

**[2016] AACR 45**  
**(PG v Her Majesty's Revenue and Customs and NG (TC)**  
**[2016] UKUT 216 (AAC))**

**Judge Jacobs**  
**4 May 2016**

**CTC/611/2015**

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**Tax credits – nature of main responsibility – proper approach to deciding parent with main responsibility**

The claimant and his wife jointly claimed child tax credit (CTC) for their children until June 2013 after which he successfully claimed as a single person. The wife then claimed CTC and, after an investigation, Her Majesty's Revenue and Customs decided that she had the main responsibility for the children and terminated the claimant's award. The claimant appealed to the First-tier Tribunal (F-tT), arguing that due to his wife's mental health he was the children's primary carer as, among other things, he spent more time with them, had arranged their education, was the main financial provider and incurred considerable costs when visiting them. The F-tT rejected his appeal after taking account of the High Court's order which provided for the children to be with the claimant on three nights and the wife on four nights, holding that responsibility had to be given its ordinary meaning, and that a parent had responsibility when a child was resident with them. The claimant appealed to the Upper Tribunal (UT), arguing that he and his wife had agreed to vary the terms of the order and that the F-tT had failed to take account of the actual arrangements. The issue before the UT was the meaning of main responsibility in rule 2.2 of regulation 3 of the Child Tax Credit Regulations 2002.

*Held*, allowing the appeal, that:

1. responsibility was an ordinary word, but one with a range of meanings and it was necessary to identify which of those meanings applied to the statutory context of CTC. The statutory test in section 8 of the Tax Credits Act 2002 depended on responsibility and the application of the rules in regulation 3 depended on the facts and circumstances of the individual case (paragraphs 26);
2. parental responsibility, especially when qualified by the word main, must refer to the practical exercise of responsibility and was not severable or divisible. Parents were the persons who had ultimately responsibility for making decisions and taking actions, whether directly or with the assistance of others. The test was who had the main responsibility, not the manner of its discharge, conscientiousness of effort or quality of attainment. Time was not an indicator of all aspects of responsibility. Expenditure was not decisive and the costs associated with contact were not factors that could be taken into consideration; they were a consequence of the exercise of responsibility, not a part of it. The proper approach was 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 lay. No factor predominates; all had to be taken into account (paragraphs 29 to 38);
3. a court order about contact was relevant to the time that each parent had with the child but, as the main responsibility was determined by its exercise, the terms of a court order would not necessarily be determinative. Parents often make other arrangements that are convenient to them or the order falls into abeyance as children grow and circumstances change. The main responsibility test must be applied to the reality of what happens, not to a legal construct of what should occur under an order (paragraph 39);
4. the F-tT erred when considering which parent had the main responsibility, because its analysis was based on the terms of the court order, not the actual responsibility exercised by each parent, and it adopted an approach that time was determinative, that failed 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 (paragraphs 41 to 42).

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

As the decision of the First-tier Tribunal (made on at under reference SC) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

**DIRECTIONS:**

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal.
- B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions (DLA)* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide how the main responsibility test in rule 2.2 of regulation 3 of the Child Tax Credit Regulations 2002 applies at the time of the claim in this case.

**REASONS FOR DECISION**

**A. The issue**

1. The issue in this case is the meaning of “main responsibility” in rule 2.2(b) of regulation 3 of the Child Tax Credit Regulations 2002 (SI 2002/2007) – “the 2002 Regulations” from now on. Specifically, the issue is what factors are relevant to applying the test or, putting it differently, what is the nature of responsibility for the purposes of that rule?

**B. History and background**

2. Mr and Mrs G’s children were the subject of a joint claim for child tax credit until Mr G made a claim as a single person from 5 June 2013. The Commissioners for Her Majesty’s Revenue and Customs – “the Commissioners” from now on – decided that he had the main responsibility for the children from that date and made an award accordingly. Mrs G made a claim as a single person from 16 June 2013. The Commissioners investigated and decided that she had main responsibility for the children from that date and terminated Mr G’s award accordingly. That decision was notified on 28 November 2013. In order to understand the subsequent appeals to the First-tier Tribunal and the Upper Tribunal, it is helpful to set out the legislation.

**C. The legislation**

3. Tax credits are paid under the authority of the Tax Credits Act 2002 – “the 2002 Act” from now on. Section 1 provides:

**“Introductory**

1. – (1) This Act makes provision for –

(a) a tax credit to be known as child tax credit; ...”

