**IN THE UPPER TRIBUNAL** **Appeal No.** UA-2022-000994-CSM
**ADMINISTRATIVE APPEALS CHAMBER**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

**Between:**

DB

Appellant

- v –

Secretary of State for Work and Pensions

First Respondent

SB

Second Respondent

**Before: Upper Tribunal Judge Church**

Decided on consideration of the papers

**Representation:**

| | |
|---|---|
| Appellant: | Unrepresented |
| First Respondent: | Danielle Vind (written submissions) |
| Second Respondent: | Unrepresented |

## DECISION

**The decision of the Upper Tribunal is to allow the appeal.**
The decision of the First-tier Tribunal made on 14 February 2022 under number SC228/20/00326 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 remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

**Directions**

1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.
2. The First-tier Tribunal hearing the remitted appeal shall not involve the judge who decided the appeal on 14 February 2022.
3. If any party has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any

such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal.

4. The tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new tribunal may reach the same or a different outcome from the previous tribunal.
5. Copies of this decision shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.
6. These Directions may be supplemented by later directions by a tribunal judge, registrar or caseworker in the Social Entitlement Chamber of the First-tier Tribunal.

## REASONS FOR DECISION

### What this appeal is about

1. This appeal has a long and unhappy history. It is about the Appellant (father)'s liability to pay child maintenance) in respect of his children, and it turns on whether the First-tier Tribunal took the wrong approach when it decided that he provides "day to day care" of the children to a lesser extent than the children's mother does.

2. On 3 March 2020 the Child Maintenance Service decided to revise a previous decision which had required the Appellant to pay maintenance of £42.71 per week in respect of his children. The revised decision was that the Appellant was not required to pay any sum by way of child maintenance (the **"CSM Decision"**). The CSM Decision was based on the Child Maintenance Service's acceptance of the Appellant's evidence that he and the children's mother provided equal shared care. The Second Respondent thought the CSM Decision was wrong because she says that she provides more day to day care to the children than their father. She appealed the CSM Decision to the First-tier Tribunal.

3. On 14 February a judge of the First-tier Tribunal heard evidence and argument and made a decision allowing the mother's appeal based on a finding of fact that the mother provided more care than the father, and that the father should pay maintenance of £42.71 per week in respect of the children from 28 August 2019 (the **"FtT Decision"**).

4. The Appellant was unhappy with the FtT Decision and applied to the First-tier Tribunal for a statement of reasons in respect of the FtT Decision (which was provided), and for permission to appeal to the Upper Tribunal.

### The permission stage

5. Although the Appellant's application for permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal judge, he renewed her application to the Upper Tribunal, and the matter came before me for consideration. I decided to grant permission. In my decision I said:

> "6. Much of what [the father] says in his criticisms of the First-tier Tribunal's decision amounts to a spirited disagreement with the judge's assessment of the evidence his findings of fact and a disagreement with the decision that [the mother] was responsible for more of the children's day to day care than [the

father]. That is insufficient to warrant permission to appeal to the Upper Tribunal.

7. However, I am satisfied that it is arguable with a realistic (as opposed to fanciful) prospect of success that the judge who heard [the mother]'s appeal erred in law because he may not have applied the correct legal tests, may not have made adequate findings of fact to support his decision, or may not have explained his decision with adequate clarity.

8. In particular, the judge said that he based his conclusion that [the mother] provided more day to day care on four matters:

> "37. The first is that the Second Respondent's case throughout both hearings of this appeal is very much based upon how much he spends on the children.
>
> 38. Secondly I was struck by the Appellant's evidence relating to her having to clean and cut her daughter's nails at bath time which she felt the Second Respondent did not do. This however was not a clinching factor but was the first step towards it.
>
> 39. I noted that across the two hearings the Appellant had used two phrases which I found to be significant.
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> 40. At the first hearing the Appellant stated that the matter revolved around "what is best for the children". In her closing submission to me she stated that the appeal "affects two people the children".
>
> 41. That to me indicated a personal touch from the Appellant which along with the cutting and cleaning of nails indicated that she was providing more day to day care as she had the holistic interests of the children at heart.
>
> 42. I did not get the impression from the Second Respondent that he grasped that it was about the children and not about the money that he spent.
>
> 43. The two phrases of the Appellant quoted above were the major factors in giving me the impression along with her other evidence that the Appellant in fact provides more day to day care for the children than the Second Respondent."

9. I consider it to be arguable that the judge based his decision that [the mother] provided a greater proportion of day to day care of the children not on evidence-based findings of fact about the care that she and [the father] actually provide, but rather on his assessment of their respective philosophies and motivations, which may not be permissible. The only differentiating finding of fact was about the cutting of the nails, and the judge expressly states that this finding was "not a clinching factor".

6. I issued Case Management Directions for the parties to make submissions on the appeal, which they duly did.

**The parties' positions**

7. The Secretary of State's representative made submissions on the appeal. She indicated that the Secretary of State supported the father's appeal. She asked that the FtT Decision be set aside and the matter remitted to a fresh First-tier Tribunal for redetermination.

8. The Second Respondent opposed the appeal., maintained that the FtT Decision involved no error of law, and argued that she provided the greater share of the children's day to day care than their father.

**The law**

9. The relevant legislation for the purposes of the decision under appeal is the Child Support Act 1991 and the Child Support Maintenance Calculation Regulations 2012.

