THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal against the decision of the First-tier Tribunal given at Edinburgh on 31 May 2018 is refused.

REASONS FOR DECISION

1. This is an appeal about child support. It concerns the question of whether there should be a deduction from child maintenance payments to reflect shared care, in a situation in which there is a court order for overnight contact which is not being adhered to.

2. In my opinion, the tribunal did not err in law in finding that payments of child support should not be decreased to reflect shared care in the circumstances of this case. The overarching question to be determined, when considering shared care under Regulation 46 of the Child Support Maintenance Calculation Regulations 2012 (the "**2012 Regulations**"), is the number of nights for which the non-resident parent ("**NRP**") is expected to have the care of the qualifying child overnight during the 12 months beginning with the effective date of the relevant calculation decision (Regulation 46(2)). In considering this question, there may be a number of relevant considerations for the decision maker. Among potentially relevant considerations, Regulation 46(4) of the 2012 Regulations has specified two that it is mandatory to consider, where they apply. One of these mandatory considerations is the terms of a court order providing for contact between the NRP and the qualifying child. If either of the Regulation 46(4) mandatory considerations apply (court order/agreement, or pattern of care over the previous 12 months) but there is insufficient evidence to determine shared care on that basis, then the decision maker may adopt the default position of an assumption of one overnight a week under Regulation 47. However, if there is sufficient evidence to answer the Regulation 46(2) question overall, it is open to the decision maker simply to decide it on all the facts. In doing so, while the decision maker must take into account the terms of any court order providing for contact, there is no obligation to determine shared care on the basis of the provisions in that court order. The weight to be attached to the court order is for the decision maker, who is also entitled to take into account evidence that the provisions of the order do not accurately reflect the number of nights for which the NRP is expected to have overnight care of a qualifying child during the relevant 12 month period.

Background facts and case history

3. The background facts are that the appellant ("**EA**") is the father of two children, born on 10 October 1999 ("**E**") and 9 November 2005 ("**R**") respectively. The second respondent ("**SA**") is the mother of E and R. EA and SA divorced on 31 May 2013. EA is the NRP. The decree of divorce granted by the Sheriff Court at Edinburgh dated 31 May 2013 (the "**court order**") made detailed provision about overnight contact between EA and R, including alternate weekends from Thursday to Mondays, and additional holiday dates. The court order has not been formally varied by any court. Unfortunately, at least by October 2015 the contact arrangements in the court order had broken down. EA was not enjoying the overnight care of R set out in the court order. This is against EA's wishes, who states that he (and his family) would very much like to have contact with R. SA says that contact stopped because R didn't want it, which included R running away one weekend to avoid contact.

4. The case history is that on 31 August 2016 the Child Maintenance Service ("**CMS**"), for whom the first respondent Secretary of State is responsible, made a decision about the level of child support EA was liable to pay with effect from 24 July 2016. SA requested mandatory reconsideration, and as a result the decision was revised on 1 November 2017. The effect of the revision was to increase payments by EA to £214.92 a week in respect of E and R, because the deduction for shared care was removed. That decision was appealed to the First-tier Tribunal (the "**tribunal**"), which on 31 May 2018 confirmed the revised CMS decision. In a statement of reasons dated 3 August 2018, the tribunal noted that under regulation 46(4) of the 2012 Regulations, in determining the number of nights of shared care the tribunal must consider the terms of any agreement or court order relating to contact. It then said:

> "The decree of divorce of the appellant and the second respondent, dated 31 May 2013, includes a contact order specifying that the appellant should have overnight contact with [R] for two nights a week and on additional holiday dates. The tribunal considered the contact order, as required by regulation 46(4), but given the lack of overnight contact between October 2015 and the date of decision, concluded that the contact order bore no relation to what was happening in practice and that accordingly it was not appropriate to base any decision about shared care on that order. The contact order is not current or effective and has not been so for a significant period of time. The provisions in the contact order are not relevant to the actual position in relation to shared care at the effective date or the likely pattern of shared care in the 12 months from the effective date. It cannot be the case that the legislation intends any written agreement to take precedence over the actual situation, no matter how old or how long it has been ineffective. Such an approach would not be in the interests of the qualifying child or in accordance with the policy intent of the deduction for shared care. The deduction for shared care is to reflect the respective costs of caring for the qualifying child borne by the parent with care and non-resident parent.