4. Section 3 deals with claims:

**“Claims**

3. – ...

(3) A claim for a tax credit may be made –

(a) jointly by the members of a couple both of whom are aged at least sixteen and are in the United Kingdom ...; ...

(b) by a person who is aged at last sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another).”

5. Section 8 deals with entitlement:

*“Child tax credit*

**“Entitlement**

**8.** – (1) The entitlement of the person or persons by whom a claim for a child tax credit has been made is dependent on him, or either of them, being responsible for one or more children or qualifying young persons.

(2) Regulations may make provision for the purposes of child tax credit as to the circumstances in which a person is or is not responsible for a child or qualifying young person.”

6. Regulation 3 of the 2002 Regulations is made under the authority of section 8(2):

**“Circumstances in which a person is or is not responsible for a child or qualifying young person**

**3.** – (1) For the purposes of child tax credit the circumstances in which a person is or is not responsible for a child or qualifying young person shall be determined in accordance with the following Rules.

*Rule 1*

1.1. A person shall be treated as responsible for a child or qualifying young person who is normally living with him (the ‘normally living with test’).

1.2. This Rule is subject to Rules 2 to 4.

*Rule 2 (Competing claims)*

2.1. This Rule applies where –

(a) a child or qualifying young person normally lives with two or more persons in

–

(i) different households, or

(ii) the same household, where those persons are not limited to the members of a ... couple, or

(iii) a combination of (i) and (ii), and

(b) two or more of those persons make separate claims (that is, not a single joint claim made by a ... couple) for child tax credit in respect of the child or qualifying young person.

2.2. The child or qualifying young person 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’);

subject to Rules 3 and 4.

*Rule 3*

3.1. The persons mentioned in Rule 2.2 (other than the child or qualifying young person) may jointly elect as to which of them satisfies the main responsibility test for the child or qualifying young person, and in default of agreement the Board may determine that question on the information available to them at the time of their determination.”

7. Section 9(7) of the 2002 Act allows for the possibility that an award might be apportioned or split between carers:

**“Maximum rate**

9. – (1) The maximum rate at which a person or persons may be entitled to child tax credit is to be determined in the prescribed manner.

...

(7) If, in accordance with regulations under section 8(2), more than one claimant may be entitled to child tax credit in respect of the same child or qualifying young person, the prescribed manner of determination may include provision for the amount of any element of child tax credit included in the case of any one or more of them to be less than it would be if only one claimant were so entitled.”

No regulations have been made under section 9(7). As the Supreme Court explained in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545; [2012] AACR 46:

“9. Although the Act allows for sharing, the decision not to provide for it in the regulations was deliberate. The Paymaster General, Mrs Dawn Primarolo, explained to Parliament (*Hansard House of Commons Debates*, 26 June 2002, vol 387, col 926-927):

“Together [the Act and the regulations] create a system that ensures that the family with main responsibility for a child will be provided with a suitable level of support, depending on their needs. That is similar to many current systems of support for children, and we believe that – currently – it provides the most suitable means to ensure that we can focus support on raising children out of poverty. Our present aim is to enable one family to claim support for any particular child at any one time. That is the principle on which the Bill, the draft regulations and the business systems being developed are based. There are several sound reasons for that approach. Usually, the person or couple who have the main responsibility for care of a child bear more of the everyday responsibilities for the child, and meet the everyday expenditure for him or her. It is vital, especially for families on lower incomes, that enough support is directed to that family to lift the child from poverty, or to keep him or her out of poverty.”

**D. The appeal to the First-tier Tribunal**

8. Mr G exercised his right of appeal to the First-tier Tribunal. That tribunal joined Mrs G as a party. She is also a party before the Upper Tribunal. The arguments in summary were these. Mrs G argued that she had the children for more time than Mr G and that this was in accordance with the terms of a decision of the High Court on 30 November 2012. The children were with her on four nights and with Mr G on three nights, with school holidays shared equally between the parents. Mr G argued for a different approach. He set out his detailed reasoning in a letter dated 23 March 2014. He argued that he was the children’s primary carer by any measure, including allocation of time, activities with the children including school work, and expenditure. As to time, he calculated that, given their work commitments, the children spent more of the daylight hours in his company than in Mrs G’s. The position was clearer if the time when Mrs G’s mother was with the children was taken out of account. As to activities, he reported that Mrs G did no after-school activities with the children. They were registered with his GP and dentist. He entered the children into their schools. His expenditure for the children, as declared in divorce proceedings, was six times that of Mrs G. He had considerable travel and accommodation costs –

he needed two residences given his place of work – whereas Mrs G had lived with minimal expense until October 2013. He concluded that he was the children’s primary carer and their primary source of stability. There is a history of mental issues experienced by Mrs G, which Mr G set out in detail in a further statement to the tribunal. This history provides a background that may explain why the arrangements for the children are as they are, but I do not need to set them out. They do not directly help with the issue I have to decide.

