Neutral Citation Number: [2025] UKUT 286 (AAC)

UA-2023-000921-CHB

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

His Majesty's Revenue and Customs

Appellant

- v –

1. AV
2. IV

Respondents

Before: Judge Markus KC
Hearing date: 4th March 2025
Mode of hearing: In person

Representation:
Appellant: Ms J. Julyan SC (Counsel); instructed by Ms H. Whittaker, HMRC Solicitors Office and Legal Services
1st Respondent: In person
2nd Respondent: In person

On appeal from
Tribunal: First-tier Tribunal (Socia Entitlement Chamber)
Tribunal Case No: SC287/22/00065
Tribunal Venue: North Shields
Decision Date: 12th October 2022

SUMMARY OF DECISION

34.2 fair hearing; 2.1 child benefit

This appeal concerned priority of entitlement to child benefit where there were claims by both parents. The Upper Tribunal has allowed the appeal because a) the First-tier Tribunal failed to join the Second Respondent to the proceedings resulting in a breach of natural justice; and b) the First-tier Tribunal failed to apply the correct legal test for priority of entitlement to child benefit under section 144 and Schedule 10 of the Social Security Contributions and Benefits Act 1992.

The Upper Tribunal has remade the decision. As to where the children lived for the purpose of section 143(1)(a) of the Social Security Contributions and Benefits Act 1992, the existence of a court order for shared care of the children was relevant but

not determinative. However, in all the circumstances of this case, the children lived with both parents. By virtue of section 144, entitlement to was to be determined in accordance with Schedule 10 of the Act. None of paragraphs 2-4 of Schedule 10 applied and so, unless the parents make a joint election, HMRC is to decide which of them is entitled to child benefit. The Upper Tribunal has no jurisdiction to make a determination under paragraph 5.

Note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 12th October 2022 under number SC287/22/00065 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

> On 6th December 2021 the children (A and J) lived with both the First and Second Respondent in accordance with 143(1)(a) of the Social Security Contributions and Benefits Act 1992. The question of which of the respondents is entitled to child benefit with effect from 6th December 2021 is referred to HMRC to exercise their functions pursuant to Paragraph 5 of Schedule 10 to the Social Security Contributions and Benefits Act 1992.

REASONS FOR DECISION

Introduction

1. This appeal concerns the application of sections 143 and 144, and Schedule 10, of the Social Security Contributions and Benefits Act 1992 in the determination of entitlement to child benefit where there are rival claims.

2. The First Respondent is referred to in these Reasons as M and is the mother of three children – J, D and A. The Second Respondent is referred to as F and is the father of those children. M had been in receipt of child benefit in respect of J and A, and F had been in receipt of child benefit in respect of D. On 11th November 2021 F claimed child benefit in respect of J and A. On 7th January 2022 HMRC superseded the previous award of child benefit with effect from 6th December 2021, and awarded child benefit for J and A to F.

3. M appealed to the First-tier Tribunal (FtT). The FtT allowed the appeal and decided that M was entitled to child benefit for J and A with effect from 6th December 2021. HMRC sought permission to appeal which was given by the FtT.

4. I have decided that the FtT's decision was made in error of law because: a) The decision was made unfairly by failing to make F a party to the appeal; b) the FtT failed to apply the correct legal test in deciding entitlement.

5. I have remade the FtT's decision, finding that the children lived with both F and M pursuant to section 143(1)(a) of the 1992 Act and so, unless the parents agree

entitlement, HMRC must decide on entitlement: paragraph 5 of Schedule 10 to the Act.

Procedural matters

F is added as a party and provided with copies of the appeal papers

6. When I first considered the appeal papers, I noted that F had not been added as a party to either the FtT and UT proceedings. On 18th December 2023 I directed that he be added to the UT proceedings. I directed that those directions, but no other documents, be sent to F and that both Respondents were to notify the tribunal if they requested non-disclosure of their address or any other information.

