

R(CS) 8/08

**Mr J Mesher
Commissioner
28 February 2008**

CCS/2696/2007

Application for maintenance – series of retrospective assessments – whether new application needed following period(s) where child had temporarily ceased to live with person with care

The mother applied for child support maintenance in 2000. The father alleged that he had not received any maintenance enquiry forms and the application was still pending in 2002 when the Child Support Agency (CSA) were informed that the qualifying child had gone to live with her father. The CSA then closed the case. The child subsequently moved back to live with her mother, the actual period of absence being disputed, but in 2004 returned to live permanently with her father. In 2006 the CSA made maintenance assessments for periods between 2000 and 2004. The father appealed against those assessments and the appeal tribunal allowed his appeal on the basis that the Secretary of State had no power to make retrospective assessments, since there had been no assessment on the application made in 2000, and there was no evidence that the father had been notified of that application. The mother appealed to the Commissioner. Paragraph 16(4) Schedule 1 to the Child Support Act 1991 gives the Secretary of State the power to cancel an assessment that has been made if the person with care in relation to that assessment ceases to be a person with care. The main issue before the Commissioner was whether that provision meant that the mother had to make a new claim when the child returned to live with her.

Held, allowing the appeal, that:

1. the Secretary of State remained under a duty to make a decision on the outstanding application with effect from the date the maintenance enquiry form had been sent to (as distinct from received by) the father (R(CS) 1/99 followed as to the correct test for the start date of a maintenance assessment), and the tribunal's finding that there was no evidence that the father had been notified of the application was inadequate in view of the evidence that the maintenance enquiry form had been sent to the father (paragraphs 13 to 15);
2. paragraph 16(4) applies only after a maintenance assessment has been made, but where the Secretary of State is considering the assessment to be made over a past period during which the other parent has not made any maintenance application, there is no question of cancelling any assessment. The question then is what assessments should be made in favour of the person who has made the application, using the power in paragraph 15 of Schedule 1 as necessary to make separate maintenance assessments in respect of different periods, including periods where there is no liability (paragraphs 22 and 23);

The Commissioner remitted the case to be heard by a differently constituted appeal tribunal with guidance (in paragraphs 24 to 26) as to the general principles to be applied in considering the changes in the provision of day to day care during the period in question.

DECISION OF THE CHILD SUPPORT COMMISSIONER

1. The parent with care's appeal to the Commissioner is allowed. The decision of the Newcastle appeal tribunal dated 25 April 2007 is wrong in law, for the reasons given below, and I set it aside. The case is referred to a differently constituted appeal tribunal for determination in accordance with the directions given in paragraphs 27 to 29 below and with any further directions given by a district chairman of appeal

tribunals (Child Support Act 1991, section 24(3)(c)). The Secretary of State must note the action required in paragraph 21.

2. This is a case where the administrative failures of the Child Support Agency (CSA) over an exceptionally long time, recognised in part by the upholding by the Parliamentary Ombudsman of a complaint of maladministration by the parent with care, were compounded by a confusing and inadequate written submission to the appeal tribunal. I am afraid that the appeal tribunal then took a fundamentally flawed legal approach. It is not surprising that both parents feel themselves to have been let down by the system.

3. In the language of the child support legislation as it applies to the present case, the appellant to the Commissioner is the parent with care of the qualifying child (Lesley Anne) and the second respondent is the absent parent. From now on I shall refer to them as the mother and the father respectively.

4. There was an oral hearing of the mother's appeal to the Commissioner, at the father's request, at Doncaster County Court on 11 February 2008. He attended with his partner. The mother attended with her partner. The Secretary of State was represented by Mr Huw James, solicitor, instructed by the Solicitor to the Department for Work and Pensions. I am grateful to the parties for their assistance.

