CHAPTER 21

Child support

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CHAPTER 21

Child support

Part 1: Jurisdiction

1 Court orders and written maintenance agreements

i Where the S of S requires a PWC to apply for a MA under s. 6 of the Child Support Act, a MA can be made even though there is a court order for child maintenance in force. In this case the parents entered a Minute of Agreement to regulate (amongst other things) aliment for their child. The Minute of Agreement was registered in the Books of Council and Session for preservation and execution and an extract copy was obtained. The question arose whether this extract copy was equivalent to a court order for the purposes of s. 10 of the Child Support Act reg. 3 of the Child Support (Maintenance Arrangements and Jurisdiction) Regs. 1992. The Commissioner held that an extract from the books of Council and Session is an "order" for the purposes of the relevant Child Support legislation. Was it an order prescribed by reg. 3? The answer was yes because it was made under the Court of Session Act 1868. **Note:** This decision relates to Scots law and will have little application in England and Wales.

R(CS) 3/99

ii As a result of an application by the PWC made under s. 4 of the Child Support Act 1991, a MA was made. The question before the Commissioner was, whether there was a "maintenance order" when the application was made. If there was, that application would have been precluded by para. 2 of the Sch. to the Child Support Act 1991 (Commencement No. 3 and Transitional Provisions) Order 1992. s. 8(11) of the Child Support Act 1991 defines a maintenance order as "an order which requires the making or securing of periodical payment to or for the benefit of the child". In the case before the Commissioner it was recited in the preamble to a court order dated 15 June 1993 that the absent parent undertook to pay periodical payments of £10 per week to each child of the family. The Commissioner held that, although undertakings may for some purposes be treated in the same way as orders, s. 8(11) reflected the distinction between undertakings and orders. A requirement to carry out an undertaking stems from the undertaking and not from the court order. Thus in this case there was no "maintenance order" in force.

R(CS) 6/99

iii A CSAT decided that there was no jurisdiction to make a MA because there was a written maintenance agreement made before 5 April 1993. The PWC appealed to the Commissioner. It was contended for the S of S and the CSO that the question whether there was a pre 1993 written maintenance agreement in force was a question solely for the S of S. Once the S of S decided that there was an "effective application" within the meaning in reg. 2 of the Child Support (MA Procedure) Regs. the validity of the application could no longer be questioned. The Commissioner held that an "effective application" only meant one made in the proper form. Once the application was placed before a CSO to deal with under s.11 of the Child Support Act, the CSO also needed to satisfy himself that there was jurisdiction to proceed.

R(CS) 1/96

iv On 19 April 1993 the PWC applied for a MA under s. 4 of the Child Support Act 1991. The CSO decided that the AP was liable to pay child support maintenance at the rate of £48.04 per week with effect from 19 April 1993. The AP appealed to the Commissioner. She contended firstly that the MA did not take proper account of the welfare of the child and thus was in breach of s. 2 of the Child Support Act 1991. The Commissioner rejected this argument. s. 2 only applied to the exercise of discretionary powers of the S of S or a CSO. Further, even in relation to discretionary matters, s. 2 only required that regard be had to the welfare of the child. It should not undermine the overall purpose of the Child Support Act which is to ensure that the AP makes proper financial provision for his or her children. Secondly the AP contended that, because there was a court order in existence at the date the application for MA was made, there

R(CS) 4/96

was no jurisdiction to make a MA because of the provision in para. 2 of the Sch. to the Child Support Act 1991 (Commencement No. 3) and Transitional Provisions Order 1992. The Commissioner held that, while the court order in question had not been rescinded it had become a "dead letter" when the children moved to live with the parent required to pay maintenance under the court order. That order was therefore was not "in force" within the meaning of para. 2 of the Commencement No. 3 Order.

R(CS) 3/97

v. A PWC applied for maintenance for two children under s. 4 of the Child Support Act 1991. A CSAT decided that the CSA did not have jurisdiction to make an assessment for one of the children until the end of the transitional period because there was a maintenance order or written maintenance agreement in force in respect of that child (para. 2 of the Sch. to the Child Support (Commencement No. 3 and Transitional Provisions) Order 1992). The CSO appealed to the Commissioner on the grounds that the tribunal had exceeded its jurisdiction. It was argued that, whether there was jurisdiction was purely a matter for the S of S when deciding whether the application was effective under reg. 2(4) of the Child Support (MA Procedure) Regs. 1992, prior to passing the application to a CSO to carry out the MA. The Commissioner rejected these contentions. Firstly, the requirement that there be "an effective application" under reg. 2(4) and (5) was no more than that the application form be completed in accordance with the S of S's instructions and signed. Secondly, once an effective application had been passed to a CSO, it was for him to decide whether an MA was prevented by the existence of a maintenance order or a written maintenance agreement i.e. whether there was jurisdiction to make an assessment. **Note:** The law has hanged since this decision was made. However the principles still apply. It is now for a DM acting on behalf of the S of S to decide whether there is jurisdiction to make an MA and that decision can be revised and appealed.

R(CS) 7/98

vi. The sole point at issue in this case was whether an agreement between an AP and a qualifying child could constitute a "maintenance agreement" for the purposes of s. 9(1) of the Child Support Act 1991. The Commissioner notes that s. 1 of the Act establishes that each parent of a qualifying child is responsible for that child's financial support. The Act, he says, is concerned with the rights, obligations and powers of the PWC, the AP and the S of S. The qualifying child has no statutory rights under the Act. Applying this general principle and drawing support from the terms of sub-sections 9(4) & (5) and s. 29 (which gives the S of S the power to collect and enforce child support maintenance but gives no power for payment to be made direct to the child) the Commissioner holds that "maintenance agreement" in s. 9(1) does not include an agreement between an AP and the child. **Note:** This applies to England and Wales only, the position is different in Scotland where children of 12 and over have rights under the Act.

R(CS) 1/01

vii In 1993, the PWC applied under s. 4 of the Child Support Act 1991 for a MA in respect to two children. However there was a court order in 1988 which required the AP to make maintenance payments equal to half the children's school fees. A child support officer decided that there was no jurisdiction to make an MA because a "maintenance order" within the meaning of para. 2 of the Child Support Act 1991 (Commencement No. 3 and Transitional Provisions) Order 1992 was in force. A tribunal decided that, as the court order dealt with school fees it was not a maintenance order. The AP appealed to a Commissioner who held that the court order required the making of periodical payments to or for the benefit of the children. The fact that the order was made by reference to the school fees did not cause it to fall outside the definition of maintenance order in s. 8(11) of the Child Support Act 1991. The S of S appealed to the CA. The court dismissed the appeal: the duty to maintain a child included a duty to cause the child to be educated so that an order for payment of school fees was an order made under Part II of the Matrimonial causes Act 1973. The Commissioner was therefore correct to conclude that the order was a maintenance order and that accordingly there was no jurisdiction to make a MA. **Note:** With effect from 4.9.95 s. 18(6) of the Child Support Act 1995 makes it clear that a school fees order made under s. 8(7) of the Child Support Act 1991 does not prevent an application for maintenance under s. 4(10) of the 1991 Act.

2 Applications under s. 6

i Under s. 6(1) of the Child Support Act 1991, where a PWC is receiving a prescribed benefit, the S of S has discretion whether or not to require the PWC to authorise him to recover CSM from the AP. In this case the S of S decided to require authorisation and made a MA effective from 18 August 1994. The AP (the father) argued that, before exercising his discretion, the S of S should have consulted him. In failing to do so the S of S had failed to have regard to the welfare of the child as required by s. 2 of the Child Support Act. The Commissioner decided that the S of S was not in breach of s. 2 in failing to consult the AP (*R v. Secretary of State for Social Security ex parte Lloyd* [1995] I FLR 856 applied). In any event, as the exercise of the discretion was a matter for the S of S, the child support adjudicating authorities had no jurisdiction to consider this issue. R(CS) 1/98

Note: Until 1 June 1999 the adjudicating authorities only had jurisdiction over decisions made by a CSO.

ii Under s. 6 of the Child Support Act the S of S can require a PWC to apply for a MA to be made if IS (and other income-related benefits) is "paid to" that PWC. The commissioner decided that "paid" in s. 6(1) of the Act meant "lawfully paid". On appeal, the CA held that in the statutory context of s. 6 it meant "actually paid". So there was no need for the assessment or collection of child support maintenance to be delayed for the issue of whether there is proper entitlement to the relevant benefits to be investigated. R(CS) 4/99

iii The PWC claimed IS and was required to apply for a MA under s. 6 of the Child Support Act 1991. The claim for IS at first failed but later resulted in the payment of benefit. An MA was made and confirmed by a tribunal. The AP appealed to the Commissioner. One of his grounds was that there was no jurisdiction to make an MA. The Commissioner decided that an application can be made under s. 6 where IS is either claimed or paid. In this case an application was made at a time when IS was claimed but not yet determined; therefore there was jurisdiction regardless of the subsequent outcome of the benefit claim. R(CS) 10/98

iv The PWC was receiving a prescribed benefit and was required to apply for a MA to be made under s. 6 of the Child Support Act. FC was paid down to 12.8.95. On 6.9.95, the PWC contacted the CSA to say that she wanted to continue as a private client. A maintenance application form (MAF) was issued to her. On 30.10.95 a CSO made a MA effective from 1.11.95. The AP appealed first to a tribunal and then to a Commissioner. The point at issue was whether the CSO had jurisdiction to make the MA effective from 1.11.95. The Commissioner held that the original application under s. 6 continued to apply. Once an application is made under s. 6 it continues to apply unless the PWC ceases to be paid a prescribed benefit **and** applies under s. 6(11) for the S of S to cease acting. Once a MA has been made in response to a s. 6 application it continues in force unless and until it is revised by way of review or cancelled/terminated. In this case the MAF issued as a consequence of the contact by the PWC in September 1995 was without effect. R(CS) 1/02

