

ENGLAND AND WALES / JUDGMENT

DL v HMRC

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IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. UA-2024-SCO-000089-CHB

BETWEEN

DL

-v-

HMRC

(His Majesty's Revenue and Customs)

Appellant

Respondent

Before: Upper Tribunal Judge Price

Decision date: 16 January 2026

Decided on consideration of the papers

Representation: Appellant: K Cochrane
Respondent: D P Eland
On appeal from

Tribunal:

Tribunal Case No:

Tribunal Venue:

Hearing Date: First-tier Tribunal (Social Entitlement Chamber)
SC948/23/00283
Edinburgh
26 April 2024
UA-2024-SCO-000089-CHB DL v HMRC
RULE 14 Order
Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant, his daughter, or the mother of his daughter, in these proceedings.
This order does not apply to: (a) the respondent; (b) any person to whom the respondent discloses such a matter or who learns of it through publication by the respondent; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the

proper exercise of the functions.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 26 April 2024 under number SC948/23/00283 was not made in error of law.

REASONS FOR DECISION

1. This appeal concerns the decision of the Respondent to award the mother of the appellant's child, C, child benefit from 10 October 2022.
2. Both parties had equal care of their daughter until January 2022. From 2014, the appellant has been in receipt of child benefit for his daughter. In August 2022, the appellant's daughter moved to live with her mother. C's mother applied for child benefit on 13 September 2022. A decision was made on 10 October 2022 to award her the benefit. From 7 November 2022, both parents had equal care again.
3. The decision to award C's mother, child benefit was reconsidered and not changed. A mandatory reconsideration notice was issued on 27 March 2023.
4. The appellant appealed the decision to the First-tier tribunal ('FtT') on 7 September 2023. The legal framework
5. Section 141 of the Social Security Contributions and Benefits Act 1992 provides that the person who is entitled to child benefit for a child or qualifying young person is the "person who is responsible for" that child or qualifying young person.
6. Section 143 defines "person responsible for". The relevant provisions of section 143 are:
UA-2024-SCO-000089-CHB DL v HMRC "(1) For the purposes of this Part of this Act a person shall be treated as responsible for a child or qualifying young person in any week if— (a) he has the child or qualifying young person living with him in that week; or
(b) he is contributing to the cost of providing for the child or qualifying young person at a weekly rate which is not less than the weekly rate of child benefit payable in respect of the child or qualifying young person or that week.
(2) Where a person has had a child or qualifying young person living with him at some time before a particular week he shall be treated for the purposes of this section as having the child or qualifying young person living with him in that week notwithstanding their absence from one another unless, in the 16 weeks preceding that week, they were absent from one another for more than 56 days not counting any day which is to be disregarded under subsection (3) below.
7. Section 144 then deals with the situation where two or more persons would be entitled to child benefit in respect of the same child. Only one shall be entitled, and the question of who is entitled is determined in accordance with Schedule 10.

8. Schedule 10 provides as follows, “1(1) Subject to sub-paragraph (2) below, as between a person claiming child benefit in respect of a child or qualifying young person for any week and a person to whom child benefit in respect of that child or qualifying young person for that week has already been awarded when the claim is made, the latter shall be entitled.

(2) Sub-paragraph (1) above shall not confer any priority where the week to which the claim relates is later than the third week following that in which the claim is made. (2). Subject to paragraph 1 above, as between a person entitled for any week by virtue of paragraph (a) of subsection (1) of section 143 above and a person entitled by virtue of paragraph (b) of that subsection, the former shall be entitled.

(3) Subject to paragraphs 1 and 2 above, as between a man and woman who are married to, or civil partners of, each other and are residing together, the woman shall be entitled.

(4) (1) Subject to paragraphs 1 to 3 above, as between a person who is and one who is not a parent of the child or qualifying young person the parent shall be entitled. UA-2024-SCO-000089-CHB DL v HMRC

(2) Subject as aforesaid, as between two persons residing together who are parents of the child or qualifying young person but do not fall within paragraph 3, the mother shall be entitled.