10. Section 4 of the Child Support Act 1991 provides:

> "**Child support maintenance**
>
> **4**.- (1) A person who is, in relation to any qualifying child or any qualifying children, either a person with care or the non-resident parent may apply to the Secretary of State for a maintenance calculation to be made under this Act with respect to that child, or any of those children.
>
> …"

11. Section 3 of the Child Support Act 1991 provides definitions of terms used in section 4 as follows:

> "**Meaning of certain terms used in this Act**
>
> **3**.- (1) A child is a "qualifying child" if-
>
> (a) one of his parents is, in relation to him, a non-resident parent; or
>
> (b) both of his parents are, in relation to him, non-resident parents.
>
> (2) The parent of any child is a non-resident parent, in relation to him, if –
>
> (a) that parent is not living in the same household with the child; and
>
> (b) the child has his home with a person who is, in relation to him, a person with care.
>
> (3) A person is a "person with care", in relation to any child, if he is a person-
>
> (a) with whom the child has his home;
>
> (b) who usually provides day to day care for the child (whether exclusively or in conjunction with any other person); and
>
> (c) does not fall within a prescribed category of person.
>
> …

(5) For the purposes of this Act there may be more than one person with care in relation to the same qualifying child.

(6) Periodical payments which are required to be paid in accordance with a maintenance calculation are referred to in this Act as "child support maintenance".

(7) Expressions are defined in this section only for the purposes of this Act."

12. Regulation 50 of the Child Support Maintenance Calculation Regulations 2012 provides:

"**Parent treated as a non-resident parent in shared care cases**

**50.**-(1) Where the circumstances of a case are that-

(a) an application is made by a person with care under section 4 of [the Child Support Act 1991]; and

(b) the person named in the application as the non-resident parent of the qualifying child also provides a home for that child (in a different household from the applicant) and shares the day to day care of that child with the applicant,

the case is to be treated as a special case for the purposes of the [Child Support Act 1991].

(2) For the purposes of this special case, the person mentioned in paragraph (1)(b) is to be treated as the non-resident parent if, and only if, that person provides day to day care to a lesser extent than the applicant.

(3) Where the applicant is receiving child benefit in respect of the qualifying child the applicant is assumed, in the absence of evidence to the contrary, to be providing day to day care to a greater extent than any other person…"

**Why there was no oral hearing of this appeal**

13. No party asked for an oral hearing. I decided that, given that each of the parties had provided clear written submissions on the appeal, no oral hearing was necessary. The interests of justice favoured this appeal being determined on the papers to avoid further delay.

**Why I have allowed this appeal**

14. The issue the First-tier Tribunal had to determine was whether the mother and father provided equal amounts of care to the children, as the father claimed, or whether the mother provided the greater amount of care, as the mother claimed. The First-tier Tribunal heard evidence on this and had a broad ambit of discretion as to how to evaluate the evidence and in terms of the findings of fact arrived at based on that evidence.

15. The First-tier Tribunal explained its reasons for deciding that the mother provided more day to day care than the father in its statement of reasons in the paragraphs quoted above in paragraph 8 of my grant of permission.

16. There is no definition of "day to day care" in the applicable regulations (the Child Support Maintenance Calculation Regulations 2012). However, in paragraph 48 of CCS/1875/10 Judge Wikeley provided an insightful analysis of the proper meaning of that expression in the context of the child maintenance regime:

> "…rather than considering who had (in legal terms) parental responsibility for S, and effectively using that as a proxy for being the person with care, the tribunal should have focussed on who was providing the hands-on care or the "immediate, short-term and mundane aspects of care" (R(CS) 11/02, at paragraph 19), bearing in mind that "child support law is concerned with maintenance and the costs of bringing up a child are more related to the aspects of day to day care as I have analysed it than to the longer-term decisions about upbringing" (R(CS) 11/02, at paragraph 24). As I postulated at the oral hearing, it is about who puts food on the table, washes the child's clothes, deals with the letters from school and reads a bedtime story."

17. As a decision of the Upper Tribunal that is not binding on me, but I agree with what Judge Wikeley says about the proper approach to assessing day to day care. Ultimately, one must consider the evidence and make findings of fact about who carries out the "immediate, short-term and mundane aspects of care" (per Commissioner Jacobs in R(CS) 11/02, at paragraph 19), and base any decision as to who provides what proportion of day to day care on those findings.

18. Instead, the First-tier Tribunal based its decision that the mother provided a greater proportion of the children's day to day care on a value judgement on the relative merits of the parents' respective values, philosophies and motivations. The only differentiating finding of fact was about the cutting of the nails, and the judge expressly stated that this finding was "not a clinching factor". Rather, the First-tier Tribunal appears to have been persuaded by its impression that the mother was motivated by what was best for the children, while the father was focussed on the money spent on them.

19. At the permission stage I said that such an approach might be impermissible. For the reasons set out above I am persuaded that the approach that the First-tier Tribunal took was impermissible and the factors that appear to have been the "clinching factor" for the First-tier Tribunal were irrelevant to the issue it had to decide. I am satisfied that the First-tier Tribunal erred in law by failing to apply the correct legal test when considering the level of day to day care provided by each parent.

20. Because further facts need to be found, and because the First-tier Tribunal is best placed to find those facts, I remit the matter to be re-heard by a newly constituted First-tier Tribunal.

**Thomas Church**
**Judge of the Upper Tribunal**
Authorised for issue on 16 March 2023