

183. That answer is that the Secretary of State is now permitted to use the information from HMRC as a starting point for calculating unearned income. That means she is no longer reliant on the non-resident parent disclosing his unearned income directly to her. Neither does the person with have to produce evidence of the level of the non-resident parent's unearned income (which she may neither have, nor be able to access) to establish a case for a variation.

184. It is to be hoped that in most cases the HMRC Information will be correct. In many others, perhaps most, there will be no evidence to suggest that it is incorrect. In such cases, the HMRC Information will not only be the starting point for the Secretary of State's decision but also the end point. The fact that, as I have held, there will remain cases in which the Secretary of State will also need to consider other evidence does not alter the fact that, in most cases, the 2012 Regulations achieve a significant reduction in administrative complexity and a simplification of the scheme.

185. It might be argued (although it was not) that, by interpreting regulation 69(3) as I have, I am preventing the Secretary of State from taking full advantage of computerised decision-making. If she were bound to use the HMRC Information, that information could, in principle could flow from HMRC's computer to the Child Maintenance Service computer and emerge as a decision without the involvement of any human mind.

186. However, quite apart from the fact that, in my judgment, the wording of regulation 69(3) is not compatible with such a process, that regulation is subject to regulation 69(6) (see paragraph 15 above). The latter regulation provides that, if the non-resident parent

no longer has the property or assets which gave rise to unearned income in a past tax year and does not have any current source of unearned income, then his unearned income for the relevant tax year is to be treated as nil.

187. It follows that, even if regulation 69(3) bears the interpretation for which the Secretary of State contends, a human mind would still need to be involved to ascertain whether regulation 69(6) applies.

188. Then there is the aim of avoiding disputes, which, it is suggested, delay the payment of child support maintenance

189. Without seeking to excuse the delay in this case, that is emphatically not the case, at least from a legal point of view. Section 33(4) of the Act provides that when making a liability order against a non-resident parent "the court … shall not question the maintenance calculation under which the payment of child support maintenance fell to be paid": Further, a maintenance calculation is final: see section 46A of the Act. It therefore remains in effect—and enforcement is therefore to be based on it—unless and until it is revised, superseded, or reversed or varied on appeal.

190. The existence of a dispute therefore need not delay the payment of the sum that has been calculated as due from the non-resident parent. A maintenance calculation that is subject to appeal may still be enforced. If, as a matter of administrative policy, the Child Maintenance Service does not in fact enforce liability in those circumstances then it is that policy, rather than the dispute, that undermines the goal of getting maintenance to children quickly.

<u>Incentivising fraud</u>

191. The FTT did not make a finding of fraud against the Father and I can see no evidence on which it could have done so. On the contrary, the Father noticed that the information provided by HMRC was incorrect and drew that attention of the Child Maintenance Service to that fact. It does not follow from the fact that the FTT disagreed with the Father's figures that those figures were deliberately or dishonestly incorrect.

192. However, it cannot be denied that some non-resident parents do lie about their income both to HMRC and to the Secretary of State. My experience as a judge of the FTT suggests that it is some way from being an isolated occurrence.

193. In such cases, the goals of, on the one hand, ensuring that children receive the maintenance that is legally due to them and, on the other, of fast-tracking the assessment of such maintenance by reliance on information provided by non-resident parents via HMRC, are mutually exclusive. Where a non-resident parent has lied about his unearned

income, either the assessment will be quick and incorrect or, if time is taken to uncover the truth, it will be correct but slower.

194. That problem is inherent in the child support system. It does not matter whether a non-resident parent has to give information to HMRC, a Family Court or the Child Maintenance Service. If he is prepared to lie about his income to the detriment of his children, he is unlikely to mind to whom he does so.

195. However, the unquestioning reliance on information from HMRC for which the Secretary of State contends would present an additional problem because it would create a double incentive to lie.

196. A non-resident parent considering whether to take the risk of lying to HMRC about his unearned income will be able to factor in the potential advantage that, as well as evading income tax, he will—unless detected—also obtain a fraudulent reduction in his liability to support his children.

197. Further, the likelihood of detection would itself be reduced. If the information from the HMRC were conclusive, it would not be a proper use of the FTT's inquisitorial powers to go behind it.

198. I therefore accept the Mother's submission that "[a]llowing the appeal would … create a child maintenance and tax dodgers' charter …". That is a tendentious way of putting the matter and I do not believe that the policy of the 2012 Regulations was to incentivise fraud. But, in my judgment, the submission correctly describes one of the effects of accepting the Secretary of State's submissions.

199. It is, of course, possible that the legislator recognised that the policy might lead to an increase in fraud but regarded that as the lesser of two evils; a necessary cost of getting some maintenance to most children quickly. Again, Parliament is sovereign and could have made the information from HMRC conclusive by using sufficiently clear words.

200. Parliament, however, has not in fact done so. For the reasons I have given, and interpreted in the context of regulation 69 as a whole, the natural meaning of "by reference to" is that the information from HMRC is not conclusive.

Alternative remedies

201. It has been suggested that any injustice to qualifying children that might result from First Interpretation could be prevented through the use of two remedies that are available to the person with care, namely applying for a variation and seeking different information from the Secretary of State.

Other variations

202. In *DB v CMEC (CSM)* [2011] UKUT 202 (AAC), the Secretary of State submitted to Judge Howell QC that the remedy for any injustice to the qualifying children resulting from HMRC holding incorrect information about (in that case) the non-resident parent's self-employed income would be for the person with care to apply for a departure direction—now, a variation—on what was known as the "lifestyle" ground (*i.e.*, that the maintenance calculation was based upon a level of income which was substantially lower that the level of income required to support the non-resident parent's overall lifestyle). That suggestion received limited endorsement from the Court of Appeal in *Gray*, although the actual decisions in *DB* and *Gray* had the effect that applying for a lifestyle variation was unnecessary under previous schemes.

203. Under the 2012 Regulations, such an application is now impossible. The 2012 scheme does allow for the possibility of a Lifestyle variation. An "additional income" variation (see para 37 above) is only possible if a non-resident parent:

(a) has unearned income (*i.e.*, as in this appeal);

(b) has assets exceeding a prescribed value;

(c) has been assessed as liable to pay child support maintenance on the flat rate or the nil rate but nevertheless has a gross weekly income; or

(d) has diverted income.