(5) As between persons not falling within paragraphs 1 to 4 above, such one of them shall be entitled as they may jointly elect or, in default of election, as the Secretary of State may in his discretion determine.
9. The recent case of *His Majesty's Revenue and Customs v AV and IV* [2025] UKUT 286 (AAC) is both relevant and helpful. This set out how the question of entitlement to child benefit, and priority of entitlement, should be determined in a case where two individuals are both claiming the same.
10. The outcome in *AV and IV* was that the children in that case lived with both parents within the meaning of child benefit law and the question priority of entitlement therefore arose. As none of the specific priority provisions in paragraphs 1 – 4 of Schedule 10 applied, and there was no election by the parents, it fell to HMRC to finally decide entitlement in accordance with paragraph 5. However, prior to that conclusion the UT gave helpful guidance on how the FtT should approach and apply section 143.
11. UTJ Markus refers to the case of *R(F) 2/79*, which is cited and relied on by Commissioner Powell in *CF/1057/2003*, where it was said of the expression “living with” in the predecessor to section 143 of the 1992 Act: “I accept that “living with” ...involved the presence, as opposed to the absence, of the child...But “living with” is not synonymous with “residing together” nor with “presence under the same roof”. Nor does it necessarily involve the exercise of de facto care and control. But where care and control is in fact exercised by the person with whom the child is staying, this is an important factor which may well lead to the conclusion that the child was living with the person concerned...But it is not the only feature that requires consideration...”

12. At [53], UTJ Markus held ‘In the light of the above decisions, the question of with whom a child is living at any time for the purpose of section 143(1)(a) is a question of fact to be decided on all the available relevant evidence. It is not a question of where the child spends the majority of their time. The existence of a court order or agreement between the parents as to joint living or caring arrangements is not decisive of where the children live. Such matters are relevant evidence but they must be weighed along with all the evidence’.
13. As is apparent from the decision in AV and IV, the answer to that question is fact-specific and, depending on the facts, it would be legitimate and in accordance with the law to find that the child lives with both claimants. UA-2024-SCO-000089-CHB DL v HMRC
14. UTJ Markus also held that ‘...it was a breach of natural justice for the FTT to have decided the appeal without making [the father] a party to the proceedings. He was deprived of an opportunity to make representations in those proceedings, even though the outcome affected him. The proceedings were unfair and I set aside the decision on that basis’.
15. Helpfully the UT in AV and IV also set out some of the relevant case law which is instructive in this matter, 46...‘In R(F) 2/79, which is cited and relied on by Commissioner Powell in CF/1057/2003, Commissioner Hallet said of the expression “living with” in the predecessor to section 143 of the 1992 Act: “14...The expression should bear its ordinary and natural meaning in the context in which it occurs. It would, in my view, be both dangerous and unnecessary to seek to define its meaning in this context or to put any gloss on the statutory language by holding that the notion of “living with” a person in this context involves the exercise of de factor care and control, or the satisfaction of some other test. The question to be decided in each case is whether the child can be said to be “living with” the claimant at the relevant time; and each case must be decided on its own particular facts and after taking into account all the circumstances.
15. I accept that “living with” ...involved the presence, as opposed to the absence, of the child... But “living with” is not synonymous with “residing together” nor with “presence under the same roof”. Nor does it necessarily involve the exercise of de facto care and control. But where care and control is in fact exercised by the person with whom the child is staying, this is an important factor which may well lead to the conclusion that the child was living with the person concerned...But it is not the only feature that requires consideration...”
47. In R(F) 2/81 the Commissioner cited the above decision but said at paragraph 12 that “the child must live in the same house or other residence as the parents and moreover by carrying on there, with the parent, a settled course of daily living...”. In that case, the child spent only Saturdays and Sundays between 11.30 and 6.30 pm on each day with her father. In that context, it is not surprising that the conclusion was that she did not live with her father.
48. In CF/326/2002 the children spent time with both parents, but it was agreed that they spent more time with the father who was their “primary carer”. Commissioner Fellner said: UA-2024-SCO-000089-CHB DL v HMRC “13...S 143(1) treats a person as responsible for a child in any week if she has that child living with her “in” that week; it does not say “throughout”

that week... “Living with” is to be construed in its normal everyday sense, and in that sense where a child regularly stays part of the week with one parent and part with another, having his own possessions in each place..., it is clear that he is living with both of them during the week.”