7. F did not respond but M objected to disclosure to F of any information in these proceedings, submitting that there had been parental alienation by F and that disclosure would add further distress to M and would concern her that parental alienation would continue.

8. I decided that, save for redaction of one short passage from an email that M had sent to the tribunal, F was entitled to see all the documents in the appeal. My reasons were as follows:

> "8. The decision of 7th January 2022 was a decision that F was not entitled to child benefit for J and A from 6th December 2021 and that M was entitled to child benefit for them. M appealed against that decision to the FtT. The FtT set aside that decision and decided that M was entitled to child benefit for those children. The FtT's decision notice did not mention F but it is the inevitable consequence of the decision that F was not entitled to child benefit. See *CF/2853/2017*.
>
> 9. The FtT should have joined F to the appeal. It was a breach of natural justice not to have done so. F was not sent a copy of the FtT's decision and so was not only deprived of the opportunity to make representations before the FtT but was also deprived of the opportunity to appeal to the Upper Tribunal. See *GC v HMRC and DC* [2018] UKT 223 (AAC) at paragraph 28.
>
> 10. As I pointed out when I made the directions of 18th December 2023, it is obvious that F also has an interest in the outcome of HMRC's appeal to the Upper Tribunal and so I joined him as a party to this appeal.
>
> 11. As a party to the appeal, he has a right to participate. He therefore needs to see the documents in the appeal.
>
> 12. As I have also previously pointed out, the Upper Tribunal has power under rule 14 of the Upper Tribunal Rules of Procedure to prohibit the disclosure of specified documents or information to a person if it is satisfied that such disclosure would cause someone serious harm and it is satisfied that it is proportionate to give such a direction. It should be noted that under this rule the Tribunal could direct that specific documents or pages are withheld or that parts of documents are blanked out so that they are not visible to the Second Respondent.

> 13. I had asked M to state what "specific documents, parts of documents or other information" she requested by withheld from F. M did not specify any specific documents or parts of documents. Instead she asked that nothing be disclosed to F (save for her address).
>
> 14. Although M has referred to the impact she fears that disclosure would have on herself and the children, this is not logically capable of relating to all the information in this appeal. Her application for non-disclosure relies on F's behaviour in regard to the care of the children and the alleged "parental alienation". However, if such behaviour is taking place, it is taking place in any event and not because of these proceedings. Moreover, F is already aware of M's allegations in regard to his behaviour and parental alienation because, as she has explained, this has been addressed in the Cafcass report. I cannot therefore discern any logical connection between disclosure of the information in this appeal and the claimed risk of adverse behaviour by F.
>
> 15. I do not need to see the cafcass report in order to decide this matter. M seeks to rely on this in order to show the alleged parental alienation and the impact on the children. I do not need to make any findings on those allegations. If the allegations are borne out by the cafcass report, then those behaviours are already taking place, they are clearly not connected with the child support appeal and F will be aware of the allegations by M. There is no material before me to suggest that disclosure of the documents in this appeal would make things worse.
>
> 16. On the other hand, to allow M' application for total non-disclosure would deprive F of the opportunity of participating effectively in these proceedings.
>
> 17. Accordingly it is my judgment that there is no justification for withholding all the documents in this appeal from F. Furthermore, M has not identified any specific documents or parts of documents to be withheld."

Further progress of the appeal

10. Following the above, the appeal has progressed slowly. The delay is regrettable but was unavoidable. In short, it has taken some time to get HMRC in particular adequately to address the issues in the appeal. There has followed a series of directions by me, written submissions from the parties, and an oral hearing at which HMRC and IV appeared but AV did not. At that hearing I directed further written submissions from HMRC and, if they wished to, from the Respondents. Unfortunately the tribunal administration initially failed to send those directions to F and this has led to further delay in the appeal coming back to me for determination.

Errors of law by the FtT

First error of law: breach of natural justice

11. For the reasons at paragraph 8 above, it was a breach of natural justice for the FTT to have decided the appeal without making F 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.

