Neutral Citation No: [2023] NIKB 119 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SIM12353** *ICOS No:* **23/048519/01** *Delivered:* **08/12/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GERALDINE MURPHY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF HM REVENUE AND CUSTOMS

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Donal Sayers KC with Lara Smyth (instructed by Owen McCloskey, Law Centre NI) for the Applicant
Joseph Kennedy (instructed by Sarah Finnegan, Crown Solicitor's Office) for the Respondent

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SIMPSON J

Introduction

[1] The applicant challenges a decision made by the respondent to award child benefit, referred to in the respondent's documentation as 'ChB', to her former husband, FM. The impugned decision is dated 7 March 2023. At the time when the decision was made child benefit was payable for three of the applicant's four children with FM. Following the decision, the applicant received child benefit for two of the children, while FM received child benefit for the third.

[2] FM was made a notice party to this application. He was written to by the applicant's solicitor, Mr McCloskey, on 30 June 2023 and informed of the proceedings to the date of the letter and the future timetable for the litigation, including the date of the hearing. He was informed that he might wish to seek legal advice and that if he wanted to be involved in the proceedings, he should notify Law Centre (NI) and the Judicial Review office in the Royal Courts of Justice. FM took no steps in the matter, from which I infer that he did not wish to be involved in these proceedings.

[3] Child benefit is a non-means tested benefit payable to families as a contribution to the cost of bringing up children.

[4] FM first made an application for child benefit for the children in 2016 following which a decision was made then to award the child benefit for one child to FM. Prior to that decision the applicant had received the child benefit for all three children for whom there was an entitlement to the benefit.

[5] There is a lengthy history from 2016 leading to the impugned decision in this case, but fortunately it is encapsulated in a neat synopsis in Mr Kennedy's skeleton argument, as follows:

> "The original decision was that FM should receive ChB for one child and the applicant should continue to receive ChB for two children. This decision was challenged by the applicant and a mandatory reconsideration took place. The outcome of which upheld the original decision. A further reconsideration took place in September 2016 and the applicant looked to appeal the ChB decision; FM also challenged the decision and a mandatory reconsideration was undertaken which, again, maintained the original decision."

[6] At all material times the applicant has earned the minimum wage in her employment and, she says, has been reliant on tax credits and child benefit. FM, in contrast, earns in excess of £60,000 per year. This level of salary leaves him liable to the High-Income Child Benefit Charge, known by the acronym 'HICBC.' The effect of this is explained in the applicant's skeleton argument:

> "The real impact of this change is that whilst FM received the child benefit, the amount payable is liable to be repaid to HMRC, and so is not available to contribute to the cost of raising the child."

[7] According to an affidavit from the respondent and sworn by Anthony Hignett, Senior Policy Adviser, HICBC is an income tax, which is typically paid through self-assessment in the tax year following the tax year in which child benefit was paid. However, that affidavit makes it clear (paras 30 and 31) that although FM received child benefit payments in the tax years 2016/17 and 2017/18, in fact he did not pay the HICBC in either of those years.

Legislative provisions

[8] The governing legislation is the Social Security Contributions and Benefits (NI) Act 1992 ("the Act"). Again, fortunately, it is not necessary to set out all the relevant legislative provisions for a proper understanding of the issues.

[9] Part IX of the Act deals with child benefit. Section 137 provides:

> 'A person who is responsible for one or more children in any week shall be entitled, subject to the provisions of this Part of this Act, to a benefit (to be known as "child benefit") for that week in respect of the child or each of the children for whom he is responsible."

[10] Child benefit is payable to only one person at any time. Section 140(3) of the Act provides:

> "Where, apart from this subsection, two or more persons would be entitled to child benefit in respect of the same child for the same week, one of them only shall be entitled; and the question which of them is entitled shall be determined in accordance with Schedule 10 to this Act.

[11] In this case it is common case that there is a 50/50 share of responsibility for all three children.

