IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CCS/2116/2013

Appellant:	Mr Charles John Adams
First Respondent:	The Secretary of State
Second Respondent:	Miss Elizabeth Green

DECISION OF THE UPPER TRIBUNAL

Judge Charles Turnbull

ON APPEAL FROM:

Tribunal:	First-Tier Tribunal (Social Security and Child Support)
Tribunal Case No:	sc242/11/07499
Tribunal Venue:	Fox Court
Hearing date:	1 November 2012

1. This is an appeal by the non-resident parent (Mr A), brought with my permission, against a decision of a First-tier Tribunal sitting at Fox Court on 1 November 2012. For the reasons set out below the First-tier Tribunal's decision was in my judgment wrong in law. I allow the appeal, set aside the First-tier Tribunal's decision and remit the matter for rehearing before an entirely differently constituted First-tier Tribunal. **It would appear to be appropriate for the appeal to be reheard at the same time as the other appeal(s) presently before the First-tier Tribunal relating to these parties.**

2. I held an oral hearing of this appeal on 3 July 2014 at which Mr A was represented by Dr Pelling, the Secretary of State was represented by Mr Stephen Cooper of the Office of the Solicitor to the Department for Work and Pensions, and the parent with care, Miss G, was represented by Mr Holden. I have since received further written submissions on behalf of Mr A and Miss G, pursuant to a Direction which I made at the hearing.

3. Mr A and Miss G have a son, Nicholas, who was born on 22 March 2001, and who lives with Miss G.

4. The decision under appeal to the First-tier Tribunal was a decision made on 28 March 2011 that Mr A was liable to pay child support maintenance in respect of Nicholas in the sum of £75 per week from the effective date of 29 April 2009. That decision included a variation on the grounds of assets and income not taken into account.

5. As far as the variation based on assets was concerned the decision maker took as the value of Mr A's relevant assets (i) a flat at 18 Cedar Drive valued at £265,000 and (ii) half the value of a flat at 22 Cedar Drive – i.e. £132,500. The flat at 22 Cedar Drive was and is comprised in a trust, and the decision maker took half its value on the (with respect) somewhat bizarre ground that Mr A was one of the two trustees.

6. The First-tier Tribunal allowed Mr A's appeal and decided that Mr A was liable to pay £57.14 per week from 24 April 2009. That sum was arrived on the basis that (i) Mr A had no earned income for the purpose of the formula assessment (ii) by way of variation under reg. 18 (assets) of the Child Support (Variations) Regulations 2000 ("the Variations Regulations") £530.77 per week was to be added to his income, which would have resulted in a child support maintenance calculation of (in round terms) £80 per week but (iii) that was reduced to £57.14 per week by reason of a two-sevenths reduction for shared care.

7. The First-tier Tribunal produced both a Decision Notice, which had a "summary of reasons", extending to some 2 pages, and a later Statement of Reasons. Both those documents must be looked at in order to ascertain its reasons.

8. As far as the variation by reason of assets was concerned, the First-tier Tribunal, like the decision maker, included in the relevant assets the flat at 18 Cedar Drive, valued at £265,000. In relation to the trust assets, the First-tier Tribunal set out its reasoning in the Decision Notice as follows:

> "9. 22 Cedar Drive is part of the Lattner Will Trust. The probate value of the trust was £533,000. That included the flat at Buckingham House. Allowing for Inheritance Tax liability we assessed the net value of the trust at £400,000. It is a discretionary trust. Mr [A] does not have a beneficial interest in the trust property but he does have the ability to control it. His co-trustee is a solicitor. He would in all likelihood follow M [A]'s wishes and instructions in how to operate the trust unless, of course, this involved anything for an illegal or improper purpose.

10. As to the amount to be taken into consideration, the note signed by the late Mrs Lattner makes it clear that her original intention was to divide her estate 5 ways. The discretionary trust was put into place as it was not clear whether or not Nicholas was going to be part of the family.

11. We have decided in these circumstances to impose a liability that effectively takes into account one fifth of the trust property. The way the regulations work, the 8% calculation applies to the entire amount but the assessment can then be reduced (not increased) to the appropriate figure under the just and equitable provisions.

12. If, looking at it on a theoretical basis, the total capital value of assets for the variation under Regulation 18 was £345,000 (£265,000 for 18 Cedar Drive and £80,000 for 1/5 of the Trust) at 8% the weekly income to be included under Regulation 25 would be £530.77. This would give a liability of £79.62 per week, rounded to £80.

