



Neutral Citation Number: [2026] UKUT 359 (AAC)
Appeal No. UA-2025-000730-CSM

RULE 14 ORDER: It is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Appellant or the Second Respondent in these proceedings. Failure to comply with this order may be contempt of court and could lead to a fine, imprisonment or other sanction.

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

KMV

Appellant

- v -

Secretary of State for Work and Pensions

First Respondent

- and -

QRB

Second Respondent

**Before: Upper Tribunal Judge Citron
Decided on consideration of the papers**

Representation:

Appellant: by himself

1st Respondent: by Lauren Holmes of Decision Making and Appeals, Department for Work and Pensions

2nd Respondent: by herself

On appeal from

Tribunal: First-Tier Tribunal (Social Entitlement Chamber)

Panel: Tribunal Judge M Angus

Tribunal ref: 1690374264493588

Tribunal Venue: Stoke

Decision Date: 2 January 2025

SUMMARY OF DECISION

5 CHILD SUPPORT

5.19 Other

34 TRIBUNAL PROCEDURE AND PRACTICE

34.1 Evidence

An issue before the First-tier Tribunal in this case was whether the Appellant's 17-year-old daughter, D, had her home with her mother, the Second Respondent, and was usually provided day to day care by her (these being the relevant limbs of the definition of a "person with care" for child support purposes). The Appellant (father) attended the First-tier Tribunal hearing but the Second Respondent (mother) did not, and the First-tier Tribunal proceeded in the absence of the Second Respondent. The decision of the First-tier Tribunal rejected the Appellant's evidence about where D was living, on grounds that it was contradictory, and accepted the Second Respondent's evidence (that D was living with her mother, the Second Respondent). On the Appellant's appeal to the Upper Tribunal, supported by the First Respondent, the Upper Tribunal finds that the First-tier Tribunal erred in law in not addressing the evidential implications of the Second Respondent's evidence being untested (because she did not attend the hearing and so could not be questioned on it), as this potentially affected both its weighing of the competing evidence, and its determination of whether it continued to be in the interests of justice to proceed in the Second Respondent's absence. There was no adequate explanation of how the First-tier Tribunal took this material circumstance into consideration. The Upper Tribunal sets the decision aside and remits the case for rehearing.

Please 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 involved an 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 remit the case to the First-tier Tribunal for reconsideration** in accordance with the following directions.

DIRECTIONS

- 1) The appeal is remitted to the First-tier Tribunal to be heard at an oral hearing.
- 2) The new First-tier Tribunal should not involve the judge who made the previous decision in this case.
- 3) The new First-tier Tribunal is bound by the decision of the previous First-tier Tribunal as regards 'shared care' but is not bound by that decision as regards the 'person with care'. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome from the previous tribunal on the 'person with care' issue.

- 4) The new First-tier Tribunal must not take into account circumstances that did not apply at the date of the original decision by the Secretary of State under appeal (5 May 2023). Later evidence can be considered if it relates to the circumstances at the time of that decision.
- 5) If the parties have any further written evidence to put before the First-tier Tribunal, or if they want written evidence they have sent to the Upper Tribunal to be put before the new First-tier Tribunal, they should send this to the relevant HMCTS regional tribunal office within six weeks of the issue of this decision. The parties should not assume that written evidence they sent to the Upper Tribunal will be forwarded on to the First-tier Tribunal.
- 6) A copy of this decision shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber.

REASONS FOR DECISION

1. The decision of the First-tier Tribunal (“**FTT**”) in question dismissed the Appellant (“**Father**”)’s appeal against a decision made by the First Respondent (“**SSWP**”) on 5 May 2023, to the effect that Father had a liability in respect of his daughter (“**D**”) in the sum of £86.01 per week from 3 May 2023. D was aged (just) 17 at these dates in May 2023. Two issues arose for determination by the FTT:
 - a. whether there should be a decrease (in liability) for shared care; the FTT decided that there should not;
 - b. whether, as at 3 May 2023, the Second Respondent (“**Mother**”), D’s mother, was a person with care in relation to D; the FTT decided that she was.

