

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the East London First-tier Tribunal dated 6 June 2016 under file reference SC124/15/01392 involves an error of law.

However, the Upper Tribunal exercises the power not to set aside the First-tier Tribunal's decision. The decision of the First-tier Tribunal stands.

This decision is given under sections 11 and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The issue before the First-tier Tribunal

1. This case, as originally argued before the First-tier Tribunal, concerned the "main responsibility" test as it applies to determining entitlement to child tax credit (CTC) as between separated parents. However, in large part as a result of subsequent decisions by Her Majesty's Revenue and Customs (HMRC), it now appears that the present proceedings carry little (if any) practical significance for either party.

The background to the appeal to the First-tier Tribunal

2. The parents separated in 2011. They have one relevant child, born in 2007, a daughter whom I shall simply call "A". The breakdown of the relationship was extremely difficult and there has been protracted litigation in both civil and criminal courts, here and overseas. The civil litigation in this jurisdiction has encompassed proceedings relating to the validity of the parties' marriage, the grounds for divorce, provision for ancillary relief and the living arrangements for A. Different aspects of that litigation have found their way to the Court of Appeal on more than one occasion.

3. The mother had an award of CTC for A for the tax year 2013/14 (and was also in receipt of child benefit). By that time, and despite the parents' bitter relationship, A was spending broadly equal amounts of time living with each parent in turn. On 7 January 2014 the Principal Registry of the Family Division made an interim residence order that A live with her father and that she have extensive contact with her mother, but on terms effectively amounting to shared care. In practice it certainly seems the existing shared care arrangements continued much as before.

4. It is right to interpose here that on 26 August 2014 the circuit judge (in what was by then the Central Family Court) rescinded the order of 7 January 2014 "insofar as it cites there is a sole Residence in favour of the Father instead the Court records until the Final hearing or further order that the living arrangements for A are that she spends equal time including equal overnight stays with each parent". Moreover, in July 2015 the Court of Appeal allowed the mother's appeal against the judgment of 7 January 2014 and set aside the circuit judge's findings of fact.

5. Meanwhile, on 27 January 2014, and so shortly after the hearing making the interim sole residence order, the father applied to HMRC for CTC in respect of A, citing the terms of that court order. At that time, as already noted, the mother had an initial award of CTC for A for the whole of the 2013/14 tax year. There were, therefore, competing claims. HMRC sent out the standard questionnaires it uses in

such cases to both parents. On 12 February 2014 HMRC formed the view that the father had main responsibility for A as from 27 January 2014. In doing so, HMRC made two decisions.

6. The first decision on 12 February 2014 was an initial decision under section 14 of the Tax Credits Act 2002 to award CTC to the father as from 27 January 2014. I also note that subsequently, on 31 August 2014, HMRC made a final end-of-year decision under section 18 of the Tax Credits Act 2002 in respect of the 2013/14 tax year, confirming the father's entitlement to CTC for the period from 27 January 2014 to 5 April 2014.

7. The second decision on 12 February 2014 was a corresponding in-year decision under section 16 of the Tax Credits Act 2002 to terminate the mother's existing award of CTC with effect from 27 January 2014. I also note that subsequently, on 23 March 2015, HMRC made a final end-of-year decision under section 18 of the Tax Credits Act 2002, in respect of the 2013/14 tax year, confirming the mother's entitlement to CTC for the period from 6 April 2013 but only up to 26 January 2014.

8. The mother was unsuccessful in seeking a mandatory reconsideration of the section 18 decision taken on 23 March 2015. According to HMRC's mandatory reconsideration notice, "we have read the Sole Residence Order and the Judgement decision of the 7 January 2014. We note that the physical care of A remained 50/50 in this order however the power of sole residence was awarded to the rival claimant. We are therefore unable to change our decision of the 7 January 2014". That last date was presumably a misprint for either 12 February 2014 and/or 23 March 2015. The mother subsequently lodged an appeal to the First-tier Tribunal.

The First-tier Tribunal's decision

9. The First-tier Tribunal (the FTT) heard from both parents at a lengthy oral hearing on 6 June 2016. The FTT Judge allowed the mother's appeal and set aside HMRC's section 18 decision of 23 March 2015 relating to the mother's CTC entitlement for the 2013/14 tax year. The decision notice helpfully summarised the FTT Judge's reasoning as follows:

"... the Tribunal finds that despite the order made ... in the family court on 07.01.2014, there were no valid grounds for removing the tax credit from [the mother] when [the father] made his competing claim for tax credit for A on 27.01.2014. HMRC based its decision on the order, which did not determine who in fact had responsibility for A for the purposes of Child Tax Credit, and which instead had been based on welfare considerations, which the tribunal could not take into account. The tribunal decided that in practice the care of A was shared equally by both claimants between 27.01.2014 and the date of decision, that neither of them had had main responsibility for A, and on the balance of probabilities that each had met her needs during the periods for which they had A in their care. On that basis removal of the Child Tax Credit from the mother had not been justified and it should be reinstated for the rest of that tax year."