12. However, I must go on to consider the other issues of law raised by this appeal because setting the decision aside for breach of natural justice does not address the substantive matters that must be resolved.

Second error of law: incorrect application of Schedule 10 of the Social Security Contributions and Benefits Act 1992

The evidence before and decision of the FtT

13. HMRC had provided the FtT with a summary of the facts asserted by each parent, including the following:
    a. F had said that all three children resided with him on a permanent basis and spent alternate weekends with M, between 5pm on the Friday until 6.30pm on the Sunday.
    b. F was already entitled to child benefit for D but he had opted not to take it because of the level of his income.
    c. There was a shared care order made on 15th October 2021 for D and A. The court also encouraged the parties to follow the same arrangements for J.
    d. M had stated that the children could spend as much time as they wished with either parent, and that they spent at least every other weekend with her.
    e. On 20th December 2021 M had provided a list of dates when the children had stayed overnight with her between 1st October and 17th December: October 1, 2, 6, 15, 24-31; November 12, 13, 26, 27; December 10 and 11.
    f. M hoped that soon the children would stay 50:50 with her and F.
    g. F had stated that J and A stayed with him all the time save for the alternate weekends with M, their school and medical records and personal possessions were kept at his address, the children would usually stay with him when ill.
    h. M said that the school and medical records hold her address, their personal possessions are kept at her address and the children would usually stay with her when ill.
    i. M paid child maintenance for the children as they spent more time with F than with her.
    j. M was seeking a court order so that the children spend at least half the time with her. She said F's behaviour was preventing the children spending more time with her.
14. The FtT bundle contained a copy of the court order dated 15th October 2021. This recorded that the parties had agreed that there should be a Final order "made on a shared care basis" in regard to D and A, and that the provisions made within the order in relation to D and A "shall be open to J and the parties should invite and encourage J to live with the parties in accordance with his siblings". The terms of the order in relation to D and A were:

> "a) The children shall live with the Applicant mother and Respondent father on a shared care basis
>
> b) The children shall live with the Applicant mother a minimum of every alternate weekend and at any other times as can be arranged in accordance with the children's wishes"

15. J was too old to fall within the order, but the court order stated that "the provisions made within this order in relation to D and A shall be open to J and the parties should invite and encourage J to live with the parties in accordance with his siblings".

16. Another document in the bundle contained information from M as to further dates when she claimed J and A had stayed with her in early 2022. F did not dispute those specific dates nor those at paragraph 11(e) above. He simply maintained his position that the children stayed with M every other weekend, Friday to Sunday and with him for the rest of the time.

17. The FtT decided that M was entitled to child benefit for J and A. The tribunal's statement of reasons set out the FtT's findings of fact including that the children resided with F, that M paid maintenance to the children in excess of the rate of child benefit at the relevant time, and that there was a shared care order. The FtT stated that, as F had declined child benefit on the basis of his income, there would be no benefit to the children if child benefit was paid to him but that there would be if it was paid to M. The FtT decided, taking into account the children's interests pursuant to section 1(1) of the Children Act 1989, that child benefit should be paid to M.

Legal framework

18. 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. So as to simplify the text that follows, I use the term "child" to embrace both child and qualifying young person.

19. Section 143 defines "person responsible for". The relevant provisions of section 143 are:

> "(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 for 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."

20. Section 144 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.

21. 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.
>
> (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."

22. No appeal lies against a decision in the exercise of the Secretary of State's discretion under paragraph 5: Social Security Act 1998, Schedule 2, paragraph 4.

The parties' submissions

23. HMRC submits that the FtT applied the wrong legal test. The FtT had found that both parents were responsible for the children in accordance with section 141: F was responsible pursuant to section 143(1)(a) and M was responsible pursuant to section 143(1)(b). Accordingly, by reason of section 144, the tribunal should have gone on to consider the question of priority of entitlement in accordance with Schedule 10. HMRC's submissions in the FtT had been that F took priority over M pursuant to paragraph 2 of the Schedule. The FtT did not consider the priority provisions in Schedule 10 and instead took into account the children's welfare. In that regard the FtT found that F had elected not to be paid child benefit but that payment to M would assist her in providing for the children.