9. The tribunal decided in favour of Mrs G. The judge’s reasoning is set out in more detail in his written reasons, but he summarised it in his decision notice:

- The judge decided that “responsibility” had to be given its ordinary meaning;
- He took account of the terms of an order made by the High Court providing for the children to be with Mr G on three nights and Mrs G on four nights, with holidays split equally;
- He decided that a parent had responsibility for a child when the child was resident with them;
- He rejected Mr G’s argument that he should take account of “the quality of the care, the contribution towards education and development and financial support provided by the respective parents”, although he accepted that these factors might be relevant if residence and the responsibility that came with it were shared equally between the parents. That was not the position in this case, as the children were resident with Mrs G “for substantially in excess of 50% of their time”.

## **E. The appeal to the Upper Tribunal**

### *The application*

10. Mr G applied for permission to appeal. In summary, his grounds were:

- The tribunal had gone wrong by taking account of the court order in respect of Thursdays rather than what happened in practice.
- There was evidence that he and Mrs G had agreed to vary the terms of the order.
- “Main responsibility” should be given its ordinary meaning, but in a broad and general sense.

11. I gave him permission to appeal, saying:

“I emphasise to Mr G that I can only set aside the First-tier Tribunal’s decision for error of law. His disagreement with the way that the tribunal has analysed the evidence and found the facts does not of itself show that the tribunal made an error *of law* in carrying out those tasks.

I have given permission because this case provides an opportunity to consider the correct approach to the interpretation and application of the main responsibility test.”

### *The Commissioners’ written submission*

12. Ms Elisa Collins responded to the appeal on behalf of the Commissioners. She argued:

“... when determining the question of main responsibility, I submit that it is not unreasonable to start from the basis that the person who spends the most time with the child is likely to be the person who bears the greater responsibility. However, this does not exclude the possibilities of there being cases where a factor other than time would justify a decision in favour of one person notwithstanding that in terms of time spent with the child,

that person is in the minority. And, the more evenly balanced the division in terms of time spent with the child, the more appropriate it becomes to look at factors other than time.”

In support, she cited *KN v HMRC* [2009] UKUT 79 (AAC). I refer to that case later.

#### *The Commissioners’ oral submissions*

13. I directed an oral hearing, which took place on 25 April 2016. Ms Galina Ward of counsel appeared for the Commissioners. Neither parent attended or was represented. I am grateful to Ms Ward for her arguments, which were broadly in line with Ms Collins’ written submission. The hearing took the form of a wide ranging discussion rather than an exposition of the Commissioners’ arguments. It is, therefore, difficult to summarise the points covered, but I refer to them in my analysis.

14. Mr G subsequently provided some written comments on Ms Ward’s written argument. He said that he had not received notice of the hearing, but accepted that he had missed the hearing date in the email. He asked for a chance to make oral submissions on what he wrote, but the time for that is past.

15. Ms Ward provided me with a copy of the Commissioners’ internal Tax Credits Technical Manual on Rule 2.2(b):

“Facts that can be considered as indicating whether a claimant has the main responsibility for a child or qualifying young person when the claimants are trying to decide who has the main responsibility include:

- who the child or qualifying young person lives with and where they keep the majority of their belongings such as clothes, toys
- who is responsible for the day to day spending for the child or qualifying young person such as buying clothes, food and providing pocket money
- who the main contact is for school/college/nursery/childcare
- who is responsible for the health care and hygiene of the child or qualifying young person such as making appointments with the doctor/dentist, doing the child or qualifying young person’s laundry
- what is the registered address for contact for the school/college/nursery/child care, healthcare
- who has legal custody of the child or qualifying young person.”

This list is not exhaustive.

#### *Mrs G’s written submission*

16. Mrs G did not make any submissions in response to Ms Ward’s argument, but she did make a short response to the appeal. She disagreed with what Mr G said about time sharing. She also referred to proceedings and actions subsequent to the time when the Commissioners’ decision was made.

