**Child Support, Liability Orders, Rights of Appeal and Powers of Magistrates**

**Stephen Lawson analyses the Lords judgment in Farley and its lessons concerning the powers of magistrates in CSA cases.**

**Alec Farley v Child Support Agency [2006] UKHL31**



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The extraordinary case of [*Farley v Child Support Agency*](http://www.familylawweek.co.uk/site.aspx?i=ed2080) [2006] UKHL 31 came before the House of Lords in May 2006; judgment was given in June 2006. That this is the third Child Support Agency case to have reached the House of Lords in the last twelve months indicates the present state of flux relating to CSA legislation (the other two cases being [*Smith v Smith*](http://www.familylawweek.co.uk/site.aspx?i=ed1574) and [*Kehoe v Secretary of State for Work and Pensions*](http://www.familylawweek.co.uk/site.aspx?i=ed442)).

**The Issues**The legal issue in the *Farley* case was relatively simple. It concerned the powers of magistrates to investigate the validity of a maintenance assessment before granting a liability order.

**Background**
The Child Support Act 1991 introduced a new child maintenance scheme. The scheme was intended to provide an effective, cheap and speedy means to enforce parental support obligations. Another aim, of considerable importance, was to reduce dependence upon social security and the cost to the taxpayer.

There are two principal routes by which applications to the Secretary of State for Work and Pensions are made. The first is where a person with care or non-resident parent chooses to apply to the Secretary of State (under section 4 of the Act). A second route (under section 6 of the Act) is made where a parent with care is required to apply to the Secretary of State for a maintenance assessment when a parent is claiming or receiving income support or other prescribed state benefits in respect of the child.

If a non-resident parent fails to pay maintenance once it has been assessed, then the Secretary of State may make a "deduction from earnings" order. This is an administrative step and is now used in about 20% of all cases. In many situations a deduction from earnings order will be ineffective, e.g. in the case of a non-resident parent (NRP) who changes employment frequently or who is self employed. In those circumstances pursuant to section 33 of the Act, the Secretary of State may apply to a magistrates court for a "liability" order against the liable person (section 33(2) of the Act). Section 33(3) imposes an obligation on the magistrates court to make a liability order where the Secretary of State applies for an order if the court is "satisfied that the payments in question have become payable by the liable person and have not been paid".

Section 33(4) was crucial in the *Farley* case. This subsection limits the matters the court may investigate on an application for a liability order. It takes away a jurisdiction the court would otherwise have. The subsection states: "on an application under subsection (2) the court … shall not question the maintenance assessment under which the payments of child support maintenance fell to be made".

The question raised by the appeal in *Farley* concerned the extent of the limitation placed on the matters the magistrates court may investigate before making a liability order.

Once a liability order is made it is regarded as the gateway to other enforcement steps available to the Secretary of State. These steps include third party debt orders, applications for a charging order (which may be over the home of the non-resident parent), referral to bailiffs, committals or suspended committals, or seizure of driving licences. The making of a liability order is thus a critical process to recover payments.

**The *Farley* Case**
On the 15th July 2003 an officer acting on behalf of the Secretary of State for Work and Pensions laid a complaint before the North Somerset Magistrates Court that the amount of £32,639.94 was due from Mr Farley by way of payments for child support. He was required to show cause why a liability order should not be made under section 33 of the Act. Since he was self-employed, there were no prospects of recovering payments under a deduction from earnings order.

Before the magistrates Mr Farley accepted that the amounts of maintenance were outstanding and unpaid. His case however was that the maintenance assessments were not lawfully made; he said, for example, that there was in existence a written maintenance agreement made before 5 April 1993. Further or in the alternative, a prerequisite for an application for maintenance under section 6 of the Act is that a parent of the child is claiming or receiving income support or other prescribed state benefits. In the present case the Secretary of State produced no evidence that this was so. Accordingly Mr Farley submitted that the magistrates should hold that he was not a liable person and that they could not be satisfied that the payments alleged to be outstanding had become payable. Before the magistrates Mr Farley's defence failed.

**Appeal**
Mr Farley appealed by way of case stated to the High Court. The Justices stated two questions namely: -

1. Do we have any adjudicative function under section 33(1a) of the Act as to whether or not a non-resident parent is a liable person?

