

R(CS) 6/08
(Secretary of State for Work and Pensions v Boyle and another
[2008] EWCA Civ 210)

CA (May, Dyson LJJ, Sir Peter Gibson)
31 January 2008

CCS/2621/2006

Maintenance assessment – effective date of formula assessment made after interim assessment

In September 1994 the mother applied for a child support maintenance assessment. In January 1995 the Child Support Agency on behalf of the Secretary of State sent the father a maintenance enquiry form, which he failed to return. The agency made an interim maintenance assessment, which was increased from 31 July 1995 by the imposition of a penalty for non-cooperation. In January 2000 a liability order was obtained against the father. The father returned the maintenance enquiry form to the agency in February 2000. In May 2005, the agency replaced the interim maintenance assessment with a full maintenance assessment at a lower rate with effect from 31 July 1995. The mother appealed and a tribunal allowed her appeal and ordered the Secretary of State to revert to the interim maintenance assessment for the period up to the receipt of the maintenance enquiry form, on the basis that regulation 8D(5) of the 1992 Regulations provided that an interim maintenance assessment could only be cancelled from the date the decision-maker received sufficient information to enable him to do so. The father appealed to the Commissioner, who upheld the decision of the tribunal. The Secretary of State appealed to the Court of Appeal.

Held, allowing the appeal, that:

1. on the correct construction of regulations 8D and 30A of the Child Support (Maintenance Assessment Procedure) Regulations 1992, taken with regulation 17(3), if the Secretary of State has sufficient information to make a full maintenance assessment covering the entire period of an interim maintenance assessment from the first effective date, the Secretary of State is obliged to revise the assessment and to convert the interim maintenance assessment to a full maintenance assessment for the entire period. However, if the Secretary of State does not have sufficient information for the entire period, the interim maintenance assessment remains in force for the period up to the date when the information is provided but can be superseded from that date (CCS/2398/2006 approved) (paragraphs 21 to 29);
2. the obligation to revise exists notwithstanding the existence or enforcement of a liability order in respect of the interim maintenance assessment (*Farley v Child Support Agency* [2006] UKHL 31, [2006] 1 WLR 1817 cited) (paragraphs 30 to 35);
3. the appeal tribunal had erred in law in making an adverse finding of credibility against the father and it was open to the Secretary of State to make the full assessment on the basis of the evidence he had provided, including that which was undocumented (paragraphs 36 to 45).

DECISION OF THE COURT OF APPEAL

Mr Clive Sheldon (instructed by the Office of the Solicitors to the Department for Work and Pensions) appeared on behalf of the appellant.

Miss Rachel Spicer appeared on behalf of the interested party.

Mr Rambert de Mello and Mr Adrian Berry (instructed by Messrs Forshaws) appeared on behalf of the respondent.

Judgment

LORD JUSTICE MAY:

1. It is notorious that legislation and in particular regulations made under or in relation to the Child Support Act 1991 sometimes give rise to difficult, even

sometimes impenetrable, questions of construction. The main issue in this appeal is whether the Secretary of State, acting through the Child Support Agency, was obliged or empowered to substitute in or after February 2000 for an interim maintenance assessment, operative from 1995, a different and lower maintenance assessment and to backdate the lower assessment upon receiving in 2000 information from the absent parent of his means and expenditure. This when the absent parent, on one view at least, had not co-operated fully so as to provide the information during the intervening five years or so, when he had failed to make payments under the interim maintenance assessment and when, in consequence, a liability order had been made against him, calculated with reference to the interim maintenance assessment.

2. The Secretary of State for Work and Pensions appeals, pursuant to section 25 of the Child Support Act 1991, from a decision of Commissioner Angus dated 4 January 2007. Leave to do so was granted by Commissioner Jacobs on 19 April 2007, Commissioner Angus having by then retired.

3. The decision of Commissioner Angus is said to raise an important point of law involving the construction of the Child Support (Maintenance Assessment Procedure) Regulations 1992 (SI 1992/1813), which I shall refer to as the 1992 Regulations.