The case as presented to the appeal tribunal of 25 April 2007

5. The appeal tribunal was told in the Secretary of State's written submission that the father's appeal was against the decision dated 14 August 2006, which made maintenance assessments of various amounts starting with one of £30.08 per week from 16 June 2000 and ending with one of £37.34 per week from 12 April 2004. There were copies of the decision-maker's notes about the calculations through that period, including a period during which Lesley Anne went to live with the father, to which I shall have to return below. It was stated that from 6 September 2004 the case had been "cancelled" because there was no longer a qualifying child, which has later emerged as Lesley Anne moving on a permanent basis to live with the father. However, there was no explanation of how a decision came to be made in August 2006 about liability to pay child support maintenance for periods so far in the past. There was a mysterious entry in the statement of the sequence of events to a decision dated 9 December 1997 that the father was liable to pay child support maintenance from the effective date of 1 October 1997. It is now known that the liability under that application was cancelled in November 1999 apparently on the mother's request following an agreement by the father to pay her a stated weekly amount direct. But there was no explanation of how another maintenance assessment came to be made on 10 April 2006 (the decision on which date was revised on 14 August 2006). It was simply asserted that the first effective date was 16 June 2000.

6. That failure of explanation is absolutely extraordinary in the light of the Parliamentary Ombudsman's investigation and ruling that is now known to have been given on 14 November 2006 and the terms of the father's appeal lodged on 27 November 2006. Among the Ombudsman's findings was that the CSA had closed the mother's case in October 2002 without taking any action to make an assessment. The Secretary of State's written submission seems almost wilfully to have failed to understand what the father was challenging in his appeal or to get to grips with most of the issues raised. The father's main challenges were that he had never received

notice of the mother's application for child support maintenance in 2000 and that the case should have been closed when Lesley Anne came to live with him in 2001/2002, so that the mother needed to make a fresh application on Lesley Anne's return to her. It was not until the case got before an appeal tribunal on 14 March 2007 after the mother had sent in a copy (with some omitted paragraphs) of the Ombudsman's report and further information had been given that directions were given for the CSA to provide a copy of the mother's maintenance application form (MAF) of 4 May 2000 and confirmation, with documentary evidence in support, that a maintenance enquiry form (MEF) was sent out to the father and, if so, to what address.

7. A copy of the MAF received on 8 May 2000 was provided, together with copies of two pages of the record of decisions and actions on a form CSA 550. Those showed a note of tracing the father's details and address on the system, with the same address as that given by the mother. Then there was a note "MEF issued" dated 14 June 2000 and another note "MEF checked /DCI accessed to confirm details. MEF issued" dated 16 June 2000. After a note of a telephone call from the mother to check progress in July 2000, the next record (undated) was to the effect that the case did not appear to have been touched for over two years. A copy of personal details of the father gave his full address as had been stated on the MAF. A form headed "authority to process IMA" recorded issue of a reminder letter CSA 39 and a CSA 720 to the father on 25 June 2000, following an unsuccessful attempt to contact him by telephone. The form gave the date of issue of a MEF as 16 June 2000. Two screen prints from computer records of the father's address gave his address as above, but without the house number (apparently entered on 8 November 1999) and in full (apparently entered on 30 April 2001). Some action was apparently taken on those dates, but I cannot tell from the print-outs what that might have been.

8. The father sent in to the appeal tribunal copies of two pages of records of contact with him that he had obtained from the CSA. Those showed, on page 176 of 182, a letter to him dated 14 December 1999 and a letter to his employer (stopping a deduction from earnings order) dated 27 October 1999. Page 175 of 182 showed contact from him (it appears) by telephone on 29 January 2005 and by letter on 19 January 2005. In his covering letter he said that that showed that contact had not been made with him on the dates on which the MEF and the reminders were alleged to have been sent. The father later sent copies of pages from his personal notepad details, which apparently (there is some blanking-out and all dates are written in pen) had no entries between 14 December 1999 and 17 June 2002 except for references to filing going to storage.

The appeal tribunal's decision

9. The father attended the hearing on 25 April 2007. The mother did not attend. The presenting officer from the CSA said that when the case was closed in error in 2002 neither parent was notified and submitted that the first effective date of the assessment made in 2006 was linked to the sending of a MEF to the father on 16 June 2000, to which there had been no response. The father is recorded as saying that the data print showed that he was not issued with a MEF. He said that he did not find out about the matter until Lesley Anne came to live with him permanently in September 2004 and he made an application for child support.