v In dealing with an appeal concerning contributions to maintenance, the Commissioner considered, as a preliminary issue, how para. 5(4) of Sch. 1 to the Act should be interpreted. This provision says that where a prescribed benefit is paid to a parent, that parent shall be deemed to have a no assessable income. The Commissioner follows the decision of the CA in *Secretary of State v. Harmon* (see R(CS) 4/99), and holds that "paid" in this context means actually paid rather than "lawfully paid". The Commissioner's attention was drawn to a decision of tribunal of Northern Ireland Commissioiners (CSC7/03-04) which had come to a different conclusion. This decision had been appealed to the Northern Ireland CA. The Commissioners said that, even if the Northern Ireland CA upheld CSC7/03/04, he would still have to prefer the decision of the England and Wales CA. See 21.8.1.ii for other aspects of this decision. R(CS) 5/05

vi In 2002 a consent order was made requiring the father to pay maintenance for the two qualifying children. In 2004 the mother claimed and was awarded IS and was R(IS) 4/08

treated as having applied for a Maintenance Calculation (MC) under s. 6 of the Child Support Act 1991. As a result a MC was made effective from 29.1.05. The NRP appealed. Meanwhile, on 1.2.05 the PWC's IS was terminated and she was convicted of having fraudulently claimed it. The tribunal dismissed the NRP's appeal relying upon the CA's decision *Secretary of State for SS v Harmon, Carter and Cocks* (see R(CS) 4/99). The Commissioner held that Harmon had not dealt with the situation where there was known fraud. In accordance with *R v South Ribble Borough Council ex parte Hamilton* (2001) 33 HLR 9, legislation should not be construed so as to enable a person to profit from his own fraud. Based on the information before him, the Commissioner held that the MC should be revised and cancelled ab initio on the grounds that the PWC had misrepresented or failed to disclose a material fact to her advantage (see reg. 3A(1)(c) of the SS and Child Support (Decisions and Appeals) Regs. 1999). The result of this was that the consent order was to be treated as having continued in force (see reg. 8 of the Child Support (Maintenance Arrangements and Jurisdiction) Regs. 1992).

3 Habitual residence in the UK

R(CS) 5/96

i The AP argued that there was no jurisdiction to make a MA because he was not habitually resident in the UK. He was a civil servant in the Home Office, who had been posted to India in August 1992. This posting was initially for 18 months but this was subsequently extended to 1997 with the possibility of a further extension of another year. The Commissioner stressed that the concept of "habitual residence" had to be interpreted in the context of child support legislation which was different from the context of SS benefits. The purpose underlying the child support legislation was the social need to require APs to maintain or contribute to the maintenance of their children. The question whether the AP had ceased to be habitually resident was one of fact for the adjudicating authorities. The important factors were the nature and degree of his past and continuing connection with the UK and his intentions as to the future. It was not enough merely to look at the length and continuity of his actual residence abroad.

4 Disputed parentage

R(CS) 13/98

i The AP disputed paternity of the qualifying child **after** a MA had been made. Following a refusal to review by a CSO, a CSAT allowed the AP's appeal, deciding that his denial of paternity invalidated the MA. The CSO appealed to the Commissioner who held that, in completing the maintenance enquiry form, the AP accepted paternity. Neither the CSO nor the AT was entitled to cancel the assessment unless and until it was established by a court that the AP was not the father of the qualifying child. The appeal against the CSO's refusal to review should have been made to a court in accordance with Arts. 3 and 4 of the Child Support Appeals (Jurisdiction of Courts) Order 1993. An AT has no jurisdiction to determine paternity disputes.

5 Old scheme or new scheme

R(CS) 1/06

i At the request of the mother (the PWC) an MA was cancelled with effect from 5.2.03. On 11.4.03 the father applied for maintenance to be assessed. On 16.5.03 the PWC also applied. On 7.7.03 the father was notified of the PWC's application. On 12.12.03 a DM made a Maintenance Calculation (MC) under the new Child Support scheme effective from 7.7.03. The Commissioner held that the operative provision in this case was para. 3(2) of Sch. 3 to the Child Support (Maintenance Calculation Procedure) Reg. 2000 ("the MCP regs"). This says that, where applications are made by both parents, it is the PWC's application that will be proceeded with. It was clear that the policy intention was that the PWC should be able to make an application more advantageous to her (i.e. under the new scheme) than an undetermined application made earlier by a Non-Resident Parent (NRP). The CSA was not, however, entitled deliberately to refuse to process the father's application with a view to assisting the mother but if it had done so, the remedy was not for the mother to be deprived of maintenance to which she was entitled but for the father to obtain compensation from the CSA.

Part 2: Requirement to co-operate

1 Interim maintenance assessments

i An interim MA was imposed because the AP had not provided the information and evidence needed to make a "normal" MA. The AP applied for the interim MA to be cancelled and on this being refused appealed to a tribunal, a Commissioner and finally to the CA. The AP argued that:

R(CS) 1/00

> 1. The law did not require him to provide information about his partner's financial circumstances until it was established that the protected income rule in para. 6 of Sch. 1 to the Act would apply to him. The Court rejected this argument: the words "maintenance assessment" in para. 6(1) meant an assessment up to the point at which the protected income rules might apply. Thus the S of S was entitled to ask for information about the AP's new family at the outset.
>
> 2. The maintenance requirement (upon which the rate of the interim MA was based) included an element in respect of the PWC but he had no liability to maintain the PWC. The Court dismissed this point. The S of S was entitled to prescribe how the maintenance requirement was to be calculated.
>
> 3. The failure of the CSA to provide him with certain undertakings before he provided the information required constituted an "unavoidable delay" which would allow the interim MA to be cancelled. This was rejected by the Court. The AP could have supplied information about himself. He chose not to do so. There was therefore no unavoidable delay.
>
> 4. He was justified in withholding information because the CSO would be in breach of s. 50(1) of the Child Support Act 1991 in disclosing his housing costs and his second wife's income to the PWC. Rejected. The PWC had a direct interest in how the MA was calculated. The rules of natural justice required that the information needed to explain the MA was provided to both parties.

ii The mother applied for an MA to be made in respect of two sons who boarded weekly at school during term times. The S of S decided that care was shared equally. Accordingly the matter was settled in accordance with which parent received CHB (reg. 20(2)(b) of the Child Support (MA and Special Cases) Regs.). The result was that the father was treated as the AP of the younger son. However this only applied during a period from November 1993 until March 1994 when the younger son went to live with his father. The father did not complete a maintenance enquiry form (MEF) and the CSO decided that he could not make an interim MA. The mother appealed and a tribunal decided that an interim MA should be made for the period in question. On an appeal by the father, the Commissioner held that no retrospective interim MA could be made because reg. 8(3) of the Child Support (MA Procedure) Regs. 1992 ("the MAP regs") prescribes that the effective date of an interim MA in these circumstances is to be a day falling after the expiry of 14 days following the issuing of a written notice of intention to make an interim MA in accordance with s. 12(4) of the Child Support Act 1991.

R(CS) 8/98

The Commissioner adds that the father's failure to complete a MEF did not prevent the CSO from making a "full" MA because the information was available from other sources.

2 Welfare of children

R(CS) 2/98

i The PWC made an application for a MA under s. 6 of the Child Support Act 1991. The alleged AP did not supply information requested and an interim MA was made under s. 12. The alleged AP (who disputed paternity of the children) threatened to kill the PWC if the CSA proceeded. The interim MA was suspended and the CSO, relying on s. 2 of the Act, decided that no further action should be taken because the welfare of the children was likely to be affected. A tribunal dismissed the PWC's appeal. The Commissioner held that, where an application is made under s. 4 or 6, the CSO is under a duty to make a "full" MA under s. 11. He cannot refuse to do so against the wishes of the PWC. s. 2 applies only where the CSO is exercising a discretionary power and not where he is under a duty to act. If a CSO has been given inadequate financial details by the AP and he decides not to make an interim MA he is still under a duty to make an assessment under s. 11. This may involve making estimates.

3 Reduced benefit directions

R(CS) 15/98

i The PWC who was in receipt of FC, failed to authorise the S of S to take action to recover CSM and failed to reply to a notice (served in accordance with s. 46(2) of the Child Support Act 1991) requiring either compliance or reasons for failing to comply. The CSO gave a reduced benefit direction. The PWC appealed to a tribunal which allowed her appeal on the basis of information that was not before the CSO. The CSO appealed to the Commissioner on the grounds that the information given by the PWC after the direction was given could only be dealt with by means of the review provisions in reg. 42 of the Child Support (MA Procedure) Regs. 1992. The Commissioner rejected this argument. A person aggrieved by a decision to give a reduced benefit direction had the right of appeal to a tribunal by virtue of s. 46(7) of the Act. That section does not limit the grounds of appeal and the normal principles therefore applied. The question for the tribunal was whether or not the direction should have been made. In deciding that question, the tribunal could take account of any evidence available to it, even if that evidence was not available to the CSO when the direction was made.

R(CS) 8/02

ii The PWC was receiving FC and was required under s. 6 of the Child Support Act to provide the information needed to enable a MA to be made. The PWC did not provide the information and a reduced benefit direction was given under s. 46(5) of the Act. The PWC said that she was at risk of violence from her current partner (who was not the father of the child) if she co-operated with the CSA. On appeal, a tribunal confirmed the decision to give a reduced benefit direction: there might be a risk of violence but that risk did not come from the childs father. The Commissioner held that this was to misread the terms of s. 43(5) of the Act - this did not specify that the source of the risk of harm or undue distress must be the child's father. There was a real risk from the PWC's current partner and so no reduced benefit direction, should have been imposed. The Commissioner substituted his own decision to that effect.