13. In our view it is just and equitable to agree a variation resulting in a liability of £80 a week and in coming to this conclusion we have applied the principles contained in the Act and the relevant issues as set out in the regulations."

9. Mr A's application for permission to appeal to the Upper Tribunal was based on contentions that the First-tier Tribunal had gone wrong in law, both procedurally and in substantive respects, in finding that the assets of the Lattner Trust were assets which he had "the ability to control", within the meaning of reg. 18(1)(a) of the Variations Regulations. The outcome which he seeks is that the FTT's decision is set aside, but only in relation to the part of the decision which found that one fifth of the assets of the Lattner Trust were relevant assets for variation purposes. He submits that the FTT's decision should be re-made by removing the £80,000 from the reg. 18 assets, which would reduce the maintenance calculation to £43.57 per week (i.e. a difference of about £14 per week).

10. In my judgment the FTT's decision was procedurally unfair in making a finding that the other trustee of the Lattner Trust, Mr Craig, would in all likelihood follow Mr A's wishes and instructions, without giving Mr A the opportunity to adduce evidence from Mr Craig about that. I do not think that Mr A and his representative were on notice that evidence from Mr Craig might be material until the issue of control was raised by the Tribunal at the hearing. I in any event have considerable doubts whether a finding that trust assets are in the control of one of the trustees or a beneficiary can be correct, in a case where there is no evidence that the trustees are not performing or would not perform their fiduciary obligations properly. Having regard to my decision below in relation to the meaning of beneficial interest in reg. 18(1)(a), it is not necessary for me to consider further the meaning of "control".

11. At the time of giving permission I raised the question whether Mr A's beneficial interest under the Lattner Trust meant that he had a beneficial interest in the assets of the Trust, within the meaning of reg. 18(1)(a).

12. That question may have additional importance by reason of events subsequent to the decision maker's decision of 28 March 2011. As I understand it a further maintenance calculation was made, by way of supersession, taking effect from 16 December 2011, in the sum of only £7.86 per week. It appears (p.872) that the reason for that decision was that Mr A informed the CSA that he had gone to live in no. 18 Cedar Drive, with the result that no. 18 was from then on any view excluded from the "assets" to which a reg. 18 variation can apply: see reg. 18(3)(e). However, it further appears that on 8 July 2013 Miss G applied for a further variation on the ground that the property from which Mr A had moved (26 Edmunds Walk) is also comprised in a settlement in which Mr A has a beneficial interest. According to Mr A's submissions in this appeal (p.856) it is beneficially

owned in equal shares by two discretionary trusts, made by his parents, in which he has an interest as discretionary beneficiary. The valuation of no. 26 was at least £1.3 million. The fact that Mr A no longer lived in it made it potentially eligible for inclusion in an assets variation. The CSA made a decision on the footing that "he has used the property in the last 12 years at his own discretion even though he is not a trustee. This must have been in agreement with the trustees and therefore [Mr A] must have the ability to control the trust." The CSA's decision was to add income to Mr A's income, by way of a variation under reg. 18, at the rate of 8% per annum on the value of no. 26. That resulted in a maintenance calculation of £214.29 per week. Mr A has appealed that decision, and the appeal remains to be heard.

13. Plainly, the question whether Mr A has a "beneficial interest" in no. 26, for the purpose of reg. 18(1)(a), may arise in that further appeal.

14. By Miss Lattner's Will she provided:

> "7(A) My Trustees shall hold my Residuary Estate on the following discretionary trust:-
>
> > (i) For not more than eighty years from my death to apply the capital for the benefit of such of [Mr A] and his issue as my Trustees think fit.
> >
> > (ii) To apply the income on the same trust as that declared in (i) or for not more than twenty one years from my death to accumulate the whole or any part of it.
> >
> > (iii) My Trustees may exercise their discretionary powers when and how they think fit and shall not be under any obligation to make payments to or for the benefit of all those in whose favour they can exercise their discretion nor to ensure equality among those who are benefited.
>
> (B) If the preceding trust fails I give half of my Residuary Estate to my cousin [RFB] but if he has died before me or before this gift vests in possession leaving issue this gift shall pass to his issue and if more than one in equal shares per stirpes contingent on attaining 25 years.
>
> (C) Subject to the foregoing my Trustees shall hold the balance of my Residuary Estate upon Trust for such registered charities and such charitable purposes (according to the law of England) as my Trustees in their absolute discretion think fit."

