

**THE UPPER TRIBUNAL**

**ADMINISTRATIVE APPEALS CHAMBER**

**DECISION OF THE UPPER TRIBUNAL JUDGE**

The appeal is allowed.

The decision of the tribunal given at Glasgow on 23 November 2018 is set aside.

The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out below.

**REASONS FOR DECISION**

1. The appellant has appealed against the decision of the First-tier Tribunal confirming the decision of the First Respondent dated 28 August 2007. The tribunal found that the Second Respondent in the appeal before it, who is also the Second Respondent in this appeal, had main responsibility for the two children of the appellant and the Second Respondent. It found that as a result the appellant was not entitled to tax credits.

2. He appealed against this decision and by determination dated 20 June 2019 I granted him permission to appeal restricting it in the following terms:

“This permission is restricted solely to the issue as to whether the tribunal arguably erred in law in paragraphs 27 and 36 in its determination in paragraph 27 that the factors referred to therein were “ultimately determinative” in the question as to which parent had responsibility for the children.”

3. The First Respondent submitted that the tribunal did not err in law in respect of the issue upon which permission was given by me. However, the First Respondent has submitted that the tribunal erred in law and that its decision should be set aside. In its submission the First Respondent submitted:

“8. The factor referred to in paragraph 27, which the tribunal found ultimately determinative as to who had main responsibility was that the caring responsibilities for the children held by the second respondent, such as the emergency arrangements for the dentist, GP and school, more than counterbalanced the marginally increased time the children spent with the appellant.

9. Paragraph 36 concludes that although the appellant had a slight edge in terms of who the children spend time with, due to the second respondent’s work commitments, the health and well-being arrangement tip the balance in favour of the second respondent.

10. In deciding the appeal on this basis the tribunal found that there was an ‘almost imperceptible difference’ in the amount of responsibility borne by each parent. The only discernible difference, so the tribunal held, was the increased time the children spent with the appellant and the fact that the second respondent was the point of contact for the school, GP and dentist.

11. The question on this appeal, therefore, is did the tribunal err in law by deciding that the person with the contact point for the school, GP and dentist was 'ultimately determinative' as the person with main responsibility?
12. Taking into account relevant case law, in particular the comments of Upper Tribunal Judge Jacobs in *PG v Commissioners for HMRC and NG [2016] UKUT 0216 (AAC)*, who stated that time is not determinative and is not an indicator of all aspects of responsibility, I submit that the proper approach to the main responsibility test is to decide who actually holds the responsibility rather who discharges or conducts it.
13. For example, in this case although the appellant had care of the children for a greater period of time this was due in part to the second respondent's work commitments and did not therefore necessarily mean that the degree of responsibility held by the second respondent was any less.
14. I therefore submit that the tribunal did not err in basing its decision on the factors in paragraphs 27 and 36 of its reasons.
15. However, it is my further submission that it is necessary to first consider if the counter balance test was assessed fairly. As such, was the time the children spent with the appellant only 'very marginally' more than the time they spent with the second respondent and was the second respondent the only point of contact for the school, GP and dentist?
16. The evidence before the tribunal was that since the appellant's separation from his now ex-wife, the children have always spent 60% of their time with him. This has increased recently due to the time he has spent caring for their son's prolonged illness. The time includes after school care for 8 out of 10 days per fortnight, 64 extra days for their son's illness and 4 out of the 6 weeks during the summer break. However, the tribunal found that the appellant had exaggerated the extent to which he provided care in order to bolster his claim for Child Tax Credits.
17. In my submission the tribunal have not explained how it came to make this assessment. I submit that it was important that it did so particularly as the second respondent disagreed only with the time spent over the summer holidays, which she states was split 50/50.
18. Furthermore, the appellant's evidence was that he was also the point of contact at the school, GP and dentist. The tribunal did deal with this aspect, but decided that the appellant had notified the school and GP to change the emergency point of contact from the second respondent to his with the sole motivation of strengthening his claim to CTC by seeking to alter the pre-existing responsibility arrangements, which weighed in favour of the Second Respondent. The appellant's evidence (see pages 72 and 73 of the bundle) contends that as he remained in the marital home following the separation and the children have always lived there with him for over 50% of the time. It was the second respondent who changed the address and point of contact with the school, GP and dentist in order to bolster her claim; he was simply rectifying the position.