4. In September 1994 Julie Boyle, the respondent, applied to the Child Support Agency acting on behalf of the Secretary of State for a maintenance payment to be made by her ex-partner, David Oldroyd, the absent parent and interested party in these proceedings in respect of their child, Luke, who was born on 6 December 1991. Julie Boyle was, within the terms of this legislation, the parent with care. A maintenance enquiry form was issued by the agency to Mr Oldroyd on 9 January 1995 and sent out to him for his completion. Mr Oldroyd did not complete the maintenance enquiry form at the time and as full information about his income was not provided the agency was not in a position to make a full maintenance assessment. Instead it made an interim maintenance assessment, initially in the amount of £66.87 per week. From 31 July 1995 the amount was increased to £101.25 per week by the imposition of a penalty for non-cooperation within Category A in paragraph 8(3A) of the 1992 Regulations. The interim maintenance assessment was made under Section 12(1) of the 1991 Act which provided that:

“Where it appears to a child support officer who is required to make a maintenance assessment that he does not have sufficient information to enable him to make an assessment in accordance with the provisions made by or under this Act, he may make an interim maintenance assessment.”

5. Five years or so later, in February 2000, the maintenance enquiry form was returned by Mr Oldroyd to the agency. This was perhaps, in part, prompted by the fact that on 19 January 2000 a liability order had been obtained from the magistrates court against him in the sum of £20,626.07 for the period from 31 July 1995 to 25 June 1999, that is to say almost a period of four years. It appears, I believe, that Mr Oldroyd had made no payment at all during that period. The Secretary of State did not, as might have been done, apply for a charging order or other means of enforcing the liability order.

6. Upon receipt of the maintenance enquiry form, in or about February 2000, the agency carried out a procedure, which took another long period, to replace the interim maintenance order with a full maintenance order. This had the effect of

reducing Mr Oldroyd's liabilities. The Child Support Agency explained this in a letter dated 25 May 2005 to the respondent's solicitors, saying that Mr Oldroyd had now co-operated and provided full details of his financial and personal circumstances to enable the agency to replace the interim assessment with a full maintenance assessment dating back to July 1995 and replacing the interim maintenance assessment. The letter gave various rates, all less than £101.25 per week, for the period between 9 January 1995 and 14 February 2000, the date on which the maintenance enquiry form was received. Assessments were also made in this letter for the period after February 2000.

7. On 19 September 2005 the agency obtained a fresh liability order. The Child Support Agency, however, said that, the conversion of the interim maintenance order to a full maintenance order backdated having been made, Mr Oldroyd had paid a sum of £8,687.07, which was taken towards his liability order. As a result of the conversion of the interim maintenance assessment to a full maintenance assessment the outstanding arrears were reduced to £5,055.75 and the liability order in this sum was therefore extinguished by payments which he had made.

8. Julie Boyle appealed against this decision made by the Child Support Agency. The appeal tribunal which dealt with her appeal allowed it and, among other things, ordered the Secretary of State to cancel the assessments and revert to the interim maintenance assessment for the period from 18 April 1995 until 6 December 1999, this assessment being, for the reasons I have indicated, considerably higher than that of the full maintenance assessment which the appeal tribunal set aside.

9. In its reasons the appeal tribunal stated that Mr Oldroyd had taken little or no active part in either the assessment or the appeal process apart from, in the appeal process, the provision of a statement which the tribunal found did not address the issues. We have been provided with that statement. It is evident from the statement that the tribunal was scarcely correct to say that Mr Oldroyd had not taken an active part in the assessment process. There is a strong case, on the basis of this statement, that from February 2000 at least he had been co-operative and he had been as co-operative as inactivity on the part of the Child Support Agency allowed. The appeal tribunal also made no reference to the fact that the statement says that from 1995 Julie Boyle had told Mr Oldroyd that he was nothing to do with Luke, that is to say that he was not his father, and that, upon activity by the Child Support Agency in 1998, Mr Oldroyd had had a DNA test whose result in December 1999 was that he is Luke's father. This ties in with his return of the maintenance enquiry form on 14 February 2000 and provides at least an explanation for his inactivity between 1995 and then. The appeal tribunal did not allude to or address this quite important point.

