Neutral Citation Number: [2024] UKUT 302 (AAC) No. UA-2024-000278-CSM

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

LP

Appellant

- v -

(1) SECRETARY OF STATE FOR WORK AND PENSIONS
(2) EM

Respondents

Before: Upper Tribunal Judge Stout
Decided on consideration of the papers

Representation:
Appellant: In person
First Respondent: L Foody, DMA Leeds
Second Respondent: In person

On appeal from:
Tribunal: First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC302/23/00503
Digital Case No.: 1666693557469819
Tribunal Venue: Ashford (by video)
Decision Date: 25 October 2023

Anonymity: The Appellant and Second Respondent in this case are anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.

SUMMARY OF DECISION

CHILD SUPPORT (5)

This case concerns separated parents who share care of their child. The issue for the Tribunal was whether one parent was providing "day to day care to a lesser extent" than the other for the purposes of regulation 50(2) of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677). The Upper Tribunal reviews the case law on this regulation and provides guidance as to the approach to be taken in such cases. The Upper Tribunal holds that the Tribunal in this case erred in law by (among other things): (i) confining its consideration of the amount of "day to day care" provided to the question of the number of hours during which each parent is responsible for the child, rather than considering how much practical care is provided by each parent; (ii) failing to make findings of fact in relation to many of the significant elements of care that were in issue between the parties including alleged differences in terms of school pick-ups and drop-offs, holidays, meals and provision of clubs; and (iii) treating additional nights' care as a 'trump card'. Case remitted 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), (b)(i) and (3) 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 in accordance with the guidance set out in this decision.**

2. **The new First-tier Tribunal should not involve the tribunal judge previously involved in considering this appeal.**

3. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or First-tier Tribunal Judge.

REASONS FOR DECISION

Introduction

1. The appellant (LP) appeals against the First-tier Tribunal's decision of 25 October 2023 refusing his appeal against the decision of the Secretary of State of 24 June 2022 relating to his liability to the second respondent (EM) in respect of child maintenance for their child (E) with effect from 22 June 2022.

2. The appeal concerns the First-tier Tribunal's decision that LP "provides day to day care to a lesser extent than" EM for the purposes of regulation 50(2) of the *Child Support Maintenance Calculation Regulations 2012* (SI 2012/2677).

3. The First-tier Tribunal's Statement of Reasons (SoR) is contained in the Decision Notice. Permission to appeal was refused by the First-tier Tribunal in a decision issued on 7 February 2024. I granted permission to appeal in a decision issued on 11 May 2024.

4. The Secretary of State in response to the appeal agrees with LP that the Tribunal in this case erred in law. She therefore supports the appeal. EM resists the appeal, but all parties have consented to a decision being made on the papers without a hearing and (for reasons set out further below) I consider it is appropriate in the circumstances to decide the case on the papers.

5. I am publishing this decision because it contains a review of the case law and guidance as to the approach the First-tier Tribunal needs to take at the remitted hearing that may be of assistance in other such cases.

6. The structure of this decision is as follows:-

The legal framework

7. Section 1 of the Child Support Act 1991 (CSA 1991) provides:

> **1 The duty to maintain.**
> (1) For the purposes of this Act, each parent of a qualifying child is responsible for maintaining him.
> (2) For the purposes of this Act, a non-resident parent shall be taken to have met his responsibility to maintain any qualifying child of his by making periodical payments of maintenance with respect to the child of such amount, and at such intervals, as may be determined in accordance with the provisions of this Act.
> (3) Where a maintenance calculation made under this Act requires the making of periodical payments, it shall be the duty of the non-resident parent with respect to whom the calculation was made to make those payments.

8. Section 1(1) of the CSA 1991 thus confirms the basic principle that a person who is a parent of a child is responsible for maintaining that child. However, by sub-section (2), where a parent falls within the Act's definition of being a "non-resident parent", then he or she is relieved of that general obligation to maintain the child, provided that he or she makes periodical maintenance payments in respect of the child as determined by the Secretary of State (or the First-tier Tribunal on appeal) in accordance with the provisions of the Act.