R(CS) 4/07

iii A DM gave a reduced benefit direction and the PWC appealed. A tribunal decided that her evidence as to a risk of harm or undue distress was unreliable and dismissed her appeal. A Commissioner subsequently overturned this decision. The CA held that, in order to judge whether a particular claimant/PWC has shown reasonable grounds for believing that there would be a risk of undue distress to her or a child, an objective judgement has to be made as to whether the foreseeable distress is unjustified or unreasonable in the context of the personal, subjective characteristics of the claimant or child. Irrationality or paranoia are to be taken into account as providing the context against which the extent of the distress is to be assessed but are not determinative.

Part 3: Effective dates

1 Date maintenance enquiry form sent

i Under reg. 30(2)(a) of the Child Support (MA Procedure) Regs. 1992, the effective date of a first MA is the date on which a maintenance enquiry form is sent to the AP. The Commissioner held that "sent" in reg. 30(2)(a) has its ordinary meaning and means "dispatched". The second presumption in s. 7 of the Interpretation Act 1978 that the document is effected at the time the letter would be delivered in the ordinary course of post, does not apply. Evidence that a maintenance enquiry form was not received does not in itself show that it was not sent for the purposes of reg. 30(2)(a). In determining whether a maintenance enquiry form has been sent the test is whether it was properly addressed, pre-paid and posted.

R(CS) 1/99

2 Effective date of MA made after interim maintenance assessment

i In 1994 the PWC applied for an MA and in January 1995 a maintenance enquiry form (MEF) was sent to the AP. As this was not returned, a Category A Interim Maintenance Assessment (IMA) was made effective from 31.7.95. In 2000 the AP returned the MEF and in May 2005 the CSA made a full MA effective from 9.1.05. This replaced the IMA from 31.7.05. A tribunal held that there was insufficient information to make a full MA for the whole period and directed the Secretary of State to revert to the IMA up to the date that the MEF was returned. This was on the grounds that, under reg 8D(5) of the Child Support (Maintenance Assessment Procedure) Regs. ("the MAP regs") an IMA could only be cancelled from the date full information was received. A Commissioner confirmed the tribunal's view and the Secretary of State appealed to the CA. The Court held that, on the correct construction of MAP regs. 8D and 30A taken together with reg. 17(3), where there was sufficient information to make an MA covering the entire period of an IMA from the first effective date the Secretary of State is obliged to revise and convert the IMA into a full MA for the entire period. This obligation exists notwithstanding the existence or enforcement of a liability order in respect of the IMA.

R(CS) 6/08

Part 4: Maintenance formula issues

1 Property or capital transfer allowance

R(CS) 5/99

i In order for a transfer of property to be eligible for an allowance under para. 3A of Sch. 1 to the Child Support (MAs and Special Cases) Regs. 1992 it must be a "qualifying transfer" within the definition in para. 1. The requirement in para. (d) of that definition is that the effect of the transfer must be that the PWC becomes beneficially entitled to the whole of the asset transferred. Prior to the transfer, each of the parents owned 50% of the former matrimonial home beneficially. The AP transferred 20% of beneficial interest in the property. The Commissioner and the CA both held that para. (d) was satisfied. A part beneficial interest was an asset in itself and so the PWC had become beneficially entitled to the whole of the asset transferred. The Commissioner also clarified the position with regard to the meaning of "VT" in the formula in para. 4 of Sch. 3A. If what was transferred was part of a beneficial ownership of a house then VT was the value of the part beneficial ownership transferred and not the value of the whole house as had been submitted by the Secretary of State.

Note: Sch. 3A was substantially amended with effect from 6 April 1999 so this decision only applies in respect of periods before that date.

R(CS) 9/99

ii In order to qualify for an allowance under Sch. 3A of the Child Support (MAs and Special Cases) Regs. 1992 a transfer property must be a "qualified transfer" within the definition in para. 1 of that Sch. Para. (e) of the definition says that a qualifying transfer must be one "which was not made expressly for the purpose only of compensating the parent with care for the loss of any right to apply for or receive periodical payments or a capital sum in respect of herself". The Commissioner held that, in deciding the purpose of a transfer of property the adjudicating authority need not confine itself to the terms of the court order or written maintenance agreement, surrounding evidence such as contemporaneous solicitor's letters could also be considered. The Commissioner also gives detailed guidance on what factors will and will not be relevant in deciding the purpose of a transfer of property.

2 Disposable income

R(CS) 10/99

i The PWC applied for a MA to be made in respect of a 13 year old boy. The AP also had daughters from his first marriage. A consent order made in 1987 (in divorce proceedings brought by the AP's first wife) required the AP to make periodical payments of maintenance in respect of his daughters. The terms of the order also included an undertaking by the AP "to be responsible for the school bills" for each of the three children. The question arose whether the payment of school fees under this undertaking was "maintenance under a maintenance order" for the purposes of reg. 11(2)(a)(ii) of the Child Support (MAs and Special Cases) Regs. 1992. If it was then it would be deducted in the calculation of the AP's disposable income. The Commissioner held that "maintenance" in reg. 11(2) includes fees and other expenses of a child's education. He further decided (applying *Gandolfo v. Gandolfo* [1981] QB 359, CA) that the undertaking could be considered an integral part of the 1987 court order for the purposes of reg. 11(2)(a)(ii). Thus the school fees were paid "under a maintenance order ".

Note: The Commissioner here reaches a different conclusion about undertakings in the context of reg. 11(2) from that reached by the Commissioner in the context of jurisdiction in R(CS) 6/99 21.1.1 ii.

R(CS) 4/02

ii Reg. 12 of the Child Support (MAs and Special Cases) Regs. 1992 says that disposable income shall be the aggregate of the income of the AP and any member of his family calculated in like manner as under reg. 11(2). The question in this case concerned reg. 11(2)(a)(i) which says that "any maintenance" falls to be included. The AP's partner was receiving Child Support Maintenance (CSM) under the Child Support Act for her children. Was CSM caught by reg. 11(2)(a)(i)? The Commissioner concluded that it was not. Firstly, where, for example one child lives with the father and one child with the mother, if CSM is taken into account the result could be an endless circle of

reassessments. Such a result would be a nonsense. Secondly, reg. 11(2)(ii) allows deductions from disposable income for maintenance paid out by the AP or his partner. However CSM is clearly excluded from his provision. It might follow from this that payments of CSM received did not fall within reg. 11(2)(a)(i).

3 Assessable income

R(CS) 6/03

i A maintenance assessment (MA) had been made in respect of child “G”. G's father and AP (Mr A) had remarried and lived with his new wife and their children. Also in his household was another child “M”. Mr A was not M’s father, nor had he adopted her. A MA was in force against M’s father. Mr A said that he was receiving Working Families Tax Credit (WFTC) and that he should therefore benefit from reg. 10A of the Child Support (MAs and Special Cases) Regs. 1992. Reg. 10A provides that, where WFTC is paid to or in respect of an AP or a PWC, that parent shall be taken to have no assessable income. However this only applies to an AP where the AP is also a parent with care and either a MA is in force for the child in relation to whom the AP is a parent with care or where the Secretary of State is considering an application for a MA in respect of that child. Mr A’s argument was that he was a PWC with respect to M.

The Commissioner held that reg. 10A would only apply to Mr A if he was a PWC in respect of M. S 54 of the Child Support Act 1991 defines “parent” as any person who is in law the mother or father of the child. The Commissioner held that Mr A was not, under English law, M’s father. He could not therefore benefit from reg. 10A. For the Human Rights aspects of this decision, see the synopsis at 19.4.l ii.

Part 5: Earnings

1 Expenses

i The AP contended that payments he made for regimental subscriptions, dress uniform, mess fees and the expenses of married quarters should be deducted from the amount of his earnings taken into account. The Commissioner held that the words "gross income" in para. 1(3) of Sch. 1 to the MAs and Special Cases Regs. 1992 meant earnings after the deductions of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment (*Parsons v. Hogg* [1985] 2 All ER 897 followed). The CSAT had been entitled to conclude on the evidence that the regimental subscriptions, dress uniform and mess fees were incurred in the performance of duties. However the expenses of married quarters were not incurred in the performance of the AP's duties. In considering whether to allow an expense the adjudicating authorities were bound to have regard to a decision by the Inland Revenue applying the same test but were not bound to follow such a decision.

R(CS) 2/96

ii The AP, a police officer, was paid housing allowance with his salary. The question was whether this allowance should be excluded from the calculation of his net income on the grounds that it was a "payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties" of his employment. If the allowance was such a payment then, by virtue of para. 1(2)(a) of Sch. 1 to the Child Support (MAs and Special Case) Regs, it was not earnings and, by virtue of para. 15(a) of Sch. 1, it did not fall to be taken into account as other income. The Commissioner held (following the decision of the HL in *Smith v. Abbott* [1994] 1 All ER 673) that, in order for para. 1(2)(a) to apply, the expenses must be incurred in the performance of the duty. The historical reason for the allowance was the need for police officers to live in areas and in accommodation of a standard that they would not be able to afford from their basic salary so that they could be available for duty. The allowance was not paid in respect of any expense incurred by police officers in using their house in the performance of their duty.

R(CS) 2/99

iii The AP was a police officer. He received certain allowances with his pay. He received a plain clothes allowance paid to him because he was a detective. He also received a rent allowance in place of the provision of free accommodation on police property. The question before the Commissioner was whether these were payments made in respect of expenses "wholly, exclusively and necessarily incurred in the performance of the duties of the employment". As regards the plain clothes allowance the Commissioner held that, to the extent that it covered special clothing for under cover work that the officer would not otherwise have, the allowance was both exclusively and necessarily for the performance of duties and was not part of earnings and did not fall to be taken into account. On the rent allowance the Commissioner held that it did not follow from the fact a police officer was effectively always on call that the domestic expenses of his home were "incurred in the performance of his duties". The tribunal was therefore right to include the rent allowance in the AP's earnings.