49. While the presence of the children’s possessions was treated as a relevant factor there, I do not take it from that that it is a necessary condition of a child being found to live with a parent. As the case law makes clear, each case will be decided on its facts. The First-tier Tribunal
16. The FtT made a decision on 26 April 2024 and dismissed the appeal.
17. They found that there had been a change in circumstances, specifically the care arrangements provided to the appellant’s daughter. They decided that C lived with her mother after that change, such that C’s mother was entitled to child benefit from 10 October 2022. The FtT went on to find that the legislation allows for the respondent to use its discretion to determine who is entitled to the benefit where both parents are entitled, but are unable to agree who should be the recipient.
18. The FtT made findings of fact including the following:
 - a. There was change in circumstances on 24 August 2022 when C went to live with her mother [11 (d)];
 - b. From 24 August 2022 C was living with her mother [11 (e)];
 - c. C did not return to live with the appellant [11 (f)];
 - d. Again, there was change in circumstances on 24 August 2022, namely C went to live with her mother [13]
 - e. C has not returned to live permanently with the appellant [14].
19. In summarising the evidence, the FtT reported that ‘However, he [the appellant] accepted that from 24th August 2022 C was living with her mother, and that in October 2022 he had overnight care of her for 10 nights in the month’ [12].
20. At [16] the FtT concluded, I am satisfied that the decision that [the mother] was entitled to Child Benefit for [C] from 10 October 2022 was correct. I find that at the relevant time, [C] was residing with [her mother], who was therefore the parent responsible for the majority of [C’s] care. Whilst [the appellant] may have maintained a bedroom in his home for [C,] and [C] may have stayed UA-2024-SCO-000089-CHB DL v HMRC overnight on occasion, I find that she stayed with [her mother] for the majority of the time.

21. At [17], the FtT concluded 'I do not consider that [C] living with her mother was a temporary arrangement, as [C] has not returned to live full-time with her father. In addition, there was no agreement in place that the arrangement was temporary. I am satisfied on the evidence before me that in August 2022, [C] chose to live with her mother'.
22. As both parents were therefore entitled to child benefit and as the matters in paragraphs 3 and 4 of Schedule 10 did not resolve the issues, the tribunal held that the Respondent was correct to make a determination under paragraph 5 of schedule 10. The FtT found that the respondent was entitled to use its discretion to make that decision and there was no reason to interfere with that decision.
23. The appellant applied to the FtT for permission to appeal, this was refused on 11 July 2024. Permission to appeal
24. On 5 July 2024, the appellant renewed his application for permission to appeal to the Upper Tribunal. The appellant put no detail into his appeal form, such that there were no grounds of appeal. Permission was therefore granted on 15 October 2024 in the following terms,
 - a) In paragraph 11(i) of the tribunal's statement of reasons under the heading findings in fact, the tribunal found that the child's mother was responsible for the majority of the care and responsibility of the child from August 2022 to November 2022. It is arguable that this is a conclusion in law rather than a finding in fact. The question arises as to whether the tribunal made sufficient findings in fact to underpin this conclusion and if not, was this an error in law sufficient to vitiate the decision.
 - b) The tribunal, so far as I can gather from the papers, did not afford the child's mother the opportunity to be a party to the proceedings. I am aware that the decision of the tribunal was in her favour, but did the tribunal err in law in not giving her the opportunity to be a party.
25. Permission was limited to these grounds. The appellant's submissions
26. Written submissions were provided on the appellant's behalf by his representative and received by the UT on 24 December 2025. It is the appellant's position that the Tribunal failed to provide sufficient findings in fact to underpin their conclusions that C's mother was responsible for the child UA-2024-SCO-000089-CHB DL v HMRC and that they applied the wrong test of 'the majority of care' instead of determining who was responsible for the child between 24 August 2022 and 6 November 2022.
27. It is the appellant's position that he still has responsibility for the child in terms of section 143 (1)(a) when C's mother applied for Child Benefit on 13 September 2022 as C should still have been considered to have been living with him when all the facts and circumstances are taken into account. This appears to be based primarily on the arguments that the appellant 'gave evidence that ...her important possessions remained at his house, that he continued to pay for all of [C's] major costs during the period and that the school and medical records were registered to him'. Further, that the FtT should have considered that [C] had been living