Grant of permission to appeal

2. In giving permission to appeal, I made the following observations:
 2. One of the issues decided by the FTT was whether [Mother] was a person with care, in relation to D, as at 3 May 2023 This would require, per section 3(3) Child Support Act 1991, that D had her home with Mother as at that date, and that Mother usually provided day to day care for D (exclusively or in conjunction with someone else). Day to day care is itself defined in regulation 1(2) Child Support (Maintenance Calculations and Special Cases) Regulations 2000.
 3. The FTT found that D was living at Mother’s on 3 May 2023 and this was expected to continue from this date. No specific findings were made about whether Mother usually provided day to day care for D, as at that date.

4. In coming to its finding about where D was living on 3 May 2023, the FTT summarised Father's written evidence, and then Mother's written evidence. It noted that Mother did not attend the FTT hearing (though she had been given notice of it); Father did attend the hearing (and presumably gave oral evidence). The FTT went on to explain why it found Father's evidence on where D lived, contradictory.
5. It seems to me the FTT arguably erred in law in the following ways:
 - a. although it quite properly subjected Father's evidence to scrutiny, it failed to address why it was prepared to take Mother's evidence at face value, in circumstances where
 - i. Mother had not attended the hearing (and no good reason for this was evident from the FTT's decision, despite the FTT having directed, in October 2024, that both parents keep it informed of any dates when they were not available – see Addition X to the FTT bundle). Although there can be situations where only one party attends a hearing, and that party's evidence is so clearly false that there would be no unfairness in not subjecting the other (non attending) party's written evidence to scrutiny (via questioning at the hearing), this, arguably, was not such a situation, as the contradictions which the FTT found in Father's evidence could reasonably be seen as omissions (or misunderstandings of the key legal issues in the case, by an unrepresented litigant), as opposed to matters which render his evidence entirely non-credible; and
 - ii. Father had made clear and intelligible challenges to Mother's evidence – such as, that Mother's house did not have a bedroom for D, and the Facebook posts from November and December 2023 (which the FTT dealt with by concluding that there "may" have been a change in D's living arrangements after 3 May 2023); and
 - b. it did not turn its mind to (and so make findings of fact about) whether, even if D had her home with Mother, Mother usually provided day to day care for D.

SSWP's response to the appeal

6. SSWP supported the appeal, and asked that the case be remitted to the FTT for reconsideration. SSWP submitted that
 - a. the FTT had erred in law by failing to adequately consider and explain why it placed greater weight on Mother's written evidence over the evidence provided by Father.
 - b. The FTT should have considered whether it was fair and just to proceed with the hearing in the absence of Mother and the further evidence she could provide.
7. SSWP cited the authority of Commissioner Howell at paragraph 2 in *CCS/2152/04*:

It is well established that even if a decision itself may be sound, it amounts to an error in law making it necessary for the decision to be set aside if sufficient findings

and reasons are not spelt out to give the parties a reasonable understanding of the basis on which it has been reached. This is a necessary safeguard since otherwise it is not possible to know whether the tribunal may have misdirected itself or omitted to take account of some material consideration in the case.

8. SSWP further submitted that the FTT failed in its inquisitorial duty to make findings of fact on who provided day to day care for D. Father's evidence could suggest that Mother did not provide day to day care for D as D lived between her grandmother's and partner's homes. It does not appear that the FTT considered this issue during the hearing. The FTT could have adjourned the hearing to direct Mother to attend and provide evidence on this matter.

Mother's response to the appeal

9. Mother is not legally represented. Unsurprisingly therefore, in her response, she did not address the question of whether the FTT decision erred in law, but rather provided factual information on matters such as why she did not attend the FTT hearing on 2 January 2025, and D's living arrangements, including copies of documents. Mother maintained, as a factual matter, that D was living with her at the relevant time (May 2023).