[12] Schedule 10 of the Act is entitled "Priority between persons entitled to child benefit" and provides:

> "**Person with prior award**
>
> 1(1) Subject to sub-paragraph (2) below, as between a person claiming child benefit in respect of a child for any week and a person to whom child benefit in respect of that child 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.
>
> **Person having child living with him**
>
> 2 Subject to paragraph 1 above, as between a person entitled for any week by virtue of paragraph (a) of subsection (1) of section 139 above and a person entitled by virtue of paragraph (b) of that subsection the former shall be entitled.

Husband and wife

3 Subject to paragraphs 1 and 2 above, as between a husband and wife residing together the wife shall be entitled.

Parents

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 the parent shall be entitled.

(2) Subject as aforesaid, as between two persons residing together who are parents of the child but not husband and wife, the mother shall be entitled.

Other cases

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 Department may in its discretion determine."

[13] It is common case that paras 1 to 4 do not apply to this applicant or her former husband, so para 5 is the material provision. No election was made by the applicant and her former husband, so (per the original legislative provisions) it fell to the Department of Health & Social Services ("the Department") to determine who should receive the benefit. In fact, the functions of the Department in relation to child benefit were transferred to the Board of Inland Revenue by section 50 of the Tax Credits Act 2002, so that the reference in para 5 to the Department is to be read as a reference to the Board. Following a subsequent merger of government departments, any reference to the Board now means His Majesty's Revenue and Customs ("HMRC").

[14] There is no right of appeal against the discretion exercised under para 5 of Schedule 10 (see para 14 of Mr Hignett's affidavit), so judicial review is the appropriate route to remedy.

[15] In addition to the legislative provisions, there is relevant guidance. The respondent has filed an affidavit from Ms Sally Sanders. Ms Sanders is an officer of HMRC within the Rival Claims Technical Team. She was the decision-maker in the impugned decision. She explains in para 14 of her affidavit that HMRC guidance was in place at the time the decision was made. She identifies this as the "Child

Benefit Procedural Guide 9520 (CBPG)." She says that the guidance "was considered in any discretionary decisions." The impugned decision in this judicial review challenge was a discretionary decision.

[16] The parties provided me with a word version of the guidance which was current when the impugned decision was made, and I have set out the relevant parts in the Appendix to this judgment.

The challenge

[17] In the amended Order 53 Statement the challenge is articulated thus:

> "The applicant challenges the decision of HMRC dated 7 March 2023, wherein it concluded that the applicant's ex-husband 'FM 'should receive an award of child benefit in respect of their daughter 'A.'"

[18] The applicant seeks an order of certiorari removing the decision into this court and quashing the decision, a declaration that the impugned decision is unlawful, and/or ultra vires and/or a violation of the applicant's rights under article 1 Protocol 1 ECHR ("A1P1"), and damages.

[19] The grounds relied on are (i) that the respondent failed to take into account, in reaching the impugned decision, a number of material facts/considerations; (ii) breach of statutory duty under section 6 of the Human Rights Act 1998, being a disproportionate interference with the applicant's rights under article 1 of Protocol 1; (iii) illegality; (iv) procedural unfairness; (v) breach of the respondent's relevant policy; and (vi) irrationality.

[20] The Order 53 Statement also seeks an extension of time since the application for judicial review was brought a couple of days outside the three-month period provided for in Order 53 rule 4(1). On 14 June 2023 Scoffield J granted this extension.

The applicant's submissions

[21] Essentially the applicant focuses on Step 6 of the guidance. This provides, under the heading "Consequences of a disallowance - Considerations" —

- the main factor in considering shared care cases is to decide whether one parent or the other has the greater responsibility of care.

- where this is not clear it is important to consider the impact the decision will have on each parent

- ChB is not a means tested benefit but where one or both parents rely on other benefits, a disallowance may have a potentially more adverse affect. The decision will not be seen in law as a 'fair' decision if this is not taken into account in the consideration.

- consider 'who stands to lose most.'

[22] The applicant says that in this case it was not clear that one parent or the other had the greater responsibility of care for the child; on the contrary it was clear that neither parent had the greater responsibility. In those circumstances, says the applicant, the decision-maker was required to proceed to consider the impact of the decision and was required to consider 'who stands to lose most.'

[23] The failure by the decision-maker to do so involves a misdirection and a breach of the policy. The interpretation of the guidance is *Wednesbury* unreasonable.

