

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The claimant's appeal is allowed in part.

The decision of the Aberdeen appeal tribunal of 15 May 2008 is set aside. That decision is remade as follows:

The claimant had the main responsibility for his son, [Ad.] in the tax year 2003 – 2004.

The claimant did not have the main responsibility for his step-son, [An.] in the above tax year.

The claimant was entitled to child tax credit in respect of [Ad.] for the above tax year. He was not entitled to child tax credit in respect of [An.] for that tax year.

REASONS FOR DECISION

1. By a decision dated 21 November 2005, HMRC held that the claimant was not entitled to child tax credit in respect of his son, [Ad.], date of birth 17 April 1997, and his step-son [An.], date of birth 10 December 1991, in the tax year 2003 – 2004. The claimant appealed against that decision. However, it was upheld by an appeal tribunal on 30 October 2006. The claimant then appealed, with success, against their decision. It was set aside by Mr Deputy Commissioner Burns QC (as he then was) on 26 March 2008, in CSTC/100/2008. The Deputy Commissioner remitted the case for reconsideration by a freshly constituted tribunal.

2. The rehearing directed by the Deputy Commissioner took place before the tribunal held in Aberdeen on 15 May 2008. That tribunal also upheld HMRC's decision. The claimant now appeals with my leave. His appeal was automatically transferred to the Upper Tribunal on 3 November 2008. It is not supported by HMRC. On 22 January 2009, the Registrar refused a request by the claimant for an oral hearing. The claimant asked me to reconsider the Registrar's ruling. I did so on 20 February 2009, but confirmed it.

3. There is (and has been) only one matter properly at issue throughout all of the above proceedings. That is whether in tax year 2003 – 2004, the claimant or his wife, from whom he has been separated since December 2001, had "the main responsibility" for [Ad.] and [An.] under rule 2.2 of regulation 3 of the Child Tax Credit Regulations 2002. The tribunal of 15 May 2008, like that of 30 October 2006, took the view that the claimant did not have "the main responsibility" for them.

4. At the tribunal hearing of 15 May 2008, the claimant specifically conceded that he did not wish to claim tax credit for [An.] in the above tax year, only for [Ad.] (see document 706, the tribunal's record of proceedings). Unfortunately, that concession is inaccurately recorded in paragraph 5 of the tribunal's full statement of reasons (document 107) by the names of

[Ad.] and [An.] being transposed. In the proceedings before the Upper Tribunal, the claimant has maintained his concession in respect of [An.]. I accept it. I hold that HMRC's decision of 21 November 2005 was correct in respect of [An.]. In the remainder of these reasons, therefore, I restrict myself to considering whether the decision of the tribunal of 15 May 2008 was correct in respect of the claimant's entitlement to child tax credit for [Ad.].

5. The application of "the main responsibility test", established by rule 2.2 of regulation 3 of the Child Tax Credit Regulations 2002 by a tribunal, is to be carried out by evaluating all relevant factors. Only if a tribunal ignores relevant factors, or relies on irrelevant ones, will they be held to have erred in law. These propositions are clearly established by paragraph 31 of CTC/4390/2004, helpfully reproduced on document 561. It is important to note that the test relates to "responsibility" rather than "care". That becomes a matter of some importance in this case. "Main" and "responsibility" are to be given their ordinary English meaning.

6. After careful consideration of the voluminous written submissions before me, I consider, in respect of [Ad.], that the tribunal did not give sufficient consideration to one relevant factor. I accept the submission made on behalf of HMRC, in paragraphs 24 – 26 of document 205, that the tribunal were correct to reject the claimant's submission that some part of the total responsibility for [Ad.] should be apportioned to his school. I agree with the submissions just referred to that when a child is at school, "the main responsibility" for that child must still be assigned to one or other parent for the purposes of rule 2.2 of regulation 3 of the Child Tax Credit Regulations 2002. The tribunal clearly and correctly took that position in paragraph 3 of their statement of reasons (reproduced on document 711). However, the claimant, in his written submissions to the tribunal, had emphasised that even on occasions when he did not have overnight residential care of [Ad.], he did have considerable responsibility for him vis à vis his school (see the last sentence of document 697 and the remainder of paragraph 1.1 on document 698). The tribunal did not address that submission at all. They allocated responsibility during the days of school term time between the claimant and his wife on the basis of which of them had residential overnight care in respect of each day (see paragraph 4 of their statement of reasons on document 711). In taking the approach of ignoring the claimant's residual daytime responsibility for [Ad.] when he was at school, and concentrating on which parent had more residential overnight care during term-time, the tribunal made a mistake of law. They gave too much weight to overnight stays and not enough to the claimant's parental responsibility for [Ad.] during school hours. I accept the submissions to that effect made by the claimant in the 3rd and 4th paragraphs of document 718 and the 3rd, 4th, 5th and 6th paragraphs of document 722, read along with the 1st paragraph of document 723. Those submissions are actually consistent with the emphasis which the tribunal rightly placed on the importance of overseeing and ensuring proper education for [Ad.] in paragraph 4 of their statement of reasons on document 711. With regard to the submission in paragraph 27 of document 806 by HMRC, I take the view that a proper consideration of the issue of [Ad.'s] education should have led the tribunal to give more weight to the claimant's involvement during the day in that aspect of his upbringing than they did. The tribunal's decision, therefore, involved them in the making of a mistake of law. That mistake is sufficiently material for me to set their decision aside under s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. That is so because of the use of the word "responsibility" in the relevant statutory test.

7. In all the circumstances, it is appropriate for me to re-make the tribunal's decision in respect of [Ad.] under s.12(2)(b)(ii) of the above Act. In doing so, I accept the tribunal's

findings of fact in respect of [Ad's] overnight residential care. As they put it in paragraph 4 of their statement of reasons on document 711, [Ad.] spent "a slightly greater proportion of [his] time with [his] mother than [his] father". However, I also find in fact, using my powers in s.12(4)(b) of the above Act, that the claimant had the primary parental responsibility for [Ad.] during school hours on the days on which he attended school in the tax year 2003 – 2004. I make that finding especially relying on the telling evidence of the contents of document 814, lodged by the claimant. I note, in particular, the absence from that document of any contact details for the claimant's wife and also its date. Document 814 provides significant corroboration for the position taken up by the claimant in his written submissions on his parental responsibility for [Ad.] during the days when he was attending school. Having regard to the findings of fact made by the tribunal and the additional finding of fact which I have just made, I hold that, in the tax year in question, the claimant satisfied the "main responsibility test" laid down by rule 2.2 of regulation 3 of the Child Tax Credit Regulations 2002 in respect of [Ad.], although not in respect of [An.] where the claimant has conceded the correctness of the decision of HMRC (see paragraph 4 above). Evaluation of the factor of daytime responsibility in term time, tips the balance in the claimant's favour as regards [Ad.], applying an overall judgement. My conclusion is reflected in the terms of my decision.

8. The claimant's appeal thus partially succeeds.

(signed)
A J GAMBLE
Judge of the Upper Tribunal
Date: 2 April 2009