10. The appeal tribunal allowed the father's appeal. It decided that the Secretary of State had had no jurisdiction to make an assessment and that the father had no

liability to pay child support maintenance for the period from 16 June 2000 to 6 September 2004. The statement of reasons, after setting out the main elements of the cases made for the CSA and the father, continued:

“5. Tribunal found that there is no statutory authority which gives power to the Secretary of State to make retrospective assessments of Child Support liability if there was no assessment liability in the first place. The Secretary of State provided no evidence that a decision had ever been made on the application made by the [mother] in 2000 when it was common ground that the case was in fact closed.

6. The Secretary of State produced no reference to any legislation that authorised the Secretary of State to issue a retrospective maintenance assessment when there was no decision in the first place. There was no evidence that the [father] had ever been notified of a child support maintenance claim or any assessment and no evidence that the [father] had paid any maintenance under the Child Support legislation.”

The appeal to the Commissioner

11. The mother now appeals against the appeal tribunal’s decision with my leave. When granting leave to appeal, I said this:

“It is arguable that the appeal tribunal failed to give an adequate explanation of why there was not jurisdiction to make maintenance assessments on the parent with care’s application received on 8 May 2000, with effective dates starting on 16 June 2000, on the basis that no decision had ever been given on that application and that there was therefore nothing to prevent a decision being made on 14 August 2006. The notion of a case being closed is an administrative one that does not seem to have an immediate connection to the legal powers of the Child Support Agency or the Secretary of State. There was some evidence that a maintenance enquiry form (MEF) was sent to the absent parent’s last notified address on 16 June 2000 and in accordance with regulation 30(2)(a) of the Child Support (Maintenance Assessment Procedure) Regulations 1992 the effective date of a new maintenance assessment depends on the date when a MEF is sent to an absent parent, regardless of when it is received or whether it is received at all. Yet the appeal tribunal did not examine the evidence of the sending of a MEF or say what effect in law it would have if it were concluded that one had been sent on 16 June 2000 (as had apparently been accepted by the Parliamentary Ombudsman).”

12. In a thorough and detailed submission dated 2 October 2007 Mr Ellis on behalf of the Secretary of State supported the mother’s appeal and submitted that I should substitute a decision confirming the decision of 10 April 2006 as revised on 14 August 2006. It was no doubt that suggestion that prompted the father to request an oral hearing. I need not go through all the points made in writing by the father and the mother on the appeal, many of which were on matters not within the scope of the present appeal. I shall refer to those points and the submissions at the oral hearing as necessary in explaining my decision.

The appeal tribunal’s errors of law

13. I have no doubt that the appeal tribunal went wrong in law in taking the view that there was no statutory power to make retrospective assessments. On the

contrary, as Mr James pointed out, initial assessments under the pre-2003 scheme will nearly always have to be retrospective, because time has to be taken to give the absent parent the opportunity to complete a MEF and often to gather further information. Then, in accordance with regulation 30(2)(a) of the Child Support (Maintenance Assessment Procedure) Regulations 1992 (the MAP Regulations) (SI 1992/1813) the effective date of the first maintenance assessment is the date of the sending of the MEF, or eight weeks later if it is returned properly completed within four weeks. Then the closure of the case in 2002, to which the appeal tribunal apparently gave some significance, cannot be allowed to undermine the duty on the Secretary of State under section 11(1) of the Child Support Act 1991 to deal with any application for a maintenance assessment in accordance with the provisions of the Act and regulations. The mother had never withdrawn her application of 15 May 2000. The legislation contained no powers simply to “close” her case as an administrative matter. For the application to be dealt with in accordance with the legislation, a decision had to be given either to make an assessment (for specified periods) or not to do so, which decision then had to be notified and would carry appeal rights. The absence of any decision having been made before the purported “closure” did not in law deprive the Secretary of State of the power, indeed the duty, to make an assessment effective from 16 June 2000 in April 2006.