with her father prior to 24 August 2022 for a significant period; that C had not necessarily chosen to live with her mother and that this was in fact her mother's decision to change the living arrangements without the appellant's consent, and that the position was only temporary in any event.

28. The appellant's submissions go on to argue, 'The Tribunal appears to have applied a test based on where she [C] stayed the majority of the time for a short period of time, and did not take into account the wider picture concerning the child's care and living arrangements. This terminology is used on a number of occasions sufficient to find that is the test applied. That is not the test set down by section 143. This amounts to an error of law... There is nothing in the reasons to indicate that the Tribunal have looked beyond physical care as the determining factor. The Tribunal have failed to consider the wider aspects of what constitutes 'living with' in terms of section 143 (1) a) and the relevant authorities. HMRC submissions
29. HMRC resists the appeal. They make the following submissions: 'The period in issue in this case began with [the mother's] claim on the 13 September 2022. That claim was made, as the tribunal found, about three weeks after a change which occurred on 24 August 2022 when [C] "went to live with mother" and did not return to live with her father until 7 November 2022, as the tribunal found'. In those circumstances, HMRC submits 'that the tribunal was entitled on the evidence to find that C was living with her mother for the period up to 7 November 2022. Furthermore, this was not a case where there was any dispute that [C] was with [her mother during the period in issue. The remainder of the tribunal's reasons are given over to the appellant's arguments that [C's] departure on 24 August 2022 was temporary and that as the original recipient of child benefit, he ought to remain entitled. The tribunal was entitled to find that there was nothing to support the UA-2024-SCO-000089-CHB DL v HMRC existence of a temporary departure, and it was correct to reject the argument that [the appellant] should retain the child benefit as original recipient. The tribunal's findings in fact reflected the evidence before it...'
30. In a later set of submissions dated 1 December 2025, HMRC submitted that 'It remains HMRC's position that the tribunal did not err in deciding this case. Whilst the tribunal did refer to "equal shared care" and "majority" care, this was a generalisation of the position each side of the period in issue in this case'. They went on to conclude that, 'It is HMRC's submission that the tribunal did not err in law in its assessment in this case. However, prior to the tribunal deciding the case, there was at least the potential for a tribunal decision which could have affected [C's mother's] entitlement. Whilst the law does preclude an appeal against HMRC's discretionary decision under paragraph 5, the tribunal dealing with an appeal in such a case could, and should, determine whether the case is one which calls for a decision under paragraph 5 of Schedule 10 at all. Such a decision starts with an assessment of the facts of the case and whether the case is one in which more than one person meets the conditions such that a decision on priority is required. Furthermore, a decision under paragraph 5 is only appropriate where none of paragraphs 1 – 4 establish priority of

entitlement on an ongoing basis. In the present case, the tribunal's findings in the context of paragraphs 1 – 4 arguably were deficient but since it is plain on the facts that a decision by HMRC under paragraph 5 was required, no material error in law arises'.