10. The appeal tribunal went on to say that:

“Regulation 8D(5) of the 1992 Regulations provides that an interim maintenance assessment Category B can only be cancelled from when the decision maker receives sufficient information to enable him to do so.

In this case the decision maker has not received confirmatory evidence of Mr Oldroyd's housing costs and has used what is termed best evidence, ie that which they have been told by the respondent.

The tribunal find as a fact that given the respondent's total failure to engage with the Agency for a protracted period to his advantage that evidence is unreliable and should have been rejected. The respondent seeks an assessment, he alone has the ability to supply primary evidence of his housing costs, and as a consequence he cannot complain, if by reason of his default his details are not available.

As the decision maker is not in possession of the respondent's housing costs he cannot make a correct assessment and that as a consequence the interim maintenance assessment must stand until 14.2.00 the date of receipt of MEF."

11. As to housing costs, we have been shown the written material about them to which this passage in the appeal tribunal's reasons refers. It is part of the Secretary of State's written submission to the appeal tribunal and concerns mortgage interest payments given as £115.38 per week for the period between 25 March 1996 and 15 December 1997. There was no written confirmation of this. This is now said to be because Mr Oldroyd was separated from his second partner during that period and she had such documents relating to these costs as there might be. The Secretary of State had accepted Mr Oldroyd's undocumented account as the best evidence available. The appeal tribunal rejected this, on credibility grounds and because it was not supported by documents, in terms which leave it mildly unclear whether they were finding positively that it was untrue or that there was insufficient material to establish Mr Oldroyd's housing costs. I incline to the first of these because of the statement of his failing to engage with the agency to his advantage so that his evidence was unreliable and should be rejected.

12. Mr Oldroyd appealed from this decision to the Commissioner. The Secretary of State was a respondent to the appeal and made representations. Julie Boyle was the second respondent and made representations through her solicitor. The Commissioner rejected the contention that the appeal tribunal erred in law in rejecting Mr Oldroyd's evidence of his housing costs. He said at paragraph 6 of the decision:

"The Secretary of State's representative is, of course, correct when he says that evidence should not be rejected simply because it is undocumented. But a tribunal is obliged to take a view as to the reliance which can be put on a party's undocumented evidence and in this case the tribunal was quite entitled to conclude that the absent parent had been recalcitrant and that his undocumented evidence, therefore, carried little or no weight. I think that the reference in the statement of the tribunal's reasons to the drawing of adverse inferences is no more than the use of over technical language to reiterate the point already made that the tribunal did not regard the absent parent as a reliable witness."

13. The Commissioner considered the parties' contentions relating to the application of regulations 8D and 30A of the 1992 Regulations, which I shall refer to in detail shortly. The Commissioner's conclusion in paragraphs 12 and 13 of his decision was as follows:

"... if a parent of a qualifying child fails to provide the information which enables the Secretary of State to make a maintenance assessment the Secretary of State can make an interim maintenance assessment and if at a later stage the parent concerned provides information which would enable the

Secretary of State to make an assessment for part of the period covered by the interim maintenance assessment the interim maintenance assessment ceases to have effect from the day on which the information is provided and the Secretary of State can make a new maintenance assessment which takes effect from the same date.

The tribunal was therefore correct to direct that the interim maintenance assessment should stand until the date on which the maintenance enquiry form was returned to the Agency by the absent parent.”

14. The Secretary of State appeals to this court on two grounds. Firstly, that the Commissioner misconstrued the 1992 Regulations taken as a whole; secondly that the Commissioner was wrong in law in upholding the appeal tribunal’s decision that there was insufficient evidence to make a full maintenance assessment from the first effective date applicable to Julie Boyle’s application for maintenance under Section 4 of the 1991 Act. There was, it is said, ample evidence.

15. The parties have helpfully reached agreement on the main question of construction, subject to what is referred to as a “caveat” advanced by Mr de Mello on behalf of Julie Boyle, with which Mr Sheldon on behalf of the Secretary of State and Miss Spicer for Mr Oldroyd do not agree. I deal with the main point of construction on which there is agreement first. I should say that I agree that the parties’ agreed construction is correct.