204. In this case, the mother has already made an application on the grounds of unearned income. The logic of the First Interpretation is that that application must fail in its entirety, because the concluding words of regulation 69(3) provide that the Father's unearned income "is to be treated as nil" and (according, at least, to Mr Najib and Ms Spicer) regulation 69(5) has no application here.

205. Further, the Father's child support liability has been assessed at the basic rate rather than the reduced, flat, or nil rates and there is no suggestion that he owns sufficient assets for there to be a case on that ground. The only application open to the Mother—other than the one she has already made—would therefore be on the grounds of diversion of income. It is this ground that Ms Spicer tentatively submits would provide her with an alternative remedy.

206. That submission is based on a misunderstanding:

(a) an "unearned income" variation is only available where the non-resident parent has *actually received* unearned income: see *MQB v Secretary of State for Work and Pensions & SRB (CSM)* [2021] UKUT 263 (AAC) at [12]; whereas by contrast

(b) it is of the essence of a "diversion" variation, that the diverted income has been diverted *at source* to another person or for another purpose and that the non-resident parent has therefore *not* received it. An example of the distinction can be seen in *AB v Secretary of State for Work and Pensions and RS (CSM)* at [68] to [69].

207. I accept that there may well be cases in which a person with care reasonably suspects that the non-resident parent controls a source of unearned income but does not know how that control has been exercised. In such cases, it would be advisable for the person with care to apply for a variation on both unearned income and diversion grounds in the alternative. But both variations cannot be agreed in respect of the same income: they are mutually exclusive.

208. Therefore, where—as here—the Mother's case, which the FTT accepted on the facts, was that the Father had actually received unearned income that had not been taken into account, a diversion variation could not offer her a remedy.

Going back to HMRC

209. It follows that, if the First Interpretation is correct, the only remedy open to a person with care where a non-resident parent's tax return misstates his unearned income would be to "go back" to HMRC.

210. When such a remedy is suggested, details of the mechanism by which it is supposed to operate are usually absent: it is simply assumed that if information from HMRC changes, the Secretary of State will be able to change her decision about the variation. On the one occasion when a mechanism has been suggested, the suggestion appears to be flawed.

211. Moreover, I accept the Mother's submission that, even in those cases in which the proposed remedy is available, it is not adequate and I reject the submissions to the contrary from the Secretary of State and the Father.

212. This section of the *Discussion* will therefore begin by exploring the circumstances in which the Secretary of State may change her decision in the light of new information from HMRC and will end with an explanation of why going back to HMRC is, in any event, an inadequate remedy.

213. What follows will almost certainly seem abstruse and technical; contrary to "common sense", even. If a decision is wrong why can't it just be changed? The answer is that the Act and the 2012 Regulations establish a technical scheme. Decisions can be changed when the rules say they can and not otherwise. Even if agreement could be reached on what "common sense" required, that consensus would not necessarily prove a sound guide to the law.

214. I should also stress that what follows is only a problem if, contrary to what I have decided, the First Interpretation is correct. In particular, the difficulties that arise from the inability of the Secretary of State to revise tribunal decisions do not exist if regulation 69(3) is interpreted as set out above. That is because the—on the law as I have held it to be—the FTT is free to substitute the correct figure for unearned income and does not have to go back to HMRC.

Revision and supersession

215. As I have already mentioned (see paragraph 189 above), decisions made under the Act—whether by the Secretary of State or a tribunal—are final and can only be changed by revision or supersession or by being reversed or varied on appeal.

216. I have also mentioned that when hearing an appeal the FTT stands in the shoes of the Secretary of State. One effect of that is that if, when making a decision, the Secretary of State had no power to revise or supersede an earlier decision, the FTT cannot do so either when deciding an appeal against that decision.

217. I do not propose to lengthen this decision further by reviewing or adding to the extensive case law on revision and supersession. A one-paragraph summary will suffice.

218. "Revision" and "supersession" are terms of art. They do not necessarily bear the same meaning that they would have in everyday speech and neither is a synonym for the word "change". Earlier decisions can only be revised or superseded if grounds exist for doing so. Those grounds are specified in legislation and decision makers cannot make them up to suit individual cases. Superseding decisions usually (but not always) take effect from a later date than a revising decision would and it is always necessary to give attention to the question of the date from which a revising or superseding decision is effective.

219. With that in mind, I turn to the decision in *PP*, which has the merit of being the only authority or submission before me that actually addresses how the receipt of new information from HMRC might allow the Secretary of State to change her decision.

220. It will be remembered that Judge Wikeley stated as follows:

> "67. If the First-tier Tribunal considers that the HMRC figure contains a mistake then, as the grounds of appeal suggest, the correct approach is to accept the figure in question but to set out the Tribunal's concerns and direct that the Tribunal's Decision Notice (and, where relevant Statement of Reasons) should be sent to HMRC. Should HMRC agree with the Tribunal and amend the figure in question, this would permit an 'any time' revision of the maintenance calculation under regulation 14(1)(f)."

221. Unfortunately, that passage overlooks the general principle that a decision of a tribunal on appeal cannot be *revised* by the Secretary of State.

222. Specifically regulation 14(1) provides:

> "**Grounds for revision**
>
> **14.**—(1) A decision to which section 16(1A) of the 1991 Act applies1 may be revised by the Secretary of State—
>
> (a)-(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;
>
> (g) …"

223. Section 16(1A) of the Act only applies to "a decision of the Secretary of State" and to a decision of the First-tier Tribunal on a referral under section 28D(1)(b)". Section 28D(1)(b) empowers the Secretary of State "to refer the application [*i.e.*, for a variation] to the First-tier Tribunal for the tribunal to determine what variation, if any, is to be made". But the power to refer only exists if the Secretary of State has not already determined the application herself. Once her decision has been made, the First-tier Tribunal can only become seised of the case if there is an appeal against that decision.