The respondent's submissions

[24] In his skeleton argument Mr Kennedy identified the relevant legislation and the guidance. In relation to the issue of how a court should approach guidance, he relied on the first-instance case of *Council for the Regulation of Health Care Professionals v GMC* [2004] EWHC 1850 (Admin). At para [24], the court noted:

> "The GMC's Indicative Sanctions Guidance for the Professional Conduct Committee is the equivalent to a sentencing guide. It helps to achieve a consistent approach to the imposition of penalties where serious professional misconduct is established. The PCC must have regard to it although obviously each case will depend on its own facts and guidance is what it says and must not be regarded as laying down a rigid tariff."

[25] As to the discretion enjoyed by the respondent, he relied on the decision in *R(Ford) v Inland Revenue* [2005] EWHC 1109 (Admin), a case which, he said, had a similar factual matrix. Similar the factual matrix may have been, but I note that the challenges to the impugned decision in that case were different from the challenges in this case. However, at para [26] the court said:

> "The discretion conferred by paragraph 5 of Schedule 10 of the 1992 Act is in the widest of terms…I see no policy reason why that discretion should be cut down in the way that the case for the claimant would suggest. On the contrary, it seems to me that to cut down the discretion in that way would be liable to lead to unbalanced and unfair decision-making."

[26] Relying on Lord Bingham's observations in *R (Corner House Research and another) v Director of the Serious Fraud Office* [2008] UKHL 60, para [41] – "The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make" – he submits that in all the circumstances of this case the exercise of the discretion was appropriate, and the decision was one which was entirely open to the decision-maker to make.

[27] As to the A1P1 challenge, he submits that since the legislation itself is not challenged, the A1P1 challenge offers no grounds for a grant of judicial review. In any event, he points to the decision in *James v UK* (1986) EHRR 123 for the proposition that in such decisions the "national authorities … enjoy a certain margin of appreciation."

[28] Further, Mr Kennedy relies on the judgment of Scoffield J in *Lancaster & Others 'Application for Judicial Review* [2023] NIKB 12, para [182], to support the proposition that decisions in cases of this nature "should be subject only to a lower intensity of review."

The approach of the respondent's decision-maker

[29] The affidavit sworn by Ms Sanders, the decision-maker of the impugned decision, sets out, inter alia, the internal history of this matter, including the appeal process, since 2016 when FM first made the claim for child benefit for all three children.

[30] Dealing with the internal guidance document, Ms Sanders says (in paragraph 15)

> "The guidance is set out in a step by step process of consideration but the officer can, if they consider they have sufficient information from both parents, consider a decision and conclude the step by step process at any point. In that way, the guidance produces a hierarchical set of considerations when applying discretion. For instance, consideration of a child's official address may not be necessary if there is conflict over that address or if there is more than one child in the considerations, similarly "who stands to lose most test" may *not apply* where the officer is satisfied that the earlier conditions adequately resolve the matter. The who stands to lose most test, in that way, becomes the final guidance in applying discretion, the most important of which is the pattern of care (and at which point, if it is adequately settled to enable the discretion to be applied, could be the only consideration) (sic)…"

[emphases in the original affidavit]

[31] According to para 34 of the affidavit, on 13 January 2023 the case file was returned to the Rival Claims Technical Team "with respect to the exercise of their discretion under Schedule 10 to the [Act], with a request to make a further reconsideration of that decision (a fourth reconsideration)." On 26 January 2023 Ms Sanders completed a review of all the evidence, and the points raised by the applicant's solicitor.

[32] Her affidavit (all emphases below are in the original affidavit) includes the following averments in paragraph 35.3:

- In re-considering the decision I took account of the number of years of experience I have in shared care discretionary decisions and given that I was responsible in assisting in the re-write … of the guidance in 2017.

- When I reviewed this case, I focused on the fairness of the decision…

- The application was to remove ChB from an existing parent and therefore the balance favoured removing ChB for *one* child to the applying parent.

- The loss of ChB was not considered. I was aware of the HICBC at this point but did not consider it to have weight in my decision-making process. The main factor in considering shared care cases is to decide whether one parent or the other has the greater responsibility of care. Where this is not clear it is important to consider the impact the decision will have on each parent.