R(CS) 10/98

Note: The law has changed since this decision was made. The current position is that a tax exempt rent allowance is included in an AP's earnings to the extent that it covers housing costs allowed in the exempt or protected income of that AP.

iv The AP received a car allowance from his employer which was apparently taxable. The AP needed a car to do his job and was provide a car to a stated standard. The AP did so by leasing a vehicle. He used the car mostly for work with some minor private use. The sole point before the Commissioner was whether or not this allowance should be included as part of the AP's earnings in calculating his liability for CSM. The allowance could be excluded if it was a payment "in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment". The Commissioner agreed that this would not apply to payments of a capital rather than a revenue nature but, citing *Atherton v British Insulated and Helsby Cables Limited* [1926] AC 205, he held that, as there was no provision in the leasing

R(CS) 4/08

agreement for the AP to purchase the car, the lease payments were not of a capital nature. The question then arose as to whether the allowance should be apportioned betwen private and business use. The Commissioner found that, as business use of the car exceeded 80% and as the allowance was less than 80% of the actual leasing costs the allowance shoud be excluded in full from the earnings taken into account.

2 Pension contributions

R(CS) 3/00

i The AP was an employed earner. He was making payments into a retirement annuity contract. The Commissioner held that one half of these payments should be deducted in the calculation of the AP's earnings in accordance with para. 1(3)(c) of Sch. 1 to the Child Support (MAs and Special Cases) Regs. 1992 ("the MASC regs"). The definition of "personal pension scheme" in reg. 1(2) of the MASC regs. adopts the definition in s. 1 of the Pension Schemes Act 1993 which, in turn, defines such schemes as those which provides "benefits in the form of pensions or otherwise payable on death or retirement". This is broad enough to include a retirement annuity contract.

3 Income Tax

R(CS) 1/05

i The AP had income from an occupational pension and earnings from self-employment. His full income tax personal allowance was exhausted in respect of his occupational pension. However, in calculating the amount of notional income tax to be deducted in the calculation of his earnings the DM decided to apply a full personal allowance. This considerably reduced the notional income tax deducted. The AP complained that it was unfair for a personal allowance to be applied twice. The Commissioner agreed. The reference in para. 2A(3) of Sch. 1 to the Child Support (MA and Special Cases) Regs. to any personal allowance "applicable to the earner" meant that the DM must have regard to the AP's actual tax position. Thus if a personal allowance had already been exhausted, it was not "applicable" when calculating notional tax liability.

4 Self-employed

R(CS) 6/06

i The AP was self-employed. In calculating his net earnings the DM made a deduction for substantial capital allowances. The PWC appealed. The matter came before a Commissioner who held that "total taxable profits" as it appears in para. 2A of Sch. 1 to the MASC regs. meant gross receipts less expenses allowable under Sch. D. No deduction could be made for capital allowances or depreciation. The Secretary of State appealed to the CA and was successful. The PWC appealed to the HL. The HL restored the Commissioner's decision for the following reasons:

1. When the amending regs. that introduced para. 2A were introduced to Parliament, Ministers presented the change as purely a matter of administrative improvement and not as a substantive change in the way earnings from self-employment were to be calculated.

2. In some circumstances DMs would have to employ the method of calculation in para. 3 of the same Sch. Under this para. neither capital allowances nor deprecation could be deducted. There was therefore a potentially unfair inconsistency between the two provisions.

3. The effect of the Department's interpretation was also to allow losses from previous accounting periods to be deducted. It was not credible that this could have been Parliament's intention. The result of applying the Department's interpretation in this case was that the AP had built up a profitable and expanding business but the children had not benefited.

4. A Departure was no remedy because there was no necessary connection between claiming capital allowances and having a lifestyle inconsistent with declared earnings.

5. The ordinary meaning of "earnings" in a self-employment case was "trading profit" and capital allowances play no part in this normal meaning.

6. Child Support is concerned with income not capital. If capital received could not be taken into account why should capital allowances be deducted?

7. Capital allowances had no connection with the needs of the children nor the AP's ability to pay maintenance.

8. It would be foolish to link a reg. to a particular box on an Inland Revenue form; the form or the description ("total taxable profits") might change.

9. Where there are two competing interpretations of a reg., the chosen interpretation should be that which better complied with the commitment to the welfare of children which the UK had made by ratifying the United Nations Convention on the Rights of the Child.

Part 6: Other income

1 Payments of compensation for personal injury

i The AP receives a pension under the Fireman's Pension Scheme. This included an injury pension payable because of disablement which arose from an injury sustained in the course of his duties. The AP argued that the injury pension should be disregarded in the calculation of his income under para. 5 of Sch. 2 to the Child Support (MAs and Special Cases) Regs. 1992 which refers to "Any compensation for personal injury . . . ". The Commissioner decided that the disregard in para. 5 was limited to payments made to an injured party by the person who is liable in the law of tort to make reparation for injury or who accepts such liability. The injury pension paid to the AP did not fall within that description and so the disregard did not apply. The AP appealed to the CA but the court upheld the Commissioner's view.

R(CS) 2/00

2 Notional income

i During 1996, the AP had made additional lump sum payments into a retirement annuity contract and a personal pension policy. The question arose: could this constitute deprivation of capital (that would otherwise produce income) within the terms of para. 27 of Sch. 1 to the Child Support (MAs and Special Cases) Regs. 1992? The Commissioner held that para. 27 could bite in these circumstances (even though regular payments into pension schemes are deductible in the calculation of earnings). However para. 27 will only bite where the person has intentionally deprived himself of capital "with the view to reducing the amount of his assessable income". The Commissioner comments that the timing of the deprivation will be important and draws attention to certain court cases concerning bankruptcy where it was held that the phrase "with a view to" was held to require that the person's "dominant intention" be established.

R(CS) 3/00

3 Rental income

i The tribunal decided that, in calculating the rental income the AP received, deductions should be made for building insurance and maintenance costs. The Commissioner says that this is wrong in law. When dealing with income that falls to be taken into account under para. 15 of Sch. 1 to the Child Support (MAs and Special Cases) Regs. 1992 the starting point is the gross rental receipts. The only deductions that can be made are those authorised by Sch. 2. The principle in *Parsons v. Hogg* does not apply to rental income.

R(CS) 3/00

4 Dividends from shares

i This was a new scheme case and a maintenance calculation was made effective from July 2003. The NRP was the sole director and shareholder of a small company. In addition to salary he received dividend income. Para. 4(1) of the Sch. to the Child Support (Maintenance Calculations and Special Cases) Regulations 2000 ("the MCSC regs") says that "earnings" from employment means "any remuneration or profit derived from that employment". A tribunal held that the NRP's dividend income was part of the remuneration or profit the NRP received as a result of his employment and that therefore it fell to be taken into account as earnings in calculating his liability for CSM.

R(CS) 4/05

The Commissioner held that this was wrong in law. If payments were truly paid as dividends on shares in a company then they must be regarded as derived from the ownership of the shares and the company's decision to pay a dividend rather than from the NRP's employment or his holding of the office of director. Genuine dividend income therefore did not fall within the definition of earnings. There was no provision in the MCSC regs. allowing dividend income to be taken into account in making a maintenance calculation.

5 Other income

R(CS) 2/08

i The NRP was the sole director and major shareholder in a small company. He had made a loan to the company and arranged for the company to pay him back at the rate of £2,500 per month. A Commissioner held that these payments failed to be taken into account in the AP's Net Income under para. 15 of Sch. 1 to the Child Support (Maintenance Assessments and Special Cases) Regs. as "any other payments or amounts received on a periodical basis". The CA in *Chandler v Secretary of State for Work and Pensions and another* [2007] EWCA Civ 1211 allowed an appeal by the Secretary of State holding that:

1. the Child Support legislation draws a clear distinction between capital and income - a periodical draw down of capital is not "income".

2. Para. 15 is a "sweep-up" provision for other types of income not specifically dealt with in the earlier paras, and in the context cannot be read as including a periodical drawdown of capital.

3. The contrary interpretation would lead to irrational distinctions between capital drawn on a regular basis and capital paid in a lump sum or irregularly.

Part 7: Housing costs

1 Meaning of "principle home"

i The AP was a sergeant in the Army. He lived in married quarters but also owned a house which he was buying on a mortgage. He spent weekends and leave periods in this house. On appeal the point at issue was whether rent on the married quarters or repayments on the mortgage should be included in the amount allowed for housing costs in the MA. This in turn depended upon which dwelling constituted the AP's "principle home" as defined in reg. 1(2) of the Child Support (MAs and Special Cases) Regs. 1992. The Commissioner held that this question was one of fact for the adjudicating authority. The test was an objective one, directed not just at the number of nights spent in the home but also at ascertaining what was normal at the date at which housing costs are calculated.

R(CS) 2/96

2 Eligible housing costs

i The point at issue was whether payments by the AP of premiums for building and contents insurance should be allowed in the calculation of his housing costs in the MA. In particular whether para. 1(g) of Sch. 3 to the Child Support (MAs and Special Cases) Regs. 1992, which allows payments "in respect of, or in consequence of, the use and occupation of the home" applied. The Commissioner held that, despite the apparently wide wording of para. 1(g), there were indications that it was intended to have a narrower meaning (albeit that what that might be was far from clear). It did not include building or contents insurance.