2. When dealing with an application for liability order – are we required to seek evidence that a parent with care was claiming a benefit, which authorised the Secretary of State to recover child maintenance?

On 12 July 2004 Keith J sitting as a judge in the Administrative Court rejected the Appeal and answered "no" to each question.

**Court of Appeal**
Mr Farley appealed to the Court of Appeal. On the 25 January 2005 the Court of Appeal, comprising Lord Woolf CJ, Lord Phillips of Maltravers MR and Lord Slynn of Hadleigh, allowed the appeal. They ruled that the magistrates court had an adjudicative function as to whether the NRP is a liable person, and that, where appropriate, the court is required to seek evidence that the parent with care (PWC) was in receipt of income support or other relevant benefit unless there was a concession by the NRP.

**Extraordinary Decision**
The same case came back before the Court of Appeal in June 2005 and was heard again by Lord Woolf and Lord Phillips (Lord Slynn had by this time retired). The Court of Appeal discovered that by virtue of sections 18 and 28a(4) of the Supreme Court Act 1981 the decision of the High Court Judge was final, and no appeal could be made to the Court of Appeal from that decision. It appears that no one had appreciated the absence of jurisdiction. The Court of Appeal recognised that the consequence was "regrettable". Although, they said, Mr Farley had an argument, which persuaded the Court to give a decision in his favour at the previous hearing on the 25 January, that decision was one which was made without jurisdiction. Mr Farley's counsel persuaded the Court to use a "degree of procedural ingenuity". Whilst there was no right of appeal by way of case stated, the Court would have had jurisdiction if there had been an appropriate application for judicial review. The problem was that there had in fact never been an application for judicial review. The Court of Appeal accepted that, rather than having the necessity of Mr Farley going back to "stage one" and making an application (such application would by then have been well outside the three month time limit (CPR 54.5)), then proceeding to the High Court and then to the Court of Appeal and possibly thereafter the House of Lords, the Court of Appeal should use the control it has over its own procedure to ensure that the benefit of the judgment which had been given was still available to Mr Farley. On the Claimant's counsel's assurance that he would make an application for judicial review, the Court of Appeal treated the application as having been made and waived any procedural requirements as to the form of the application. The application was then treated as coming before the Court as an application for permission to apply for judicial review. The Court of Appeal (sitting as a Court of First Instance) granted that permission but refused the application. The Claimant's counsel then undertook to make an application for permission to appeal and the Court of Appeal (sitting as the Court of Appeal) would then grant the application and issue a declaration in the terms of their original decision, which was given on the 25 July 2005.

The extraordinary nature of this decision must truly be recognised. Never before has there been such a dramatic example of the complexities of child support legislation. The Master of the Rolls agreed that this process involved "extraordinary use of the jurisdiction", but accepted that it was right to do so. The Court of Appeal then refused permission to appeal to the House of Lords – but the Lords themselves gave permission and the case came to be heard there.

**Putting all of this in context: The Auditor General's report**
The very day the Lords' judgment came out the Auditor General produced a report, "Child Support Agency – Implementation of the Child Support Reforms". The report was damning and had especially pertinent observations about liability orders.

By the end of 2005 the CSA collected over £5 billion in maintenance payments since it was formed in 1993, but at the same time historical arrears amounted to £3.5 billion. During 2004/2005 over half of the full maintenance assessments reviewed as part of the National Audit Offices annual assessment of accuracy throughout the lifetime of a case, were found to have suffered error at some point in the process. For ten consecutive years the Auditor General qualified his audited opinion on the Agency's client's funds, due to the effects of these errors on the accounts. The failings with the CSA IT system is well documented but the Auditor General reflected that enforcement action was difficult to target at present because the Agency's accounting system does not enable it to identify the largest debtors or the most persistent offenders. In 2005 the Child Support Agency's Standards Committee reported to the Work and Pensions Select Committee that 65% of the cases where a liability is sought were inaccurate.