[33] At para 35.4 she says that the guidance —

> "… makes clear that the 'main factor 'in considering shared care cases is to consider whether one or other has the greater responsibility of care — where there is any lack of clarity, *then* we must consider the impact. In this case it was perfectly clear from the evidence provided at all stages that the responsibility of care for the three children is *equal*."

[34] Para 35.5 is as follows:

> "All the information provided by the applicant and [FM] has been considered, including the fact that there are 3 children following the 7 night in 14 night pattern of care. This had the strongest weight in reviewing the decision, as required by the Guidance. Only where this is unclear do I need to go on to consider the impact on each parent,

> *with the only specified exception to that* the unique elements contained in the following paragraph."

[35] Para 35.6 states:

> "So, the only impact I need to consider in all cases is where a disallowance 'may have a potentially more adverse affect 'but it immediately reiterates that 'ChB is not a means tested benefit'… However, it did not appear that the benefits the applicant received would be affected in this respect and no evidence has been provided to suggest this would be the case."

[36] In para 35.7 she says:

> "Given the responsibility of care is *clear*, it was not necessary to go on to consider any further impact — those are further stages where it is not clear. In particular I need not balance the 'who stands to lose 'test — that clearly applies in the very fringe cases where care and other hardships do not make an obviously fair outcome clear. Therefore, the effect the decision might have on [FM's] liability to … HICBC is not considered."

[37] Finally, part of para 36 states:

> "After taking all the information into consideration I concluded that the original decision [ie to award child benefit for one child to FM] was fair and reasonable …"

Mr Hignett's affidavit

[38] From Mr Hignett's affidavit I take the following matters. In para 21 Mr Hignett notes that "Ultimately the question before the decision-maker is — taking all the evidence into account, is the decision to award child benefit to X rather than Y a fair and reasonable one?"

[39] At para 22 he says:

> "HMRC can, and in some circumstances do, consider 'who stands to lose most.' This is in the context of whether the decision to award child benefit to X rather than Y is a fair and reasonable one. However, the question of who stands to lose most is not in respect of entitlement to child benefit itself, but rather with regards to other benefits which may rely on receipt of child benefit as a condition

> of entitlement, and if as a result of not being awarded child benefit, entitlement to those other benefits would cease."

[40] Accordingly, since the only other benefit the applicant was entitled to was child tax credit the decision to remove child benefit for one child did not affect the applicant's entitlement to child tax credit.

[41] At para 23 he says:

> "It seems that if the loss of child benefit itself were a factor when HMRC are obliged to exercise discretion in cases where more than one person could be entitled to child benefit, the claimant to whom child benefit was not awarded would always be able to successfully argue that they lost most where HMRC decides to award child benefit to a different claimant."

[42] Finally, as he states in paras 16 and 25 the liability to HICBC is usually unknown to HMRC when the decision in relation to child benefit is made, because such liability is only calculated in the tax year following that in which the award of child benefit is made.

Consideration

[43] Essentially, the issue in this case boils down to a narrow one: whether or not the decision-maker was right to take the view, expressed by her in para 35.7 of her affidavit, that the "responsibility of care is *clear*", and therefore whether, as a result of the view she took she was correct to decline to consider "impact" and "who stands to lose most" in Step 6.

[44] The first bullet point in Step 6 states: "the main factor in considering shared care cases is to decide whether one parent or the other has the greater responsibility of care."

[45] Entirely conscious as I am that the legislation provides a very wide discretion, and that the guidance is not to be interpreted like a statute, it is my view that the decision-maker misdirected herself. She decided that the "responsibility of care is clear", but that was not the question which the guidance indicated she should ask. The question in the guidance, and the one which she should have asked herself, was "whether one parent or the other has the greater responsibility of care." If she had asked that question, the only answer would have been that neither had the greater responsibility of care, so while "responsibility of care" was clear, there was no such clarity as to which parent had the greater responsibility of care.

[46] Accordingly, in my view, it was incumbent on the decision-maker to go on to consider the impact of the decision and the further test, viz "who stands to lose most."