9. One or both parents may fall within the definition of "non-resident parent" under the Act. By section 3(2) CSA 1991:

> (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.

10. As defined, therefore, a person can only be a "non-resident parent" if parent and child are not living in the same household and the child has "his home" with someone else who is a "person with care". "Person with care" is defined in section 3(3) CSA 1991 as follows:

> (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) who does not fall within a prescribed category of person.

11. Although the reference in section 3(3)(a) to the child having "his home" (singular) with the person could be read as suggesting that only one person may be a "person with care" of a child, section 3(5) makes clear that "there may be more than one person with care in relation to the same qualifying child", so that it follows that the Act envisages that a child may have two homes.

12. Section 4(1) of the CSA 1991 permits either a "person with care" or a "non-resident parent" to apply to the Secretary of State for a maintenance calculation to be made with respect to any qualifying child. Section 4(2) provides for the collection and enforcement of any maintenance payable in accordance with that calculation by the non-resident parent. The Act, and the Regulations made thereunder, include provision for how the maintenance calculation should be carried out. Section 42 of the CSA 1991 permits the Secretary of State to provide by regulations for "special cases" to which the normal rules do not apply.

13. This appeal is concerned with the "special case" for which provision is made in regulation 50 of the *Child Support Maintenance Calculation Regulations 2012* (SI 2012/2677) ("the 2012 Regulations"). Regulation 50 deals with cases where both parents provide "a home" for the child and share care of the child, i.e. where both parents would on the face of statutory definitions set out above be "persons with care" and not "non-resident parents". Regulation 50 is a deeming provision that operates in certain circumstances in such cases to deem one parent to be the "non-resident parent" and thus liable to pay child maintenance when they would otherwise have no such liability under the Act. It provides as follows:

> **50 Parent treated as a non-resident parent in shared care cases**
> (1) Where the circumstances of a case are that—
> (a) an application is made by a person with care under section 4 of the 1991 Act; and
> (b) the person named in that 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 1991 Act.
> (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.
> (4) For the purposes of paragraph (3), where a person has made an election under section 13A(1) of the Social Security Administration Act 1992 (election not to receive child benefit) for payments of child benefit not to be made, that person is to be treated as receiving child benefit.

Relevant case law

14. Regulation 50 has been the subject of attention from the Upper Tribunal in a number of cases. In particular, a number of cases have dealt with the approach to be taken to deciding for the purposes of regulation 50(2) whether a person against whom an application is brought "provides day to day care to a lesser extent than the applicant" so that they fall to be treated as the non-resident parent for the purposes of the Act and Regulations.

15. There is no definition of "day to day care" in the current Act or Regulations. Under previous schemes, the thrust of the equivalent special case provision was that the non-resident parent (or "absent parent" as that previous scheme put it) was the person who had care of the child for the fewest number of nights (see regulations 1(2) and 8 of the *Child Support (Maintenance Calculations and Special Cases) Regulations 2000*, SI 2001/155). One of the definitions of "day to day care" in regulation 1(2) was "care of not less than 104 nights in total during the 12 month period ending with the relevant week".

16. The number of nights' care provided remains relevant under the current regime as the amount of maintenance to be paid by a non-resident parent falls to be decreased by reference to the number of nights for which the non-resident parent is expected to have care for the qualifying child in the relevant 12-month period (see regulations 46 and 47 of the 2012 Regulations). However, case law has established that although overnight care still counts for the purposes of evaluating the amount of "day to day care" a parent provides for the purposes of regulation 50(2), it holds no special status.

17. In *JS v SSWP* [2017] UKUT 296 (AAC), Judge Ward put the point thus at [20]:

> 20. … the expression 'day to day care' in regulation 50 is a phrase in common usage and does not require definition. Whilst I agree that its connotations are of routine care, I am not looking to rephrase the statutory test. It will be a question of fact for the FtT in the light of all the evidence available to it. Such an approach is in my view consistent with *GR* [2011] UKUT 1010 (AAC) and (when allowance is made for the different legislative context) *R(CS)11/02*. In the context of reg 50, overnight care is therefore not a trump card … but is one factor, along with others.