That was an irrelevant consideration under paragraph 1-4 of Schedule 10. It may have been a relevant consideration for HMRC in the exercise of the discretion under paragraph 5 but that would not have given rise to a right of appeal to the FtT

24. In the Upper Tribunal proceedings, neither of the Respondents has made any submissions on this issue. Their submissions have addressed the practical arrangements for the children including where they lived or stayed, and certain financial matters.

Analysis

25. HMRC is correct as to the FtT's error of law. As both parents, according to the FtT's findings, would be entitled to child benefit, section 144 required that priority between the parents had to be decided in accordance with the provisions of Schedule 10.

26. The FtT did not address priority in that way. Instead the tribunal decided to address the matter by reference to the children's welfare. The failure to address priority in accordance with the legislative framework was an error of law, and the children's welfare was entirely irrelevant to any of paragraphs 1-4 of Schedule 10.

27. Although the children's welfare may have been a relevant factor under paragraph 5, the FtT did not have jurisdiction to consider entitlement under that paragraph 5. It would have been for the Secretary of State to decide priority under paragraph 5 and that decision would not have been appealable to the FtT.

28. Accordingly, the FtT erred in law in that it applied the wrong legal test and took into account an irrelevant consideration.

Conclusion on errors of law

29. The first and second errors of law mean that the FtT's decision was both procedurally and substantively flawed and I set the decision aside.

Whether to remit the case to the FtT or remake the decision

30. The question then arises under section 12 of the Tribunals Courts and Enforcement Act 2007 as to whether the Upper Tribunal should remit the appeal to the FtT for reconsideration or whether the Upper Tribunal should remake the decision.

31. I am satisfied that I can remake the decision on the basis of the evidence before me and the parties' submissions. I consider it is proper to do so because nothing would be served by remitting the appeal to the FtT and that it would cause further delay to the conclusion of this appeal in circumstances where the proceedings have already gone on for a long time. No party has objected to my remaking the decision and they have all had the opportunity to make submissions on the remaking of the appeal.

32. HMRC's position as to the correct approach on the facts has changed during the course of these proceedings. HMRC's final position has been set out helpfully in written submissions filed pursuant to directions made following the oral hearing in March 2025. I summarise them further below.

33. Both F and M have filed written submissions to which I refer below, where appropriate.

34. Two issues arose as regards the remaking of the decision: a) as to the effective date of the decision under appeal; b) as to the substantive question of entitlement to child benefit.

a) <u>The effective date of the decision under appeal</u>

The parties' submissions

35. The decision under appeal was taken by HMRC on 7th January 2022. HMRC submits that that decision was a supersession of the original awarding decision, pursuant to section 10 of the Social Security Act 1998. The ground of the supersession was that there had been a relevant change of circumstances since the original decision had been taken (regulation 13 of the Child Benefit and Guardian's Allowance (Decisions and Appeal) Regulations 2003 – "the Decisions and Appeals Regulations").

36. Neither of the parents have made submissions about the effective date of the decision.

Discussion and conclusion on effective date

37. I agree with HMRC that the decision of 7th January was a supersession of the original decision that M was entitled to child benefit and it was made on the basis of a relevant change of circumstances with an effective date of 6th December 2021.

38. Regulation 16 of the Decisions and Appeals Regulations provides that the effective date of a superseding decision made on the basis of a relevant change of circumstances is the earliest of the dates prescribed by paragraphs (3) to (8). The applicable paragraph in this case is paragraph (5): the effective date is the date of the relevant change of circumstances.