16. The relevant regulations are as follows. Regulation 8D of the 1992 Regulations provides that:

“(1) Subject to paragraph (2) where a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act is made following an interim maintenance assessment, the amount of child support maintenance payable in respect of the period after 18 April 1995, during which that interim maintenance assessment was in force should be that fixed by the maintenance assessment.

(1A) The reference in paragraph (1) to a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act shall include a maintenance assessment falling within regulation 30A(2).

(2) Paragraph (1) shall not apply where a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act falls within paragraph (7).

...

(5) Subject to paragraph (6) an interim maintenance assessment shall cease to have effect on the first day of the maintenance period during which the Secretary of State receives the information which enables the Secretary of State to make the maintenance assessment or assessments in relation to the same absent parent, person with care and qualifying child or qualifying children, calculated in accordance with Part 1 of Schedule 1 to the Act.

(6) Where the Secretary of State has insufficient information or evidence to enable him to make a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act for the whole of the period beginning with the effective date applicable to a particular case, an interim maintenance assessment made in that case shall cease to have effect –

(a) on 18 April 1995 where by that date the Secretary of State has received the information or evidence set out in paragraph (7); or

(b) on the first day of the maintenance period after 18 April 1995 in which the Secretary of State has received that information or evidence.

(7) The information or evidence referred to in paragraph (6) is information or evidence enabling the Secretary of State to make a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act, for a period beginning after the effective date applicable to that case, in respect of the absent parent, parent with care and qualifying child or qualifying children in respect of whom the interim maintenance assessment referred to in paragraph (6) was made.”

17. Regulation 30A of the 1992 Regulations provides as follows:

“(1) Subject to regulation 33(7), where a new maintenance assessment is made in accordance with Part 1 of Schedule 1 to the Act following an interim maintenance assessment which has ceased to have effect in the circumstances set out in regulation 8D(6), the effective date of that maintenance assessment shall be the date upon which that interim maintenance assessment ceased to have effect in accordance with that regulation.

(2) Where the Secretary of State receives the information or evidence to enable him to make a maintenance assessment calculated in accordance with the provisions of Part 1 of Schedule 1 to the Act, for the period from the date set by regulation 3(7) of the Maintenance Arrangements and Jurisdiction Regulations or regulation 30(2)(a) or (b), as the case may be, to the effective date of the maintenance assessment referred to in paragraph (1), the maintenance assessment first referred to in this paragraph shall, subject to regulation 33(7), have effect for that period.”

It is fair to say perhaps that the meaning and effect of all that does not leap off the page.

18. It is submitted on behalf of the Secretary of State that the Commissioner misdirected himself as to the application of the regulations read as a whole. It is submitted that the Commissioner correctly understood the effect of regulations 8D(6) and (7) and 30A(1) of the 1992 Regulations. Those provisions, it is said, deal with the situation where the Secretary of State does not have the evidence or information necessary to make a full maintenance assessment from the first effective date applicable to an application. However, the issue at the heart of the appeal to the Commissioner went beyond that; the issue was whether there was sufficient information or evidence to convert the interim maintenance assessment to a full maintenance assessment from the first effective date. The answer to that question is to be found elsewhere, it is suggested, within regulations 8D and 30A than those parts to which the Commissioner referred.

19. The effect of regulations 8D(1), (1A) and 30A(2) is, it is submitted, that where the Secretary of State has sufficient evidence to make a full maintenance assessment from the first effective date applicable in respect of an application and where he or she makes it then for any period after 18 April 1995 where the full maintenance assessment and the interim maintenance assessment overlap, it is the full maintenance assessment which determines the amount of liability for child

support maintenance for that period. The Secretary of State is under a duty to make a full maintenance assessment in those circumstances because the language of regulation 8D(1) is mandatory and the Commissioner (it is said) should have so held.

20. It is agreed that the effective date in this case is the date in July 1995 when the interim maintenance assessment was increased to £101.25.