18. Judge Ward went on at [21]-[22] to hold that the First-tier Tribunal had erred in law in that case by focusing on night-time care and, indeed, wrongly applying the calculation provisions in regulations 46 and 47 to the liability question that falls to be determined under regulation 50:

> 21. The FtT did go wrong in law by applying regs 46 and 47 to the reg 50 question and as a result became unduly preoccupied with care provided overnight to the detriment of considering other issues. M does not advance a positive reason why the FtT's approach was correct. I agree with Mr James that there is no logical reason to apply the reg 46 and 47 provisions to reg 50 for two main reasons. First, regs 46 and 47 are stated to exist for a specific purpose – see the opening words to reg 46. Secondly, the form of reg 50 was

> evidently adopted advisedly. Although there was something of a precursor to reg 50 in the form of reg 8 of the 2000 Regulations, significant changes were made to the provision between the two sets of regulations. Under the 2012 Regulations it is possible for the deeming provisions to operate so that neither of the parents is treated as a non-resident parent at all, which was not the case under reg 8 of the 2000 Regulations. More significantly still, reg 8 of the 2000 Regulations fell to be applied specifically by reference to the "104 nights" definition of "day to day care". No such definition (nor indeed any) applies to reg 50. It is evident that the emphasis on nights in the definition for the purposes of reg 8 could lead to a number of difficulties: see e.g. Child Support: the Legislation (12th Edition) at p.18. The omission of such a definition applying to reg 50, particularly in the context of there being problems of application of the previous definition and where other structural changes were made to the provision, must be taken as deliberate.
>
> 22. One particular aspect of wrongly applying regs 46 and 47 was that nights when S was in the care of L are likely to have been wrongly not taken into account for reg 50 purposes. **If F arranged for S to be looked after by L when F was away working, that is time which it would be open to a FtT to take into account as part of day to day care provided by F**. [Emphasis added]

19. That latter point is potentially important in this case. Judge Ward was there holding that a Tribunal may take into account as day to day care provided by a parent the care that they provide by arranging for the child to be looked after by someone else.

20. As to what "day to day care" is, Judge Ward in *JS* (at [20]) and Judge Gray in *CF v SSWP & GG (CSM)* [2018] UKUT 276 (AAC) considered it was still appropriate to look back to what had been said about the meaning of "care" by Judge Jacobs in his decision in *R(CS)11/02* under the previous scheme where the focus was on nights of care. In *CF* at [33]-[34] Judge Gray held (emphasis added):

> 33. An evaluation of the division of child care responsibility has to be on the basis of day to day care. Upper Tribunal Judge Jacobs' decision in *R(CS)11/02* is still the touchstone in explaining this; despite different statutory provisions applying in that case, the matters that it sets out (save for the reference to the need for overnight care for 104 nights which does not apply in the context of the 2012 scheme) establish the principle that **day to day care involves more than the mere counting of days and nights; it involves the exercise of judgment in respect of parenting tasks and**

> **responsibilities**. In my view an evaluation in that context will usually result in a reasoned decision as to which of the parents provides day to day care to a greater extent.
>
> 34. **Where, on analysis, the facts show equal responsibility for day to day care then there is no non-resident parent from whom maintenance may be claimed. In light of the reasoning in R(CS)11/02 that is likely to be an unusual occurrence.**

21. I am uncertain what Judge Gray meant by her observation in her last sentence as it is not apparent to me why it should be an "unusual occurrence" that the facts will show equal responsibility, or that the reasoning in *R(CS)11/02* points in that direction. Many of the cases under regulation 50 (and the present appeal is no exception) are cases where there is evidence that the parents set out to achieve equal division of responsibility for their child(ren). It is unclear to me why in practice therefore that should turn out to be an "unusual" outcome when regulation 50(2) is applied.