39. Although F had alleged a change to the children's living arrangements since January 2021, that did not of itself amount to a *relevant* change. A relevant change "postulates that the decision has ceased to be correct" (*R(I) 56/54* at [28]). The change in living arrangements (if found to have occurred) would not of itself have meant that the decision had ceased to be correct as M could have continued to be entitled to child benefit pursuant to section 143(1)(b). In the absence of a rival claim, there would have been nothing to cause her entitlement to end. The end to M's entitlement only came about as a result of F making his own claim for child benefit and a finding that the children lived with him and not M, as a result of which F's claim would take priority over M's three weeks after the week in which F's claim was made (paragraphs 1(2) and 2 of Schedule 10 to the 1992 Act). That was the change of circumstances which led to the supersession of M's entitlement on 5th December 2021 and the commencement of F's entitlement on 6th December. See CF/2826/2007 for an explanation of the operation of these provisions.

b) <u>Entitlement to child benefit</u>

The parties' submissions

40. As I have set out, HMRC's response to the appeal in the FtT was that J and A lived with F pursuant to section 143(1)(a) and that M was responsible for the

children pursuant to section 143(1)(b), and therefore that (following the 3 weeks after the week in which F made his claim) F had priority of entitlement in accordance with paragraph 2 of Schedule 10. In HMRC's original submissions to the Upper Tribunal, they maintained that position. HMRC submitted that for the relevant period the children did not live with M although they spent some time with her.

41. In their revised submissions HMRC now submits that at all relevant times J and A lived with both parents in accordance with section 143(1)(a). Accordingly, as the parents had not agreed on entitlement, priority between them was to be decided by HMRC pursuant to paragraph 5 of Schedule 10.

42. F's position is that all three children had lived with him for the majority of the time since January 2021 and that they did not live with M. F provided a calendar showing the dates each of the children has spent with F and with M from January 2021 to September 2024. This shows that at the time of the decision, J and A spent significantly more time staying at F's house than at M's, although they did spend some time at M's house every month. I do not have a weekly breakdown of where they stayed. The number of nights spent by the children with M in October and November was consistent with those asserted by M as set out at paragraph 13(e) above, but there was a difference between them of one night for December. In submissions from F received by the UT on 20th June 2025, F stated that in January 2021 both J and A expressed a wish to reside primarily at F's home and at M's only every other weekend. He says that he provided for J's and A's daily living needs, and that official records (medical, school, etc) were registered to F's address. He also set out recent living arrangements (long post-dating the effective date) but (save in one regard as set out below) these are not relevant to the decision in this appeal.

43. M has made brief written comments about her financial position but has not provided further information on the living arrangements at the relevant time.

Discussion and conclusions

44. I had asked the parties to address the impact of a shared care or similar order on the question where a child lives. This was because it seemed to me that the approach of the courts was that, where there is a shared care order, the children live with both parents and priority is decided under paragraph 5. However, I also noted that the impact of the shared care order had been assumed but not specifically addressed by the courts in any of the decisions to which I referred. See *R (Chester) v Secretary of State for Social Security* [2001] EWHC Admin 1119 and *R (Gerald Ford) v Board of Inland Revenue* [2005] EWHC 1109 (Admin). In the Northern Ireland decision *R (Murphy) v HMRC* [2023] NIKB 119. In *CF/2853/2017,* the child spent time with each of the parents. The Upper Tribunal judge said that meant that they had "shared care". There was no court order. Although the father disputed HMRC's findings as to the pattern of care, the premise of HMRC's and the FtT's approach was that the child lived with both parents. However, that premise appears simply to have been accepted by the Upper Tribunal but without being addressed in the tribunal's reasoning.

45. Only Ms Julyan made submissions on this point and, more generally, the meaning of "living with". She helpfully referred me to a number of decisions in which the Social Security Commissioners.

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:

> "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.

50. *CF/1057/2003* was an appeal by the Board of Inland Revenue. The child's parents had separated. The family proceedings court made a residence order in favour of the father and a contact order in favour of the mother. The order specified the days on which the child was to stay with the mother, amounting to his spending a little under half of his time with the mother. Commissioner Howell accepted that the child spent more time living with the father than with the mother and that the father was the primary carer but he decided that, taking into

account all the evidence, the child lived with both parents (paragraphs 24 and 25). He followed the three decisions which I have summarised above.