> In these circumstances, the tribunal decided that it was reasonable to look at the pattern of shared care. The appellant did not have any shared care of [R] from October 2015 to the effective date of 24 July 2016, a period of nine months. As there was a consistent pattern for nine months, the tribunal considered that was a reasonable time period to consider. The lack of shared care may be for complex reasons, but the key issue is what happened, not why. There were no changes in July 2016 which suggested that there would be a sudden increase in overnight contact. The appellant indicated in March 2018 that he had overnight care with [R] on 16 September 2016, possibly 17 September 2016, 16 June 2017 and 17 June 2017. The dates are outwith the period under consideration by the tribunal, and in any event do not suggest any significant change.
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> On this basis, the tribunal decided that it was not likely that the appellant would have sufficient overnight care of [R] from 24 July 2016 to qualify for a shared care deduction. The established pattern would suggest that there was likely to be no or limited overnight care in the 12 months from the effective date. The non-resident parent has no shared care and no associated costs it is in line with the underlying purpose of this part of the legislation for there to be no deduction in relation to shared care".

5. On 17 December 2018 I extended the time for appealing to the Upper Tribunal, and granted limited permission to appeal, on the basis that issues arose concerning the interpretation and application of Regulation 46 of the 2012 Regulations, and in particular Regulation 46(4) in the context of the test in Regulation 46(2). Permission was refused on the other grounds advanced.

6. The basis of EA's appeal is that a deduction for shared care should have been made, because shared care should have been determined on the basis of the contact arrangements in the court order, having regard to Regulation 46(4) of the 2012 Regulations. He makes a number of detailed arguments, which I have addressed in the discussion section below. SA has not provided any response to the appeal. The Secretary of State does not support the appeal, arguing that the tribunal did not err in law in finding that there should be no deduction for shared care. None of the parties has requested an oral hearing and I am satisfied that I can determine the appeal fairly on the papers.

Governing law

7. The amount of child maintenance payable by a NRP is regulated by statutory provisions. In this case, the relevant governing provisions are in the Child Support Act 1991 (the "**1991 Act**") and the 2012 Regulations made under Schedule 1 Part 1 paragraph 9 of the 1991 Act. The preamble to the 1991 Act says that it is:

> "An Act to make provision for the assessment, collection and enforcement of periodical maintenance payable by certain parents with respect to children of theirs who are not in their care; for the collection and enforcement of certain other kinds of maintenance; and for connected purposes".

Under Section 1 of the 1991 Act, it is provided that each parent of a qualifying child is responsible for maintaining him. The overall purpose of the 1991 Act is to make provision for parents whose children are not in their care to pay maintenance to support their children.

8. In carrying out the child maintenance assessment which determines the amount payable, there is provision for a decrease in the amount payable if there is shared care within the meaning of the legislation. Schedule 1 of the 1991 Act sets out detailed provisions about how maintenance calculations are made, and paragraph 7 provides insofar as relevant:

> ("2) If the care of a qualifying child is, or is to be, shared between the non-resident parent and the person with care, so that the non-resident parent from time to time has care of the child overnight, the amount of child support maintenance which he would otherwise have been liable to pay the person with care, as calculated in accordance with the preceding paragraphs of this Part of this Schedule, is to be decreased in accordance with this paragraph.
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> (3) First, there is to be a decrease according to the number of such nights which the Secretary of State determines there to have been, or expects there to be, or both during a prescribed twelve-month period.
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> (4) The amount of that decrease for one child is set out in the following Table–
>
> | Number of nights | Fraction to subtract |
> |---|---|
> | 52 to 103 | One-seventh |
> | 104 to 155 | Two-sevenths |
> | 156 to 174 | Three-sevenths |
> | 175 or more | One-half |
>
> (5) If the person with care is caring for more than one qualifying child of the non-resident parent, the applicable decrease is the sum of the appropriate fractions in the Table divided by the number of such qualifying children".

Accordingly, the amount of child maintenance payable by a NRP may be reduced if there is shared care of children for at least 52 nights a year on average. It is worth noting that paragraph 7(2) explains shared care as "so that the non-resident parent from time to time has care of the child overnight". The focus is on the NRP having overnight care from time to time.