224. If, as paragraph 67 of *PP* suggests, the FTT were to accept the original HMRC figure even though it believed it to be wrong, that figure would cease to be part of a decision of the Secretary of State that is subject to revision by virtue of section 16(1) and (1A), and become embodied in the decision of a tribunal, which is not so subject.

225. It would not solve that particular problem if the FTT were to adjourn to see if HMRC accepted the person with care's evidence that the non-resident parent had under-

declared his unearned income. Even if the information provided by HMRC were to change, that would—again assuming the First Interpretation to be correct—be a change of circumstances that occurred after the date of the maintenance calculation. Section 20(7)(b) of the Act would therefore prevent the FTT from taking it into account. The Secretary of State would have to revise the maintenance calculation causing the appeal to lapse.

226. In this case, there might be a further problem even if the earlier decision had not been made by a tribunal. The ground for revision depends upon the information "held" by HMRC having been amended, not the information *provided* to the Secretary of State. Although it is not certain—see paragraph 45 above—it may be that HMRC "held" the correct information[20] at all material times but misreported it to the Secretary of State. If so that information will not have been "amended" and there would be no ground for revision.

227. The Secretary of State does, however, have power to supersede decisions of Tribunals. Regulation 17(1) provides:

> "**Grounds for supersession**
>
> 17.—(1) A decision mentioned in section 17(1) of the 1991 Act may be superseded by a decision of the Secretary of State, on an application or on the Secretary of State's own initiative, where—
>
> (a) there has been a relevant change of circumstances since the decision had effect or it is expected that a relevant change of circumstances will occur;
>
> (b) the decision was made in ignorance of, or was based on a mistake as to, some material fact; or
>
> (c) the decision was wrong in law (unless it was a decision made on appeal).

and section 17(1) of the Act mentions (among others) decisions of the First-tier Tribunal and the Upper Tribunal.

228. However would supersession on any of those grounds provide a person with care with an adequate remedy, where the FTT had accepted the original, incorrect, information from HMRC?

[20] *i.e.*, correct if the First Interpretation were to be accepted.

229. Such a decision would—obviously—be "a decision made on appeal" and so regulation 17(1)(c) would not apply.

230. At first blush, it might seem that the FTT's decision was based on a mistake as to a material fact within regulation 17(1)(b). But accepting the First Interpretation, in which the Secretary of State had to accept the information from HMRC in all circumstances would mean that the material fact would not be the actual amount of the non-resident parent's chargeable unearned income, but rather the amount specified by HMRC. Taking this case as an example, at the relevant time the material fact would be that HMRC had said the Father's unearned income was nil. If that information were subsequently to change, it would not mean that the FTT had been mistaken about it at the time with which it was concerned.

231. That leaves regulation 17(1)(a) and change of circumstances. If one accepts that it is the level of unearned income specified by HMRC that is the material fact, then a change in that information would amount to a "relevant change of circumstances" and the Secretary of State could supersede the FTT's decision on that ground.

232. However, that would not be an adequate remedy for a person with care, because the superseding decision would be prospective only. Regulation 18(6) provides:

> "(6) Where paragraphs (2) to (5) do not apply—
>
> (a) if the supersession decision is made on an application by one of the parties, the decision takes effect from the date of the application;
>
> (b) if the supersession decision is made on the Secretary of State's own initiative on the basis of information provided by a third party, the decision takes effect from the date on which that information is provided; and
>
> (c) if the supersession decision is made on the Secretary of State's own initiative, and sub-paragraph (b) does not apply, the decision takes effect from the date on which it is made."

It is unnecessary for me to set out paragraphs (2)-(5) of regulation 18. In the circumstances under consideration, they do not apply. A superseding decision based on new information from HMRC would be covered by regulation 18(6)(b) and would therefore take effect from the date on which that information was provided. The person with care would not receive the correct level of maintenance for her children for the period between the effective date of the original maintenance calculation and the effective date of the superseding decision.

233. A decision of the Secretary of State that supersedes a tribunal decision can sometimes be retrospective. Regulation 31 of the 2012 Regulations states:

> "**Supersession of tribunal decision made in error due to misrepresentation etc.**
>
> 31.—(1) Where—
>
> (a) a decision made by the First-tier Tribunal or the Upper Tribunal is superseded on the ground that it was erroneous due to misrepresentation of, or that there was a failure to disclose, a material fact; and
>
> (b) the Secretary of State is satisfied that the decision was more advantageous to the person who misrepresented or failed to disclose that fact than it would otherwise have been but for that error,
>
> the superseding decision takes effect from the date on which the decision of the First-tier Tribunal or, as the case may be, the Upper Tribunal, took or was to take, effect"

As this part of the discussion assumes, for the purposes of argument only, that the First Interpretation is correct, the "material fact" would again be the information provided by HMRC, and not the true level of a non-resident parent's unearned income. In this case, it would make no difference that, as the FTT implicitly found, the Father misrepresented or failed to disclose his income to HMRC. Nothing in the Father's tax return can possibly have caused HMRC to tell the Secretary of State that his unearned income was nil.

234. It follows that—assuming there has been misrepresentation or failure to disclose[21]—the "person who misrepresented or failed to disclose the material fact" was HMRC. The decision being superseded was not "more advantageous" to HMRC than the superseding decision and regulation 31 would not apply.

235. I hope that is sufficient to demonstrate that "going back to the Secretary of State" would not be an adequate remedy for the Mother in this case.

236. And if the First Interpretation is correct, supersession of a tribunal decision will often be a difficult remedy for *any* person with care. Even if a non-resident parent can be shown to have misrepresented or failed to disclose material facts about his income to HMRC, the *ground for supersession* will always be that the conclusive information from HMRC

[21] See paragraph 45 above.

was wrong and the superseding decision will never be either more or less advantageous to HMRC.

237. I accept, however, that the circumstances of other persons with care will differ and that, as long as it occurs before the FTT has given a final decision on appeal, revision of the Secretary of State's decision by the Secretary of State will sometimes provide an adequate remedy.

238. Sometimes, but not always, and I suspect not even usually. The person with care will often not have the evidence to show that the non-resident parent's unearned income has been under-declared without the assistance of the FTT and, if the HMRC figure is to be treated as conclusive, there will be limits on the assistance that the tribunal may properly give her.