14. The strongest argument made by the father on this point was as follows. The appeal tribunal made its decision on the basis that a MEF had not been sent to him following receipt of the mother’s MAF. Therefore, the Secretary of State had had no power to make any maintenance assessment for any day between 16 June 2000 and 5 September 2004, after which date he ceased to be an absent parent in relation to Lesley Anne. In support of that argument he could point to paragraph 6 of the appeal tribunal’s statement of reasons, accepting the father’s argument that he had never been notified of a child support assessment claim.

15. However, there are at least two errors of law involved with that finding. The first is that the test under regulation 30(2)(a) of the MAP Regulations is the date on which a MEF is sent, in the sense of being dispatched (see Commissioner’s decision R(CS) 1/99). It does not matter on which date the MEF was received or even that it was not received at all. In using the word “notified” the appeal tribunal left it unclear whether it was applying the wrong test of receipt of the MEF (on which it might have accepted the father’s evidence) or the right test. The second, and more important, error is that the appeal tribunal rested its finding on there being no evidence of notification. As I have set out in paragraph 7 above, there was in fact a good deal of evidence of the sending of a MEF to the father at his then address, and the Ombudsman had accepted in her investigation that a MEF had been sent on 16 June 2000. The father has sought to cast doubt on that evidence by pointing to a MEF having been recorded as sent on two different dates, to the absence of his house number from one record of his address and to the absence of mention of contact with him in June 2000 from other records. But, be all that as it may, it was simply not good enough for the appeal tribunal just to say that there was no evidence of the father having been notified. For its finding to have been adequately explained it needed to consider the evidence noted above and the contrary arguments of the father in the body of its statement of reasons and give some explanation of why it came down one way or the other. The explanation it did give could only have got close to adequacy if the appeal tribunal had been applying the legally wrong rule.

The need for a rehearing by a new appeal tribunal

16. For those reasons alone the appeal tribunal's decision has to be set aside. If the question of whether the MEF had been sent on 16 June 2000 had been the only issue in dispute I would probably have substituted a decision on the appeal against the decision of 10 April 2006 as revised on 14 August 2006, in accordance with the suggestion in the Secretary of State's submission of 2 October 2007. However, it was obvious at the oral hearing that a dispute of fact remained in being about the length of the period for which Lesley Anne went to live with the father in 2001/2002. Both parents said that they could produce further documentary and oral evidence in support of their positions, including possibly the attendance of Lesley Anne at a new hearing to give direct evidence and her obtaining copies of records from the school that she was attending at the time. In the light of that dispute, the case should be referred to a new appeal tribunal for rehearing, at which all the available evidence can be considered.

17. Before making that reference I need to make some brief comments about the current state of the documentary evidence and also to give some guidance about the effect in law of Lesley Anne's change of residence.

18. Mr Ellis's submission of 2 October 2007 on behalf of the Secretary of State helpfully summarised the evidence in the papers by that date in paragraphs 26 to 29, although with one significant mistake. He first pointed to the evidence of the payment to the father of working families' tax credit (WFTC) for the period from 14 January 2002 to 6 July 2002 (see the notes of the CSA officer on 15 July 2006 on page 19) and of child benefit for the period from 7 January 2002 to 4 February 2002 (see those notes and the letter dated 27 April 2006 from Her Majesty's Revenue & Customs (HMRC) to the mother (page 165) confirming the precise dates of the gap in the mother's entitlement as from 8 January 2002 to 3 February 2002 inclusive). However, in relation to WFTC, account must be taken of the fact that at the time awards were made for fixed periods of six months and were not altered by changes of circumstances within that period. In relation to child benefit, account must be taken of the rules about how long entitlement can continue after a child has ceased to live with a claimant, depending on whether and when a competing claim is made. There was also a note by the CSA officer (page 25) that the father's jobseeker's allowance (JSA) records noted the receipt of WFTC and child benefit, but that Lesley Anne had left his household on 1 February 2002. It is not clear whether that information came from a telephone enquiry or inspection of a copy of the JSA records, or if those records are still available.