#### *Mr G’s written submission*

17. Mr G’s submission in response to Ms Ward’s argument reflects the case he put to the First-tier Tribunal. In briefest summary, he mentioned:

- the time spent with each parent;
- the extent to which Mrs G conceded his case on time;
- the way that holiday time was shared;
- the way that the tribunal had calculated time;

- the difference between the court order and the judge's judgment and its significance;
- the nature and extent of his responsibility.

## F. Analysis

### *The case law*

18. The Upper Tribunal, and the Social Security Commissioners before them, considered regulation 3 in a number of decisions that raised various issues in different factual contexts. I refer to those that were discussed at the hearing. As the judges have regularly emphasised, the application of the rules in regulation 3 depends on the facts and circumstances of the individual case. It is not helpful to try to apply the rules to the facts of one case by reference to the outcome of another case even if the facts were superficially similar. Even a small difference may be significant. Cases are only relevant in so far as they establish the correct *approach* to the issue.

19. I take the cases in the order that they were decided, beginning with CTC/4390/2004, a decision of Mr Commissioner (later Upper Tribunal Judge) Williams. He said there:

“31. ‘Main’ is obviously an ordinary word of the English language. The temptation to define it further should be resisted. It is for the Commissioners to evaluate it (or for the tribunal to do so on appeal) and no one else. It requires the decision maker, in any case of conflicting claims, to identify the claim that is stronger, but stronger by reference to what? The answer must come from reading the Rules with the sections under which the decisions are to be taken. It is a broad answer. The Commissioners have power to ask for ‘any information or evidence that the Board consider they may need’ (see sections 14(2) and 16(3)). In other words, it is for the Commissioners to consider on what information or evidence the issue is to be decided. That is subject to two points: (1) Rule 2 requires that the Commissioners compare the conflicting claims. Fairness must require that the same information or evidence is sought from the conflicting claimants when that comparison is made, or at least equal opportunities are given to the conflicting claimants to present anything considered to be relevant. (2) The decision of the Commissioners is subject to an open appeal to the tribunal. The tribunal must decide for itself what information it considers it may need, and it is not bound to follow the choices of the Commissioners. So a tribunal is free to decide what it considers relevant, and may come to a different view to the Commissioners. This is subject to the practical problem that the tribunal does not have the same powers to demand information as the Commissioners. Perhaps it should have, but it can only use the powers available to it under its own Regulations or, indirectly, the Commissioners’ powers. The tribunal’s choice of factors is open to further challenge only if it can be shown that it is ignoring relevant factors or relying on irrelevant ones so that it is wrong *in law* in the way it makes its decision.

32. It is therefore not appropriate to lay down any general list of what is or is not relevant. I am also asked in this case about one specific factor. Can the Commissioners take into account the fact that if the award of tax credits is made to one of the conflicting claimants rather than the other then the amount paid is greater?

...

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.”

20. In CTC/1686/2007, Mr Commissioner Williams rejected the argument that it was appropriate to follow the same approach that the Commissioners had taken in respect of child benefit by awarding benefit in respect of one child to the father and in respect of the other child to the mother.

21. Next comes *KN v HMRC* [2009] UKUT 79 (AAC), a decision of Upper Tribunal Judge Gamble. He said:

“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 3<sup>rd</sup> and 4<sup>th</sup> paragraphs of document 718 and the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> paragraphs of document 722, read along with the 1<sup>st</sup> 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."

22. In *CM v Her Majesty's Revenue and Customs (TC)* [2010] UKUT 400 (AAC) Upper Tribunal Judge May found an error of law in the First-tier Tribunal's refusal to give any weight to the evidence of the couple's younger son, who was 17 at the time he gave the evidence. He also found an error of law in the tribunal's decision to follow CTC/4390/2004 by deciding in favour of the father on the basis that his income was lower than the mother's. The judge said:

"6. ... 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. ...

8. ... 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.”

23. In CTC/2409/2013, Judge Humphrey set aside a decision of the First-tier Tribunal on the ground that it had based its decision entirely on the comparative amount of time that the child spent with each parent, without regard to any other relevant factor.

