[2018] AACR 25

(French v Secretary of State for Work and Pensions and Beckam [2018] EWCA Civ 470)

CA (Hickinbottom and Coulson LJJ) **CCS/865/2015**
13 March 2018

Child support – assessment of income – whether regular winnings from gambling constitute earnings from gainful employment

The appellant was a professional gambler whose sole source of income for 25 years had been from gambling. He paid no income tax or national insurance on any of his winnings and undertook no other income-generating activity linked to gambling which could be characterised as a trade or other form of self-employment. The Child Support Agency (CSA) assessed him as liable to make payments of child maintenance based upon his income from gambling and he appealed on the basis that such income should not be considered as earnings in the maintenance assessment. The First-tier Tribunal and the Upper Tribunal both upheld the CSA's decision and in his submission to the Court of Appeal the appellant argued that his case was materially indistinguishable from that of *Hakki v Secretary of State for Work and Pension and Blair* [2014] EWCA Civ.530, [2015] 1 FLR 547. The issue before the court was whether the appellant's regular winnings from gambling constituted earnings from gainful employment.

Held, allowing the appeal, that:

1. for the purposes of a child maintenance assessment the scope of self-employed earnings was the same as for the assessment of welfare benefits and income tax (paragraph 20);

2. it had been established since 1925 that gambling winnings were excluded from self-employed earnings for the purposes of income tax. Even the fact that someone was a "professional" gambler with no other source of income did not mean he was a "self-employed earner". As gambling winnings were not generally taxable income, they were not generally earnings considered for a child maintenance assessment. Such winnings would only qualify as self-employed earnings where an adjunct to a trade or profession in which the individual was engaged and without such an association, as a matter of law, gambler's winnings could not amount to profits or gain arising from a trade, profession or employment, and could not be within the scope of the self-employed earnings for the purpose of the child support scheme (paragraphs 20 and 27);

3. the only proper conclusion was that the appellant was not at any material time gainfully employed as a self-employed earner: *Hakki* followed (paragraphs 26 to 28).

DECISION OF THE COURT OF APPEAL

The appellant did not appear and was not represented.

Tim Buley instructed by The Government Legal Department, appeared for the first respondent.

The second respondent did not appear and was not represented.

Judgment

LORD JUSTICE HICKINBOTTOM:

Introduction

1. The appellant is a professional gambler, who derives his entire income from gambling. The short point in this appeal is whether his regular winnings from gambling constitute earnings from gainful employment such that they should be taken into account in the

assessment of the amount for which he is liable to pay the second respondent, the mother and the parent with care of his child, by way of child support. Both the First-tier Tribunal (F-tT) and the Upper Tribunal(UT) held that they do. The appellant, supported by the Secretary of State, contends that they do not.

2. In this appeal, the appellant has represented himself. Unfortunately, he suffers from a serious heart condition, and informed the court this morning that he was too unwell to travel. He did not seek an adjournment – indeed, he expressed a firm wish for the appeal to proceed in his absence – and we have the benefit of his helpful skeleton argument. The second respondent has taken no part in the appeal. Before us, Tim Buley of counsel appeared for the first respondent, the Secretary of State.

The facts

3. The relevant period for the assessment of child support in this case is 1996 to 2011. As to the appellant's gambling during those years, First-tier Tribunal Judge Vasmer, sitting in the F-tT (Social Entitlement Chamber), made various findings of fact to which there has been no challenge.

4. The appellant is a professional card gambler, whose sole source of income for the last 25 years has been gambling. When gambling, his annual expenses are about £6,800. In 1996 and 1997, he played four nights per week, winning about £30,000 per year net of losses but before expenses (i.e. £23,200 net of expenses). In 1998 and 1999, he was ill and did not play. He began to play again in 2000, but at a reduced level, winning £19,000 per year (i.e. £12,200 net) in the period 2000-2; before rising again to his pre-illness level for the period 2003-11.

5. In addition to card playing, the appellant bet on horses and occasionally boxing, generally winning £1,000-£3,000 net of losses per year, but with additional large single wins on horses in 2002 (£4,000) and 2009 (£30,000). He also had a standing bet of £1,500 per year with a friend as to whether, in the league, Manchester United (his team) would end the season above Liverpool (his friend's team). Over the period in question, the respective fortunes of those teams very much favoured the appellant.

6. The appellant did not pay income tax or national insurance contributions on any of his gambling winnings.

7. On the basis of these winnings, on 24 December 2012, the Child Support Agency ("the CSA") on behalf of the Secretary of State made a series of decisions in relation to the appellant's weekly liability for child support maintenance of his child – a qualifying child under the scheme – in various periods from 1996 to 2011 in amounts ranging from £95 to £110 per week, except for the years 1998 and 1999 when it was nil.