15. Regulation 18 of the Variations Regulations provides, so far as directly material, as follows:

> "(1) Subject to paragraphs (2) and (3), a case shall constitute a case for the purposes of paragraph 4(1) of Schedule 4B to the Act where the Secretary of State is satisfied there is an asset –
>
> > (a) in which the non-resident parent has a beneficial interest, or which the non-resident parent has the ability to control;
> > (b) which has been transferred by the non-resident parent to trustees, and the non-resident parent is a beneficiary of the trust so created, in circumstances where the Secretary of State is satisfied that the non-resident parent has made the transfer to reduce the amount of assets which would otherwise be taken into account for the purpose of a variation under paragraph 4(1) of Schedule 4B to the Act; or

(c) which has become subject to a trust created by legal implication of which the non-resident parent is a beneficiary.

(2) For the purposes of this regulation "asset" means –
(a) ……..
(b) a legal estate or beneficial interest in land and rights in or over land;
(c) ……

(3) Paragraph (2) shall not apply –

……..

(e) to property which is the home of the non-resident parent or any child of his"

16. The nature of an interest under a discretionary trust is explained as follows in *Snell's Equity,* 32nd edition (2010) at 22-005:

> "The beneficiary's only right is to be considered for the exercise of the trustee's discretion and to compel due administration of the trustee's duties. He has no more than a hope that the discretion will be exercised in his favour. Except for any money that the trustee has already appointed to him, he therefore has no interest that his creditors or assigns could claim against. His interest is not alienable to another person.
>
> But the beneficiary's interest is nonetheless proprietary in character since it gives him a stronger equitable title to the trust property than any third party with no entitlement to it at all. He would have a sufficient interest to trace and recover any money that the trustee transferred in breach of trust. But his only right would be to compel the third party to reinstate the misapplied trust money to the trust fund. He could not require the third party to pay the money directly to him since that would give the beneficiary a stronger right against the third party than he had against the trustee himself."

17. There is no doubt that the discretionary beneficiaries are beneficiaries under Miss Lattner's will trust. The question, however, is whether they have a "beneficial interest" in the assets of that trust, within the meaning of reg. 18(1)(a). It is recognised in case law that the word "interest" in a statute, and in my judgment therefore also the words "beneficial interest", are capable of having a wider meaning than what might be termed their strict conveyancing meaning. Thus, in *Gartside v IRC* [1967] 2 All ER at p.180, Salmon LJ said (in the Court of Appeal):

> "The word "interest" as used in the Finance Acts has a wider meaning than its strict conveyancing meaning. It is now well settled that those eligible to benefit under a discretionary trust, commonly called the "discretionary objects", have an interest in the property from which the income, the subject of the discretionary trust, is derived. This is so notwithstanding that there is a power of accumulation of surplus income and the trustees may never pay to or apply for the benefit of any of the discretionary objects one penny of the income (*A-G v Farrell* [1931] 1 KB 81)."

18. In *A-G v Farrell* Greer L.J. said (at p.101), of a discretionary object:

> "He has no legal right to force the trustees to give him anything; at the same time he had in a colloquial sense an interest in the estate, because it was an estate out of which something might be allotted to him in the discretion of the trustees."

19. The House of Lords in the *Gartside* case agreed that the word "interest" was capable of a very wide meaning: see, in particular, Lord Wilberforce at para. 44 of the typed version of the speeches which is attached to the Secretary of State's submission: "It can be accepted that "interest" is capable of a very wide and general meaning". However, as has been pointed out in the submissions in this appeal to me, the House of Lords disagreed with the Court of Appeal that the word "interest", as used in the expression "interest in possession" in the estate duty legislation which fell for consideration there, was capable of bearing such a wide meaning, because if it did it would be impossible to define the extent or value of the property which passed for estate duty purposes. Lord Wilberforce thus went on to say (at para. 45):

> "No doubt in a certain sense a beneficiary under a discretionary trust has an "interest": the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a Court of Equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion "fairly" or "reasonably" or "properly" that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere *spes*. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a Court of Equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed."

20. The question is therefore whether the words "an asset ….. in which the non-resident parent has a beneficial interest", in reg. 18(1)(a) of the Variations Regulations, have a meaning sufficiently wide to encompass the interest of a beneficiary under a discretionary trust. In my judgment they probably do, for the following reasons.