21. To put it shortly the parties now agree that, where there is an interim maintenance assessment, if the Secretary of State has sufficient information to make a full maintenance assessment covering the entire period of the interim maintenance assessment from the first effective date, the Secretary of State is obliged to convert the interim maintenance assessment to a full maintenance assessment for the entire period, thereby backdating it. However, if the Secretary of State does not have sufficient information for the entire period but only, perhaps, for part of it the interim maintenance assessment remains in force for the period up to the date when the information is provided but can cease to have effect for the future from the date when sufficient information is provided.

22. I take for convenience from Miss Spicer's written submissions her explanation of this construction as follows, saying that I agree with the substance of it. It is as follows:

“Where a PWC makes an application for a maintenance assessment but the [Child Support Agency] do not have sufficient evidence to make that assessment (which may be for a number of reasons), Section 12(1) of the Child Support Act 1991 (the Act) permits the Secretary of State to make an interim maintenance assessment.

The regulations concerning the amount and duration of interim maintenance assessment are contained within the [1992 Regulations]...

...The procedure for converting an [interim maintenance assessment] into a [full maintenance assessment] is dealt with within Regulation 8D.

Regulation 8D(1) provides that where a [full maintenance assessment] is made following an [interim maintenance assessment], the amount payable in respect of the period after 18 April 1995 during which the interim maintenance assessment was in force shall be that fixed by the full maintenance assessment. That is, the full maintenance assessment ‘replaces’ the interim maintenance assessment for that period.

Paragraph 2 of regulation 8D however disapplies this requirement: ‘where a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act falls within paragraph (7)’.

Paragraph 7 somewhat perplexingly [in Miss Spicer's words] simply defines the information or evidence which is referred to in paragraph (6) [with reference to a period beginning after the effective date applicable to that case, and paragraph 6 provides, relevantly] ‘that where the Secretary of State has insufficient information or evidence to enable him to make a maintenance assessment ... for the whole of the period beginning with the effective date ... an interim maintenance assessment in that case shall cease to have effect – [either on 18 April 1995 in one instance or] on the first day of the maintenance period after 18 April 1995 in which the Secretary of State has received the information or evidence.’”

23. The exception to paragraph 1 provided for in paragraph 2 applies only where the Secretary of State has not been provided with sufficient evidence to enable him to recalculate the maintenance assessment for the whole period beginning with the effective date applicable to that case. The distinction is between the ability of the Secretary of State to revise an assessment or to recalculate it and backdate it and to supersede a decision involving recalculation without backdating. Miss Spicer refers us to regulation 17(3) of the 1992 Regulations which is in these terms:

“Subject to regulation 20(6) a decision of the Secretary of State under section 12 of the Act may be revised where –

(a) the Secretary of State receives information which enables him to make a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act for the whole of the period beginning with the effective date applicable to a particular case;”

24. The provision is subject to, and in contrast with, the Secretary of State’s power to recalculate an assessment without backdating it where information has not been provided for the whole of the period. Regulation 20(6) provides:

“An interim maintenance assessment may be superseded by a decision made by the Secretary of State where he receives information which enables him to make a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act for a period beginning after the effective date of that interim maintenance assessment.”

25. Accordingly, where there is such a lack of information as only to allow a supersession to be made, then regulations 8D(6) and 30A(1) provide when the interim maintenance assessment should cease to have effect and how the effective date of the new assessment should be set.

26. It remains a mystery to me why the Secretary of State has to backdate in full if full information is provided for the whole period but cannot backdate at all if, for instance, proper information is provided for most of the period but not quite all of it. But that, I fear, is a matter of having to live with sometimes impenetrable regulations.

27. The agreed construction of regulation 8D of the 1992 Regulations in particular accords with the exposition of it in paragraphs 13 to 15 of the decision reached on 20 July 2007 after that of Commissioner Angus in the present case, the decision of Commissioner Mesher in CCS/2398/2006, which is in the following terms:

“13. A Category A IMA may also come to an end under regulation 8D(5) of the MAP regulations:

‘(5) Subject to paragraph (6), an interim maintenance assessment shall cease to have effect on the first day of the maintenance period during which the Secretary of State receives the information which enables him to make the maintenance assessment or assessments in relation to the same absent parent, parent with care, and qualifying child or qualifying children calculated in accordance with Part 1 of Schedule 1 to the Act.’