Father's reply

10. Father is not legally represented. Unsurprisingly therefore, in his reply, he did not address the question of whether the FTT erred in law, but rather responded to, and disagreed with, the factual assertions in Mother's response. Father maintained, as a factual matter, that D was not living with Mother at the relevant time (May 2023).

Why I have determined this appeal on the papers

11. SSWP did not request a hearing; Father did; Mother's response was ambiguous on this point. Given that neither Father nor Mother was legally represented, and neither had addressed the legal issues in the case in their submissions, it did not seem to me in line with fairness and justice to hold a hearing; and I indicated to the parties that I was therefore minded to determine the appeal on the papers, in directions issued on 15 July 2026, inviting any further written submissions in their light. I have accordingly decided that it is fair and just to determine this appeal on the papers.

Why I have decided that the FTT erred in law

12. The FTT's reasoning, in coming to its conclusion that D lived with Mother as at 3 May 2023 (and so that Mother was a person with care), was as follows:
 - a. Father had first raised the argument that D was not living with Mother, in evidence he provided on 21 February 2024: the FTT noted that the point had not been raised in Father's notice of appeal, which was made on 26 July 2023.

- b. To support his argument that D was not living with Mother, Father
 - i. provided Facebook posts from November and December 2023 which, he said, indicated that D was not living with Mother at the time. The FTT noted that Father confirmed that he could not provide any earlier Facebook evidence;
 - ii. asserted that D did not have her own room at Mother's house (which, he said, had 4 bedrooms and had three young boys living there, each with their own room);
 - iii. said that he had been told this (that D was not living with Mother) by other family members. Father asserted that, since November 2020, D had been living with her maternal grandmother and her boyfriend.
- c. Mother's written evidence (provided on 2 January 2024) was that D had been living with Mother and her partner since November 2020.
- d. The FTT cited two pieces of evidence of Father's which, in its view, ran counter to the case Father was making about D not living with Mother. First, in evidence provided on 20 August 2023, Father wrote that D "has been with her mum since 16th November 2020" (the point he was making there was that Mother only claimed child support at a later date, which Father asserted was related to when their other child, who lived with Father, turned 19 and was out of education). Second, in evidence provided on 24 May 2024, Father wrote that in November 2020, D's maternal grandmother "took it upon herself to force [Mother] to take D back in". The FTT noted that Father said the first statement was in error and should have read that D had been with Mother *and her family* since November 2020.
- e. Based on this, and the fact that Father did not mention the issue in his notice of appeal, the FTT found Father's evidence about where D was living to be "contradictory". It then concluded that D was living at Mother's as at 3 May 2023 and was expected to continue doing so from that date (although the position may have changed later in the year).

13. In short, the FTT, faced with conflicting evidence as to whom D was living with at the relevant time, preferred one party's (Mother's) to the other's (Father's) and explained why by reference to the "contradictions" it found in Father's case. To that extent, it cannot be said there was any legal error in the FTT's decision.

14. The feature of the case the FTT did not address in its decision, however, was that Mother did not attend the hearing (and no explanation was given for this in the FTT's decision), and so her evidence – which was ultimately the evidence the FTT preferred – was not tested via questioning at the hearing, either by Father or by the FTT itself, acting inquisitorially.