[47] Step 9, which deals with reaching a reasonable decision ends with the commendation:

> "**Note:** The decision maker should ask, as a last check once a decision has been made, 'Taking all the evidence into account, is the decision to award ChB to X rather than Y a fair and reasonable one (and would any ordinary person think it is fair and reasonable.'"

[48] I consider that in the circumstances of this case, if the decision-maker had moved to a consideration of the commendation in Step 9, she may have decided the decision was not fair and reasonable and that an ordinary member of the public may not have considered it to be fair and reasonable.

[49] In the circumstances I consider that the approach of the decision-maker was based on a clear misdirection and amounted to a breach of the HMRC policy guidance.

[50] The applicant also relies on the failure of the respondent to take into account the consequences of disallowing the applicant's claim. Four matters are relied on in para 33 of the applicant's skeleton argument. First, the impact of the loss of child benefit to the applicant; secondly, the fact that FM would be subject to HICBC. However, in light of the affidavits from the respondent I consider that the approach to each of these issues is a policy matter for the respondent and, since such policy matters are not challenged in this application, I consider that they do not assist the applicant. Sub-para (iii) of para 33 asserts that it was plainly the applicant who stood to lose most, but this will be a matter for the decision-maker when the matter is reconsidered in light of my decision in this case. Sub-para(iv) asserts that the best interests of the child would be served by child benefit being awarded to the applicant. This is not a matter which appears anywhere in the guidance as a relevant consideration.

[51] Accordingly, I reject the challenge based on the respondent's failure to take into account those matters. Further, since precisely those four matters form the basis of the challenge based on *Wednesbury* unreasonableness, as articulated in the Order 53 Statement, I reject that ground of challenge also.

[52] Finally, in the light of my decision above, I do not propose to deal with the challenge based on A1P1.

Disposition

[53] In the circumstances and on the very limited grounds I have identified I will bring up into this court and quash the decision made in this case. Since I am wholly unable to decide what the final decision might have been if the correct question had been posed and had the decision-maker gone on to consider the further matters in step 6 — and indeed I recognise that the decision might have been the same as that challenged in this application — I remit the decision to the respondent with a direction that the matter be reconsidered but by a different decision-maker.

[54] I will hear the parties on the issue of any other remedy and the issue of costs.

APPENDIX

CBPG9520 – Rival Claims Legislative: Discretionary Decisions

Introduction

If 2 or more people claim ChB for the same child in the same week and all meet the basic responsibility conditions of entitlement, only one of them can be entitled to ChB in respect of that child for that week

Schedule 10 of the Social Security Contributions & Benefits Act 1992 sets out the rules for determining who has priority of entitlement; these rules must be considered in order. Only when both claimants have met the basic responsibility conditions, is schedule 10 a factor. The priority rules are subject to each other in order and the discretionary decision only comes into force at Priority rule 5 of schedule 10. It may be entitlement has already been decided using priority rules 1-4, if not, at priority rule 5 the customers must be given the opportunity to elect (agree) who will be entitled. If this fails only then is there legal provision to make a discretionary decision.

A Commissioners decision often has to be made in these cases after considering other facts.
The steps below should be considered before making a decision on behalf of the commissioner

Step 1

Explanation of rule 5

- it may be entitlement has already been decided using priority rules 1-4, if not, at priority rule 5 the customers must be given the opportunity to elect (agree) who will be entitled. If this fails only then is there legal provision to make a discretionary decision
- once the priority rules have been exhausted and a discretionary decision is required, to try and apply rules to a Commissioners decision restrains discretion and could lead to an unfair decision. The decision maker on behalf of the Commissioners for HM Revenue and Customs must look individually at each case on its own merits. Cases might appear similar, but each one is unique because the facts of each case are unique to that child and the people looking after them
- go to Step 2

Step 2

Establishing the facts

- facts are obtained from enquiry forms such as CH15C(DC)
- evidence is also collected from other sources such as
    - statements on the ChB claim form
    - letters from the customer or their solicitor
    - court orders such as a residence order
    - telephone conversations
    - information from Jobcentre plus offices, Enquiry Centres
    - information from an impartial third person such as a Social Worker or teacher
- it is essential to look at all the information provided, and take all the available evidence into account in order to build up an accurate factual picture of the customers and the child's circumstances
- record each piece of information on the evidence summary sheet as it is received to prove that the decision maker has considered all the evidence in reaching their decision
- go to Step 3

Note: some information will be more reliable than others and the decision maker will have to bear this in mind when making the final decision. If some information is regarded as unreliable, or if there is conflicting information, this should be recorded on the written reasoning kept on the file.