Paragraph 6 applies where the Secretary of State does not receive enough information to enable him to make an assessment under Part 1 of Schedule 1

(ie a formula assessment) In addition, regulation 17(3)(a) provides, subject to regulation 20(6), for revision of the decision imposing an IMA where:

‘(a) the Secretary of State receives information which enables him to make a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act for the whole of the period beginning with the effective date applicable to a particular case;’

Regulation 20(6) provides for supersession of a decision imposing an IMA when the information received does not enable a formula assessment to be made for the whole of the period. The difference appears to be that the effective date of the supersession will be the date of the receipt of the information, but the effective date of the revision will be that of the original decision.

14. It is not easy to work out the interaction of all those provisions and I shall have to come back to some of them. For present purposes, it is enough to say that when the Child Support Agency receives enough information to make a formula assessment when a Category A IMA is in force (as appears to have happened here by 27 June 2005) the IMA ceases to have effect (regulation 8D(5)) and, also, if that information covers the whole period of the IMA, can be revised from the effective date of the IMA (regulation 17(3)(a)). It remains somewhat unclear what ceasing to have effect means, whether a decision must be made to give effect to regulation 8D(5) and whether a revision should always be carried out under regulation 17(3)(a) whenever regulation 8D(5) applies. Perhaps a reason why those questions have not been resolved, and need not be in the present case, lies in the further provisions discussed in the following paragraph.

15. Regulation 8D(1) of the MAP regulations provides:

‘(1) Subject to paragraph (2), where a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act is made following an interim maintenance assessment, the amount of child support maintenance payable in respect of the period after 18 April 1995, during which the interim maintenance assessment was in force, shall be that fixed by the maintenance assessment.’

The effect of paragraph (2), which refers on to paragraph (7), is to limit the effect of regulation 8D(1) to cases where the formula assessment goes back at least to the effective date of the IMA. Thus, in the present case, if the effective date of the first maintenance assessment made on 27 June 2005 was properly 29 January 1999, or any other date down to 7 May 1999, the amount payable by the absent parent for the whole period covered by the Category A IMA became the amount fixed in the formula assessment rather than the amount fixed in the IMA. That was why the letter of 7 July 2005 said that the arrears owed by the absent parent had reduced by £35,559.14. And it appears that regulation 8D(1) operates independently of whether any separate decision has been made specifically revising the decision making the IMA.”

28. It is clear that the facts of that case were quite close to the facts of the present case and, in my judgment, Commission Mesher substantially and correctly construed the regulations.

29. I should finally say that although the operative paragraphs 10 and 12 of Commissioner Angus's decision in the present case are correct so far as they go and upon the findings of fact of the appeal tribunal which the Commissioner upheld, the Commissioner makes no reference to regulation 8D(1) or 30A(2); further, in paragraph 9 of his decision he appears to accept, although this was not necessary to his decision, the submission on behalf of Julie Boyle, recorded in paragraph 8 of the decision, that an interim maintenance assessment remained effective until the Secretary of State was provided with proper information. If this is to be read as saying that the provision of proper information cannot ever result in a maintenance assessment backdated to the first effective date, it would, in my judgment, be wrong for reasons which are accepted by the parties in this case.

30. Mr de Mello's caveat seeks to persuade us that regulation 8D(1) should, by some process, be construed as inapplicable after a liability order has been made, as was made in the present case. He submits that regulation 8D(1) can be read as not applying if there is a liability order made in respect of that period when an interim maintenance assessment is in force. He says that this can be achieved as a matter of construction. He derives that construction from reference to the structure of the 1991 Act and for that purpose he referred us to section 2 of the Act which refers to the welfare of the child, section 4 which include references to enforcement, Section 33 which relates to liability orders, section 36 which relates to enforcement in county courts and he refers us to the decision of the House of Lords in *Farley v Child Support Agency* [2006] UKHL 31, [2006] 1 WLR 1817 for the limits of the powers of magistrates courts when there are liability orders to be made and enforced.