R(CS) 3/96

ii The AP had been given an advance of salary to enable him to buy the former matrimonial home. On separation, the mother remained in the former matrimonial home. The salary advance had to be repaid by monthly instalments. The CSO treated these repayments as income of the PWC in respect of her housing costs. On appeal, the tribunal decided that the repayments should be deducted from the AP's assessable income. The Commissioner decided that the monthly repayments of salary did not fall within any of the sub-paras. of para. 1 of Sch. 3 to the Child Support (MAs and Special cases) Regs. 1992. They were therefore not payments of eligible housing costs incurred by either parent.

R(CS) 6/98

iii The AP appealed to the Commissioner against the tribunal's decision that his council tax liability, while being included in the calculation of his protected income, would not be included as an eligible housing cost in assessing his exempt income. The Commissioner held that an item could only be included as an eligible housing cost in exempt income if it appeared in the list in para. 1 of Sch. 1 to the Child Support (MAs and Special Cases) Regs. ("the MASC regs"). The AP argued that council tax came within para. 1(g) "payments in respect of, or in consequence of, the use and occupation of the home". While not deciding what para. 1(g) means precisely, the Commissioner holds that it has a narrow, restricted meaning. The Commissioner points to reg. 11(1)(j) which makes specific provision for council tax to be included in protected income and concludes that it was not intended that council tax would be included in para. 1(g) of Sch. 1.

R(CS) 11/98

R(CS) 12/98

iv At the time of his separation from the PWC, the AP continued to reside in the joint home. He paid the PWC £5,000 raised by taking out a second mortgage on the home. The question before the Commissioner was whether the interest payable on the £5,000 loan was an eligible housing cost. The Commissioner pointed out that the opening words of para. 1 of Sch. 3 say "... the following payments in respect of the provision of a home shall be eligible to be taken into account as housing costs ...". If a person has an unchallengeable right to the occupancy of a home, he has been provided with a home and thus interest on any mortgage raised for an unconnected purpose is not eligible. However, where it is necessary for a parent to acquire a further interest in order to preserve the right of occupancy then this will amount to the "provision of a home". In the instant case the AP was at risk of losing his right of occupancy because it was likely that a court would make an order for sale under s. 30 of the Law of Property Act 1925 because the children were no longer living in the house.

R(CS) 2/05

v In 1987 the AP bought a home jointly with his brother. He took out a joint endowment mortgage with a 25 year term ending in 2012 or 2013. In 1999 the AP and the PWC bought a house with an endowment mortgage for the same term. When they divorced, the AP transferred the endowment policies to his ex wife but he retained the matrimonial home. He took out a repayment mortgage with a term of about 12 years. The question before the Commissioner and then the CA was whether the resulting, relatively high, mortgage repayments were "necessarily incurred" as required by para. 4(1)(a) of Sch. 3 to the Child Support (Maintenance Assessments and Special Cases) Regulations. The Commissioner decided that although para. 4(1) set a high threshold, it must be interpreted and applied sensibly with appropriate regard to the realities of property acquisition and the mortgage market. In particular it was not appropriate to disallow all housing costs that were not absolutely essential. The Court held that the test of necessity must be considered in a common sense and reasonable way. All the circumstances must be weighed in making this judgement. However "necessity" requires some degree of compulsion or oxigency and is not a test of sensibleness or reasonableness. The Commissioner's decision had identified the correct legal test and had applied it reasonably.

R(CS) 03/05

vi The AP had a current account mortgage. At the outset the mortgage agreement involved a repayment plan setting out the monthly repayments to be paid over the term of the loan in much the same manner as a repayment mortgage. These were called the planned payment. However the advantage of a current account mortgage is that as soon as money is paid into the account the capital outstanding (which is calculated on a daily basis) reduces and thus the interest payable reduces immediately also. Because of this and certain voluntary additional payments the AP got ahead of the repayment plan. The AP could choose how much to pay each month provided he paid at least the minimum payment. This was calculated by rescheduling the remaining loan and working out the minimum amount that would have to be paid each month in order to pay off the mortgage by the end of the agreed term.

The issue before the Commissioner was whether the minimum payment or the planned payment should be used in calculating the AP's eligible housing costs. The Commissioner held that the minimum payment should be used because this was the amount "necessarily incurred" (para. 4(1)(a) of Sch. 3 to the Maintenance Assessments and Special Cases Regulations). As regards calculating the interest payable for the purposes of the disposable income/protected income stage of the formula, the Commissioner held that the interest should be calculated using the actual capital balance outstanding at the effective date of the MA.

Part 8: Special cases

1 Contribution to maintenance

i A CSO decided that the AP was liable to make a contribution to maintenance with effect from 13 June 1995. The prescribed deduction of 5% of his personal allowance was accordingly made from his IS. Such a deduction is not to be made where the AP receives one of a list of benefits set out in Sch. 4 to the Child Support (Maintenance Assessments and Special Cases) Regs. 1992 ("MASC regs"). On appeal the AP argued that there had been a failure to check whether he was receiving any of the listed benefits and that this failure rendered the decision void, even though he was not actually in receipt of any of them. The Commissioner held that the decision was wrong in law but it was not void. He set aside the original decision and substituted his own to the same effect. The AP appealed to the CA which held that a procedurally flawed decision was not necessarily defective or void. It was implicit in para. 7A of Sch. 5 to the MASC regs. that, on review, the relevant decision need not be revised and if it were not revised would continue to have effect from when it was made. The absence of an express power or specific provision in Sch. 5 for upholding on review a decision that was reached unlawfully did not mean that no such option was available to the CSO. The CA also held that deductions made in respect of a contribution to maintenance were not to be regarded under s. 2 of the Child Support Act 1991 as adversely affecting the children's welfare.

R(CS) 7/99

ii Following an unsuccessful attempt to obtain information needed to complete a review of the MA from the AP, the DM imposed a Category A interim maintenance assessment effective from June 2001. The AP applied for this to be cancelled on the grounds that he had given up self-employment and had claimed JSA. The DM refused this request but a tribunal decided that a full MA at the minimum amount should be made effective from 30.7.02. Both the Secretary of State and the PWC appealed. For most of the relevant period the AP had in fact been exempt from the minimum amount. Questions therefore arose whether a liability to make a contribution to maintenance could apply retrospectively or only by deductions from benefits for a prospective period. The Commissioner held that the liability to pay a contribution to maintenance arises independently of the terms of s. 42 by dint of the requirements in s. 1 of the Child Support Act 2001. Thus, if the effective date provisions allowed it, there was nothing to prevent a decision that there was liability to pay contribution to maintenance having effect from a past date. In the instant case the first date in respect of which JSA was payable was 3.8.02. The effect of regs. 8D(8) and 23(12) of the Child Support (Maintenance Assessment Procedure) Regs was therefore that the interim maintenance assessment could be lifted and there was a liability to pay contribution to maintenance from 3.8.02. See 28.1.2.v for another element of this decision.

R(CS) 5/05

2 More than one AP

i Reg. 23 of the Child Support (Maintenance Assessments and Special Cases) Regs. 1992 says that where a person has care of two or more qualifying children and there is more than one AP, certain elements of the maintenance requirement will be divided by the number of AP's. A question arose, first with a Commissioner and then at the CA, about when this reg. fell to be applied. This question boiled down to the meaning of "qualifying children" in the context of reg. 23. The Commissioner decided that the meaning to be given was that in para. 10 of Sch. 1 to the Act. This meant that a child was a qualifying child only if an application or child support maintenance had been made in respect of that child. The CA disagreed with this view and decided that "qualifying children" in reg. 23 had the meaning in s. 3 of the Act. Thus the maintenance requirement could be split even if the PWC could not or did not wish to apply for child support maintenance in respect of all the other children in her care.

R(CS) 5/00

ii The PWC had four children living with her and her husband. The father of the eldest was the AP, the father of the youngest was her husband and the father of the other two children was dead. A MA was made against the AP. The AP argued on appeal that the deceased father was an "absent parent" for the purposes of reg. 23 of the Child Support (Maintenance Assessments and Special Cases) Regs. 1992 and that therefore, in calculating the Maintenance Requirement, certain elements should be divided by 2.

R(CS) 2/03

The Commissioner held that the definition of "absent parent" for the purpose of reg. 23 was that in s. 3(2) of the Child Support Act 1991 and the natural meaning of the words in s. 3(2) and reg. 23 was not apt to include a deceased parent. There was nothing in the scheme of the legislation that required the provisions to be given anything other than their natural meaning. While the precise philosophy behind reg. 23 was not very clear, an examination of its likely purpose seemed to be in favour of the natural meaning, rather than a meaning which would include a deceased parent.

3 Shared care

R(CS) 14/98

i The mother and father lived apart but shared care of their daughter. The father received CHB in respect of her. Following an application by the father a CSO decided that the mother was liable to pay some CSM. The mother appealed to a CSAT on the grounds that, as the child lived in the same household as her, she was not an AP within the definition in s. 3(2) of the Child Support Act 1991. The tribunal rejected this argument. The Commissioner, in dismissing the appeal, decided that a case where both parents provide day to day care is a special case. Thus the terms of s. 3 can be modified. In this case they are modified by reg. 20 of the Child Support (MAs and Special Cases) Regs. 1992. In the instant case, reg. 20(2)(b)(i) meant that the mother was **treated** as the AP. The Commissioner went on to reject an argument that reg. 20 was *ultra vires*.

R(CS) 11/02

ii The AP contended that he had day to day care of the QC within the meaning given in reg. 1(1) of the Child Support (MAs and Special Cases) Regs. 1992. He provided evidence which, he argued, showed that he had care of the child for 105 nights in the year. However only on 93 of these nights did the QC stay overnight in the same house as the AP. The remaining nights were spent with the child's grandparents or aunt. The Commissioner therefore had to decide what "care" meant in the context of reg. 1(1). The Commissioner held that the emphasis on nights in the definition meant that the law was concentrating on the immediate, short-term aspects of care such as deciding on the child's activities, diet and bedtime. Care in this context also meant exercising control over the child's behaviour, protecting the child from harm and providing care in case of illness. Separation might still be compatible with providing care in this sense, for example, where a child goes to spend the evening with a friend or where the child is left with someone while the parent goes shopping. Applying these principles to the case before him the Commissioner decided that the AP was not providing [day to day] care on the nights were the child stayed with her grandparents or aunt.