9. Paragraph 9 of Schedule 1 of the 1991 Act contains powers enabling regulations to be made to make provision for various matters in respect of shared care, including "how it is to be determined whether the care of a qualifying child is to be shared as mentioned in paragraph 7(2)". The 2012 Regulations contain further provision. Regulation 46 provides, with the key parts set out in bold:

> "(1) This regulation and regulation 47 apply where the Secretary of State determines the number of nights which count for the purposes of the decrease in the amount of child support maintenance under paragraphs 7 and 8 of Schedule 1 to the 1991 Act.
> (2) Subject to paragraph (3), **the determination is to be based on the number of nights for which the non-resident parent is expected to have the care of the qualifying child overnight during the 12 months beginning with the effective date of the relevant calculation decision**.
> ….
> (4) When making a determination under paragraphs (1) to (3) the Secretary of State **must consider**—
> **(a) the terms of any agreement made between the parties or of any court order providing for contact between the non-resident parent and the qualifying child; or**
> **(b) if there is no agreement or court order, whether a pattern of shared care has already been established over the past 12 months (or such other period as the Secretary of State considers appropriate in the circumstances of the case).**
> (5) For the purposes of this regulation—
> (a) **a night will count where the non-resident parent has the care of the qualifying child overnight and the child stays at the same address as the non-resident parent**;
> (b) the non-resident parent has the care of the qualifying child when the non-resident parent is looking after the child; and
> (c) where, on a particular night, a child is a boarder at a boarding school, or an in-patient in a hospital, the person who would, but for those circumstances, have the care of the child for that night, shall be treated as having care of the child for that night".

Regulation 47 provides:

> "(1) This regulation applies where the Secretary of State is required to make a determination under regulation 46 for the purposes of a calculation decision.
> (2) If it appears to the Secretary of State that—
> (a) the parties agree in principle that the care of a qualifying child is to be shared during the period mentioned in regulation 46(2) or (3) (decrease for shared care); but
> (b) there is insufficient evidence to make that determination on the basis set out in regulation 46(4) (for example because the parties have not yet agreed the pattern or frequency or the evidence as to a past pattern is disputed), the Secretary of State may make the decision on the basis of an assumption that the non-resident parent is to have the care of the child overnight for one night per week.
> (3) Where the Secretary of State makes a decision under paragraph (2) the assumption applies until an application is made under section 17 of the 1991 Act for a supersession of that decision and the evidence provided is sufficient to enable a determination to be made on the basis set out in regulation 46(4)".

Discussion

10. It is not in dispute that the effective date of the maintenance assessment calculation is 24 July 2016. For EA to be entitled to a decrease in maintenance payments to reflect shared care, the decision maker had to be satisfied there were over 52 nights of shared care a year. Under Regulation 46(2) of the 2012 Regulations, the decision maker had to determine the number of nights for which the EA was expected to have the care of R overnight in the twelve month period from 24 July 2016. The drafting of Regulation 46(2), and in particular the word "is expected", reflects the fact that many maintenance calculations will be carried out when part of the period is in the future and the actual position is not known. By the time the present case was before the tribunal, the actual answer was known: there had been a maximum of 4 overnights during the relevant period (16 September 2016, possibly 17 September 2016, 16 June 2017 and 17 June 2017). The reality of the situation was that there had in fact been far fewer overnights in the relevant 12 month period than the 52 overnights or over to qualify for a shared care reduction in child maintenance.

11. The question for me is whether the obligation in Regulation 46(4) of the 2012 Regulations, that the Secretary of State must consider the terms of any court order providing for contact, meant that shared care should be calculated in accordance with overnight contact listed in the court order, rather than the reality of the situation. I have decided the CMS and tribunal were correct to find there should be no decrease for shared care.