8. The appellant appealed to the F-tT on the basis that, under the relevant statutory scheme, his gambling winnings should not have been taken into account as earnings in the maintenance assessment.

The statutory scheme

9. The principle statute governing child support is the Child Support Act 1991 ("the 1991 Act"). The 1991 Act has, from time-to-time, been substantially amended, but this case is subject to the original scheme (sometimes referred to as "the 1993 scheme"). Unless indicated to the contrary, statutory references in this judgment are to the provisions in that scheme.

10. The scheme provides for an "absent parent" to be liable to make weekly payments for the benefit of the "parent with care" and for the upkeep of qualifying children. Payments are made pursuant to a "maintenance assessment", i.e. a formal determination as to the existence and amount of the weekly liability, which may vary over time if one of the variables upon which the assessment is made (e.g. the absent parent's income) changes.

11. The formula for calculating the amount of the weekly payment is set out in Schedule 1 to the 1991 Act. One variable within the formula is the income of the absent parent, referred to as "N".

12. How N is calculated is set out in the Child Support (Maintenance Assessment and Special Cases) Regulations 1992 (SI 1992/1815) ("the 1992 Regulations"). Regulation 7 provides that N shall be the aggregate of the amounts determined in accordance with Parts I to V in Schedule 1 to the 1992 Regulations. Part I Chapter 1 is concerned with earnings as an employed earner; Part I Chapter 2 with earnings as a self-employed earner; Part II with benefit payments of various kinds; Part III with "other income"; Part IV with income of a child treated as the income of the parent; and Part V with other amounts treated as income of the parent.

13. "Earnings" is defined in paragraph 2A (2) of Part I Chapter 2 as "the taxable profits from self-employment" of the particular earner, less various amounts such as income tax and national insurance contributions. By paragraph 2A (5), "taxable profits" means "profits calculated in accordance with Part 2 of the Income Tax (Trading and Other Income) Act 2005".

14. The appellant is not an "employed earner"; nor has it ever been suggested that Parts II-V have any application in his case. The only question is whether, as a result of his winnings from gambling, he comes within Part I Chapter 2 as a "self-employed earner" and those winnings are earnings in that capacity.

15. Regulation 1(2) of the 1992 Regulations provides that "self-employed earner" has the same meaning as in section 2(1)(b) of the Social Security Contributions and Benefits Act 1992, namely:

> "… a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)".

Section 122(1) of the same Act provides that, for the purposes of the Act:

> "'employment' includes any trade, business, profession, office or vocation and
>
> 'employed' has a corresponding meaning."

16. The circumstances in which an absent parent's gambling is a trade or business, so that his taxable income from it is to be taken into account in the assessment of his child support liability for a qualifying child, was considered by this court in *Hakki v Secretary of State for Work and Pensions and Blair* [2014] EWCA Civ 530; [2015] 1 FLR 547 ("*Hakki*"). Mr Hakki was also a professional card gambler but, it seems, of a somewhat higher profile than the appellant, being known in the poker community as "Tony the Hitman Hakki". He played regularly, on average three or four days per week, on-line and in casinos and poker tournaments mainly in London and Brighton, but occasionally at other venues in the United Kingdom and abroad. He was experienced and canny in choosing the tables on which he played, selecting those on which he thought he had the best opportunity to win and be paid.

He seems to have earned on average over £500 per week by gambling. He appeared on television and in magazines about poker, and his poker results were published on a European poker website. At one stage, he had his own website with reviews and strategies for on-line poker.

17. The CSA made decisions in respect of Mr Hakki's liability to pay child support for his child – who was also a qualifying child under the scheme – on the basis that his winnings should be taken into account as self-employed earnings. Mr Hakki appealed, and there was a series of tribunal rulings including a decision of the UT(Administrative Appeals Chamber) (Upper Tribunal Judge Mesher) that, depending on the extent to which his gambling activities were organised, Mr Hakki could be said to be "gainfully employed" as a "self-employed earner" and therefore his earnings from gambling should be taken into account in the maintenance assessment (reported as *HH v Child Maintenance and Enforcement Commission* [2011] UKUT 60 (AAC)). In making that ruling, Judge Mesher relied upon a dictum of Rowlatt J in *Graham v Green* [1925] 2 KB 37, an income tax case which determined that winnings from gambling were generally not taxable, at page 40:

> "… if you set on foot an organised seeking after emoluments which are not in themselves profits, you may create, by way of a trade or an adventure or a vocation a subject-matter which does bear fruit in the shape of profits or gains. A different conception arises, a conception of a trade or vocation which differs in its nature, in my judgment, from the individual acts which go to build it up, just as a bundle differs from odd sticks."