31. He submits that where a calculation is made as to liability the Secretary of State then proceeds to collect the amount so calculated. If there is a liability order made, that order remains extant until the amount specified in it is paid by the person against whom it is made. The effect of recalculation in those circumstances under regulation 8D(1) and 30A(2) such as is agreed would happen in other circumstances would be that it would be an attempt to set aside the liability order by an improper process. There would still, he submits, be liability under the liability order and regulation 8D(1) cannot be used to set it aside. He asks us to consider the impact on the parent with care and submits that it would be wrong if regulation 8D put the enforcement process to a standstill. In these circumstances it could he says lead to absurd results and it would be unfair to the parent with care who is the recipient of the proceeds of the interim maintenance assessment.

32. In my view, as a process of construction Mr de Mello's submission does not start. Regulation 8D(1) has no words or provision which can properly be construed as meaning that the paragraph is not to apply if there has been a liability order nor can this be achieved by a process of implication. It would be pure composition and, in my view, it is impermissible.

33. Commissioner Angus in effect dealt with this in paragraph 9 of his decision in the present case, as follows:

“Because of the effect of the Maintenance Assessment Procedure Regulations the matter of the liability order is for the appeal tribunal and for me somewhat academic. The calculation of the liability for child maintenance is entirely a matter for the Secretary of State and for those to whom an appeal can be made under the 1991 Act. The court to which an application for a liability order is made has no jurisdiction to consider the correctness of the

maintenance assessment under which the liability has arisen [and reference is made to *Farley*]. As the order is in favour of the Secretary of State it is for him to enforce it and as questions relating to the collection of child support maintenance are not within the jurisdiction of the tribunals or the Commissioners neither are questions relating to the enforcement of a liability order.”

34. We were also referred to paragraph 32 of the opinion of Lord Nicholls of Birkenhead in the *Farley* case. Lord Nicholls said this:

“I add a brief postscript. The House was told that sometimes applications for liability orders are made and granted, and liability orders are enforced, even though at the time appeals against the validity of the relevant maintenance calculations are pending. Clearly there are circumstances where this may be justified; for instance where it is necessary to take steps to prevent assets from being put beyond reach. Equally clearly there may be circumstances where it will be oppressive to follow this course. I wish to note only that when faced with an application for a liability order where an appeal is pending against the validity of the underlying maintenance calculation the justices should consider whether it would be oppressive to make a liability order.”

35. This passage contemplates the making and perhaps enforcement of a liability order when an appeal is pending. It presupposes that if the appeal succeeds it may be necessary for the Secretary of State to unpick the enforcement and some or all of the consequences of the liability order. I agree that the technical means of achieving this may be tricky but if necessary it would have to be achieved by some means. I agree also that the parent with care may encounter difficulty if she has received and perhaps spent payments at a rate which is subsequently reduced and backdated. We were told that the interim maintenance assessment forms expressly warn of this possibility. Valiantly though he tried, I am afraid that Mr de Mello’s submission did not, in my view, come near to persuading me to adopt the compositional construction which he proposes and I would for these reasons reject the caveat.

36. The ground of appeal relating to the appeal tribunal’s evidence findings I deal with next. The regulations speak of:

“information which enables the Secretary of State to make the maintenance assessment”

That is regulation 8D(5)

“Insufficient information or evidence to enable the child support officer to make a maintenance assessment calculated in accordance with Part 1 of Schedule 1 to the Act”

That is regulation 8D(6) and (7) and regulation 30A(2).

37. As appears from the part of the appeal tribunal’s decision which I have quoted the tribunal rejected the information supplied by Mr Oldroyd (a) because the information of his housing costs for part of the period was not confirmed by other evidence and (b) because of his total failure to engage with the agency for a protracted period **to his advantage** so that the evidence was unreliable and should be rejected. The tribunal drew adverse inferences from Mr Oldroyd’s conduct and, as a

consequence, did not accept the relevant housing costs without independent evidence.