239. And even if full directions are given (*i.e.*, because there is a dispute about current income) the Secretary of State may understandably not wish to go back to HMRC until the FTT has decided, at least provisionally, what the true position is.

240. What is the FTT then to do? Should it adjourn indefinitely—possibly for years—while the Secretary of State goes back to HMRC and HMRC carries out an enquiry, in the hope that the Secretary of State will then revise her decision and cause the appeal to lapse? In making that decision, how should the Tribunal take into account the fact that the revised decision would give rise to a further right of appeal by either parent?

241. Further, if getting the correct amount of maintenance to qualifying children quickly is one of the goals of the 2012 scheme, that goal is not served by requiring the Secretary of State to go back to HMRC when the FTT could give the correct decision immediately.

Other considerations

242. Even if everything I have said above about revision and supersession is incorrect and those processes could technically deliver justice to a person with care when HMRC misinforms the Secretary of State about the level of the non-resident parent's unearned income, I judge that going back to HMRC for a different figure is inherently an inadequate remedy because it unfairly favours the non-resident parent and denies the person with care agency in the resolution of a dispute to which she is a party.

243. The point can be dealt with relatively briefly. If a person with care, contacts HMRC with her concerns about the non-resident parent's tax return, they may take what she tells them into account, but they will not involve her in any resulting enquiry. They may not even reply to her.

244. That is understandable and correct. One taxpayer does not have any standing in relation to the tax affairs of another. Whether or not a non-resident parent pays the correct amount of tax is between him and HMRC. The person with care has no legitimate interest in that question: it is none of her business.

245. It is, however, very much the business of a person with care that her children should receive the amount of child support maintenance that is legally payable in respect of them. And if the First Interpretation is correct, that can only be achieved if the information provided by HMRC accurately reflects the correct amount chargeable to income tax under Parts 3-5 of ITTOIA. If the only way the person with care can rectify incorrect information is to "go back to the HMRC", then HMRC's procedures will deny her any further input into the decision.

246. Specifically, if HMRC opens an investigation, the non-resident parent will have a right to reply to what the person with care has told them. HMRC will not ask the person with care to comment on anything the non-resident parent says because of their duty of confidentiality. HMRC may therefore accept an explanation from the non-resident parent that the person with care could demonstrate to be false, because HMRC do not have information that she does. Moreover, it is not just a question of information and evidence. The person with care will also be denied an opportunity to make representations.

247. From the person with care's point of view, the remedy of "going back to HMRC" is also inadequate because HMRC may simply refuse, or omit, to act on the information she has provided. In some cases, HMRC will be unable to act because the time limit for opening an enquiry has expired: see paragraph 39(e) above.

248. In cases where an enquiry is still possible, HMRC might, or might not, be more obliging if the request to reconsider came directly from the Secretary of State. But the Child Maintenance Service will not necessarily make such a request.

249. It is instructive that, in this case, the Child Maintenance Service have known that the information provided by HMRC was incorrect ever since it received the Father's letter of 13 November 2015: see paragraph 46 above. It has also known since Judge Mitchell's decision in *SB* was promulgated on 12 February 2016 that it had power to ask HMRC to correct it. That power could have been exercised at any time before the First-tier Tribunal gave its final decision on 23 January 2018 but was not. The situation was crying out for the Child Maintenance Service to ask HMRC to check their records, but that did not happen.

250. In cases where HMRC do not reconsider the case and/or the Child Maintenance Service does not ask them to do so, the person with care's only remedy would be expensive and uncertain judicial review proceedings.

251. I regret the need to say so, but no-one would even suggest that the circumstances and procedures I have described above were a proper remedy for one party to a dispute if the subject matter of that dispute were anything other than child support.

The European Convention on Human Rights

252. Particularly as I am disagreeing with Judge Wikeley, I cannot ignore the fact that this decision might not be the last word on this issue. I therefore record my doubts about whether, if the First Interpretation is correct, that would be consistent with the rights of a person with care under Article 6 of the Convention.

253. That Interpretation leads to a situation in which the FTT—a judicial body—must accept the evidence of the non-resident parent (via HMRC) without considering the evidence of the person with care (because it would be legally irrelevant).

254. That is so even if the person with care's evidence is overwhelming and even if the non-resident parent admits that the information provided by HMRC is incorrect. The person with care's remedy is said to be to go back to HMRC—a non-judicial body—and rely on a process that HMRC might not choose to initiate, and in which the procedures would not permit her full participation.

255. I do not base this decision on my incomprehension because I have not heard argument on the point. As presently advised, however, I do not understand how that can be said to provide persons with care with a fair hearing by an independent and impartial tribunal in the determination of their civil rights and obligations.

Reconciling the two parts of regulation 69(3)

256. I come, finally, to the apparent inconsistency between the two parts of regulation 69(3), that has created so much difficulty in this case.

257. The regulation states unambiguously that if the HMRC Information is to the effect that the non-resident parent has no unearned income, then "the amount of the non-resident parent's unearned income is to be treated as nil". Why, it is asked, would the HMRC Information not be similarly conclusive for all other levels of unearned income? But, it is also asked, if the HMRC Information is conclusive for all purposes, does that not make the "is to be treated as nil" provision otiose?

258. This was factor that weighed heavily with Judge Wikeley in *PP*. He decided that the HMRC Information must be conclusive because, in part, he accepted the submission that:

> "… it would be both bizarre and illogical if the Secretary of State and the First-tier Tribunal could go behind a positive non-nil unearned income

> figure but not go behind a nil figure. Such an approach would mean that the taxpayer who fraudulently failed to declare any unearned income at all would actually be in a better position in the child support scheme than the negligent taxpayer who had carelessly under-stated the amount of their unearned income."

259. I regret I do not find that persuasive. To begin with, treating the information from HMRC as conclusive would mean that *all* non-resident parents who under-declare their income—by whatever amount, in any circumstances, and whether fraudulently or not—receive an illegitimate benefit at the expense of their children.

260. Moreover, I do not agree that it is correct to regard the two parts of regulation 69(3) as inconsistent or the regulation as a whole as ambiguous. In my judgment, the correct word is "puzzling".