Step 3

Examples of common relevant facts - Physical responsibility

- the number of hours each parent has responsibility for the child each week
- normally there is no need to make a distinction between time spent in school and time at home. This may have a special significance, however, and must be recorded in the written reasoning if, for example
    - the child is away at boarding school or
    - spends some time in residential care because they are disabled
- the existence of a court order specifying arrangements for the care of the child(ren)
- separated parents sometimes agree to unofficially vary the terms of a court order, for example during school holidays. Consider how the child is actually cared for if this is different to arrangements set down in the residence order. This is acceptable if there is some stability and pattern to the new arrangements

- record in the written reasoning whether you are accepting the evidence of the residence order or the actual caring arrangements (If these are different state why you are accepting one rather than the other)
- in some cases parents will deliberately keep varying the arrangements made under the residence order to try and gain the advantage, such as each parent arranging to be away from home when the other parent came to collect the children, to gain an extra day when they could say the children had stayed with them
- this should not be treated as a relevant change of circumstances for ChB purposes. In this type of case consider accepting the arrangements set down in the residence order (which were decided by a family law judge after careful consideration of the parents circumstances)
- record in the written reasoning why you are accepting the residence order arrangements rather than the actual fluctuating arrangements that have no settled pattern
- go to Step 4

Step 4

Examples of common relevant facts - Address of child

- it is possible for the parents different addresses to be used in all or any of these circumstances but it is relevant evidence to be considered
    - the child's recognised address for registration with school, doctor
    - the address where the child's possessions are mainly kept
    - the address the child stays when ill
- if the information given does not help decide entitlement, such as the evidence given by the parents does not agree or both addresses are the first point of contact because the care is shared, record this in the written reasoning
- state what you are accepting, or cannot accept as reliable evidence
- give the reasons for what you are accepting, or cannot accept as reliable evidence
- go to Step 5

Step 5

Examples of common relevant facts - Contributions

- the costs incurred by each parent generally give some indication of the parental responsibility, who buys what, such as the child's food and clothes
- what other expenses in respect of the child are met by either customer, such as cost of footwear, school uniform, school fees/trips, pocket money, holidays and entertainment, books/toys/ computer, extra curricular activities

- this may not be conclusive, one parent may be able to afford to spend more on the child than the other parent. Particularly if that person is dependent on state benefits the other in a high paid job, investigations into income should not be considered, ChB is not a means tested benefit
- record the evidence, stating in the written reasoning why it does or does not carry weight when reaching the decision
- go to Step 6

Step 6

Consequences of a disallowance - Considerations

- the main factor in considering shared care cases is to decide whether one parent or the other has the greater responsibility of care
- where this is not clear it is important to consider the impact the decision will have on each parent
- ChB is not a means tested benefit but where one or both parents rely on other benefits, a disallowance may have a potentially more adverse affect. The decision will not be seen in law as a 'fair 'decision if this is not taken into account in the consideration
- consider 'who stands to lose most '
- go to Step 7

Step 7

Exercising discretion - Consequences of a disallowance - Examples

- if ChB is disallowed will it mean one or both parents will also lose CTC or a family premium and/or child allowance paid with another benefit
- if a persons only source of income is IS or JSA the impact of a disallowance may make it difficult to provide for the child's needs during the time they care for them
- if they have been claiming IS as a lone parent and receiving ChB, a disallowance will mean they lose their IS entitlement altogether and will have to sign on as available for work and claim JSA as a single person
- consider, if the loss of a child allowance paid with IS would result in an adverse affect on one claimant's income, would a decision to award to that claimant result in a greater loss to the other claimant
- if the potential loss of a child allowance and family premium paid with IS/JSA could have an adverse affect on one claimant, will a decision to award to that person constitute a greater injustice to the other claimant
- if one of the customers is in receipt of DLA on behalf of their disabled dependant, they may lose entitlement

