

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 26 March 2010 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.

STATEMENT OF REASONS

1. The claimant has appealed against the decision of the tribunal recorded at page 40. The decision by HMRC which was appealed against is recorded as follows:

“[The appellant] is entitled to tax credits of £604.98 Child Tax Credit for the period 6 April 2008 to 27 June 2008. [The appellant] is not considered, for tax credit purposes, to be responsible for her youngest son [.....] from 6 April 2008. However is responsible for her eldest son [.....] for the period 6 April 2008 to 27 June 2008.

As [the appellant] is not working during the period of the award she is not entitled to Working Tax Credit for the period 6 April 2008 to 27 June 2008.”

The grounds of appeal are set out at pages 54 to 56. They are principally related to the fact that she was not awarded tax credit in respect of her younger son and she seeks to demonstrate an error in law in relation to the tribunal’s approach as set out in the paragraphs of their reasons which are referred to in the grounds of appeal. The Respondents do not support the appeal for the reasons set out in its submission at pages 68 to 71. The claimant responded to that at page 72. The appeal to the tribunal arose by virtue of the fact that the appellant’s former husband was awarded the tax credits in relation to the younger son over the relevant period.

2. The law is conveniently summarised in the Respondent’s submission at paragraphs 4 and 5 of the section headed “submission” where it says:

“4. Section 8(1) of the Tax Credits Act 2002 (‘the Act’) sets out the basic entitlement condition for child tax credit; a person must be ‘responsible’ for a child or young person in order to satisfy the test. HMRC determine whether that person is responsible for a child or young person by reference to the Child Tax Credit Regulations 2002, regulation 3, Rules 1 to 4.

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5. It should be noted that Rule 4 provides a list of circumstances where a child or young person is treated as not being the responsibility of any person. The circumstances of this case do not fall into the prescribed list therefore this rule does not apply. As such only Rules 1 to 3 apply in this case.

Rule 1

Provides that a person is treated as responsible for a child or young person if that child or young person is normally living with him (the “normally living with test”). This Rule is subject to Rules 2 to 4 of the same CTC Regulations.

When considering any claimants’ entitlement to CTC HMRC first needs to establish if there is a child normally living with them. It follows then that where there are two claims for CTC in respect of the same child TCO need to establish if that child normally lives with one or both or neither of the claimants. In this case the child appears to normally live with both claimants and therefore TCO moves on to the next rule.

Rule 2

Applies where the child or young person in question normally lives with two or more persons and who make separate claims (competing/rival claims). In these cases the child or young person is treated as the responsibility of only one of those claimants, whichever of them has ‘main responsibility’.

In this case there has been a household breakdown, the child spends a proportion of their time living at each of the estranged claimant’s home and each claimant has made a claim for CTC. However, HMRC can only treat one of the claimants as being responsible for the child therefore TCO move to the next rule.

Rule 3

Provides for competing claimants to decide themselves who satisfies the main responsibility test for the child or young person. In the absence of any such agreement HMRC may decide by ‘comparing between them’ which claimant satisfies the main responsibility test.

As it is possible for a child to ‘live with’ more than one person and as HMRC have found that the child ‘lives with’ both the claimants to some degree, they must give the claimants the opportunity to decide between themselves who should receive tax credits for the child.”

3. It is then accepted that Rule 3 could not apply as the appellant and her former husband were unable to decide who should receive tax credits for the younger son. In these circumstances it is said:

“It therefore falls to HMRC to consider who has ‘main responsibility’ for the child. To do this HMRC takes evidence from both claimants and makes a decision based on the information provided. This is what has happened in this case.”

That decision favoured the child’s father rather than the appellant and it was that decision which was before the tribunal.

4. There was clear evidence before the tribunal from the appellant’s younger son that she was responsible for him. In that letter he said:

“My name is [....] and I am 17 years old. My mum and dad split up in 1998 and at that point me, my brother [....] and my mum moved into a different house. I have been living with my mum ever since but have been able to go and see my dad whenever I wanted. My mum bought everything for me (clothes, shoes, etc).

Many thanks

[....]”

That evidence was dealt with as follows:

“[The appellant] has lodged a letter from [younger son] (page 38). In my view this is significant evidence which cannot be disregarded but I am unable to attach any weight to it. When considering this letter I have borne in mind that a child is likely to take sides in a dispute of this sort and is open to persuasion whatever that child’s age. I am unable to attach the weight to it that I would attach to evidence from an independent witness. I am unable to attach the necessary weight to it which would persuade me that [younger son] “normally lives” with [the appellant] or that she has the “main responsibility” for [younger son].”

It appears that there is a typing error at the beginning of paragraph 13 where the context would suggest that it was the appellant who submitted the letter rather than her former husband. The view taken by the tribunal in relation to the reliability of the evidence of the younger son appears to be exclusively based upon general perception by the tribunal of evidence given by children in family disputes rather than to the specific evidence given by him as an individual. It is to be noted that at the time he gave his evidence he was seventeen years old and there is no indication on the face of the written evidence that he was not telling the truth in relation to what he said. What he said was material to the issue before the tribunal and I am not satisfied that the explanation for the treatment of his evidence is safe. The conclusion in paragraph 14 is in my view dependent to a material extent in the rejection of the evidence of the younger son. I use the word reject advisedly as not giving “the necessary weight” to it in the context in which it was given is in effect to reject it. In these

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circumstances as the matter was material to the issue concerned I hold that the tribunal's decision errs in law and must be set aside.

