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Hakki v Sec of State for Works & Pensions (2014)EWCA Civ 530 - Brief Case Comment (A Short Practical Insight)

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The Court of Appeal considered the question of whether the winnings of a 'professional' poker player were "earnings" for the purpose of the Child Support Agency.[1]

What's happened?

Mr. Hakki, a father who did not pay any child maintenance, was a professional poker player who supported himself purely through his poker winnings. The mother applied to the Child Support Agency (CSA) for child maintenance payments, which he opposed on the basis that his winnings did not constitute "earnings" for the purpose of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (MASC).

A First Tier Tribunal concluded that Mr. Hakki was self-employed for the purpose of the regulations and therefore obligated to make maintenance payments. It held that Mr. Hakki used a high level of skill when it came to his poker playing and had an organised approach to his poker earnings. This made his poker winnings "very much like a job". Mr. Hakki appealed to the Upper Tribunal, which dismissed the appeal, and then to the Court of Appeal.[2]

Lord Justice Longmore, the leading judge of this case, stated that the definition of earnings for the purpose of the CSA was set out in Regulation 1(2) of the MASC Regulations, which provides that "self-employed earner" has the same meaning as in Section 2(1)(b) of the Social Security Contributions and Benefits Act 1992, where it means a person who is "gainfully employed in Great Britain otherwise than in employed earner's employment". In Chapter II of Part I of Schedule I to the MASC Regulations "earnings" is defined to mean "the taxable profits from self-employment" of the earner. The question was, therefore, whether Mr. Hakki's profits were taxable profits or not.

The Court of Appeal held, referring to *Graham V Green* (11925) 2 K B 37, that gambling was generally not taxable; however, it could be taxable if there is a sufficient degree of organisation and an element of what Justice Rowlatt had called "a subject matter which does bear fruit in the shape of profits or gains."[3]

The Court of Appeal therefore considered whether Mr Hakki had sufficient organisation in

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[1] Hakki v Sec of State for Works & Pensions (2014)EWCA Civ 530
[2] Ibid.
[3] Graham V Green (11925) 2 K B 37

relation to his poker playing to constitute a trade or profession. The following factors were relied upon by the defendant of the appeal to show a degree of organisation:

1) Mr Hakki appeared on television for a few weeks, he made the final program and won a prize;
2) He had his own website (on which he referred to himself as a professional poker player)and used it to communicate his online poker strategies;
3) That his poker results over 7 or 8 years were published on two other poker websites (these also had profiles of him as a poker player on them);
4) He choose the locations he would play at;
5) He set himself target sums which he would aim at winning and would stop playing (he would not go home before he reached this target);
6) He selected a table at which he was most likely to win.

The court held that Mr Hakki did not have a "sufficient organisation in his poker playing to make it amount to a trade (or a business)". Lord Justice Longmore observed that factors 4-6 "must be common to many successful gamblers", and that "isolated appearances on television and having one's own website are hardly, these days, evidence of organisation amounting to a trade or profession". There was no element of what Rowlatt J in *Graham* "a subject matter which does bear fruit in the shape of profits or gains"[4]: there was merely frequent and successful card playing. The Appeal was therefore allowed.

<u>Why is it important?</u>

The case reiterated the definitions of "self-employed" and "earnings" for the purpose of the CSA. The court reaffirmed the general rule that poker winnings are not taxable and that *Graham* is good law. As *Graham* was a King's Bench Division decision the Court of Appeal was not obligated to follow its judgement; however, Lord Justice Longmore stated that he did not see the point in diverging from such an old case law and provided policy reasons to support this decision.[5]

Whilst the courts have stated that a gambler's winnings could be taxable, the Court of Appeal took a very narrow approach, which means that very few cases will fall within the category of taxable gambling winnings. Nevertheless, it is not impossible for poker winnings to constitute earnings for the purpose of the CSA.

<u>How does this fit into existing law and practice?</u>

In deciding whether poker winnings were taxable, the court applied *Graham*. Reaffirming *Graham*, the court clarified that the general rule is, that gambling winnings are not taxable and unless there is a sufficient degree of organisation, these would not constitute earnings for the purpose of the CSA. This authority had never previously been challenged in the Court of Appeal and this case therefore settled that *Graham* is good case law.