18. On remittal, the F-tT made appropriate findings of fact, and held that Mr Hakki was indeed so gainfully employed in gambling. Judge Mesher dismissed the further appeal, on the basis that it was open to the F-tT to make the findings of fact that it did.

19. On appeal to this court, Mr Hakki, supported by the Secretary of State, contended that Judge Mesher had misunderstood and misapplied the dictum of Rowlatt J. Longmore LJ, giving the substantive judgment of the court, agreed. At [13], he observed that, in *Graham v Green*, Rowlatt J, in language redolent of the 1920s, distinguished economic activity aimed at financial gain as a one-off event (or a series of one-off events) from a venture with the same aim which is properly seen as trading as "an organic whole". Of the consideration of the latter in *Graham v Green*, Longmore LJ continued:

> "13. … The most familiar instance was a trade which has as its object the securing of a capital increment. Selling an object for more than one has bought it is not a profit or gain for income tax purposes. (That is why, many years later, we now have a gains tax). But someone who does so on a regular basis may earn profits which are taxable not as profits of a transaction but as profits of a trade. The same is true of profits made from contracts for differences. Similarly finders of objects are not taxable but a person who starts a salvage or exploring undertaking may make profits. They are not profits of the findings but profits of the adventure as a whole. If he makes a loss, the loss is not due to the failure to find but to the trade:
>
> > 'That is a good test, because it shows the difference between the trade as an organism and the individual acts' (page 41).
>
> The thing about obtaining profits on contracts for differences or obtaining things which are the subject of finding is that there is an 'element of fecundity' about them. All this is no doubt all elementary to a tax lawyer.

14. Rowlatt J then distinguished the case of the bookmaker who is (page 42):

> "… organising an effort in the same way that a person organises an effort if he sets out to buy himself things with a view to securing a profit by the difference in their capital value in individual cases."

He then turned to the man who bets with the bookmaker and said:

> 'These are mere bets. Each time he puts on his money at whatever may be the starting price. I do not think he could be said to organize his effort in the way as a bookmaker organises his, for I do not think the subject matter from his point of view is susceptible of it. In effect all he is doing is just what a man does who is a skilful player at cards, who plays every day. He plays to-day, and he plays to-morrow, and he plays the next day, and he is skilful on each of the three days, more skilful on the whole than the people with whom he plays, and he wins. But it does not seem that one can find, in that case, any conception arising in which his individual operations are merged in the conception of a trade. I think all you can say of that man, in the fair use of the English language, is that he is addicted to betting. It is extremely difficult to express, but it seems to me that people would say he is addicted to betting, and could not say that his vocation is betting. The subject is involved in great difficulty of language, which I think represents great difficulty of thought. There is no tax on a habit. I do not think 'habitual' or even 'systematic' fully describes what is essential in the phrase 'trade, adventure, employment, or vocation'. All I can say is that in my judgment the income which this gentleman succeeded in making is not profits or gains, and that the appeal must be allowed, with costs.'

15. Although this final paragraph concludes with a reference to Mr Graham himself, it is couched in terms of complete generality. It is clear that Rowlatt J thought that the effort of a gambler is not 'susceptible to organisation' in the same way that a bookmaker organises his effort. If that is right an individual gambler, as such, cannot be taxable on his winnings. The fact that many gamblers may have (or think they have) a system which results in their winning more often than losing cannot constitute a sufficient degree of organisation to constitute a trade, profession or vocation.

16. This authority has now stood for many years and I would certainly not in 2014 wish to question it, even though it can be said that the Court of Appeal in *Cooper v Stubbs* [1925] 2 KB 723 left the matter open.

17. Rowlatt J did not have to consider, however, a case of a gambler who could legitimately be said to be running a business. A poker player who appeared regularly on television advising people how to play poker and received a fee for so doing would no doubt be taxable in respect of his fees because he would be engaging in a trade or profession. If in the course of that business he also made winnings from other people participating in that programme, that might well be part of that business. Mr Bartlet-Jones [Counsel for the parent with care] suggested numerous hypothetical cases in which it might be said difficult to say precisely which side of an undoubtedly existing line each such hypothetical case might fall. I am therefore persuaded that it is possible to conceive a case in which a gambler's winnings might be taxable.