22. It is instructive, however, to go back to *R(CS)11/02* itself. In that decision, Judge Jacobs gave the following guidance, which is worth setting out in full given the nature of the appeal in this case:

> 12. There are a number of aspects to caring for a child. There is the carer's mental attitude towards the child, being concerned about the child's health and welfare. Then, there is decision-making about the child. This covers everything from the immediate and mundane (like what time the child should go to bed) to the long-term and important (like education and religion). There is also the provision of the necessities of life, like food, clothing and shelter. Finally, there is responsibility for the child's control and protection.
>
> 13. Aspects of care may be divided between different people: for example, the child may be at school, on a school trip, with a babysitter or staying on a sleepover at a friend's home. In each of these cases, some aspects of care will pass to the teacher, the baby sitter or the friend's parents. The nature and extent of the care provided will vary according to the circumstances. But in all these examples the care involved will be immediate or, in the case of a school trip, short-term.
>
> 14. Aspects of care may be shared by different people. The most obvious example is when the child's parents live together and with the child. In that case, potentially all aspects of care may have to be discussed. In other cases, only the longer-term

aspects of care require agreement: for example, if the child's parents are separated but share parental responsibility.

15. The child may be allowed some freedom of choice in care. The extent to which that is allowed will depend on the child's age and maturity as well as on the attitude of those with control and parental responsibility. But to the extent that the child has freedom of choice, that is always because it has been allowed by someone with that authority.

16. The physical presence of the child is not necessary for the all aspects of care. That is obviously the case as far as the long-term decision making is concerned. It may also be the case for the immediate and mundane aspects of care. For example, a parent may allow a child to go on a sleepover, but stipulate the child's diet. Or the parent may tell a baby sitter what time the child has to be in bed or the television programmes that the child may watch.

17. So there are different aspects to care, which may be divided between or shared by different persons, including the child, and those persons need not in all circumstances be in the child's presence.

18. The issue for me is: what aspects of care are covered by 'day to day care' in the child support scheme?

19. Day to day obviously covers overnight. This is put beyond doubt by the details of the definition in regulation 1(2), which refers to numbers of nights. Inherent in the language and the emphasis on nights is a concentration on the immediate, short-term and mundane aspects of care. That means deciding on the child's activities, diet and bedtime. It also means exercising control over the child's behaviour, protecting the child from harm and providing care in case of illness.

20. This does not mean that the child must be in the parent's presence at all times. Separation is not necessarily incompatible with a parent having day to day care of a child. The significance of the separation depends on its duration and purpose, and on the degree to which the parent continues to exercise control over the child and to be responsible for the child's behaviour and protection. Some separation is almost inevitable during a stay, for example when the parent or child goes to the toilet. The duration and purpose of that separation is always compatible with day to day care. Other separation is not inevitable, but its purpose and its duration in comparison to

the length of the stay are compatible with day to day care. For example, a child may go to spend an evening with a friend while staying with an absent parent. The same is the case if the child is left in someone else's charge while the parent is absent, for example to go shopping.

21. How does this apply to the nights when S was staying with her father's parents or sister?

22. When S was staying with his parents or his sister, the absent parent (a) agreed that she could stay with them rather than with him, (b) accepted financial responsibility for her, (c) was always geographically close by and (d) was the person who would have been called upon if she had been taken ill or had any significant difficulties. The significance of those facts has to be assessed in the context of the law's concern with overnight and immediate care and control. In that context, they are not sufficient to give him her day to day care for those nights.

23. The absent parent's agreement to S staying elsewhere was an aspect of his care of her at the time. It was a decision about what she could do and where she could go for a night or two. She was never far away and he could be called quickly and easily if he was needed. However, for practical purposes during the night it was S's grandparents or aunt who exercised immediate control over her and who had responsibility for immediate control and safety. The nature of the care they exercised, its duration and its purpose were all incompatible with the absent parent having S's day to day care while she stayed elsewhere. The reality was not that S was in his care. It was that she was spending time that she could have spent in his care in the care of other relatives instead.

24. I have not overlooked the fact that day to day care is not exclusively concerned with absent parents. The definition of 'person with care' requires that the person must usually provide day to day care for the child. See section 3(3)(b) of the Child Support Act 1991. Nothing in my reasoning is incompatible with that other context. 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.