- it is important to look at the facts of each case individually and record the reasoning
- consider the overall impact of the decision and record this in writing
- CSA may make a decision affecting one party, based on ChB decision, however, we cannot pre-empt a decision by CSA
- Child Benefit processing do not have to take account of the CSA decision, even if the customer complains that the CSA are treating them as the absent parent because they have been disallowed ChB
- go to Step 8

Step 8

Exercising discretion - Considering the evidence

- complete the evidence summary sheet (CH1781) as information is gathered from phone calls, letters, replies to enquiry forms
- it is essential that the written record held on file records
    - all the facts of the case, from the information and evidence supplied
    - the consideration given to each fact
    - the decision
    - the reasons for the decision, in the light of the facts/evidence
    - the reasons why an alternative decision was rejected
- record your reasoning in writing, to show why you are deciding in favour of one person rather than the other
    - each piece of evidence should be referred to, if you are not accepting a piece of evidence as reliable, state why
    - show that you have considered the consequences of a particular decision, compared with the consequences of making an alternative decision (sometimes several alternative decisions) and that you have come to a reasonable decision in the light of this
    - Go to Step 9

Step 9

Exercising discretion - Reaching a reasonable decision

- after considering the evidence it is quite possible to reach more than one reasonable decision. It is not a case of one decision being 'right 'and the other 'wrong.' If the decision is challenged the court will look at 2 things
    - is the decision a reasonable one
    - is it fair in the light of all the evidence available at the time

- if the decision maker has made an unfair decision, or reached the decision in an unreasonable way, it is an abuse of the power conferred by Parliament
    - a decision which has not taken all the available evidence into account can never be a reasonable and fair decision
- the courts will not usually overturn an unfair or unreasonable decision but will ask the decision maker to review the decision, taking all the facts into account so as to reach a fair and reasonable one
    - the decision following review may be the same, but because all the available evidence has been taken into account and carefully considered it should have been arrived at properly
- go to Step 10

Note: The decision maker should ask, as a last check once a decision has been made, 'Taking all the evidence into account, is the decision to award ChB to X rather than Y a fair and reasonable one (and would any ordinary person think it is fair and reasonable) '

Step 10

Exercising discretion - Examples of reasonable decisions

Scenario 1

- If one customer has the greater responsibility of care, for example one customer has the child living with them the majority of time, it is fair and reasonable to award ChB to them

  Note: You must record on file the evidence you relied on in deciding that customer A has more responsibility than customer B

Scenario 2

- it is a good indication that the court had good reason to give one person the greater responsibility if a residence order
    - gives one customer 'residence 'and the other parent 'contact' or
    - states that the child shall mainly live with one of them
- if daily care of the child is shared more or less equally, it is fair and reasonable to accept the residence order as a deciding factor. Although, you must take into account if following information/evidence it is determined the care is equal and conflicts with the court order, then the decision to award as per the court order wouldn't be fair or reasonable **Note:** Record this on file

Scenario 3

- If care of 2 or more children is shared equally, and a residence order does not give one customer greater responsibility than the other it may be appropriate to pay each customer for one or more child each

  Note: Record your reasons for doing so on file

- go to Step 11

Step 11

Exercising Commissioners' discretion - Communicating the decision

- it is important that we communicate decisions to our customers in a clear manner. We must ensure that our customers fully understand how we reached the decision. Refer to the written reasoning documented on CH1781, to construct an easily understandable paragraph for inclusion in the letter. Detail what facts have been considered, what facts have not been considered and why
- when drafting a letter to a customer remember to
  - explain the law in relation to rival claims to ChB
  - explain discretionary decisions, when and why they are used
  - explain the process we go through
  - keep the explanation straightforward and relevant to the specific circumstances of the case. Do not go into great detail
- our duty is to give fair and reasonable decisions, which we can justify. If the customer remains unhappy and asks for a reconsideration then our explanation could go into further depth