261. For the reasons given above (and particularly in paragraph 136), the natural meaning of regulation 69(3) is to create a general rule and an exception. Subject to regulation 69(5) and (6):

(a) the Secretary of State must generally treat the information from HMRC as a factor in the determination of—but not necessarily as conclusive of—the non-resident parent's unearned income; but,

(b) where HMRC says that the non-resident parent has no unearned income, the Secretary of State must treat that information as conclusive.

In short, the regulation unambiguously means what Judge Jacobs—with considerably greater concision than I have been able to manage—says it means in *Child Support: The Legislation:* see paragraph 17 above. The problem is not any lack of clarity in what the legislator has said, but rather a difficulty in understanding why she has said it. Why should the two cases be treated differently?

262. I doubt whether answering that question is a matter for me.

263. It would be different if my reading of regulation 69(3) led to an absurdity, but it does not. The legislator has decided to identify two cases and treat them differently. Provided she has done so with sufficient clarity (which, in my judgment, she has) then she is not also obliged to satisfy the intellectual curiosity of judges. I note that Judge Jacobs' commentary does not seek to explain why regulation 69(3) is as it is.

264. However, and in full realisation that I may be in territory on which angels would fear to tread, I do not find it difficult to see reasons for treating those non-resident parents who declare that they have no unearned income differently from those who declare that they

have some. The exception created by the "is to be treated as nil" test greatly increases administrative convenience in circumstances where it is unlikely to undermine the accuracy of the determination.

265. People with no unearned income are likely to form the overwhelming majority of non-resident parents. Most people do not own rental properties or receive dividends from shares. The most recent statistics state that, although 77% of UK residents have savings accounts, 9% have no savings, and over 40% of people do not have sufficient savings to support themselves for a month in the absence of income. Even if they have small amounts of interest on savings, so that a nil declaration on the self-assessment return may not technically be correct, the omission is immaterial. Such savings are unlikely to attract tax because of the personal savings allowance of £1,000 (or £500 for higher rate taxpayers). They will also not come anywhere near reaching the £2,500 annual threshold required by regulation 69(1). Except among landlords and those who own shares, unearned income of at least £2,500 a year is rare.

266. In those circumstances, treating those non-resident parents who do not declare unearned income as having no unearned income greatly increases administrative convenience.

267. It also promotes fairness by preventing those non-resident parents who have no unearned income from having to prove a negative. Those who have unearned income should be able to produce documentary evidence of the amount. Those who have none will, by definition, have no such documents. The concluding words of regulation 69(3), have the effect of that non-resident parents who say they have no unearned income are not to be vexed by the need to prove otherwise unless the circumstances of the case bring it within regulation 69(5).

Conclusion

268. Taking all those factors into consideration, I judge that regulation 69 operates as follows:

(a) A case for variation exists under regulation 69 if—in the relevant year—the non-resident parent has an income of at least £2,500 that is chargeable to income tax under Parts 3 to 5 of ITTOIA but not relieved by section 118 of the Income Tax Act 2007: see regulation 69(1), (2) and (4). "Chargeable" means income on which income tax should properly have been charged under those Parts, not the income on which tax was actually charged.

(b) In determining the level of the non-resident parent's unearned income, the Secretary of State should—with one exception—normally take the information from HMRC as

her starting point. That information will usually be no more than what HMRC have been told by the non-resident parent. However, information in a self-assessment return is given under a formal declaration that it is true, and under-declaration is subject to penalties including, in an appropriate case, criminal penalties. To that extent, regulation 69 pays the non-resident parent the courtesy of supposing that the figures he has declared to HMRC were correct.

(c) If, however, there is other evidence that suggests the HMRC Information is incorrect, the Secretary of State is entitled to consider that evidence and—attaching whatever weight to it seems appropriate—to reach her own conclusion as to the true level of unearned income.

(d) The exception referred in sub-paragraph (b) above is that, if the HMRC Information does not disclose any unearned income, the Secretary of State must treat the amount of the non-resident parent's income as nil.

(e) That, however, is subject to regulation 69(5).

(f) Regulation 69(5) applies if, to summarise, there is no HMRC information for the most recent tax year. That includes circumstances where "information" in the broad sense of the word has been provided but that information is not relevant to the level of the non-resident parent's unearned income and is therefore not "information" in the narrow sense contemplated by regulation 69(3): see paras 125-130 and 144 above. That will often be the case if HMRC has informed the Secretary of State that the non-resident parent had no unearned income, but there is evidence of sufficient weight to show that was not the case.

(g) If regulation 69(5) applies, the Secretary of State may "if satisfied that there is sufficient evidence to do so, determine the amount of the non-resident parent's unearned income by reference to the most recent tax year", on the basis that "any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return. The Secretary of State may require the non-resident parent to provide—and the FTT may direct the production of—any further evidence reasonably needed to inform that determination.

269. Interpreted in that way, the law is now less complex than the law as declared in *Gray* because the Secretary of State no longer has to carry out a detailed assessment in every case. Administrative convenience has also been increased.

270. However, fairness has been retained because it remains possible for a person with care who, on reasonable grounds, suspects a non-resident parent of under-declaring his unearned income to challenge the information provided to—and therefore by—HMRC

and to obtain the assistance of the state (in the form of the inquisitorial jurisdiction of the FTT) to do so.

271. By contrast, the interpretation for which the Secretary of State contends, would have required the First-tier Tribunal (and also the Secretary of State herself, had it been appreciated that not all of the £51,450 figure was earned income) to treat the non-resident parent's unearned income as nil even though all the evidence, including the Father's own evidence (which the HMRC figure should have reflected), showed unequivocally that that was not correct.

272. That contrast comes close to reducing the First Interpretation to absurdity. In which context, I respectfully agree with what Judge Mitchell said in paragraph 34 of *SB*: see paragraph 152 above.

Disposal

273. I am not convinced that the FTT realised that this was a case in which the information provided to the Secretary of State by HMRC meant that—subject to regulation 69(5)—it was required to treat the Father's unearned income as nil.