Furthermore, the Court of Appeal also followed the judgement in *Cooper v Stubbs* (1925) 2 KB 723. It held that *Cooper* was a long-standing authority for the fact that many gamblers may think they have a system which results in them winning more often than losing, but this

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[4] Ibid.
[5] Ibid.

does not mean that there is sufficient organisation for these winnings to be taxable. Whilst it was believed by some that *Cooper* was unclear case law in this area, Lord Justice Longmore made it clear that the Court of Appeal would not question such an established authority and had no reason to do so.[6]

The court categorized poker together with other gambling games, although it acknowledged that poker is different due to the fact that it requires a level of skill and is not purely based on luck and probability – in contrast with gambling machines, for example. The court, however, did not go so far as to categorise it with other leisure sports, and differentiated it from golf, citing *Down v Compston* (1937) 2 ALL ER 475 as the leading case for golf winnings being taxable. It also reaffirmed that any winnings which a professional golfer receives from separate private games would not be taxed, as these would not fall within his vocation as a professional golfer. [7]

Lastly, the case was distinguished from *Burdge v Pyne* (1969) 1 WLR 364. The contrasting point in this case highlighted by the court was that Mr. Burdge was an owner of a club which had fruit machines, a card room and roulette. He, or a family member, always played as a dealer, and he always won. It can therefore be seen that a clear distinction is not only the owning of a site where the gambling takes place, but also the fact that Mr. Burdge always won when he played and often played as the dealer, and therefore there was little risk involved compared to regular poker playing.[8] This led the court to conclude that he did not act as a poker player and that this was sufficient to make his winnings taxable. It is unclear from *Hakki* whether one must go as far as to prove that there is almost no risk in the gambling or to show that one owns or organises a poker/gambling round/room. What has been made clear is that this would be enough to show that the earnings would be taxable. With the current case law in this area, there is a grey area between Mr. Hakki's level of organisation and a casino/gambling game owner's level of organisation, and it is unclear at which point there would sufficient organisation for the earnings to be taxable.

<u>In what ways does this affect practitioners?</u>

Hakki has provided a clarification of the law and further guidance on how to determine whether a practical sum is taxable and therefore constitutes earnings for the purpose of the CSA.[9] Gambling winnings will generally not constitute earnings as they will generally not be taxable. Nevertheless, whilst making the general rule clear, the court has left the possibility open for gambling, especially poker, to be taxable. This exception is, however, hard to prove and will only apply in very few cases. *Hakki* has highlighted that the courts are relatively reluctant to consider a gambler self-employed for the purpose of the CSA, unless he acts very differently to other gamblers.

On closer examination of the factors which did not constitute a sufficient level of organisation in *Hakki* , the real difficulties of showing that gambling winnings should be taxable are made clear. Mr Hakki had had TV appearances in which he played an official tournament and won a prize but Lord Justice Longmore appears to put emphasis on the fact that these TV appearances were not regular, and on-going. The case therefore leaves open the question

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[6] Cooper v Stubbs (1925) 2 KB 723.
[7] Down v Compston (1937) 2 ALL ER 475
[8] Burdge v Pyne (1969) 1 WLR 364
[9] Hakki v Sec of State for Works & Pensions (2014)EWCA Civ 530

whether a poker player with regular TV coverage would also fall outside the scope.

In addition, it is clear that the courts have drawn a line between sports, such as golf where prize winnings are taxable, and gambling. Furthermore, having a website, which expressly shows a organised approach to poker, was not enough. The court will not consider whether the defendant has called himself professional or his poker playing organised, but will take a more objective approach. Most people, apart from long-term TV players, casino owners or poker game organisers, will most likely fall outside the scope of definition of "earnings" and the CSA.

Finally, *Hakki* can be seen as an early sign of the difficulties that the reforms of the Child Support Act 1991, which are now fully in place, will throw up. The decision can be seen to create a new generation of avoidant paying parent. In contrast to this, however, if the Court of Appeal had overturned *Graham*[10], this could have had the long-term consequences of many gamblers being entitled to social benefits including pensions or social security benefits related to their gambling.

What, if anything, should I be doing differently as a result?

Whilst this case does not redefine earnings or taxable profits, it does affirm that *Graham*[11] is good law. The court has made it clear that it is reluctant to find that a poker player's winnings, or winnings from any form of gambling, are taxable. Although it has not excluded the possibility of winnings constituting earnings, a very high level of organisation of these incomes must be shown. One should therefore ensure that most non-taxable incomes, especially gambling incomes, are not included in CSA assessments.

The Court of Appeal highlighted a possible alternative claim for maintenance payments by means of a "departure direction" on the basis of sections 28A-28I of the Child Support Act 1991 "where the Secretary of State is satisfied that the current assessment is based upon a level of income of the non-applicant which is substantially lower than the level of income required to support the overall lifestyle of that non-applicant", This would have to be a separate application from the CSA assessment. Lord Justice Longmore indicated that it is unclear how successful this application would be in the case of Mr. Hakki[12]; however it is an alternative option, which may be open to parties who are unsuccessful with CSA assessments.

[10] Graham V Green (11925) 2 K B 37
[11] Ibid.
[12] Hakki v Sec of State for Works & Pensions (2014)EWCA Civ 530