12. My starting point is that I should aim to interpret the provisions in the 2012 Regulations so they promote the policy and objects of the enabling legislation (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). The enabling Act for the 2012 Regulations is the 1991 Act. This Act was amended in various respects by the Child Maintenance and Other Payments Act 2008, with the aim of making changes to ensure a faster, more accurate and transparent process for assessing child maintenance payments. The context is child support, and the guiding principle is that parents should take financial responsibility for all of their children. The overall purpose of the 1991 Act (having regard to its preamble) is to make provision for parents whose children are not in their care to pay maintenance to support their children. The rationale for the shared care provisions in the 1991 Act and the 2012 Regulations flows from the preamble and Section 1 of the 1991 Act. Overnights a child spends with the NRP are times when the NRP is maintaining that child. Sufficient overnights may count towards the NRP's support obligation. Overnights meeting statutory conditions may accordingly reduce the overall financial liability to make child maintenance payments to the parent with care. The wording of paragraph 7(2) of Schedule 1 of the 1991 Act further reflects that rationale. Paragraph 7(2) defines shared care as being where the care of a qualifying child is, or is to be, shared between the NRP and the person with care, so that the NRP from time to time has care of the child overnight. If the NRP is supporting their children in part by way of shared care satisfying the statutory criteria, there can be reduced payments of child maintenance.

13. Moving on to the 2012 Regulations themselves, these Regulations were introduced to rewrite and consolidate four previous sets of regulations; they aimed to retain the basic principles where appropriate but simplify and streamline them where appropriate (*The Child Support Maintenance Calculation Regulations 2012: A Technical Consultation* (the "**Technical Consultation**")). In relation to shared care, the primary obligation in the 2012 Regulations is for the Secretary of State to make a determination based on the number of nights for which the NRP is expected to have the care of the qualifying child overnight during the relevant 12 month period (Regulation 46(2)). Regulation 46(4) makes it clear that, in making the Regulation 46(2) determination, the Secretary of State must consider the terms of any court order. But Regulation 46(4) does not say the Secretary of State "must give effect to" or "must accept" the terms of any court order. It imposes an obligation on the Secretary of State only to consider any court order, when determining the number of nights the NRP is expected to have care of the qualifying child in the relevant 12 month period. After taking a court order into account, in many cases the Secretary of State will conclude that the arrangement in it properly reflects the shared care a NRP is expected to enjoy in the relevant 12 month period, because in the normal course it will be expected that the provisions in a court order will be observed. But in my opinion, it is open to the Secretary of State in other cases to consider the terms of any court order or agreement, and nevertheless make a Regulation 46(2) determination in terms which do not reflect the court order, for example where there is clear evidence that what is in the court order is not in fact what is expected in terms of overnight care during the relevant period.

14. I reject the argument that "expected" in Regulation 46(2) means that the provisions in a court order must be followed. "Expected" in my view falls to be interpreted as what is expected in reality, rather than being solely a matter of legal right under a court order. Looking at the reality of the situation gives effect to the intention of the enabling legislation that NRPs are financially responsible for all of their children. If the NRP is not in fact partly maintaining those children by shared care, to reduce the amount they pay would be to remove part of their financial responsibility for the children, which would not advance the purpose of the legislation. This conclusion is reinforced by Regulation 46(5)(a) of the 2012 Regulations, which applies for the purpose of Regulation 46 as a whole. Regulation 46(5)(a) makes provision about when "a night will count" as a night of shared care. This is defined as where the NRP has the care of the qualifying child overnight and the child stays at the same address as the non-resident parent. If there is no overnight care, the night does not count, which is another way of saying that the focus is on the reality of the situation. Regulation 46(5)(a) could have no purpose if "expected" meant legal right under a court order or agreement, as opposed to the situation in reality.

15. I have taken into account that Regulation 46(4)(b) goes on to say "or (b) ***if*** (bold added) there is no agreement or court order, whether a pattern of shared care has already been established over the past 12 months". I acknowledge that one possible reading of this provision is that patterns of shared care over the past 12

months may only be considered in the absence of an agreement or court order. Accordingly, if there is a court order, these patterns cannot be looked at, and on that basis it might be argued that the tribunal erred in law. This reading is bolstered by Regulation 47(2)(b), which makes provision for shared care to be determined on an assumption of one overnight a week, if evidence is insufficient to make a determination on the bases set out in Regulation 46(4). In essence, it is arguable that there is a three stage process to answering the Regulation 46(2) question. Is there a court order or agreement? If so, overnights are determined by the contact provisions in that. If not, is there an established pattern of shared care over the previous 12 months? If not, the Regulation 47 assumption of one overnight a week should be applied. I will call this the "**three stage approach**". There is some support for the three stage approach in *JS v SSWP* [2017] UKUT 296 at paragraph 26a where the Upper Tribunal Judge says, obiter:

> "Reg 46(4) directs one first to an agreement or court order, if there is one. Only if there is not is it appropriate to go to the pattern of shared care referred to in reg 46(4)(b). A similar reference to an agreement or court order is not to be found in the equivalent provision in the [Child Support (Maintenance Calculations and Special Cases) Regulations 2000] (reg 7) and must be taken to have been introduced deliberately into reg 46."

There is further support for the three stage approach when the Explanatory Memorandum to the 2012 Regulations is considered. Paragraph 7.1 states:

> "Child maintenance legislation is based on the general principle that all parents take financial responsibility for all of their children. The main objective of child maintenance legislation is to maximise the number of effective maintenance arrangements for children who live apart from one or both of their parents. This is supported by two further objectives:
>
> 1. To encourage parents to make and keep effective voluntary maintenance arrangements, to be known as family-based arrangements.
>
> 2. To support parents in making applications for statutory child maintenance".

Paragraph 7.4.5 of the Explanatory Memorandum provides:

> "Where parents have no agreement in place regarding shared care of their children or there is no identifiable pattern of shared care, the Commission can assume an amount of such care equivalent to one night a week. Any assumption of shared care will continue until the parents reach an agreement or an order is made by the court as a result of family proceedings. This will remove a difficult area of decision making which often resulted in cases remaining indefinitely paused while awaiting evidence from either party".

It is clear from the rest of the Explanatory Memorandum that one of the government's concerns was to simplify maintenance assessments, that shared care was a difficult area in practice, and that it could lead to delays. EA makes similar points under reference to the Technical Consultation, which was a government consultation on draft 2012 Regulations before they were enacted. He refers to paragraph 65 which states, in relation to the assumption ultimately enacted in Regulation 57: "The assumption will continue until the parents reach agreement or, if they are involved in family proceedings, an order is made by a court". The three stage approach, including simply following a court order regulating contact where there is one, would be likely to simplify the decision making process and remove a difficult area of decision making.

16. However, I reject the three stage approach, and prefer the interpretative approach summarised at paragraph 2 of this decision. Under this approach, the terms of the court order about contact are one consideration which must be taken into account when making the Regulation 46(2) determination, but those terms are not conclusive of the outcome of the determination. I prefer this approach for three main reasons:
    (1) It more closely promotes the policy and objects of the enabling legislation (paragraph 12 above). If maintenance is decreased when the NRP is not in fact supporting children by providing overnight care (even if the terms of a court order suggest they would be), it does not promote the policy and objects of both parents meeting their financial responsibilities to support children.
    (2) It better reflects the language the legislature chose to use (paragraph 14 above). The legislation imposes a requirement to consider, not to follow or give effect to the court order.
    (3) It is more congruent with ordinary principles of administrative decision making, that all relevant circumstances should be taken into account when making a decision. It seems to me that the three stage approach does not cover all of the considerations which may be relevant to the expected number of overnights. By way of example, future 'knowns' such as chronic illness, or plans to be overseas, could be relevant to calculating what is to be expected in the relevant 12 month period under Regulation 46(2). The interpretation I prefer leaves it open to the decision maker to consider these matters, rather than being confined by the matters in the three stage approach.

    In reaching this decision, I have taken into account the dicta in *JS v SSWP* [2017] UKUT 296 quoted above, but they have not altered my view. Those dicat do not decide that the agreement or court order is conclusive of the Regulation 46(2) question; they do not say so, they refer immediately after to the Regulation 46(5) test which directs the decision maker to discount nights where there has not in fact been overnight care, and are in any event obiter. I have also taken into account the terms of the Explanatory Notes and Technical Consultation. Neither of these say that the question of shared care must be decided in accordance with any contact order. In the absence of clear provision in the 2012 Regulations, I am not prepared to read Regulation 46(4)(a) as providing that contact terms in a court order are a conclusive answer to the Regulation 46(2) determination. It is sufficient if those terms are considered, but the weight to be afforded is a matter for the decision maker. In appropriate cases it is open to the decision maker to give more weight to the reality of the situation.