21. First, in contrast with the position in *Gartside*, the child support legislation would not be rendered impracticable or unworkable if a wide meaning were given. In the estate duty legislation it was necessary to know precisely the extent of the property in which an interest in possession subsisted. For the purpose of regulation 18, however, there is nothing unsatisfactory about saying that a discretionary beneficiary has a beneficial interest in the whole of the assets in respect of which a discretion to apply income or capital in his favour subsists. That is because the decision maker or First-tier Tribunal on appeal is in effect required to limit the amount of income which is added, by way of variation, to the non-resident parent's net income under reg.18 to the amount which is "just and equitable": see s.28F of the Child Support Act 1991, as interpreted in *RC v CMEC and WC* [2009] UKUT 62 (AAC). Under that provision, when determining whether to treat the notional income (at 8% or some lower rate) of all or any part of the value of the trust assets as added to the non-resident parent's income, the decision maker or tribunal can take into account the likelihood of trust income or capital actually being paid to or applied for the benefit of the non-resident parent, and past history may obviously be important in relation to that. The decision maker or tribunal will also be able to take into account whether trust income or capital would be paid to or applied for the benefit of the non-resident parent, were he to ask for it.

22. Secondly, there is in my view no doubt that, in relation to assets which are held on trust in the particular situations specified in reg. 18(1)(b) and (c), an interest of the non-resident parent in those assets as a discretionary beneficiary is sufficient to bring those assets within the scope of a reg. 18 variation. That is because it is sufficient, under limbs (b) and (c), that the non-resident parent is "a beneficiary" of the trust. It cannot therefore be argued that the legislature cannot have contemplated that it would be satisfactory or workable for assets to be included in a variation merely on the basis of an interest in those assets as a discretionary beneficiary.

23. Thirdly, it has to be accepted that a fixed (as opposed to discretionary) beneficial interest in assets brings those assets within reg. 18(1)(a), even though that beneficial interest is of negligible value. For example, if property is held on trust for A for life, with remainder on various other trusts, with an ultimate remainder (if all the previous trusts fail) to B (the non-resident parent), then B has a beneficial interest in the trust assets even though he has no interest in income during A's life and even if it is virtually certain that he will never be entitled to anything at all. If, as must be the case, those trust assets are assets which would fall within reg. 18(1)(a) by reason of B's remote beneficial interest in them, it would be odd if trust assets whose income or capital may be applied in favour of B pursuant to a discretionary trust could not be the subject of a variation at all, however great the probability that the income or capital would in fact be so applied.

24. Fourthly, it would have been known to the legislators that discretionary trusts are commonly used in situations where it is intended that all or a substantial part of the income will in fact be paid to A, but where it is desired that A should not be capable of being treated for tax purposes as having an interest in possession in any part of the income. There is no reason why the legislature should have wished that a non-resident parent who is able to avoid being treated as entitled to an interest in possession for tax purposes should also be able to avoid being treated as having an interest in the assets for variation purposes. As I have said, the degree of likelihood that the non-resident parent will, in the particular case, actually be paid income or capital is something which can be taken into account under the just and equitable provision in s.28F.

25. Fifthly, although the structure of reg. 18(1)(a), (b) and (c) might at first sight suggest that some narrower meaning should be given to the nature of a beneficial interest which can bring the trust assets within limb (a), when the enacting history is taken into account I do not think that that is so.

26. Reg. 18(1)(a) is a general provision relating to assets in which the non-resident has a beneficial interest, or which he has the ability to control. (b) and (c) relate to trusts arising in particular situations, namely either where the non-resident parent was the settlor and created the trust in order to reduce child support maintenance, or where the trust has arisen "by legal implication". In the case of (b) and (c) it is sufficient that the non-resident is a "beneficiary of the trust" or "a beneficiary". Both those expressions would clearly in my view encompass the case of a discretionary beneficiary. That might suggest that the different wording "in which the non-resident parent has a beneficial interest" in (a) must be intended to be narrower: if it is not then there appears to be no need for (b) or (c), because they would both fall within (a) in any event.

27. However, one must take into account that the original wording of (a) was "in which the non-resident parent has <u>the</u> beneficial interest". The amendment to substitute "a" for "the" was made in 2002. The original wording was plainly unsatisfactory in that it would appear to have applied only where the non-resident parent was the absolute owner of the entire beneficial interest, and therefore not even in the situation where he had, say, a 50% absolute beneficial interest. Excluding the case of a bare trust, the effect of the original provisions was therefore that the jurisdiction under reg. 18 applied to assets in which the non-resident had a beneficial interest under a trust only in the case of trusts created in the specific situations set out in (b) and (c). But the effect of the amendment to (a) was undoubtedly to widen (a) so that it applied to beneficial interests under all trusts, whether express or arising by operation of law, and whether or not created in order to avoid child support maintenance. In that situation I do not find it surprising that the draftsman, when making the amendment, overlooked that his amendment had rendered limbs (b) and (c) unnecessary, and therefore did not remove limbs (b) and (c). There does not seem to me to be much force in a contention that, when making the amendment, it was intended that there should be a difference, in relation to the question whether assets which are the

subject of discretionary trusts are covered, between the expressions used in (a), (b) and (c).