25. This is not to say that day to day care is solely concerned with cost. It is undoubtedly correct that the assumption of financial responsibility that usually accompanies day to day care is the rationale behind the allowance for shared care in

> the child support maintenance formula. However, financial responsibility and care, though they may be connected, are not the same thing. Indeed, short-term overnight care may involve only minimal cost, or even no cost at all. So, the fact that the absent parent may have retained financial responsibility for S while she was staying elsewhere was not of itself sufficient for him to have her day to day care for that time.

23. It will be noted that, in that decision on the previous scheme, Judge Jacobs at [22] considered that a parent was not providing "day to day care" overnight just by deciding where the child would stay, remaining geographically close, being the person who would be called on in the event of significant difficulty, or being the person with financial responsibility. Although it is clear (especially from [16], [17], [20] and [25]) that Judge Jacobs considered that all of these factors can in principle constitute "care", in his judgment they were not capable in law of constituting "day to day care" within the meaning of that previous scheme, given what he termed "the law's concern with overnight and immediate care and control".

24. This distinction between mere "care" and "day to day care" was emphasised by Judge Wikeley in his decision in *CCS/1875/10* at [48]:

> "…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."

25. However, it will be noted that there is tension between Judge Jacobs' decision in *R(CS)11/02* and the decision of Judge Ward decision in *JS*. What Judge Ward said in *JS* at [22] about it being open to a Tribunal to count as "day to day care" by one parent time when they have arranged for the child to be cared for by someone else is on its face inconsistent with Judge Jacobs' earlier decision, (although it is evident from [20] of *JS* that Judge Ward regarded his decision as being consistent with Judge Jacobs').

26. Judge Jacobs returned to the topic in *MR v SSWP* [2018] UKUT 340 (AAC), in which (without addressing the point of apparent inconsistency I have identified above), he approved Judge Ward's decision in *JS* as follows:-

> *Day to day care*
> 16. The tribunal directed itself correctly by following Judge Ward's decision in *JS*. I agree with that decision. The judge was right that the tribunal has to apply the language of day to day care and not substitute some other phrase by way of definition. It is, though, necessary to analyse what it involves in order to make findings of fact on matters that are relevant.
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> 17. The father has spoken of his involvement in his children's lives and the money he pays for them. Those points are not directly relevant. The test is about providing care. It is not about love, affection and devotion. No one is doubting his feelings for his children. It is just that they are not relevant under regulation 50. What matters is the practical care that is provided. Nor is the test just about finances. Of course money is important and some aspects of care involve money. But not all care costs money and care that comes for free is care nonetheless. Bandaging a knee, responding to a cry in the night, or providing comfort for the loss of a pet, these are all part of day to day care and no less a part because they come without charge and at no cost.
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> 18. The father has tried to counterbalance the additional nights that the children spend with their mother by emphasising his contributions. The time that a child spends with a parent is important, but not just for itself. The longer a parent spends with their child, the greater the chances to provide care. That is why overnight care is relevant – because protecting children and responding to their needs at night is part of day to day care - and why it is not decisive – because the night is only part of the time.
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> 19. Details can be significant, but it is important not to lose sight of the pattern, which is what the tribunal has to find. Fluctuations may cancel themselves out: here the father accepted that the week-long holidays with each parent 'would largely balance themselves out'. And a child's specific needs may vary from time to time: it may be pure chance whether the child is with their father or mother when they fall and need to go to the hospital.
>
> 20. The tribunal had to look for a pattern or distribution of care by taking account of the evidence as a whole, including all the details that the parents provided. These are easy words for the Upper Tribunal to write, but they are not so straightforward for the First-tier Tribunal to apply and explain. There is no formula that a tribunal can apply

> to take account of all the different aspects of care. Suppose the father pays for his children to attend an after school club, their mother picks them up, unless she is working, when her parents stand in for her. How is the care involved to be allocated? And how does any of that compare with making sure that the children go to bed at a sensible time and don't eat too much junk food? Unless the facts make the decision clear cut, it must involve a broad and impressionistic evaluation.