10. The FTT Judge later issued a lengthy statement of reasons which amplified the decision notice somewhat, although the central reasoning is as summarised above. The father asked for permission to appeal to the Upper Tribunal, but the District Tribunal Judge refused that application.

The grounds of appeal and the Upper Tribunal proceedings

11. The father renewed his application before the Upper Tribunal. He set out a total of nine distinct grounds of appeal. His primary ground of appeal was that the FTT

had not actually found that the mother had the main responsibility for A but had in effect allowed the appeal based on the timing of the claims, which was an irrelevant consideration. Following an oral hearing, Upper Tribunal Judge Lloyd-Davies gave the father permission to appeal, highlighting the father's principal argument but not restricting the grant of permission in any way. Mr A Hignett subsequently provided a detailed response to the appeal on behalf of HMRC, which I return to below. Despite several efforts by the Upper Tribunal office, since then the parents have barely engaged with the further appeal process. Following Judge Lloyd-Davies's recent retirement, the case has been reallocated to myself for decision.

12. I note the mother has submitted a very short response to the father's appeal, simply stating that she is concerned that any decision does not adversely affect her daughter and also takes into account the overall financial affairs between the parents. I would simply note that the present appeal is solely concerned with CTC entitlement for the 2013/14 tax year; it has no wider ramifications. In addition, and in any event, it is well established that the parties' respective financial positions are not matters which can be used to determine who has main responsibility for a child under the relevant statutory test (see e.g. *PG v HMRC and NG (TC)* [2016] UKUT 216 (AAC); [2016] AACR 45 at paragraphs 27 and 31-32).

13. The father has not filed any reply to Mr Hignett's response on behalf of HMRC. This may be because he feels he has said all he wishes to say on the appeal already (and his grounds of appeal are clearly set out). It may also be because in a sense the caravan has moved on, as Mr Hignett explains, and the present proceedings have no real relevance to his current position.

The HMRC response in the Upper Tribunal proceedings

14. I return to the HMRC response to the appeal. Mr Hignett's submission can be conveniently summarised in the following points.

15. First, the FTT may well have erred in law by not actually making a decision as to which parent was the person with main responsibility for A during the period from 27 January 2014 to 5 April 2014. As Mr Hignett says, "the FTT appear to have determined that both were equally responsible, and from that it followed CTC could not justifiably be removed from the mother" (HMRC response at paragraph 5).

16. Second, the FTT's decision that the mother was entitled to CTC for A for the entire 2013/14 tax year had been implemented by HMRC on 1 September 2016. I deduce from that information that HMRC's previous (non-appealable) decision that the mother was liable for an overpayment of CTC (amounting to £1,123.30) for the period of just over two months towards the end of the 2013/14 tax year has been rescinded.

17. Third, and despite the fact that the father had been made a party to the mother's appeal, HMRC pragmatically took the view that the FTT's decision should have no direct impact on the father's entitlement for the 2013/14 tax year. HMRC's final end-of-year decision of 31 August 2014, which was taken under section 18 of the Tax Credits Act 2002, had confirmed the father's entitlement to CTC for the period from 27 January 2014 to 5 April 2014. That decision, although taken before the FTT hearing, was technically not part of the mother's appeal to the FTT which sat on 6 June 2016. Mr Hignett reports that "HMRC took no further decision on the [father's] entitlement in respect of that tax year" (HMRC response at paragraph 16).

18. Fourth, Mr Hignett notes that HMRC had subsequently made a section 16 decision on 26 August 2016 which had terminated the father's then entitlement to

CTC for the 2016/17 tax year. (I note in passing that the appeal file gives no clue as to how CTC was awarded for the 2014/15 and 2015/16 tax years). HMRC appear to have taken that decision on 26 August 2016 based on the FTT's then recent ruling about the 2013/14 tax year. The father's appeal to the Upper Tribunal in the present proceedings had been made a month or so later. Mr Hignett surmises that the appeal was brought in part at least to protect the father's position in relation to the 2016/17 tax year. In the event, on 27 April 2017 HMRC and the father settled the father's appeal relating to the 2016/17 tax year. HMRC accepted that it should not have relied on the FTT decision about the position in 2013/14 to change a decision relating to 2016/17. HMRC accordingly 'cancelled' the decision of 26 August 2016 and paid the father CTC for the 2016/17 tax year.

19. Drawing the threads together, Mr Hignett submits that even if the FTT erred in law, it is also arguable that the error made no difference to the outcome of the matter so far as the father is concerned. Mr Hignett invites the Upper Tribunal to dismiss the appeal on that basis. First, he argues that the FTT's decision of 6 June 2016 on the mother's appeal had no impact on the father's entitlement to CTC for the 2013/14 tax year. HMRC's section 18 decision of 31 August 2014 had confirmed the father's entitlement to CTC for the period from 27 January 2014 to 5 April 2014 and had not been revisited. Second, although HMRC had relied on the FTT's decision to the father's detriment in relation to the 2016/17 tax year, HMRC's adverse section 16 decision of 26 August 2016 had since been revoked. Mr Hignett accordingly asks me to dismiss the appeal on the basis that any error by the FTT was immaterial and had no practical effect so far as the father was concerned.