28. In my judgment, therefore, the FTT was wrong to hold that Mr A does not have a beneficial interest in the assets of the Lattner Trust.

29. If I were satisfied that, had it proceeded on the footing that the Lattner Trust assets fell within reg. 18(1)(a) because they were assets in which Mr A had a beneficial interest, as opposed to being assets of which he had control, the FTT would still have made the decision which it did – i.e. that £80,000 of the Trust assets should be included for variation purposes – it would be possible for me, without receiving any additional evidence, to re-make the FTT's decision in the same terms as that which it actually made. However, I do not think that I can be sufficiently sure of that. The FTT's reasoning depended to a substantial extent on its finding as to ability to control, which as I have said was in my view procedurally unfair.

30. Mr A submits that I should set aside only that part of the FTT's decision which found that trust assets to the value of £80,000 (i.e. one fifth of the trust assets) were assets for reg. 18 purposes, and that I should myself re-make that part of the decision, if necessary after holding a further hearing in relation to factual matters relevant to the trust assets. It is not strictly possible to set aside a FTT's decision in relation to a part only of its reasoning. Either the FTT's decision is set aside or it is not: see section 12 of the Tribunals, Courts and Enforcement Act 2007. What can be done, however, in a case where the FTT's error affects only a self-contained part of its reasoning, is to set aside the FTT's decision but then for the Upper Tribunal to direct that whoever is to re-make that decision (i.e. whether it is the FTT or the Upper Tribunal) shall reconsider only the part of the decision affected by the error of law, with the rest of the re-made decision being to the same effect as that made by the FTT.

31. In the present case, the FTT would clearly in any event, and regardless of the error of law which it made in relation to the Lattner Trust assets, have decided that it was just and equitable to direct a variation under reg. 18 in respect of the value of no. 18 Cedar Drive. However, I am far from clear that, had it found that no part of the Trust assets should be included in assets for reg. 18 purposes, it would have dealt with the application for a variation on lifestyle grounds in the very brief manner which it did in para. 21 of the Decision Notice:

> "It is not appropriate to make a variation on lifestyle grounds. Overall, the lifestyle is explained once the unearned income and other relevant issues are taken into account."

32. The FTT plainly considered that, looked at overall, the maintenance calculation which it arrived at was a fair one: see in particular para. 29 of the Statement of Reasons. Had it not been able to arrive at that result by including £80,000 of the Trust assets by way of an assets variation, it might have felt it necessary to consider the possibility of a variation under reg. 20 in far more detail. It did set out some further reasoning in relation to cost of lifestyle in paras. 20 to 25 of the Statement of Reasons. Mr A may be correct in submitting that the FTT fully investigated the cost of his lifestyle and concluded that it was to be explained by items excluded by reg. 20(3) of the Variations Regulations and other matters. However, if it did, it did not in my judgment set out that reasoning in sufficient detail to enable it to be properly understood.

33. The FTT may further have gone wrong in law in not explaining what the "reasonable purpose" was for which the shares in the company were considered in para. 18 of the Decision Notice to be retained. The company appears to be dormant and owns no. 17 Cedar Drive, and there would appear to be a substantial potential surplus for Mr A on a winding up of the company.

34. In my judgment the whole of the FTT's decision must therefore be re-made, and it is not appropriate to make a direction that any part of its findings or reasoning shall be adopted by whoever re-makes the decision. As there is still at least one other outstanding appeal before the FTT, which will therefore in any event be reconsidering closely related matters, it is in my judgment plainly appropriate that the rehearing of this appeal should be remitted to a fresh FTT, rather than that the decision be re-made by the Upper Tribunal.

35. At the time of the hearing before me I was concerned that, in remitting the appeal for redetermination by a fresh FTT, I might be making a decision which neither Mr A nor Miss G would want, in preference to the other side's contention succeeding, given the time and costs which a redetermination will involve, and given that only some £14 per week, for a period of rather less than 3 years, is directly at issue. However, Mr A has confirmed that he would rather have that result than an outcome whereby the FTT's existing decision stands, and Miss G positively submits that if the FTT's decision is set aside the appeal should be remitted to the First-tier Tribunal for redetermination.

Charles Turnbull
Judge of the Upper Tribunal
5 August 2014