The use of liability orders is increasing. In 2003/04, 3385 liability orders were obtained. In the following year this had risen to over 6,700 and in 2005/06, 9600 such orders were obtained. My own practice "at the coalface" leads me to believe in the next financial year the number of liability orders obtained, will have increased significantly.

Against this background of increased use of liability orders and against the statistical background of obvious errors, it is particularly important that an independent judiciary ensures the rights of citizens are adequately protected.

**House of Lords**Lord Nicholls of Birkenhead delivered the leading speech. He concluded that "… Section 33(4) precludes the Justices from investigating whether a maintenance assessment, or maintenance calculation in the current terminology, is a nullity".

Lord Hope of Craighead, Lord Hutton, Lord Walker of Gestingthorpe and Lord Manse gave concurring judgments.

Lord Nicholls did state that the appropriate remedy for an NRP agreed by an assessment was appeal pursuant to section 20 of the Act, and that thereafter an absent parent's remedy was confined to an application for judicial review.

Lord Nicholls did throw one crumb of comfort to aggrieved NRPs. He did say that "… I wish to note only that when faced with an application for a liability order where an appeal is pending against the validity of the underlying maintenance calculation the Magistrate should consider whether it would be oppressive to make a liability order. If they consider it would be oppressive they should adjourn the hearing pending the outcome of the Appeal or for such shorter period and on such terms as may be just."

**Commentary**
The position adopted by the House of Lords is unsatisfactory. There are many reasons for this. Firstly, by virtue of regulation 31 of the Social Security and Child Support (Decisions and Appeals) Regulation 1999, any appeal must be brought within one month of the date of notification of the decision against which the appeal is brought. Regulation 32 of the same regulations permit an appeal by up to a further one year after the expiration of the last day for appealing, if there are "special circumstances". There is no power to extend this overall thirteen-month period. Problems arise because NRPs regularly fail to understand the relevance or significance of assessment documentation sent to them by the CSA. In my considerable experience of dealing with CSA claims I have yet to have met either a PWC or an NRP who has fully understood their appeal rights as a result of documentation sent to them by the CSA. The problem is compounded because often it is only when the CSA set out to enforce maintenance arrears that an NRP sets out to consider the consequences of an assessment. Because delays in enforcement are so notorious, by the time the CSA get around to issuing proceedings the right to appeal has often elapsed. The only remedy then available would be to resort to a judicial review, a time consuming and expensive process that is well beyond the reach of most ordinary citizens. All this, of course, is against a background of a scheme that was deliberately and allegedly set up to be simple to use and understand.

Secondly, because the language of the House of Lords is so clear, it is particularly disappointing that the Lords did not even consider whether an assessment was in the first place a "nullity". There could, for example, have been fatal flaws in an assessment process relating to a lack of information being given to an NRP, which would render an assessment a nullity. Given the universal clammour of criticism that has come from such diverse sources as the Prime Minister, the Independent Case Examiner, the House of Commons Select Committee for Work and Pensions and the Auditor General, it is disappointing that the House of Lords has not been more vigilant to protect the rights of citizens.

Thirdly, in a planning permission context the House of Lords has, before, considered powers of administrative bodies. The case of *R v Wicks* [1997] 2 All ER 801 related to the powers of a Criminal Court to consider whether an enforcement notice granted pursuant to Town and Country Planning legislation was a nullity. The Lords concluded that if an enforcement notice was a nullity or "patently defective on its face", then the court had power to consider the validity of the original notice, but again recognised that the usual remedy would be by way of Judicial Review.

Fourthly, the limited powers of magistrates to investigate the adequacy of liability order assessments are similar to the limited powers to set aside a deduction from earnings order. Following on from the *Farley* case it is unlikely that magistrates presented with an application to set aside a deduction from earnings order pursuant to regulation 22 of the Child Support (Collection and Enforcement) Regulations 1992 would have no power, in effect, to 'suspend' the implementation of ADEO pending outcome of an Appeal – the only remedy would therefore be to pursue a theoretical appeal by way of judicial review proceedings.

Judicial review is beyond the reach of most litigants, and indeed the majority of the legal profession have not had to deal with judicial review claims, and so to say that there is a theoretical claim in judicial review is not in reality affording access to justice for users of the child support scheme.