24. Most recently in CTC/417/2015, Upper Tribunal Judge Markus QC said in remitting the case for a rehearing:

“8. There are a number of errors in the tribunal’s approach. First, the tribunal found that the main responsibility test was satisfied on the principal ground that the father was in work and the mother was not. It does not follow that the parent with the highest income takes greater financial responsibility for a child. Second, financial contribution, if relevant, is only one factor in deciding which parent has main responsibility. The weight to be afforded to that factor is a matter for the tribunal but in some cases it may carry little weight. The tribunal erred in treating financial responsibility as determinative. Third, possibly as a result of this erroneous approach, the tribunal failed to make adequate inquiries into other relevant factors. For instance, although the school had both parents’ addresses, other relevant considerations in relation to schooling were whether in practice the school liaised more with one parent than the other, who the school contacted in an emergency, and what the arrangements were for attending parents’ evenings. In addition, the GP surgery had the mother’s address which was an indicator of the mother’s responsibility. The tribunal should have enquired further into this, for instance to find out which parent in fact took responsibility, or main responsibility, for arranging medical appointments and taking D to the GP. The tribunal might have elicited other relevant information had it enquired, such as the respective responsibilities of the parents in arranging after-school and social activities, and what happened during holidays. The tribunal’s concentration on financial responsibility meant that it failed to make inquiries into a range of other relevant factors such as these.”

#### *Other legislation*

25. Other legislation uses different concepts to deal with the issue of parents who jointly share responsibility. Child benefit is awarded to the parent with whom the child is living or who contributes at least the amount of the benefit to the cost of providing for the child: section 143 of the Social Security Contributions and Benefits Act 1992. In housing benefit, the test is where the child is normally living. If the child spends equal amounts of time in different households, the incidence of child benefit is used as a tie-breaker, and “primary responsibility” is used as a long stop if that doesn’t resolve the issue: regulation 20 of the Housing Benefit Regulations 2006 (SI 2006/213). This was the approach taken in family credit, which was in many ways the predecessor of tax credits: regulation 7 of the Family Credit (General) Regulations 1987 (SI 1987/1973). Family credit was rebranded as working families’ tax credit under the Tax Credits Act 1999. Outside the benefit field, the child support legislation classifies parents as parent with care or non-resident parent by reference to which is providing day to day care to the greater extent, with a rebuttable presumption in favour of the person receiving child benefit: see regulation 50(3) of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677). I mention these to show the range of options available to policy makers. The tax credit approach is different and must be interpreted as distinct from any of those possibilities.

## G. Analysis

26. Responsibility may be an ordinary word, but it is one with a range of meanings and it is necessary to identify which of those meanings applies to the statutory context of child tax credit. This does not involve defining the language used in the legislation or glossing it. It merely clarifies which particular meaning within the normal range is appropriate in the statutory context.

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. I agree with Judge May in *CM* on that point rather than with Judge Williams in *CTC/4390/2004* where he said that it was permissible to take account of the comparative consequences of an award or of how a rational competing couple might agree. I do, though, agree with Judge Williams at [35] that it would be wrong to decide in favour of the mother rather than the father just because she is the mother or vice versa. I also agree with him in *CTC/1686/2007*, where he said that it was wrong to follow the award of child benefit, which is subject to a different test for entitlement.

28. As a comparative assessment, the responsibility cannot refer to legal responsibility. Parental responsibility is defined by the Children Act 1989:

### “Meaning of ‘parental responsibility’

3. – (1) In this Act ‘parental responsibility’ means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.”

This responsibility is not severable or divisible. It makes no sense to speak of one parent as having the *main* parental responsibility or of comparing how much parental responsibility the competing claimants have. When Judge Gamble referred to “parental responsibility” in *KN* at [6] and [7], he was using those words in their general descriptive sense rather than in reference to the legal concept. Responsibility, especially when qualified by *main*, must refer to the practical exercise of responsibility rather than a legal concept.

29. Caring for a child is a major component of responsibility on any test. Although I agree with Judge Gamble’s reasoning in *KN*, I warn against taking his remark at [5], that the test relates to responsibility rather than care, out of its context. The argument in that case was that neither parent should be treated as responsible for the time the child was at school. Judge Gamble rejected that argument and his remark was made in that context. He was making the point that there is more to responsibility than actual care, not that responsibility does not involve care as one of its components.

30. What are the components of taking practical responsibility for a child? Actually providing care is one of them, as I have just said. It also involves:

- making decisions from the mundane (what brand of trainers to buy for them) to the most significant (which school should they attend);
- providing for their needs by feeding and clothing them;

- nurturing them and protecting them in their physical, mental, educational and social development;
- being available in case of need.