> 18. Subsequent authorities show that such a case is indeed conceivable. In *Down v Compston* [1937] 2 All ER 475 a professional golfer was taxed on his professional earnings in the ordinary way. He also received winnings from bets on separate private games. These winnings were not taxable since his vocation as a professional golfer did not give rise to his winnings nor did he have an organisation constituting the business of betting on his private games of golf. In *Burdge v Pyne* [1969] 1 WLR 364, by way of contrast, the taxpayer was the owner of a club which provided fruit machines, a card room and roulette. Mr Burdge was usually present and successfully played three-card brag with members of the club. He (or a member of his family) always acted as dealer and he always won. These winnings were held to be part of his trading receipts and were taxable. The case was thus different from that of Mr Graham because there was a trade whereas Mr Graham 'was not carrying on any trade at all', see page 368A per Pennycuick J."

20. From the various statutory provisions to which I have referred and *Hakki*, the following propositions are therefore clear.

i) For the purposes of a child support maintenance assessment, the scope of self-employed earnings is the same as it is for the assessment of welfare benefits and income tax. That is unsurprising given that the definition used in the child support scheme is transposed from the Social Security Contributions and Benefits Act 1992, and is in terms of "taxable income".

ii) It has been established since at least 1925 that winnings from gambling are generally excluded from the scope of self-employed earnings for the purposes of income tax. The fact that an individual is a "professional" gambler, who has no other income and relies upon gambling for a living, does not of itself mean that he is "gainfully employed" as a "self-employed earner" for the purposes of liability to income tax; nor does the regularity, sophistication or success of his gambling, or his employment of a system that (at least in his own belief or aspiration) will result in his winnings exceeding his losses. A policy reason for HM Revenue and Customs, with the support of the Secretary of State for Work and Pensions, not wishing to tax winnings from gambling is not hard to identify: if such winnings were taxable as self-employed earnings, then gambling losses could be set off against other taxable profits or gains, possibly to the point at which the taxpayer might be entitled to claim social welfare benefits (see *Hakki* at [9]), an outcome which might understandably be regarded as unacceptable in policy terms.

iii) As gambling winnings are not generally taxable as self-employed earnings, neither are they generally regarded as self-employed earnings for the purposes of the assessment of welfare benefits or of a child support maintenance assessment.

iv) Such winnings are only self-employed earnings for any of these purposes where they are an adjunct to a trade or profession in which the individual is engaged, e.g. where the individual makes his winnings as a dealer at a gambling club which he owns (*Burdge v Pyne*), or where a poker player receives a fee for regularly appearing on television to advise the audience as to how to play poker and makes winnings from other people participating in that programme (see *Hakki* at [17]). But, without such an association, as a matter of

> law a gambler's winnings cannot amount to profits or gains arising from a trade, profession or employment, and cannot be within the scope of the self-employed earnings for the purposes of the child support scheme.

21. In Mr Hakki's case, this court held that, although he was a sophisticated and successful gambler with his own website and reported poker results etc, there was in his case no "organised seeking of emoluments", in the sense that his winnings were derived from mere gambling, unassociated with any trade or profession; and so his gambling activities were not such that the tribunal could properly have found that his winnings were earnings from gainful employment within the 1992 Regulations. At [21], the court concluded that 'the only possible conclusion' was that Mr Hakki was not gainfully employed as a self-employed earner. They consequently allowed the appeal.

The tribunal proceedings

22. To return to the chronology of the appellant's case, the CSA having made a series of decisions on the basis that the appellant's winnings from gambling should be included as a factor in the maintenance assessment, he appealed to the F-tT.

23. Following a hearing on 18 June 2014, in a decision promulgated on 12 December 2014 Judge Vasmer made the factual findings to which I have already alluded (see paragraphs 4-5 above); and, applying the law as set out by Judge Mesher in *Hakki*, he concluded that, as a matter of fact, "[the appellant's] gambling playing poker, betting on horses and placing private bets was not carried out for recreational purposes and was an undertaking of employment". I pause to note that Judge Vasmer was apparently not referred to *Hakki* in the Court of Appeal, in which judgment had been handed down on 25 April 2014 (i.e. between the hearing and the determination). In the event, the judge varied the CSA's decisions to reflect notional income tax and national insurance, but otherwise refused the appellant's appeal.

24. The appellant, supported by the Secretary of State, appealed to the UT. On 3 November 2015, Judge Levenson gave permission to appeal; but, on 2 February 2016, having considered the judgment of this court in *Hakki*, he refused the substantive appeal. He concluded, at [13] of his determination, that the appellant was simply seeking to reargue the facts as found by the F-tT. The core of the judge's reasoning is found in [15] of his determination:

> "The Court of Appeal in *Hakki* held that on the facts as found by the F-tT in that case 'the only possible conclusion' was that the father was not gainfully employed as a self-employed earner (paragraph 21). That is not the case here. The Court of Appeal had endorsed Judge Mesher's approach to the law in his first decision… and, whether or not the F-tT knew of the Court of Appeal's decision, its own decision was consistent with it. It was entitled to find the facts that it found, for the reasons that it gave and, on the basis of those facts, to reach the conclusion that it reached and to make the orders that it made."