19. Mr Ellis then pointed to three statements by the father: (a) as recorded by the CSA officer on 15 July 2006 that Lesley Anne lived with him from December 2001 to April 2002 (page 12); (b) in his letter of appeal, that Lesley Anne came to live with him on a permanent basis (page 28); and (c) in oral evidence to the appeal tribunal, as noted in the record of proceedings (page 55), that Lesley Anne went to live with him for about four months in 2002/03 and he had child benefit for about two of those months. The significant mistake is that Mr Ellis referred under (c) to weeks when the record of proceedings clearly said months. Mr Ellis should also have referred to the CSA officer's notes on page 25, setting out what the father had stated on a form CSA191 received on 26 June 2006, which was not in the papers before the appeal tribunal. The notes were that the father had stated that Lesley Anne went to

stay with the mother from February 2002 to 2005 and he had shared care for two to six days a week. It is not clear where the information in (a) came from.

20. Mr Ellis thirdly pointed to evidence from the mother in the form of her letter dated 20 February 2007, in which she said that Lesley Anne had gone to live with the father on a temporary basis, not full-time, and returned home on 3 February 2002. She also said in that letter that at that time she had telephoned the CSA to let them know the situation and had been told that because the stay was less than 56 days they would just pro rata the days in computing shared care. She had been told that her paper file was being transferred to a computer system and that she would be contacted when that was done.

21. As noted above, each parent has said that further evidence could be made available for a new appeal tribunal. That would all be helpful. Since the period in question is now several years in the past and we all know how unreliable our memories can be, I stress that copies of records or documents from that period or close to it would probably be particularly helpful. An explanation of the general circumstances and reasons for Lesley Anne's changes of residence would be of assistance to the new appeal tribunal, together with the background of whether any court residence order was in force at the time and whether or not it was formally varied. The Secretary of State must provide a fresh written submission to the new appeal tribunal with copies of all the records mentioned in paragraphs 18 and 19 above that are still in the CSA files, as well as the results of a search for any record of the telephone call or other contact from the mother mentioned in paragraph 20 above. If necessary because records are no longer in the CSA file, enquiries should be made to the JSA authorities and to HMRC (for WFTC and child benefit) to see if any records are available of information received from either parent around December 2001 to April 2002 about where Lesley Anne was living and the dates involved.

22. So far as the law is concerned, I have concluded that Mr Ellis was right in his submission of 2 October 2007 to rely on paragraph 15 of Schedule 1 to the Child Support Act 1991, but not to rely on paragraph 16(4). Paragraph 15 authorises the making of separate maintenance assessments in respect of different periods where the circumstances would produce liability of different amounts for those periods. Paragraph 16(4) provides that the Secretary of State "may" cancel a child maintenance assessment when satisfied that the person with care "with respect to whom a maintenance assessment was made" has ceased to be a person with care in relation to the qualifying child. The father has also in effect relied on paragraph 16(4) in his contention that the mother's case should have been closed after Lesley Anne went to live with him, with the result that a maintenance assessment could be made against him for subsequent dates only if the mother had made a new maintenance application. There was some discussion at the oral hearing of the effect of the word "may" in paragraph 16(4) and how far it gave the Secretary of State a discretion. However, I have concluded that paragraph 16(4) is not applicable in the present case for a more fundamental reason.

23. The reason is that paragraph 16(4), by its own terms, applies only after a maintenance assessment has been made, ie has been put into operation. In circumstances like those of the present case, where the Secretary of State is considering the assessment to be made over a past period on a maintenance application, during which the other parent has not made any maintenance

application, there is no question of cancelling any assessment. The question is what assessments should be made in favour of the person who has made the application, using the power in paragraph 15 of Schedule 1 as necessary. That power may, if appropriate in the circumstances, be used to identify periods in which there is no liability on the part of the other parent. The fact that there is some period of no liability, even as a result of the parent who made the application being the absent parent for that period, does not prevent assessments being made in favour of that parent for subsequent periods in which he or she was not an absent parent.