51. The Commissioner also considered whether a child can be said to live at a particular address at any point in a week when they are physically present for only part of it, concluding:

> *"*34….The word "live" does not necessarily connote physical presence. If I live at a particular address, I live there even when I am not physically present at the address"

52. In *CF/4571/2003* at paragraph 14 Commissioner Mesher said:

> "…"living with" in section 143(1) is an essentially factual concept…I also agree…that it follows from R(F) 2/79 that it is wrong to say that the terms of a court order about residence or contact…are irrelevant. It was relevant in that case that the childrens' stays with the claimant were in accordance with the court order. So, it is relevant in the present case, but not conclusive, if some of Alice's stays with Mr J are outside the terms of the contact order…"

53. 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.

54. I turn then to the present case. Although not conclusive, the court order in October 2021 (made with the agreement of the parents) that the arrangements should be on a shared care basis is relevant. It is indicative of the reality of the living arrangements at the time and of the parties' intentions. There is nothing in the material before me to suggest that the arrangements had changed between October and December 2021.

55. Although the order provided for the children to spend considerably more time with F than with M, it nonetheless required (or in the case of J encouraged) significant and regular stays with M. The schedule of living arrangements provided by F shows that they spent significant amounts of time at M's house. The arrangements did not always adhere to the pattern envisaged by the Family Court, but I am satisfied on the evidence that the children stayed with M as a regular feature of their living arrangements.

56. F's written submissions received by the UT on 18th September 2024 relate largely to the children's living arrangements since 2021. However, in one respect what he said there sheds light on the position before that. He said that J "still only goes to his mother's…every other weekend". It is implicit in this, and in particular the use of the word "still", that there had been a continuing pattern of J staying with M every other weekend. I find that, on balance of probabilities, this would have been the position in December 2021. It is consistent with the evidence that was before the FtT, including F's assertions there. It is borne out by the calendar of dates provided by F where in each of the months in 2021 up to and including November J and A spent at least 4 nights per month with M (and more nights than that in a number of those months), which is consistent

with their staying with M on a minimum of every other weekend. Although, as F has explained in his submissions in the Upper Tribunal, by September 2024 J would not always go to M's house on what would be M's weekend, that does not alter the general position of his regularly staying with M and having done so in December 2021.

57. F has submitted that the children's possessions were kept at his house. However, I consider it unlikely that they kept no possessions at M's house. On F's case the children had lived with M until January 2021. At that time, J was 16 years old, D was 13 and A was 11. They would have kept most if not all of their possessions at M's house when they were living there. It is not likely that they would have moved all their possessions to F's house after that date, given the continuing arrangement that they spent regular amounts of time at M's. I consider this to be the case in regard to all three children, and particularly so in regard to the two younger children given that they would have needed to have toys as well as clothes at both addresses. On balance of probabilities, I find that at least some of their possessions remained at M's house.

58. In the light of the above, my conclusion is that J and A lived with both F and M at the relevant time.

59. I have considered whether this appeal is affected by section 143(2). I am satisfied that it is not. Section 143(1) is to be considered first and, where J and A lived with both parents in accordance with that provision, section 143(2) does not arise: see *CF/326/2002*. In any event, even if the children were to be treated as living with M only in those weeks in which they stayed with her for some of the time, on balance of probabilities and in the light of the schedule of arrangements provided by F, they were not absent from M for more than 56 days in the previous 16 weeks.

60. As J and A lived with both parents, none of the specific priority provisions in paras 1 to 4 of Schedule 10 applied and so paragraph 5 of that Schedule applied. In the absence of an election by the parents, it is for HMRC to decide entitlement. Decisions under paragraph 5 do not fall within the tribunal's jurisdiction.

61. Accordingly, I allow HMRC's appeal, set aside the FtT's decision and remake it as set out above.

Kate Markus KC
Judge of the Upper Tribunal
Authorised by the Judge for issue on 19th August 2025.