R(CS) 4/03

iii The Secretary of State made a MA on the basis that the AP had shared care of the child. The PWC appealed but the tribunal confirmed the Secretary of State's decision on the grounds that the PWC had produced no evidence to refute the AP's statements concerning the number of nights for which he had care. The shared care rules apply where both parents have "day to day care" of the child. Para. (a) of the definition of that phrase in regulation 1(1) of the Child Support (MA and Special Cases) Regs. 1992 provides that day to day care means care of not less than 104 nights in total during the 12 month period ending with the relevant week. Para. (b) provides for an alternative assessment period "where in the opinion of the Secretary of State a period other than 12 months is more representative of the current arrangements".

The Commissioner held that the alternative assessment period does not have to end in the relevant week and that the reference to "current" arrangements meant arrangements at the effective date of the maintenance assessment at issue. The tribunal had erred in failing to give reasons why it preferred the AP's evidence over that from the PWC. The case was remitted to a fresh tribunal.

R(CS) 7/08

iv This was a new scheme case governed by the changes in law created by the Child Support, Pensions and Social Security Act 2000. A tribunal found that occasions when the NRP looked after the children at the PWC's home overnight, this counted as shared care for the purposes of para. 7 of Sch. 1 to the Child Support Act 1991. The PWC appealed to a Commissioner. Under reg. 7 of the Child Support (Maintenance Calculation and Special Cases) Regs. a night will count for the purposes para. 7 of Sch. 1 where the NRP has care of the child overnight and the child stays at the same address as the NRP. A Commissioner held that both of these requirements were satisfied: on the nights concerned the NRP had looked after the child and he and the child had stayed at the same address.

4 Child in LA care

i The child was placed in the care of a LA and was required by a High Court order to live with the mother. Later the child left the mother's home to live with the father. The father applied for CSM and a MA was made. On appeal to a tribunal, the mother contended that the child had not been lawfully placed with the father by the LA and therefore he was not a person with care. Reg. 51 of the Child Support (MA Procedure) Reg. 1992 ("the MAP regs") says that, where a child being looked after by a LA is placed with a person under the Children Act 1989 ("the Children Act"), that person is not a person with care **unless** the person is a parent of the child **and** the placement is made under s. 23(5) of the Children Act. In addition, reg. 27A of the Child Support (MAs and Special Cases) Regs. 1992 says that, where a child is placed with a person under s. 23(5) the definition of "person with care" in s. 3(3) of the Child Support Act 1991 is modified so as to include that person. In dismissing the appeal, the Commissioner held that the child had in fact been placed with the father under s. 23(5). He was therefore a person with care and there was jurisdiction to make the MA.

R(CS) 7/02

5 Child in boarding school

i One of the qualifying children, who was autistic, had been placed by the local authority in a private residential school for pupils with special needs under section 20 of the Children Act 1989. The child spent the school holidays with his mother. The father argued that the maintenance assessment should be reduced under regulation 25 of the Child Support (Maintenance Assessment and Special Cases) Regulations 1992 ("the MASC Regulations") to exclude the days of residence at the boarding school.

R(CS) 1/04

The Commissioner's first of all rejected the father's contention that the "special" school in this case was something distinct from a "boarding school". In the Commissioner's view the ordinary meaning of "boarding school" covered any school which provides overnight residence for some pupils. As it was clear that the mother would care for the child during term times if he were not a boarder, the effect of reg 27 was to modify the terms of S 3(3)(b) of the Child Support Act 1991 with the effect that the mother was the person who usually provided day to day care. In addition, para. (b)(i) of the definition of day to day care in the Child Support (Maintenance Assessments and Special Cases) Reg 1(2) meant that the mother was treated as providing day to day care during term time. However that did not exclude consideration of reg 25 of the Child Support (Maintenance Assessments and Special Cases) Regs. The Commissioner held that the meaning of the phrase "day to day care" in reg 25 must be the definition given in reg 1(2) (including the special provision in para. (b)(i)). It followed that the LA could not have day to day care during a period when the mother was treated as having it.

A LA was not to be taken to be providing day to day care merely by placing a child in a boarding school in the exercise of its powers under S20 of the Children Act 1989 and paying all the fees. Day to day care concentrated on the immediate, short-term and mundane aspects of care (R(CS) 11/02) or the direct, rather than indirect provision of care.

ii The qualifying child (D) attended a school for children with physical disabilities. Attached to the school is a residential unit intended to provide respite care for pupils and their families during term time. This unit is funded from the LA's education budget. D stayed overnight at the unit more frequently than on a purely respite basis. The AP contended that the LA was providing some day to day care for D and that the case therefore fell within the terms of reg 25 of the Child Support (Maintenance Assessments and Special Cases) Regs. 1992 (care provided in part by a LA). However the Secretary of State argued that D was a boarder at a boarding school under reg 27, in which case D would be treated as in the care of the person who would have care were the child not boarding.

R(CS) 2/04

The Commissioner held that the arrangements made with respect to D did not amount to him being in the care of the LA within the meaning of Ss 22 and 23 of the Children Act 1989. The powers and duties of a local education authority are different from those of a LA's social services functions. A local education authority has no power to provide day to day care for a child within the meaning in Child Support legislation.

Next, the Commissioner considered whether reg 27 applied. He held that reg 27 must include boarding school places funded both privately and from public funds and cites with approval the definition of boarding school in R(CS) 1/04. The Commissioner says that he is uncertain whether in this particular case D can be said to be a border. However he does not have to decide this: if he is a boarder then the mother would be looking after him if he were not boarding. If he is not a boarder the mother remains the person who normally cares for the child.

Part 9: Cancellations and terminations

1 AP returns to live with PWC and qualifying child

R(CS) 8/99

i The AP had started to live in the same household as the child in respect of whom a child support MA was in force. The central issue in this case was when the MA should cease to have effect. Para. 16 of Sch. 1 to the Child Support Act 1991 seemed to offer conflicting alternatives. Sub-para. (1)(b) says that a MA shall cease to have effect "on there no longer being any qualifying child with respect to whom it would have effect". However sub-para. (1)(d) says that a MA shall cease only when the AP and the PWC had been living together for a continuous period of six months. On appeal the Commissioner decided that para. 16(1)(b) applied. Where a parent who had moved out returned to be a member of the same household as the other parent (and child) that child ceased to be a qualifying child because neither of his or her parents was an AP (see the definition of "qualifying child" in s. 3(1) of the Act). There was no need for the parents to have been living together for a continuous period of six months.

2 Child temporarily ceases to live with PWC

R(CS) 8/08

i In April 2006 a DM made a retrospective MA effective from June 2000 with a series of separate assessments made under para. 15 of Sch. 1 to the Child Support Act 1991. However this MA was subsequently cancelled with effect from September 2004 because the sole Qualifying Child (QC) moved to live permanently with the father (and former AP). A question arose as to how in law an earlier period when the QC had lived with his father for a temporary period should be treated. Para. 16(4) of Sch. 1 to the Act says that the Secretary of State may cancel an MA where the PWC ceases to be a PWC in relation to the QC. The Commissioner held that para. 16(4) applies only after an MA is made. It does not apply to the situation where an MA is being made for the first time for a retrospective period. In those circumstances temporary periods where the child ceased to live with the PWC should be dealt with by making separate assessments under para. 15 at £nil for the relevant periods.

Part 10: Departures

1 Property or capital transfers

i Under para. 3(1)(b) of Sch. 4B to the Child Support Act 1991 a departure direction may be given if, before 5 April 1993, an AP makes a transfer of property in accordance with a court order or maintenance agreement and, in consequence of that transfer, no maintenance was payable for the children or the amount of maintenance was less than it would otherwise have been. This is provided that the property transfer is not property reflected in the formula assessment. The Commissioner held that "maintenance" in para. 3(1)(b) does not include the provision of a home as a stable base for the children's development and schooling. The Commissioner then considered what evidence was admissible in deciding what effect the property transfer had on the amount of maintenance for the children. In a court order case the following will be admissible:

R(CS) 4/00

1. the terms of the court order;

2. any contemporaneous surrounding evidence such as solicitor's letters, (although these should be treated with caution as they may be partisan and may set out negotiating positions);

3. the terms of any judgment that was given by the court to explain why the order was made (this will be the best evidence if it is available);

4. the legal context in which the order was made, including the range of orders that may be made and the factors to which a judge must have regard;

5. the oral evidence of the parties to the tribunal or to the Commissioner (although this will be of limited value as it may be partisan and may reflect a party's misunderstanding or later rationalisation of what happened and why).

2 Lifestyle inconsistent

i The tribunal gave a departure direction on the grounds of diversion of income and lifestyle inconsistent. AP appealed to the Commissioner. Firstly, he argued that the tribunal hearing should not have proceeded in his absence. He had telephoned on the morning of the hearing saying that he had a migraine. The Commissioner held that provided the tribunal had considered the circumstances, reg. 11(6) of the CSATs (Procedure) Regs. 1992 allowed it to proceed with the hearing in the absence of a party to the proceedings. Secondly the AP argued that the tribunal decision had the effect of overturning a consent order made by a County Court and that this was improper. The Commissioner rejected this argument. Neither *res judicata* nor issue estoppel applied. The County Court was dealing with different issues. Finally, the AP argued that the tribunal should not have proceeded to a decision without the evidence of the Company Secretary who had been summonsed as a witness. Rejected, the tribunal was entitled to proceed without the evidence of this witness. The CA dismissed the AP's application for leave to appeal confirming the Commissioner's decisions.