24. I began an attempt to set out the possible effects in law of a qualifying child moving from one parent to another, in a situation where the previous maintenance assessment was made on the basis that both were parents with care (through providing day to day care to some extent), but one parent was treated as the absent parent by virtue of regulation 20 of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (the MASC Regulations) (SI 1992/1815). Regulation 20 lays down the rule that if one person provides day to day care to a greater extent than the other, the other person is to be treated as the absent parent. If the extent of provision is equally divided, the person not in receipt of child benefit is to be treated as the absent parent. However, I have concluded that it would be wrong and unhelpful for me to speculate on the large variety of possible factual situations in advance of the new appeal tribunal making specific findings of fact in the present case. Therefore, I merely suggest some general principles and indicate that I do not accept the approach in paragraphs 36 to 39 of Mr Ellis's submission of 2 October 2007.

25. In accordance with paragraph 23 above, the new appeal tribunal, like the decision-maker on 10 April 2006, must look back at the circumstances in 2001 and 2002 as it determines them to have been. It is possible that the change in Lesley Anne's residence arrangements had the result that the mother ceased to be a parent with care at all. That would mean that for the period that that was so, no maintenance assessment could be made against the father, but it does not prevent the making of an assessment against him from the date on which the mother resumed her status as a parent with care.

26. Another possibility is that, looking back, the change was merely temporary, so that the mother remained a parent with care throughout. Then there would be a question of whether during the affected weeks the balance of the provision of day to day care had shifted so that, under regulation 20 of the MASC Regulations, the mother would (if those weeks were considered in isolation) be treated as the absent parent. The question then would be whether, using the power in paragraph 15, no assessment should be made against the father for those weeks or whether the additional nights of day to day care should be put into the averaging process over a longer period (as the extent of day to day care is intended to be assessed over a reasonable period, taking account of minor or temporary fluctuations). The answer will depend on the new appeal tribunal's findings of fact and its own evaluation of the circumstances. But what I conclude is not a proper approach is that taken by the decision-maker carrying out the revision on 14 August 2006, as explained in the officer's notes on page 20, and endorsed by Mr Ellis in his submission. That approach was to put the extra nights of care by the father in excess of two a week (assessed by the decision-maker at 21) into an average over 12 months, giving a figure of 2.4 nights, but only to make an assessment using that ratio for the weeks from 4 January 2002 to 7 February 2002. It seems to me, as I understood Mr James

to agree at the oral hearing, that if such an averaging approach were taken it would have to be given effect over a longer period. If separate assessments were being made for particular weeks, then it would seem much simpler, during the period of change, to accept whatever the pattern of day to day care is eventually found to have been for whatever period.

The Commissioner's decision and directions to the new appeal tribunal

27. The decision of the appeal tribunal of 25 April 2007 is set aside as wrong in law. The father's appeal against the decision of 10 April 2006, as revised on 14 August 2006, is referred to a differently constituted appeal tribunal for determination in accordance with the directions below. There must be a complete rehearing of the appeal on the evidence presented and submissions made to the new appeal tribunal, which will not be bound by any findings made or conclusions expressed by the appeal tribunal of 25 April 2007.

28. A district chairman of appeal tribunals, who will look at this case on its receipt back from the Commissioners' office, may wish to consider giving procedural directions (including directions as to timing) in relation to the matters mentioned in paragraph 21 above.

29. I direct the new appeal tribunal to apply the principles of law set out in paragraphs 13 to 15 above. The new appeal tribunal will have to consider afresh whether or not it is satisfied that a MEF was sent to the father on 16 June 2000 or on any other date. In relation to Lesley Anne's change of residence in 2001/02, I direct the new appeal tribunal to apply the interpretation of paragraph 16(4) of Schedule 1 to the Child Support Act 1991 in paragraphs 22 and 23 above and to take into account the more general guidance given in paragraphs 24 to 26. The evaluation of all the evidence will be entirely a matter for the judgment of the new appeal tribunal.