17. My preferred interpretation of Regulation 46 does not involve ignoring or changing the court order for contact, or condoning its breach. If a court has made an order for contact, then the parents to whom that order is directed should obtemper it. If they do not, there are mechanisms through the courts for them to be held to account in appropriate circumstances. These mechanisms include the NRP making applications to the court to enforce contact, or for variation of the contact order. In making further decisions the courts will treat R's welfare as the paramount consideration and also, in view of his age, take

into account his views. But it is not for tribunals to enforce the court order. Their function is to apply the law under the 1991 Act and 2012 Regulations. Neither the 1991 Act nor the 2012 Regulations provide that the provisions of a court order for contact must be followed when deciding if there is shared care. The obligation is only to consider it. The contact process and the child maintenance process are separate processes determined in different fora and governed by their own rules. The Court of Appeal has made it clear that the effect on liability to pay child support under the Child Support Act 1991 is not a relevant consideration in court proceedings about the level of contact (*In re B (A Child)* [2006] EWCA 1574). In so finding, the Court of Appeal stated:

> "It would be wrong in principle because it would put the cart before the horse. First breed your horse, namely the optimum arrangements for the child in terms of contact or shared residence, devised without reference to child support. Then, at the rear of the horse, let Parliament fit the appropriate cart, namely the amount of the liability for child support".

The court process governing contact is not governed by the child support legislation. In a similar way, the application of child support legislation is not governed by family law regulating contact. When a child maintenance assessment is made, a court order about contact is merely one consideration for the decision maker, albeit a mandatory consideration which may be entitled to considerable weight depending on the circumstances.

18. I note in passing that I have reached the same conclusion as judges interpreting previous child support regulations. In CCS/2885/2005, at paragraph 9 it was found that overnight care which counts for the purposes of shared care is actual overnight care. It is overnight care if children stay overnight with the NRP, even if not authorised by a court order. Equally, it is not overnight care where children have not stayed with the NRP, even if that contact had been authorised by a court order. What matters is whether the care is provided or not. This is echoed at paragraph 9 of CCS/880/2007; what matters is what actually happens, regardless of the provisions of the contact order made by the court. EA correctly points out that these are not cases about the terms of the 2012 Regulations, but involve application of earlier regulations in different terms. But it does not follow that decision makers must therefore treat arrangements set out in a court order as conclusive about overnights for shared care. The innovation in the 2012 Regulations is that it is now mandatory to consider a court order or agreement setting out contact when deciding whether there is shared care. But that innovation does not go so far as saying that the contact order is conclusive on the question of shared care. The decision maker must also take into account other relevant circumstances. Ultimately, the decision maker must reach a decision about what is expected in terms of overnight care over the relevant 12 month period, based on all relevant considerations.

19. Turning to the tribunal's decision, it expressly takes into account the terms of the court order under Regulation 46(4), as the legislation provides. The tribunal then

considered other factors bearing on the determination which fell to be made under Regulation 46(2). It concluded that "there was likely to be no or limited overnight care in the 12 months from the effective date". It thereby answered the Regulation 46(2) question. Read as a whole, its decision was in accordance with the child support legislation and I do not find there was any material error of law. I agree with the tribunal judge that it is not the intention of the child support legislation that the contact arrangements set out in the court order must take precedence over the actual overnight contact, no matter how old the court order was or how long it had been ineffective. As the tribunal judge put it, the deduction for shared care is to reflect the respective costs of caring for the qualifying child borne by the parent with care and NRP; the approach suggested by EA would not be in the interests of the qualifying child or in accordance with the policy intention of the deduction for shared care.

20. I can understand EA's frustration. He wishes to see his son, and would like SA to facilitate that. He considers it is in the best interests of his son to have contact with him, and feels it is unfair that he pays additional child maintenance, having lost credit for shared care because contact ordered by a court is not happening. However, if EA is not content with the present level of contact, he has avenues of recourse in the courts available to him. As far as child support is concerned, in my opinion, the tribunal correctly applied the law. For these reasons I refuse the appeal.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 30 April 2019