38. It is submitted by the Secretary of State that the Commissioner erred in law in accepting the appeal tribunal's decision that Mr Oldroyd had not provided sufficient evidence to allow a full maintenance assessment to be made from the first applicable effective date. There is, it is submitted, no rule of law that corroboration of the claimant's own evidence is necessary. An appeal tribunal needs to take account of the practical difficulties that a parent might encounter in providing documentary evidence to corroborate its statements. Further the Child Support Commissioners encourage, it is said, tribunals to take a robust approach to deciding issues like the amount of earnings to be taken into account in a full maintenance assessment. Appeal tribunals should not, it is said, ignore the evidence of an unco-operative parent, that is one who was not engaged with the process, where that evidence is of some probative value, allowing them to make an informed estimate of matters such as housing costs. The Commissioners, it is said, should either have accepted Mr Oldroyd's evidence as the best that was likely to become available or he should have made further investigations as to the possibility of obtaining better evidence of these housing costs. Or alternatively the Commissioner could have remitted the matter to be addressed by the tribunal.

39. Mr de Mello submits on behalf of Julie Boyle that this ground of appeal is an attempt no more than to reopen facts under the guise of a point of law and should be dismissed summarily in the light of the unassailable finding of the appeal tribunal and the Commissioner.

40. I am persuaded that the appeal tribunal did make clear errors of law as follows. First, Mr Oldroyd's failure to engage with the agency for a protracted period could not properly, on analysis, be said to have been to his advantage. On the contrary it was palpably to his disadvantage because the interim maintenance assessment was at a punitive rate of one-and-a-half times the standard rate and he was clocking up arrears at that rate to the point where he had a liability order in excess of £20,000. Mr de Mello suggested a possibility that in some cases, perhaps not this, the correct assessment under the regulations might be in excess of 1.5 times that which was calculated for the purpose of an interim maintenance assessment, but that seemed to me to be far-fetched and not sustainable on the present case. In my view this was a material point because it reduces, perhaps extinguishes, the suggestion that Mr Oldroyd was intentionally manipulating the system to his advantage by not co-operating and this was the main basis for the adverse judgment on credibility.

41. Second, it was not, I think, correct in the light of the detailed statement, which was before the appeal tribunal and which we have seen, that Mr Oldroyd had taken no active part in the assessment or the appeal process. He had not been very active between 1995 and February 2000 but neither apparently had the Child Support Agency until 1998. More importantly he had been active and fully co-operative from February 2000 and details of this were before the appeal tribunal in the form of his statement.

42. Third, Mr Oldroyd had a better than passable part-explanation for his inactivity from 1995 to the end of 1999. He had been told, so he said, that he was not Luke's father and did not know that he was Luke's father until the results of the DNA testing which he received in December 1999. This is not alluded to at all in the

appeal tribunal's decision and at least needed to be dealt with if an adverse finding was to be made based on his inactivity and non-co-operation during that period which, on any view, was the main period to which that might relate.

43. For these reasons, in my judgment, the adverse finding of credibility which resulted in the appeal tribunal rejecting the information about housing costs between March 1996 and December 1997 is unsustainable because it resulted from material errors of law in the assessment of the evidence. The technical result of that is that this court should set that finding aside. The question then is whether the matter should be remitted for reconsideration or whether this court should, as it is agreed we are entitled, form its own view on the material available. In my judgment this court should, in this case, form its own view. I reach this conclusion because first, the material available to us is in my view sufficient and second, because a further expensive protraction of these proceedings is, broadly, in no-one's interest.

44. Adopting this approach I consider that it was properly open to the Secretary of State in May 2005 to accept this undocumented part of Mr Oldroyd's material. A proper assessment of his credibility, not all of which was favourable to him, nevertheless should not lead to a rejection of this part of a wider body of material, the rest of which was acceptable, where Mr Oldroyd had for five years done his best to co-operate and provide what information he could. He had a reasonable explanation for not having supporting material for these housing costs and the amount was not intrinsically or obviously wrong.

45. In my judgment the Secretary of State, therefore, was entitled to make the findings of fact which were made and was entitled upon those findings to backdate the full maintenance assessment made in May 2005 to July 1995.

46. For these reasons I would allow this appeal.

LORD JUSTICE DYSON:

47. I agree.

SIR PETER GIBSON:

48. I also agree.

Order: Appeal allowed.