19. Bearing in mind the basis on which the tribunal reached its decision on the main responsibility point, I submit that it was clearly necessary that the tribunal dealt with this aspect of the appellant's evidence.
20. I submit that the tribunal did not err in law by deciding the question of main responsibility on the basis that it did. However, and whilst acknowledging the narrow basis on which permission to appeal was granted in this case, it is my submission that the tribunal's assessment in terms of time spent, and the appellant's motivation for changing the contact details at school, GP and dentist was not sufficiently explained.
21. I therefore support the appeal. If the Upper Tribunal agrees it is invited to allow the appeal, set the decision of the tribunal aside and remit the appeal back to a fresh tribunal for redetermination.

4. The Second Respondent has also made a submission which is recorded at pages 206 and 207. It does not address the issue of law I identified in my grant of permission nor the matters raised by the First Respondent in his submission. It is in essence evidence about the circumstances of the appellant and the Second Respondent's views about him. The appellant in his response at pages 211 to pages 213 does not address the issues raised in my Grant of Permission and the First Respondent's response.

5. The crucial paragraphs in the tribunal's statement in relation to who had the main responsibility for the children are paragraphs 27 and 36. These paragraphs are in the following terms:

"27. Taking all the relevant factors into account and weighing all the evidence, I find that there is an almost imperceptible difference in the amount of responsibility borne by each parent. Whilst I find that very marginally the time spent with the Appellant was slightly in excess to that spent with the Second Respondent purely on the basis of her work commitments, this is more than counter-balanced by the existing arrangements that were in place for the caring responsibilities for the children, such as the emergency arrangements for the dentist, GP and school. I find that this factor is weighted in the Second Respondent's favour and is ultimately determinative as to who had main responsibility for the children.

36. Given my findings about the equality between the parents' responsibility in many aspects of the care for the children and the slight edge in favour of the Appellant in terms of who the children would spend time with, I judge that the health and well-being arrangements tip the balance in favour of the Second Respondent."

6. I also note that in setting out the task that the tribunal had to perform it was said in paragraph 11:

"11. In determining the case the Tribunal reminded itself that the assessment of main responsibility was a comparative exercise and involve consideration of all the relevant factors. No one factor predominates. The Tribunal made sure that it took account of all the appropriate case law, particularly the comments of Upper Tribunal Judge Jacobs in *PG v Commissioners for Her Majesty's Revenue and Customs and NG* [2016] UKUT 0216 (AAC)."

The case is wrongly cited as “NG”, the correct identification is “PG”.

7. In that case the Upper Tribunal Judge identified two errors in law on the part of the tribunal whose case was appealed to him. The first is set out in paragraph 41 of his decision and is related to the evidential basis upon the tribunal’s analysis of the time spent with each parent which was based upon what was contained in a Court Order. The second error was expressed in the following way:

“42. The second error is that the tribunal adopted an approach that time was determinative. As I have explained, that is not correct, as it fails to take into account the lack of relationship between time spent and the nature of some of the decisions that are taken in the exercise of responsibility. This is a separate point from the other error, although the two were related in this case in that the tribunal’s analysis of the time spent with each parent may not have been sound anyway.”

8. I fully accept what the Upper Tribunal Judge said in PG in relation to the amount of time spent with each parent being not determinative in reaching a decision as with whom the main responsibility lay. However, in my view it is equally an error in law to hold that in the current case the address which the dentist, GP and the school held for the children was as the tribunal put it “ultimately determinative as to who had the main responsibility for the children”. This is particularly so in this case having regard to the factors set out in paragraph 18 of the First Respondent’s submission to the Upper Tribunal. In these circumstances I accept the First Respondent’s submission in paragraph 19. I hold that the tribunal’s decision errs in law and must be set aside.

9. In remitting the case to a freshly constituted tribunal I would direct the tribunal that is to hear the appeal to follow the approach set out in paragraph 38 of the Upper Tribunal Judge’s decision in PG where he said:

“The proper approach is to collect information about all aspects of responsibility, to resolve any conflicts in the evidence, and then to form a balanced judgment on where the main responsibility lies. No factor predominates; all must be taken into account.”

The freshly constituted tribunal should also take into account what was said by the First Respondent in paragraphs 18 and 19 of its submission along with such other evidence as the appellant and Second Respondent produce.

(Signed)  
D J MAY QC  
Judge of the Upper Tribunal  
Date: 6 December 2019