Naturally, the extent to which there is a need for decisions and actions will vary according to the age of the child. I do not intend this list to be exhaustive.

31. Many of these actions and decisions will involve expenditure. That expenditure might be considerable; private education for example. The cost itself is not decisive. The issue depends on the exercise of responsibility, not the financial contribution. Main responsibility cannot be bought. It is not a prize for the parent with the deeper pocket or the more generous spirit.

32. The parents' arrangements may involve them in expenditure on themselves, most likely for the costs of their own travel and accommodation costs associated with contact. Those costs are not factors that can be taken into consideration. They are a consequence of the exercise of responsibility, not a part of it.

33. It is exceptional for parents to be able to devote themselves to their children 24 hours a day. Almost inevitably, they will leave some aspects of the most immediate care to others when the child is at school or they are working or otherwise busy. The others involved may be professionals, like teachers, or others, like baby sitters or grandparents. It may be a matter of choice or convenience to involve others. It may also be a matter of necessity if the parent is disabled, physically or mentally. Such parents may require a great deal of help with the practical aspects of caring and even with the decision-making. None of this means that parents are not responsible at times when others are also involved. They are nonetheless the person to go to in case of problems and the person who must ultimately take responsibility for making decisions and taking actions, whether this is done directly or with the assistance of others.

34. Parents vary in the quality of the decisions they make and the actions they take. Responsibility comes in many forms, as I have shown. In deciding who has the main responsibility, it is relevant to ask whether a parent is discharging particular aspects of responsibility. But it is not relevant to ask how well they are doing so, except in an extreme case where the discharge is so poor as not to amount to discharge at all. One person may be a good parent, another a bad parent, and a third an indifferent one. They all have responsibility for their children. And that is the test in rule 2.2. It is not a test of conscientiousness of effort or quality of attainment. The issue is who *has* the main responsibility, not the manner of its discharge.

35. Ms Ward argued to that effect on the basis of convenience in decision-making. How could a decision-maker obtain the information necessary or judge the quality of a parent's care for a child? The only possible way was to concentrate on the objective, observable facts like those set out in the Technical Manual and covered in the questionnaire that is issued to competing claimants. I have come to the same conclusion, but based on an analysis of the language of the legislation and the nature of responsibility rather than on the practicalities of decision-making.

36. Ms Ward argued that time was the key factor, as the main responsibility was likely to be found to lie with the parent who had the child for the longer time. That may be an accurate prediction of the outcome in the general run of cases, but I have no way of knowing that. It may accurately reflect the position in the cases I have cited, but they are a selection from the Upper Tribunal's case load and a small percentage of the greater numbers decided without challenge by the First-tier Tribunal, which in turn are but a fraction of the total number of decisions taken by decision-makers.

37. Ms Ward's argument would in effect replace the language of rule 2 with the provision formerly in force for family credit. There, as currently in housing benefit, one issue was whether a child spent equal time in different households. That no longer applies in tax credit. The

departure from the legislation previously in force and the different terms of the legislation must be significant.

38. I prefer to avoid setting a threshold such that it is only necessary to focus in on individual aspects of responsibility when time with the child is shared equally. This follows from the varying aspects of responsibility. Some may involve only a single decision, but one that may have significant and long-term effects; the choice of school is an example. But it has to be taken into account along with the everyday and mundane decisions, like whether the child can have a packet of crisps. In other words, time is not an indicator of all aspects of responsibility. Nor does it help in balancing the long-term against the short-term, the important strategies against the ephemeral. 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.

39. Any court order about contact is relevant to the time that each parent has with the child. As the focus is on responsibility rather than on time, that reduces the significance of the terms of the court order. As the main responsibility is determined by its exercise, the terms of a court order will not necessarily be determinative. Parents often make other arrangements that are convenient to them or the order falls into abeyance as children grow and circumstances change. The main responsibility test must be applied to the reality of what happens, not to a legal construct of what should occur under an order.

#### **H. The errors of law**

40. I consider that the First-tier Tribunal made two errors of law.

41. The first error is that the tribunal's analysis of the time spent with each parent was based on the terms of the court order. The reasons record that there was no corroborative evidence of an agreement to vary the order, as envisaged by the order itself. That was wrong. The issue for the tribunal was which parent, comparatively speaking, had the main responsibility, not which parent should have had it under the strict terms of the court order. It should have made findings on the actual responsibility being exercised by each parent.

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.