274. That is understandable—the information was wrong—but the concluding words of regulation 69(3) mean what they say.

275. But even if the Tribunal erred in that respect, the error was immaterial.

276. For the reasons I have given, regulation 69(5) applied and entitled the FTT, "if satisfied that there is sufficient evidence to do so, [to] determine the amount of the [Father's] unearned income by reference to the most recent tax year", but on the basis that "any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return".

277. That is what the FTT did and, in my judgment, the figures it arrived at cannot be faulted, not least because the terms of the Father's permission to appeal prevent it.

278. My decision is therefore as set out on pages 1 and 2 above.

Authorised for issue
on 23 October 2023

Richard Poynter
Judge of the Upper Tribunal

Corrected under rule 42
on 6 November 2023

Appendix

Relevant Legislation

The Original Child Support Scheme

Child Support (Maintenance Assessments and Special Cases) Regulations 1992

Schedule 1, paragraphs 2A-3

1. The provisions considered by the Court of Appeal in *Gray v Secretary of State for Work and Pensions & James* (see paragraph 66 above) were as follows:

> "2A.—(1) Subject to paragraphs 2C, 4 and 5A, "earnings" in the case of employment as a self-employed earner shall have the meaning given by the following provisions of this paragraph.
>
> (2) "Earnings" means the taxable profits from self-employment of that earner, less the following amounts—
>
> (a) any income tax relating to the taxable profits from the self-employment determined in accordance with sub-paragraph (3);
>
> (b) any National Insurance Contributions relating to the taxable profits from the self-employment determined in accordance with sub-paragraph (4);
>
> (c) one half of any premium paid in respect of a retirement annuity contract or a personal pension scheme or, where that scheme is intended partly to provide a capital sum to discharge a mortgage or charge secured upon the self-employed earner's home, 37.5 per centum of the contributions payable.
>
> (3) For the purposes of sub-paragraph (2)(a) the income tax to be deducted from the taxable profits shall be determined in accordance with the following provisions—
>
> (a) subject to head (d), an amount of earnings calculated as if it were equivalent to any personal allowance which would be applicable to the earner by virtue of the provisions of Chapter 1 of Part VII of the Income and Corporation Taxes Act 1988 (personal reliefs) shall be disregarded;

(b) subject to head (c), an amount equivalent to income tax shall be calculated in relation to the earnings remaining following the application of head (a) (the "remaining earnings");

(c) the tax rate applicable at the effective date shall be applied to all the remaining earnings, where necessary increasing or reducing the amount payable to take account of the fact that the earnings relate to a period greater or less than one year;

(d) the amount to be disregarded by virtue of head (a) shall be calculated by reference to the yearly rate applicable at the effective date, that amount being reduced or increased in the same proportion to that which the period represented by the taxable profits bears to the period of one year.

(4) For the purposes of sub-paragraph (2)(b) above, the amount to be deducted in respect of National Insurance Contributions shall be the total of—

(a) the amount of Class 2 contributions (if any) payable under section 11(1) or, as the case may be, (3), of the Contributions and Benefits Act; and

(b) the amount of Class 4 contributions (if any) payable under section 15(2) of that Act, at the rates applicable at the effective date.

(5) For the purposes of this paragraph, "taxable profits" means profits calculated in accordance with Part 2 of the Income Tax (Trading and Other Income) Act 2005.

(6) A self-employed earner who is a person with care or an absent parent shall provide to the Secretary of State on demand a copy of—

(a) any tax calculation notice issued to him by Her Majesty's Revenue and Customs; and

(b) any revised notice issued to him by Her Majesty's Revenue and Customs.

…

2C—Where the Secretary of State accepts that it is not reasonably practicable for a self-employed earner to provide any of the information specified in paragraph 2A(6), "earnings" in relation to that earner shall be calculated in accordance with paragraph 3.

3.—(1) Where paragraph 2C applies, and subject to sub-paragraphs (2) and (3) and to paragraph 4, "earnings" in the case of employment as a self-employed earner means the gross receipts of the employment including, where an allowance in the form of periodic payments is paid under section 2 of the Employment and Training Act 1973 or section 2 of the Enterprise and New Towns (Scotland) Act 1990 in respect of the relevant week for the purpose of assisting him in carrying on his business, the total of those payments made during the period by reference to which his earnings are determined under paragraph 5.

(2) Earnings shall not include—

(a) any allowance paid under either of those sections in respect of any part of the period by reference to which his earnings are determined under paragraph 5 if no part of that allowance is paid in respect of the relevant week;

(b) any income consisting of payments received for the provision of board and lodging accommodation unless such payments form the largest element of the recipient's income.

(3) Subject to sub-paragraph (7), there shall be deducted from the gross receipts referred to in sub-paragraph (1)—

(a) except in a case to which paragraph 4 applies, any expenses which are reasonably incurred and are wholly and exclusively defrayed for the purposes of the earner's business in the period by reference to which his earnings are determined under paragraph 5(1) or, where paragraph 5(2) applies, any such expenses relevant to the period there mentioned (whether or not defrayed in that period);

(b) except in a case to which paragraph 4 or 5(2) applies, any value added tax paid in the period by reference to which earnings are determined in excess of value added tax received in that period;

(c) any amount in respect of income tax determined in accordance with sub-paragraph (5);

(d) any amount in respect of National Insurance contributions determined in accordance with sub-paragraph (6);

(e) one half of any premium paid in respect of a retirement annuity contract or a personal pension scheme, or, where that scheme is intended partly to provide a capital sum to discharge a

mortgage or charge secured upon the parent's home, 37.5 per centum of the contributions payable.

(4) For the purposes of sub-paragraph (3)(a)—

(a) such expenses include—

(i) repayment of capital on any loan used for the replacement, in the course of business, of equipment or machinery, or the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair;

(ii) any income expended in the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair;

(iii) any payment of interest on a loan taken out for the purposes of the business;

(b) such expenses do not include—

...

(ii) any capital expenditure;

...

(v) any loss incurred before the beginning of the period by reference to which earnings are determined;

(vi) any expenses incurred in providing business entertainment.

...