R(CS) 2/01

ii A tribunal gave a departure direction in respect of lifestyle inconsistent under reg. 25 of the Child Support Departure Direction and Consequential Amendments Regs., 1996. The AP appealed to a Commissioner who held:

R(CS) 3/01

1. It is necessary to assess the level of income needed to support the AP's lifestyle and to consider the difference between that and the income declared for the formula assessment.

2. It is necessary to form a positive view on whether it is just and equitable to give a departure. To do that a tribunal needs to know what effect the departure would have on the amount of CSM payable.

3. No burden of proof applies when evaluating evidence in relation to the just and equitable provision.

R(CS) 6/02

iii A tribunal decided that the AP had a lifestyle inconsistent with his declared income. However it also found that the lifestyle was partly funded by contributions by his partner. The tribunal directed that the AP's net income should be increased by some £25 pw in accordance with reg. 40(5) of the Child Support Departure Direction and Consequential Amendments Regs. 1996 ("the Departure regs"). The PWC appealed to the Commissioner who set aside the tribunal's decision on the grounds that the reasons were inadequate and that there had been a breach of natural justice. In remitting the case to a fresh tribunal, the Commissioner went on to clarify how regs. 25 and 40(5) work in this sort of case:

1. if the income needed to support the lifestyle and the declared income is met **entirely** by a partner then no direction can be given because of reg. 25(2).

2. however, if the partner only funds **part** of the lifestyle then this can be taken account of in arriving at the amount by which net income is to be increased in accordance with reg. 40(5). This is because reg. 40(5) says "the net income ... shall be increased by the amount specified in the departure direction, being the whole **or part of** the difference between [the income needed to sustain the lifestyle and the declared income]".

3 Costs arising from illness or disability

R(CS) 2/02

i The AP applied for a departure direction in respect of costs arising from long-term illness or disability under reg. 15 of the Child Support Departure Direction and Consequential Amendments Regs. 1996. Reg. 15(3) states that in calculating the amount of special expenses, "financial assistance from any source in respect of" the long-term illness or disability shall be deducted. The question before the Commissioner was whether the AP's Industrial Injuries Disablement Benefit constituted such "financial assistance". The Commissioner held that it did not. Firstly the term "financial assistance" is not a phrase that is appropriate to include benefits and is not used in this way elsewhere in legislation. Secondly regs. 15(3)(b) and (4) deal specifically with how DLA and AA are to be treated. If the term "financial assistance" was intended to encompass benefits then there would be no need for these to be dealt with separately. Examples of financial assistance to which reg. 15(3)(a) would apply would be voluntary or charitable payments which are (wholly or partly) disregarded or payments under an insurance policy.

4 Debts incurred before separation

R(CS) 3/02

i The AP applied for a departure direction under reg. 16 of the Child Support Department Direction and Consequential Amendments regs. 1996 in respect of a debt incurred before he became an AP. The debt was a loan for £5,000 taken out in March 1996. The AP said that the loan was to cover food, fuel, telephone bills, water rates and community charge. The tribunal decided that no departure direction should be given because the debt was one which it was satisfied was "reasonable to exclude" in accordance with reg. 16(2)(m). The tribunal's reasoning was that the loan was to provide for day to day living expenses but these were already catered for in the maintenance formula. On appeal, the Commissioner rejected this reasoning: it was based on a false premise because the expenses concerned were incurred before any MA came into force.

The Commissioner held that the tribunal should have examined each purpose for which the loan was taken out and to make clear decision in respect of each purpose whether it was reasonable to exclude that part of the debt. the Commissioner adds that he would expect tribunals to take the view that it is reasonable to exclude debts which were incurred to provide an extravagant lifestyle or to purchase items not reasonably required.

R(CS) 3/03

ii The AP was a partner in a building business. Most of the partnership's work was done for W.P. & Sons Ltd. The AP and his wife incurred some legal costs and in July 1996 the AP borrowed £10,000 from W.P. & Sons to pay these off. The AP separated from his wife on October 1996. In 1997 the AP applied for a Departure Direction under reg. 16 of the Child Support Departure Direction and Consequential Amendments Reg.

1996 (debts incurred before the AP became an AP). A DM decided that no departure direction could be given because of reg. 16(2)(k) which excludes “a loan obtained by the applicant, other than a loan obtained from a qualifying lender or the applicant's current or former employer”. A tribunal decided that, while the word “employer” was wide enough to include a company which engaged another person as an independent contractor, in this case W.P & Sons limited had “employed” the partnership rather than the AP. The tribunal therefore dismissed the appeal and the AP appealed to the Commissioner.

The Commissioner rejected the tribunal's interpretation of the word “employer”. In the context of reg. 16 an employer means a person who employs another under a contract of service. Neither W.P & Sons Ltd nor the partnership was the AP's employer. The Commissioner went on to consider whether the AP could benefit from reg. 16(4) which provides for the treatment of second debts taken out to clear first debts which might qualify under reg. 16(1). Firstly the Commissioner holds that reg. 16(4) applies as much to a situation where debt 2 is taken out solely to clear debt 1 as it does where debt 2 is taken out only partly in order to clear debt 1. Secondly, the Commissioner asked himself whether a second debt coming within reg. 16(4) was subject to the restrictions in reg. 16(2). His answer was yes: the second debt would be excluded under reg. 16(2)(k), unless it was obtained from a qualifying lender or a current or former employer.

R(CS) 5/03

iii The AP and the PWC purchased the matrimonial home with a building society mortgage. In 1991 the house was sold leaving a “negative equity” debt of £10,000 which the couple repaid under a scheme arranged with the lender. In August 1992, the couple separated. In 1996 the AP made an arrangement whereby the lender agreed to acept a payment of £5,000 in full and final settement of the debt. The AP raised this £5,000 by taking out a personal loan, which he repaid monthly. The AP applied for a departure direction under reg. 16 of the Departure Direction and Consequential Amendments Regs. 1996. The application was refused and a subsequent appeal to a tribunal was dismissed. The AP appealed to the Commissioner on the grounds that the personal loan replaced the original mortgage debt and that mortgage debt was clearly a debt incurred before he became an absent parent.

The Commissioner held that, where repayments were payable under a loan or mortgage in respect of a property which **had been** in the past, but was no longer, the home of the PWC and any child in respect of whom the current assessment was made, then the payments did **not** fall within the exception in reg. 16(2)(h) and the payments did not constitute special expenses. It was important, when considering reg. 16(2) and (4) to consider the situation as at the date of the AP's application for a departure.

5 Decision-making and appeals

R(CS) 9/02

i A departure direction was given in 1997 which had the effect of reducing the amount of CSM payable. In 1999, a fresh MA was made. In addition to making the fresh MA the DM recorded that the departure direction was to continue to have effect. The PWC appealed and the appeal was taken as being against the departure direction. The Commissioner held that the departure decision and the decision on the MA are separate and that they attract separate appeal rights. The Commissioner went on to provide general advice to tribunals on these issues:

1. ideally, the Secretary of State should always give a departure decision when a fresh MA is made. That will allow an immediate appeal against the departure direction element

2. if an appeal is made following a fresh MA and the grounds are wholly or partly to do with a departure the district chairman must identify whether the Secretary of State made a decision regarding the departure.

3. if such a decision has been made then there is an appeal against it.

4. if no such decision has been made, the tribunal has no jurisdiction to deal with the departure issues. The case should be referred to the Secretary of State so that the “appeal” can be treated as an application for supersession of the departure direction. That will generate a decision that can be the subject of an appeal.

ii The PWC applied for a departure on the grounds that the AP’s lifestyle was

R(CS) 1/07

inconsistent with his declared income. The DM referred this to a tribunal in accordance with s. 28D(1)(b) of the Child Support Act 1991. The PWC also appealed against the MA. Before the tribunal heard these two cases, the PWC advised the CSA that she had come to an agreement with her ex-husband and therefore no longer wanted any action taken against him. However this agreement later broke down and the tribunal heard the two cases. The tribunal gave a departure direction. On appeal to the Commissioner, the AP argued that the tribunal should have decided that the departure application had been withdrawn. The Commissioner rejects this argument: reg. 40(1) of the Social Security and Child Support (Decisions and Appeals) Reg. says that a referral of a departure application may only be withdrawn by the Secretary of State. He had not done so and so the tribunal was entitled to proceed. The CA refused leave the AP leave to appeal from the Commissioner's decision.

6 Contact costs

R(CS) 5/04

i The AP applied for a departure under reg. 14 (contact costs) of the Child Support Dparture Direction and Consequential Amendments Regs. 1992 ("the DD regs"). He ived some distance from the qualifying children and so had to stay overnight when visiting them. His contact costs were therefore higher than they would usually be for a father living closer to his children. A DM refused to give a departure because the costs did not exceed the special expenses threshold of £15 per week set out in reg. 19. An AT confirmed the decision. A Child Support Commissioner refused leave to appeal to a Commissioner on 26.9.02 and on 18.10.02 refused to set aside his refusal. The AP sought Judicial Review of both of the Commissioner's determinations. Q claimed that under Art. 3 of the Commissioner's determinations it would be fair or just and equitable that his monthly expenses be calculated and treated as weekly ones. Q also relied on the European Convention on Human Rights 1950 Art. 3, Art. 6 (together with Art. 14), Art. 8 and Art. 1 of the First Protocol.

The Admin Court of the High Court of Justice refused both applications. Reg. 3 of the DD regs applied to the interpretation of the Regs. as a whole, and was not a gateway to a result that treated monthly expenditure as weekly by reference to an individual case and to an argument based on fairness or what was just and equitable. Q had not satisfied S. 28F(1)(a) of the Act because his allowable expenses did not breach the threshold set out in reg. 19 of the DD regs.