15. Whilst I would not go so far as to say that the FTT ought to have adjourned the hearing to facilitate Mother's attendance (or at least to discover why Mother had not attended), it does seem to me that the FTT's balancing of the evidence did need to take account of the point that, whereas Father's evidence had been tested by the FTT (and found wanting), Mother's had not.
16. This point seems to me an important one in that, whilst Father's evidence clearly had weaknesses (as identified in the decision), the FTT needed to turn its mind to whether those weaknesses were serious and convincing enough to countervail the fact that Mother's evidence was entirely untested. One can envisage scenarios where one party's evidence is so weak, that there is little significance in the fact that the other party's evidence was not subject to questioning at a hearing; but one can also envisage scenarios where one party's evidence has some weaknesses, but they are not fundamental enough to countervail the fact that the other party's (conflicting) evidence was untested. In the latter type of situations, the FTT will have to re-assess, after hearing the attending party's evidence, whether it continues to be fair and just, and in the interests of justice, to carry on with the hearing in the other party's absence; and, if it is, there will need to be an adequate explanation in the statement of reasons, as to why. I am relying on established authority as to the continuing obligation to consider whether or not it is fair to proceed in a party's absence throughout the case: *KO v SSWP (ESA)* [2013] UKUT 544 at [6].
17. The decision in this case fell into error, in my view, because it did not address these evidential implications of Mother's non-attendance, either by (for example) explaining that the weaknesses it identified in Father's evidence were (in its view) fundamental enough to countervail the fact of Mother's evidence being untested by questioning, or (again for example) by explaining why, if that was not the case, it was nevertheless in the interests of justice to carry on with the hearing in Mother's absence (perhaps, for example, because there was no realistic prospect of Mother attending on a future date, because of the particular circumstances of the case). This was not a case, in my view, where it was so 'obvious' that the weaknesses identified in Father's evidence countervailed the fact that Mother's evidence was untested, that nothing need be said about it in the reasons: it seems to me the weaknesses identified in Father's evidence might, in whole or in part, have been attributable to Father's not fully understanding the legally significant issues in the case, or not having expressed himself in writing with precision, in the light of those issues.
18. In my view, this error of law was material because, if the FTT had turned its mind to the evidential implications of Mother's evidence being untested, it may have reached a different conclusion, either as to the significance of the weaknesses in Father's evidence it identified (such that it could have changed the outcome of the FTT's decision as to where D was living at the relevant time), or as to whether it continued to be in the interests of justice to carry on with the hearing in Mother's absence.

19. I add by way of addendum that, in researching legal authorities for this case, I came across the following (from a decision of the Irish Supreme Court (*Kiely v Minister for Social Welfare* [1977] IR 267) cited in a High Court judgment (*R (Bonhoeffer) v GMC* [2011] EWHC 1585 (Admin)), which expresses, somewhat more pointedly and in the context of procedural fairness in adversarial proceedings, the point of principle which I think underlies my decision in this case:

19. Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination. The dispensation of justice, in order to achieve its ends, must be even-handed in form as well as in content. Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence. In such cases it would be cold comfort to the party who had been thus unjustly vanquished to be told that the tribunal's conduct was beyond review because it had acted on logically probative evidence and had not stooped to the level of spinning a coin or consulting an astrologer. Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side, has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice.

20. The English High Court judgment commented at [68]:

Nonetheless, while the [Irish Supreme Court] decision is of course not binding on this Court and it did not address the problems which arise when it is difficult or impossible to secure the attendance of the accuser to give oral testimony, it provides a classic statement of why it may be unfair to refuse an opportunity for cross-examination to a person whose own evidence is subject to cross-examination.

Why I have decided to remit the case to the FTT for reconsideration

21. Given that the FTT decision involved material legal error, it is right that I set it aside. Having done so, the Upper Tribunal's further powers are restricted to either re-making the decision or remitting the case to the FTT for reconsideration. The latter is the proper course in a case such as this, requiring consideration of all the evidence afresh, given the FTT's primacy as fact-finding tribunal. I have therefore remitted the case to the FTT for consideration afresh in accordance with the directions above (which restrict the rehearing to the 'person with care' issue, as the conclusions of the set-aside FTT decision on 'shared care' were not challenged (and sufficiently distinct)).

22. Finally, the foregoing means it is unnecessary to consider the other arguable error identified in the permission decision, as to whether it was an error on the part of the FTT not to have made an express finding as to whether Mother (the person with whom the FTT found that D resided) also usually provided day to day care for her. Given this, all I would say on this point is that it certainly would have been good practice for the FTT to have made an express finding on this limb of the definition of “person with care” in section 3 Child Support Act 1991, as well; whether failure to make an express finding is a material error of law will depend on whether it could nevertheless reasonably have been inferred from other findings made.

Zachary Citron
Judge of the Upper Tribunal
Authorised by the Judge for issue on 17 September 2026