5. Further, in paragraphs 14 and 15 the tribunal said

“14. I find on the basis of the evidence that it is more likely than not that [the younger son] spends equal time with each parent. On the basis of the evidence I find that [the younger son] “normally lives” equally with both parents and they both have equal responsibility for him and neither parent can be said to have the “main responsibility” for him” making the judgment on an overall basis over a period of time. Overall I find that the two competing claims of [the appellant] and [Mr G] are equally balanced on the evidence before me.

15. I have resolved the issue before me, therefore, on the basis of the guidance in CTC/4390/2004. In that case the Upper-tier Judge suggests that when looking at two seemingly equally balanced claimants look at the one who would benefit more from the claim. I find that it was appropriate in the circumstances to consider which household would receive the greater award of CTC. As [the claimant's] income was higher than [Mr G's] income it was appropriate for [Mr G] to receive the higher CTC. On the basis of the totality of the evidence I find the Respondent's decision was correct.”

6. I am persuaded that the basis for their decision in paragraphs 14 and 15 of the tribunal's statement is also an error of law. As set out above having rejected the evidence of the younger son and having determined that neither parent had “the main responsibility” for him, the tribunal considered that it was appropriate in the circumstances to consider which household will receive the greater award of Child Tax Credit. The tribunal made no decision on the issue of who had the main responsibility of the younger son. In my view, the tribunal was not entitled to avoid making a decision on who had the main responsibility for the younger son. For the purposes of Rule 3 competing parents can decide among themselves which of them is to receive the credit. However, it is not a legitimate consideration for either the respondents or a tribunal when determining a claim to avoid a decision on “main responsibility” and to decide who is to succeed by what is a non statutory test of which parents' household would benefit more financially. Further, who would benefit most financially could not be a proper criteria for deciding who had the main responsibility for the reasons I have set out below in paragraph 8. The tribunal in approaching the matter in that way cited CTC/4390/2004 as authority for what they did and it appears that the respondents consider this approach to be both reasonable and correct - see paragraph 14 of their submission and in paragraph 13 they note that the Tax Credit Office have adopted this approach in some cases.

7. What was said by the Commissioner in that case was:

“33. As mentioned above, the Commissioners after the oral hearing and at my request and with the agreement of both F and M, calculated in detail what was best for F and M in this particular appeal. All now accept that the best outcome in terms of

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the maximum payment of child tax credit for the year in question is that M receives the child tax credit for the children. In the particular circumstances that is a better award for the children than if F received the child tax credit or each receiving some of it. That must be subject to a proviso. The result might be different in later years.

34. The Commissioners argue that they should take the view that in this case it is therefore appropriate to regard M as having the main responsibility because in that way the greater advantage is given to the children, and that assisting the children is the main purpose of the 2002 Act.

35. I have stressed that it is for the Commissioners, and the tribunal, to decide what they should do. I can only decide what they could do. As a matter of law, I see no reason why the Commissioners should not take this approach. It is, after all, the approach that would be taken by properly-advised conflicting claimants reaching the best overall agreement between themselves. So it is the nearest the Commissioners can come to what the claimants might have agreed in their own best interests. I would certainly regard the converse approach - that the Commissioners award credits to the person who would cost the public purse least - as both outside the spirit and intent of the 2002 Act and against any decision that rational conflicting claimants would agree, and therefore irrelevant in law. Any decision that preferred the mother to the father simply because she was the mother could be discriminatory. But the Commissioners and tribunal must decide for themselves what factors should be used.”

8. It is not clear from that decision the extent to which there was any competition between the parents concerned before either the tribunal or the Social Security Commissioner, though the fact it was before the Commissioner suggests rule 3 had not been applied, as to which of them should be found entitled to the credit. However, I do not consider that where there are competing claims and the parents have not themselves reached agreement as to which of them should receive the tax credit consideration as to which parent would receive the greater benefit, is a legitimate consideration in determining the issue as to which of them has the main responsibility for a particular child. In-so-far as the Commissioner in CTC/4390/2004 was suggesting that which household would obtain the greater financial credit was a legitimate consideration for the purposes of the “main responsibility” test, I disagree with him and decline to follow him. The tax credit for a child is paid to a parent and not to that child. The parent will apply that credit for the benefit of the child in the context of his or her general household expenditure including items which are general to the household such as accommodation, heating, lighting and items which are particular to the child such as clothing. It can therefore be seen that it would be both illogical and wrong to prefer one parent over the other for the purposes of the credit on the basis of their respective incomes and the effect that these would have in the calculation of any award. It is not a factor which is pertinent to a decision as to which parent has main responsibility, neither is consideration as to an award to which parent would save the public purse.

9. In the circumstances I remit the case to a freshly constituted tribunal. That tribunal in determining the appeal must follow what I have said about CTC/4390/2004. It will be open to the appellant to lead evidence in relation to the other matters she has referred to in her

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grounds of appeal at page 55 and to supply such evidence as she considers appropriate in support of her appeal. The tribunal will require without recourse as to consideration as to which household would benefit most from the tax credit to make a decision one way or another determine who had the main responsibility for the younger son over the relevant period and make their decision on the appellant's claim accordingly.

(Signed)
DJ MAY QC
Judge of the Upper Tribunal
Date: 20 October 2010