The Upper Tribunal's analysis

20. I am indebted to Mr Hignett for his invaluable analysis both of the FTT decision under appeal and of the subsequent decision-making history in relation to both parents and their CTC entitlement.

21. The original HMRC decision to withdraw CTC from the mother with effect from 27 January 2014 was flawed because it was based exclusively on the fact that there was an interim sole residence order. As Upper Tribunal Judge Jacobs observed in *PG v HMRC and NG (TC)*, "As the main responsibility is determined by its exercise, the terms of a court order will not necessarily be determinative" (at paragraph 39).

22. The FTT decision of 6 June 2016 was also flawed, but in a different way. The FTT failed to make any finding as to which parent had "main responsibility" for A. Instead, it concluded that they had equal shared care and neither had main responsibility for her over the period in issue. On that basis, it held, the mother's prior award of CTC should not have been withdrawn. There are at least two fundamental problems with the FTT's approach.

23. The first is that where a child normally lives with two or more persons in different households, then that child "shall be treated as the responsibility of (a) only one of those persons making such claims; and (b) whichever of them has (comparing between them) the main responsibility for him (the "main responsibility test") (Rule 2.2 of regulation 3 of the Child Tax Credit Regulations 2002 (SI 2002/2007), emphasis added). The language of Rule 2.2 is mandatory. Not making a decision as to the issue of main responsibility is not an option (see CTC/4390/2004 at paragraph 28).

24. The second problem is that the effect of the FTT's decision was to prioritise the mother's claim as being first in point of time, which is impermissible. As the HMRC response to the mother's appeal noted (at paragraph [14]), "the first claimant to CTC

in respect of a given child cannot expect to retain entitlement merely because they claimed first” (see also CTC/4390/2004 at paragraph 29). As Judge Jacobs explained in in *PG v HMRC and NG (TC)* (at paragraph 27):

“The statutory test in section 8 depends on responsibility. That is defined first in terms of who the child is normally living with: rule 1.1. That is, of course, a deeming provision under section 8(2). It does not actually equate responsibility for a child with living with the child. It is though some indication, albeit not one of great significance, that the kind of responsibility envisaged is the kind that would normally be exercised when living with a child. Rule 2.2 comes in as a tie breaker only when the child is normally living in two households and there are competing claims. In those circumstances, rule 2.2 imposes a comparative test of main responsibility as judged between the competing claimants. Rule 3 allows the competing parties to agree between themselves, but if they cannot, the Commissioners have to ‘determine that question’. The question referred to must mean the main responsibility question.”

25. So, on appeal, it falls to the FTT rather than HMRC to “*determine* that question”, and not to *dodge* that question.

26. The question then is: what to do next? As noted above, Mr Hignett for HMRC suggests that I dismiss the appeal on the basis that any error of law by the FTT was not material in that it has had no practical impact on the father. I have also considered the mother’s position. The current position for her appears to be that HMRC has implemented the FTT’s decision and so presumably withdrawn the overpayment decision (see paragraph 16 above). If the FTT’s decision is overturned, then it is conceivably possible that the question of the mother’s entitlement to CTC for the latter part of 2013/14 may be re-opened.

27. We appear to have arrived at a situation in which HMRC has apparently given effect to separate decisions which mean that both parents have been found to be entitled to CTC in respect of A for the same period from 27 January 2014 to 5 April 2014. This is even though strictly Rule 2.2 in regulation 3 of the Child Tax Credit Regulations 2002 provides that only one person can be found to have main responsibility for a child at any one given time. HMRC’s pragmatic approach is perhaps understandable given the conflict-ridden history of these proceedings. HMRC has exceptionally been prepared to countenance parallel payments for separated parents for the same period in other cases (see *DG v HMRC and EG (TC)* [2016] UKUT 505 (AAC) at paragraphs 30-39 and especially at paragraph 34).

28. Whilst I can see the attraction of Mr Hignett’s proposed mode of disposal, I prefer to take a rather different approach, but one that ends up in the same place. On balance, I consider that I should allow the father’s appeal to the Upper Tribunal, given the FTT’s clear error. However, as a matter of discretion it is unnecessary for me to set aside the FTT’s decision. It is sufficient that the parties should know that I consider the FTT’s reasoning to be flawed. I reach that decision bearing in mind, as the three-judge panel of the Upper Tribunal observed in *BB v South London and Maudsley NHS Trust and the Ministry of Justice* [2009] UKUT 157 (AAC), that “it must be relevant to consider whether setting aside the tribunal’s decision could be of practical benefit to any of the parties” (at paragraph 20). Accordingly, I exercise the power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 not to do so.

29. I am entirely satisfied that setting aside the FTT’s decision in the present case would be of no practical benefit to HMRC, the father or the mother. The last thing

these parents and their daughter need is yet more litigation, especially over now historic matters.

Conclusion

30. The decision of the First-tier Tribunal involves an error of law. I therefore allow the appeal but for the reasons above do not set aside the Tribunal's decision (Tribunals, Courts and Enforcement Act 2007, sections 11 and 12(2)(a)).

**Signed on the original
on 25 September 2018**

**Nicholas Wikeley
Judge of the Upper Tribunal**