(5) For the purposes of sub-paragraph (3)(c), the amount in respect of income tax shall be determined in accordance with the following provisions—

(a) subject to head (c), an amount of chargeable earnings calculated as if it were equivalent to any personal allowance which would be applicable to the earner by virtue of the provisions of Chapter 1 of Part VII of the Income and Corporation Taxes Act 1988 (personal reliefs) shall be disregarded;

(b) subject to head (bb), an amount equivalent to income tax shall be calculated with respect to taxable earnings at the rates applicable at the effective date;

(bb) where taxable earnings are determined over a period of less or more than one year, the amount of earnings to which each tax rate applies shall be reduced or increased in the same proportion to that which the period represented by the chargeable earnings bears to the period of one year;

(c) the amount to be disregarded by virtue of head (a) shall be calculated by reference to the yearly rate applicable at the effective date, that amount being reduced or increased in the same proportion to that which the period represented by the chargeable earnings bears to the period of one year;

(d) in this sub-paragraph, "taxable earnings" means the chargeable earnings of the earner following the disregard of any applicable personal allowances.

(6) For the purposes of sub-paragraph (3)(d), the amount to be deducted in respect of National Insurance contributions shall be the total of—

(a) the amount of Class 2 contributions (if any) payable under section 11(1) or, as the case may be, (3) of the Contributions and Benefits Act; and

(b) the amount of Class 4 contributions (if any) payable under section 15(2) of that Act, at the rates applicable to the chargeable earnings at the effective date.

(7) In the case of a self-employed earner whose employment is carried on in partnership or is that of a share fisherman within the meaning of the Social Security (Mariners' Benefits) Regulations 1975, sub-paragraph (3) shall have effect as though it requires—

(a) a deduction from the earner's estimated or, where appropriate, actual share of the gross receipts of the partnership or fishing boat, of his share of the sums likely to be deducted or, where appropriate, deducted from those gross receipts under heads (a) and (b) of that sub-paragraph; and

(b) a deduction from the amount so calculated of the sums mentioned in heads (c) to (e) of that sub-paragraph.

(8) In sub-paragraphs (5) and (6) "chargeable earnings" means the gross receipts of the employment less any deductions mentioned in sub-paragraph (3)(a) and (b)."

The 2012 Child Support Scheme

Child Support Act 1991 (as amended by the Child Support, Pensions and Social Security Act 2000 and Child Maintenance and Other Payments Act 2008)

Section 11

2. The primary legislation governing maintenance calculations is in section 11 of the Child Support Act 1991 ("the Act"). So far as relevant, it states as follows:

"**Maintenance calculations**

11.—(1) An application for a maintenance calculation made to the Secretary of State shall be dealt with by the Secretary of State in accordance with the provision made by or under this Act.

(2) The Secretary of State shall … determine the application by making a decision under this section about whether any child support maintenance is payable and, if so, how much.

(3)-(5) …

(6) The amount of child support maintenance to be fixed by a maintenance calculation shall be determined in accordance with Part I of Schedule 1 unless an application for a variation has been made and agreed.

(7) If the Secretary of State has agreed to a variation, the amount of child support maintenance to be fixed shall be determined on the basis determined under section 28F(4).

(8) …"

2. This case is therefore governed either by paragraph (6) or by paragraph (7) of section 11, depending on whether the First-tier Tribunal was correct to agree a variation.

Schedule 1, Part 1

3. There are four rates at which a non-resident parent may be liable to pay child support maintenance: the nil rate, the flat rate, the reduced rate, and the basic rate. In this case, there is no dispute that the applicable rate is the basic rate.

4. Paragraph 2 of Schedule 1 to the Act provides that a basic rate liability is to be calculated by applying a specified percentage to the non-resident parent's "gross weekly income". Paragraph 10 of that Schedule provides that the meaning of that phrase is to be defined in regulations:

> "10.—(1) For the purposes of this Schedule, gross weekly income is to be determined in such manner as is provided for in regulations.
>
> (2) The regulations may, in particular—
>
> (a) provide for determination in prescribed circumstances by reference to income of a prescribed description in a prescribed past period;
>
> (b) provide for the Secretary of State to estimate any income or make an assumption as to any fact where, in Secretary of State's view, the information at Secretary of State's disposal is unreliable or insufficient, or relates to an atypical period in the life of the non-resident parent.
>
> (3) Any amount of gross weekly income (calculated as above) over £3,000 is to be ignored for the purposes of this Schedule."

Section 28F

5. Section 11(7) of the Act refers to section 28F(4). So far as relevant, section 28F states:

> "**Agreement to a variation.**
>
> **28F.**—(1) The Secretary of State may agree to a variation if—
>
> (a) the Secretary of State is satisfied that the case is one which falls within one or more of the cases set out in Part I of Schedule 4B or in regulations made under that Part; and
>
> (b) …
>
> (2) & (3) …

(4) Where the Secretary of State agrees to a variation, the Secretary of State shall—

(a) determine the basis on which the amount of child support maintenance is to be calculated in response to the application for a maintenance calculation; and

(b) make a decision under section 11 on that basis.

(5) …

(6) In determining whether or not to agree to a variation, the Secretary of State shall comply with regulations made under Part II of Schedule 4B."

Schedule 4B

6. Part I of Schedule 4B contains more detailed powers for the Secretary of State to make regulations about the cases in which a variation may be agreed (*i.e.*, by virtue of section 28(1)(a)).

7. In particular, paragraph 4 contains a power to prescribe "additional cases":

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

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

(a) the non-resident parent has assets which exceed a prescribed value;

(b) a person's lifestyle is inconsistent with his income for the purposes of a calculation made under Part I of Schedule 1;

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

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

8. Part II of Schedule 4B contains what are described as "Regulatory Controls" with which the Secretary of State must comply by virtue of section 28F(6). The relevant provisions of that Part are included in paragraph 5 as follows:

> "5.—(1) The Secretary of State may by regulations make provision with respect to the variations from the usual rules for calculating maintenance which may be allowed when a variation is agreed.
>
> (2) No variations may be made other than those which are permitted by the regulations.
>
> (3) Regulations under this paragraph may, in particular, make provision for a variation to result in—
>
> (a) a person's being treated as having more, or less, income than would be taken into account without the variation in a calculation under Part I of Schedule 1;
>
> (b) a person's being treated as liable to pay a higher, or a lower, amount of child support maintenance than would result without the variation from a calculation under that Part.
>
> (4)-(5) …"

Child Support Maintenance Calculations Regulations 2012

Latest available tax year—Regulation 4

9. Subject to regulation 69(5), regulation 69(3) requires a non-resident parent's unearned income to be determined by reference to the "latest available tax year". That phrase is defined by regulation 4 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)."