The matters relied on by the AP regarding his treatment fell far short of the standard set for a breach of Art. 3 of the Convention, *R (on the application of Pretty) v. Director of Public Prosecutions & anr* (2001) UKHL 61, (2002) ACD 257 applied. His arguments in reference to Art. 6, together with Art. 14, led nowhere as the decisions had been correct in law.

With regard to Art. 8 and Art. 1 of First Protocol, the Court expressed sympathy for the claimant. He did not have a substantial income and the fact that expenses such as boarding charges are not included in the DD regs acted as a disincentive in maintaining monthly contact with his daughters. The court agreed that this was not fair, just or equitable. However that was not the same as saying that Art. 8 is engaged. The Court concluded that, assuming the claimant's Art. 8 rights have been infringed and assuming that Art. 1 Protocol 1 is engaged, the AP's arguments fail on the proportionality arguments.

In line with *R (On the application of Anthony Plumb) v. Secretary of State for DWP* [2002] EWHC 1125 there is a pressing social need to which the child support scheme is a response and that, in respect of it the executive enjoys a wide margin of appreciation. In the balance of competing considerations relating to the proportionality arguments these points outweighed the points advanced by the AP.

R(CS) 5/08

ii The AP applied for a departure direction in respect of travel to work costs to be superseded. He claimed: a) petrol costs between his home and his place of work, b) parking costs in the town where he worked, c) travel by car to meet his clients and d) travel by train to London for business meetings. The Commissioner agreed with the tribunal that reg. 13 of the Child Support (Departure Direction and Consequential Amendments) Regs. 1996 only allowed costs incurred in travelling from home to work.

Thus the expenses in c) and d) could not be allowed. The question was whether the parking costs could be allowed under reg. 13 as a "minor incidental cost such as tolls or fees for the use of a particular road or bridge, incurred in connection with travel…[from home to work]". The Commissioner compared the current tolls for several crossings (e.g. The Severn Bridge) and found that the amounts were similar to the AP's parking costs. Those costs were therefore "minor". He also held that, as a matter of the ordinary meaning of reg. 13, the parking costs were incurred "in connection with" travel to work and that they were also incurred "for the purpose of" such travel.

Part 11: Other

1 Validity of legislation

i The AP appealed against a decision that he was liable to pay £71.96 per week under the Child Support Act 1991. His grounds of appeal to the Commissioner raised major issues concerning the validity of the Child Support Act and regs. and so was heard by a tribunal of Commissioners. The Commissioners held that:

R(CS) 2/95

1. CSM was not "pay" and so the obligation to pay child support maintenance was not covered by Article 119 of the EEC Treaty and Council Directive 75/117/EEC;

2. child support Commissioners have jurisdiction to decide whether any child support reg. is *ultra vires* (*CAO v. Foster* [1993] AC 754 applied);

3. applying the test in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, the various regs. made under the Child Support Act 1991 that had been applied in this case were not invalid on the grounds of "irrationality";

4. the regs. were not invalid by reason of incompatibility with s. 2 of the Child Support Act. s. 2 was confined to the exercise by the S of S or a CSO of discretionary powers in individual cases.

ii In a decision mainly concerned with housing costs it was contended before the Commissioner that the operation of the Child Support Act 1991 entailed a limitation of the appellant's rights of access to his child and thus breached Article 8 of the European Convention on Human Rights (right to respect for family and private life). The Commissioner found no basis for this contention. The Commissioner also held that EC Directive 79/7 (equal treatment) had no application to the child support legislation.

R(CS) 3/96

2 Estoppel

i The father of two children had made an agreement with a liable relatives officer of the DSS to pay maintenance at a fixed rate for three years from August 1991. The mother applied for CSM and an MA was accordingly made, effective from 15 October 1993. The father sought to argue that the CSO was prevented from making the MA because of the principle of estoppel. The Commissioner held that, while assurances as to the future are capable of creating an "equitable" estoppel, an estoppel cannot prevent a duty enjoined by statute from being carried out. In taking this view the Commissioner follows both R(SB) 8/83 and *Maritime Electric Company v. General Dairies Ltd* [1937] AC 610.

R(CS) 2/97

3 Matters outside the scope of the maintenance formula

i The AP was required under a mortgage agreement to pay £110 per month in respect of the mortgage on the former matrimonial home where the PWC and qualifying child resided. He also paid the children £20 per week pocket money. The Commissioner held that neither the mortgage payments nor the pocket money could be taken into account because the formula simply did not allow crediting of that nature. Such crediting could only take place at the discretion of the S of S when it came to the enforcement of payment due under a MA.

R(CS) 9/98

4 Effect of the Limitation Act

The AP appealed against a supersession that resulted in an MA effective from September 1998. The qualifying child was born in 1988. The AP argued that s. 9(1) of the Limitation Act 1980 applied. This says: "An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued". The child was born more than six years

R(CS) 10/02

before the first MA and so, the AP argued, liability was barred. The Commissioner rejected these arguments:

1. the process whereby a MA is applied for and made is not an "action" as defined in s. 38(1) of the Limitation Act.

2. in any event no "cause of action", within the meaning of s. 9(1) of the Limitation Act accrues until the MA has been made.

3. even if the cause of action could be regarded as accruing at an earlier date, that would not be the date of the child's birth but (at best) from day to day after the Child Support Act 1991 came into force.

Part 12: Variations

1 Procedure

i On 13.9.04, the PWC appealed against a maintenance calculation on the grounds that the NRP had rental income. The PWC also applied for a variation. A DM rejected this on preliminary consideration under s. 28B of the Child Support Act 1991 and decided not to revise the maintenance calculation. The tribunal hearing the appeal decided to agree a variation under reg. 18 (assets) of the Child Support (Variations) Regs. 2000. The Commissioner held:

R(CS) 2/06

1. a decision under s. 28B rejecting an application for a variation does not of itself dispose of the application. Such a decision must be in the form of a decision not to revise or not supersede the maintenance calculation;

2. it would have been possible for the DM to treat the PWC's appeal as an application for a variation. In the benefits context, the Commissioners have always encouraged DMs to look at the substance of a letter from a claimant rather than its form and to treat it as an application for whatever is most advantageous to the claimant. A greater degree of restraint is needed in Child Support because what is advantageous to one parent is often disadvantageous to the other.

ii The PWC applied for a variation on the grounds of diversion of income. This was referred to a tribunal in accordance with S. 28D(1) of the Child Support Act 1991. Before the Commissioner, it was argued by the Secretary of State that, on a S. 28D(1) referral, a tribunal could only agree to the variation and state how it applies and that it was for the Secretary of State to make the revision or supersession necessary to give effect to the variation. The Commissioner disagreed holding that, on a referral, the tribunal not only decided the details of the variation but was also required to make the consequent revision or supersession. The Commissioner's reasons for this conclusion were:

R(CS) 5/06

1. As a variation application is treated as an application for revision or supersession, the Commissioner could not see how the tribunal could decide the variation without making a revision or supersession.

2. In order properly to apply the Just and Equitable provisions the tribunal needed to know the effect of a proposed variation on the MC; so why should it not take that decision properly so as to avoid any injustice?

3. In practice the making of a referral normally involved little beyond sending a set of documents. There was no logic in giving little help with the decision but then insisting that the revision or supersession was reserved to the Secretary of State.

4. If the tribunal makes the revision or supersession, this avoids the creation of a separate decision that can give rise to a second appeal to a different tribunal.

5. Any difficulty the tribunal may have in calculating the MC can be overcome by directing the Secretary of State to make the calculations and giving the parties liberty to apply if they disagree with the way those calculations are done. Finally the Commissioner commented that any problems which might arise about the admissibility of court documents could be obviated by obtaining the formal authority of the relevant court. (see also *21.12.2.i*).

2 Just and Equitable

R(CS) 5/06

i The PWC applied for a variation on the grounds of diversion of income. This application was referred to a tribunal under S. 28D(1) of the Child Support Act 1991. The tribunal agreed to a variation under diversion, determining that the NRP's net income should be increased by £359.15 pw. It went on to find that this would result in a MC of £89.79 pw. However the tribunal decided that it would only be Just and Equitable to agree a variation that resulted in a MC at £60 pw. In its Statement of Reasons, the tribunal identified an error in its calculations. The result of the increase in net income should have been a MC at £53.92 pw. Nonetheless the tribunal confirmed its decision that the MC should be £60 pw. The Commissioner found that there was an inconsistency between the Decision Notice and the Statement of Reasons which was in itself an error in law. The Commissioner held that it was "arguable" whether the legislation allowed a tribunal to reduce a proposed variation by using the Just and Equitable provisions. However he did not decide that point. He held however that it was beyond question that Just and Equitable could not be used to increase a variation above the amount justified by the relevant Variation reg. (see also *21.12.1.ii*).

3 Special expenses

R(CS) 1/08

i A MC was made, adjusted to reflect shared care. The NRP sought a variation on the grounds of contact costs. He said that he incurred considerable costs in travelling long distances to pick up and return his daughter when she stayed with him one weekend per fortnight. A variation was refused by the DM but allowed by a tribunal. The relevant provision is reg. 10(4) of the Variation Regs. which says that "costs of contact shall not include costs which relate to periods when the NRP has care of the qualifying child overnight as part of a shared care arrangement". The Commissioner held that the tribunal had incorrectly read the words "which relate to" as during. A much broader meaning was intended. If the costs are incurred for the purposes of a period, which is a question of fact, then they are incurred "in relation to" that period.

The decisions listed below are not included in chapter 21

Decisions which are no longer relevant because of a change in legislation

R(CS) 1/97
R(CS) 3/98
R(CS) 5/98