31. They also submitted that, following the case of AV and IV, it was an error of law not joining in C to the proceedings. However, this was not a material error of law, given the decision that was made. Conclusions Ground 1: incorrect application of section 143
32. The issue on this appeal was whether the FtT were wrong in their conclusion that either parent was entitled to child benefit and therefore the provisions set out in Schedule 10 which enable such conflicts to be resolved did not apply. The argument as to why both parents were not entitled to child benefit concerned the application of section 143 as set out above. '(1) For the purposes of this Part of this Act a person shall be treated as responsible for a child or qualifying young person in any week if— (a) he has the child or qualifying young person living with him in that week...' Following AV and IV, it is clear that the question of with whom a child is living at any time for the purpose of section 143(1)(a) is a question of fact to be decided on all the available relevant evidence. UA-2024-SCO-000089-CHB DL v HMRC
33. Thus the issue the FtT had to ask itself was who C was living with. And following AV and IV this test was not to solely be equated with 'where the child spends the majority of their time'.
34. Reading the FtT's reasons as a whole it is clear that have applied the test correctly.
35. First, the FtT made factual findings concerning where C was living. They repeated this finding on three separate occasions.
36. Second, and perhaps crucially in this case, is that it was not in dispute factually that C was residing with her mother at the relevant point, albeit that this was said to be a temporary arrangement. However, the appellant did not know if or when C was going to return to live at his home. This is demonstrative of an absence of control, which was significant, as it indicated that it was not the appellant who had care and control over C at the relevant point. This was clearly a relevant factor.
37. The appellant's submissions accept that between 24 August 2022 to 6 November 2022, C stayed at her mother's for all the time, save for 17 nights. The FtT clearly took into account where C stayed for the majority of the time [16]. Again, this was a relevant factor and as such was not an error of law.
38. It was accepted by the appellant in his submissions before this tribunal, that C's mother 'had the greater share of the physical care'. The appellant concedes in the same submissions that physical care for the majority of time in the relevant period was exercised by C's mother. These concessions echo's the FtT's record of the appellant's evidence before them. It follows from the provision of physical care, that a significant degree of control must have exercised by C's mother as person with whom C was staying. Indeed, the FtT made an express finding that C's mother was responsible for most of her care in this period [16]. Again, this was a

relevant factor.

39. It follows that the FtT took into account the particular wider factual circumstances, as set out in the case law and helpfully summarised in AV and IV. The FtT did not simply determine where C was residing for the majority of the time and substitute that for a view as to where she was living. It found that as C was residing with her mother, her mother had the majority of responsibility for care in the period. That is a different finding.
40. Further, the factors relied upon by C's father to argue C was not living with him, although relevant are clearly not determinative. UA-2024-SCO-000089-CHB DL v HMRC
41. The totality of his argument was that C living with her mother was a temporary arrangement. Yes, he did not know when C would come back to live with him (in the event she did not). He had some of her possessions at her house. His was the address on her medical records. He paid for her activities.
42. Such factors clearly do not lead to a conclusion that the appellant must have been the only parent with whom C was living at the relevant time. The contrast of these factors weighed against those relied upon by the FtT in finding that C was living with her mother, demonstrates the strength of the FtT's reasoning. Living with requires the presence not the absence of a child (In R(F) 2/79) C was absent from her father's home and care for the vast majority of this period. As the UT accepted in AV and IV 'While the presence of the children's possessions was treated as a relevant factor there, I do not take it from that that it is a necessary condition of a child being found to live with a parent'.
43. I do not find in this case that the addition of payment for activities or the address for a child's medical records are sufficient to make a finding that a child was living with the appellant. These activities by definition will always be undertaken by one parent. Although they may be relevant factors, they are not clearly determinative.
44. For these reasons, I find that the FtT applied the correct test. It correctly considered where C was living and did not narrow that to a question of where she was residing. I therefore dismiss this ground of appeal. Ground 2: procedural fairness
45. I agree with the HMRC submission that following AV and IV it was an error of law not joining in C's mother. However, I also agree that this was not a material error of law, given the decision that was made. For this reason, I do not allow this ground of appeal.
46. It follows that the respondent was correct to determine that both parties were eligible for receipt of child benefit. In this case, paragraphs 1- 4 of schedule 10 did not assist in determining which party should receive the benefit. Therefore, paragraph 5 applied. The respondent exercised this statutory discretion. This decision cannot be appealed.
47. For these reasons, I do not allow this appeal. Louise Price UA-2024-SCO-000089-CHB DL v HMRC Judge of the Upper Tribunal Authorised for issue on 16 January 2026 UA-2024-SCO-000089-CHB DL v HMRC

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