That definition is also relevant to "the HMRC figure" from which a non-resident parent's "historic income is calculated: see regulations 34-35 below.

Gross Weekly Income—Regulations 34-39

10. The powers conferred by paragraph 10 of Schedule 1 to the Act have been exercised to make Chapter 1 of Part 4 of the Child Support Maintenance Calculations Regulations 2012 ("the Regulations"). Regulations 34-39, which form part of that Chapter, are of particular relevance in this case. So far as material, they read as follows:

> "**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) no historic income is available; or
>
> (c) the Secretary of State is unable, for whatever reason, to request or obtain the required information from HMRC.
>
> (2A) For the purposes of paragraph (2)(a), current income is to be treated as differing from historic income by an amount that is at least 25% of historic income where—
>
> (a) the amount of historic income is nil; and
>
> (b) the amount of current income is greater than nil.
>
> (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).

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.

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 after any deduction for relievable pension contributions made by the non-resident parent's employer in accordance with net pay arrangements.

(3) The amount identified as income for the purposes of paragraph (1)(b) is not to include a UK social security pension.

(4) The amount identified as income for the purposes of paragraph (1)(d) is to be taken after deduction of any relief under section 83 of the Income Tax Act 2007 (carry forward trade loss relief against trade profits).

(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.

Current income – general

37.—(1) Current income is the sum of the non-resident parent's income—

(a) as an employee or office-holder;

(b) from self-employment; and

(c) from a pension,

calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42.

(2) Where payment is made in a currency other than sterling, an amount equal to any banking charge payable in converting that payment

to sterling is to be disregarded in calculating the current income of a non-resident parent.

Current income as an employee or office-holder

38.—(1) The non-resident parent's current income as an employee or office-holder is income of a kind that would be taxable earnings within the meaning of section 10(2) of ITEPA and is to be calculated as follows.

(2) As regards any part of the non-resident parent's income that comprises salary, wages or other amounts paid periodically—

(a) if it appears to the Secretary of State that the non-resident parent is (or is to be) paid a regular amount according to a settled pattern that is likely to continue for the foreseeable future, that part of the non-resident parent's income is to be calculated as the weekly equivalent of that amount; and

(b) if sub-paragraph (a) does not apply (for example where the non-resident parent is a seasonal worker or has working hours that follow an irregular pattern) that part of the non-resident parent's income is to be calculated as the weekly average of the amounts paid over such period preceding the effective date of the relevant calculation decision as appears to the Secretary of State to be appropriate.

(3) Where the income from the non-resident parent's present employment or office has, during the past 12 months, included bonus or commission or other amounts paid separately from, or in relation to a longer period than, the amounts referred to in paragraph (2), the amount of that income is to be calculated by aggregating those payments, dividing by 365 and multiplying by 7.

(4) Where the earnings from the non-resident parent's present employment or office have, in the past 12 months, included amounts treated as earnings under Chapters 2 to 11 of Part 3 of ITEPA (the benefits code) the non-resident parent's current income is to be taken to include the amount of those benefits as last obtained by HMRC divided by 365 and multiplied by 7.

(5) Where the non-resident parent's employer makes deductions of relievable pension contributions from the payments referred to in paragraph (2) or (3) the amount of those payments is to be calculated after those deductions.

Current income from self-employment

> **39.**—(1) The non-resident parent's current income from self-employment is to be determined by reference to the profits of any trade, profession or vocation carried on by the non-resident parent at the effective date of the relevant calculation decision.
>
> (2) The profits referred to in paragraph (1) are the profits determined in accordance with Part 2 of ITTOIA for the most recently completed relevant period or, if no such period has been completed, the estimated profits for the current relevant period.
>
> (3) The weekly amount is calculated by dividing the amount of those profits by the number of weeks in the relevant period.
>
> (4) In paragraphs (2) and (3) the "relevant period" means a tax year or such other period in respect of which the non-resident parent should, in the normal course of events, report the profits or losses of the trade, profession or vocation in question to HMRC in a self-assessment return.
>
> (5) In the case of a non-resident parent who carries on a trade, profession or vocation in partnership, the profits referred to in this regulation are the profits attributable to the non-resident parent's share of the partnership.
>
> (6) The profits of a trade, profession or vocation that the non-resident parent has ceased to carry on at the effective date of the relevant calculation decision are to be taken as nil."

11. Regulation 34(4) refers to the definition of "relevant tax year" in regulation 4(2), which is as follows:

> "(2) … a "relevant tax year" is any one of the 6 tax years immediately preceding the date of the request for information [under regulation 35(2)]."

Variations—Regulations 69, and 73

12. The power conferred by paragraph 4 of Schedule 4B to the Act were exercised to make Chapter 3 of Part 5 (Grounds for variation: Additional Income) of the Regulations.

13. The only regulation in that Chapter that is relevant for the purposes of this case is regulation 69 (which was made under the express power conferred by paragraph 4(2)(c) to make provision with respect to cases where "a person has income which is not taken into account in such a calculation" (*i.e.*, the calculation under Part I of Schedule 1 to the Act).

14. Regulation 69 is reproduced at paragraph 15 of the main body of this decision.

15. Also relevant is regulation 73(1) in Chapter 4 of Part 5 (Effect of variation on maintenance calculation), which is made under the powers conferred by paragraph 5(1) and (3) of Schedule 4B. It states:

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

16. Regulation 74, to which regulation 73(1) refers is not relevant in this case.

17. The "capped amount" is the amount of £3,000 referred to in paragraph 10(3) of Schedule 1 to the Act (see the definition in regulation 2 of the Regulations).