He consequently confirmed Judge Vasmer's decision that the appellant's gambling winnings should be included as a factor in the child support maintenance assessment.

25. The appellant appealed to this court, and, on 6 June 2017, Lindblom LJ granted permission to appeal. Thus, the appeal has come before this court.

The ground of appeal

26. The appellant, supported by Mr Buley for the Secretary of State, relies upon a single ground of appeal, namely that this case is materially indistinguishable from *Hakki.*

27. I find that submission to be overwhelmingly powerful, and indeed made good. Just like Mr Hakki, the appellant is a professional gambler in the sense that he derives his entire and not inconsiderable income from gambling; but, crucially, like Mr Hakki, he does not undertake any other income-generating activity linked to that gambling which could in itself be characterised as a trade or other form of self-employment. Consistent with the well-established line of earlier revenue cases, a gambler, however sophisticated, organised or successful, as a matter of law will never, on that basis alone, be carrying out an activity amounting to self-employment. It is only when gambling is linked to some other business activity, which in and of itself amounts to self-employment, that winnings from mere gambling may fall to be assessed as part and parcel of that business, as was the case in *Burdge v Pyne* (see paragraphs 19 and 20(iv) above). Whether that other business activity is such as to amount to self-employment may depend upon the facts of a particular case; but, whatever the factual background, mere gambling without more can never amount to self-employment.

28. In my respectful view, Judge Levenson therefore failed properly to apply *Hakki*. He proceeded on the basis that the Court of Appeal in that case had endorsed Judge Mesher's approach, which was to treat the issue of whether mere gambling was self-employment as simply a question of fact, dependent upon the degree of organisation involved in that gambling. That was to misconstrue Longmore LJ's judgment. In [15]- [16], he was clear that, following the lead of *Graham v Green*, "an individual gambler, as such, cannot be taxable on his winnings" because mere gambling cannot be self-employment. It is true that Longmore LJ later said, at [20], that he did not consider that, on the facts, "Mr Hakki had a sufficient organisation in his poker playing to make it amount to a trade (or business) let alone a profession or vocation"; and, at [21], that "[t]here would have to be evidence of much more by way of organisation than found by the tribunal before Mr Hakki could be said to be making earnings from any gainful employment". However, in making those observations, he clearly did not intend to derogate from what he had earlier said: he was there considering whether Mr Hakki's activities in appearing on television and having his own web site in themselves evidenced a trade, finding that they did not. Indeed, at [21], he found that there was *no* evidence that Mr Hakki was making earnings from any gainful employment. In the appellant's case, there is certainly no more evidence.

29. I am therefore satisfied that, if Judge Vasmer had correctly directed himself in law, on his findings of fact, he could not properly have concluded that the appellant's gambling winnings were earnings from gainful employment within the 1992 Regulations; nor could Judge Levenson have so concluded.

Conclusion and Disposal

30. For the reasons I have given, subject to my Lord, Coulson LJ, I would allow the appeal; and set aside the decision of the UT as erroneous in law. Having done so, given that, on the facts as found by the F-tT, the only possible proper conclusion is that the appellant was not at any material time gainfully employed as a self-employed earner, I would exercise this court's powers under section 14(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, and would remake the decision of the UT. In doing so I would allow the appeal against the determination of the F-tT, find that the appellant was not at any material time a self-employed

earner, and so find that the appellant had no income attributable to self-employment to be taken into account in the maintenance assessment. I would remit that matter back to the Secretary of State formally to remake the decision on the second respondent's application for child support on that basis.

31. For the sake of completeness, and in deference to Mr Buley's submissions in relation to the ability of a parent with care such as the second respondent to apply for a "departure direction" under sections 28A-28I of the Child Support Act 1991 and the Child Support (Departure Direction and Consequential Amendments) Regulations 1996 (SI 1996/2507) – and to Longmore LJ's reference to such a procedure in *Hakki* at [23] – without giving any indication as whether any application would be appropriate or succeed, it is right to emphasise that this judgment does not extinguish any opportunity the second respondent might have to make and pursue an application under those provisions. Her ability to make an application will be triggered by the Secretary of State's remaking of the decision on the basis of this judgment, to which I have referred.

LORD JUSTICE COULSON:

32. I agree.