27. It seems to me, from that last paragraph of Judge Jacobs' decision in *MR,* that he must be taken to be in agreement with Judge Ward that, under the current regime in the CSM Regulations 2012, it is open to a Tribunal to take into account as day to day care all of the elements of care that he had identified in *R(CS)11/02*, without the distinction that he made in that earlier decision under the previous regime between "care" and "day to day care". What Judge Jacobs' says in *MR*, however, (as I read it) is that it is up to the Tribunal to 'weigh' the various ways in which care may be provided, with the implication being that, for example, an hour in which a parent personally looks after a child will normally count as providing more day to day care than an hour in which a parent arranges for a child to be looked after by someone else, but the hour during which the parent arranges for a child to be looked after by someone else can still count and falls to be given some weight by the Tribunal.

28. In *DW v SSWP and JH (CSM)* [2023] UKUT 19 (AAC) Judge Sutherland Williams referred to *R(CS)11/02*, *JS, CF* and *MR* and upheld a Tribunal's decision where, in Judge Sutherland Williams' judgment, the Tribunal had carried out the complicated weighing exercise envisaged by Judge Jacobs' in *MR* in a way that disclosed no error of law. The approach that the Tribunal took in that case seems to me potentially to provide a model for how Tribunals might lawfully approach the difficult exercise required by regulation 50(2) as it has become established in *CS, CF* and *MR*. *DW* was a case in which the Tribunal had accepted that the child stayed with each parent for an equal number of nights (see [33]) and the Tribunal's task was to assess the extent to which day to day care was provided at other times. As the Upper Tribunal describes it, the Tribunal took the approach of "[sub-dividing] the evidence into broad areas of routine practical and personal care … [including] time spent with each parent; healthcare; recreational activities; clothing and belongings; and schooling" ([34]). The Tribunal appears to have taken what might be termed a 'balance sheet approach' of deciding in respect of each area how much care mother or father provided. Judge Sutherland Williams emphasised that the evaluative assessment is a matter of fact for the Tribunal, but observed at [36]-[40]:

> 36. The above approach assisted the judge with the overarching concept of care, which carries with it not simply the act, but the preparation, the planning, the responsibility, and the facilitation of activities which not only go to the child's general well-being, but also to her day to day care. …
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> 39. In conducting the above exercise, it would not in my judgement be right to ignore the small elements of day to day care that, when taken together, can involve further additional time and involvement, which in turn can contribute towards the broad and impressionistic evaluation the judge is conducting.
>
> 40. The parents brought to the tribunal a range of evidence, over 200 pages, from text messages to dental appointments, which they sought to rely upon to demonstrate either equal day to day care or lesser/greater care. The judge was required to consider that evidence. Had she not, the alternative ground open on appeal would have been that she failed to consider all the evidence before her.
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> 41. In granting permission, Judge Jacobs asks whether the differences identified by the judge are matters relating to care. In my view they were. There is no set formula that a tribunal can apply to take account of what all the distinct aspects of care will be (see para 20, MR). Considerations may include, but are not limited to, a responsibility for the wellbeing of the child and a responsibility for routine everyday things, like making sure the child is healthy and safe, that they get to appointments, school or social events, and that they are clothed and fed. Such activities may also include care that is provided on one or more specified days or parts of days in any given period, subject to the findings of the tribunal. The factors the judge took into account in the instant appeal all touch upon these things.

29. Judge Sutherland Williams went on at [44] to reject the appellant's submission that the Tribunal erred in law by seeking to find "an hour here or there" or "identify tiny or minor elements of care" or "assign micro time allocations". He considered that to be a misreading of the decision. (I note here that the implication of Judge Sutherland Williams' judgment at this point is that it would have been an error of law if the Tribunal had attempted to "assign micro time allocations". This is a point that is potentially also of relevance to the present case.)

30. Judge Sutherland Williams went on to make two further points: first, that regulation 50(2) does not require an assessment of whether one parent or the other has a greater or lesser *opportunity* to provide care, it is a question of what care is actually provided: see [46]; and, secondly, that a parent's motive in

participating in the care for their child is not directly relevant to the regulation 50(2) assessment, but "may become tangentially or otherwise relevant if it goes to the question of whether a party has lesser or greater day to day care or to the question of credibility" ([54]).

31. That latter issue about motivation is also dealt with by Judge Church in *DB v SSWP and SB (CSM)* [2023] UKUT 70 (AAC), albeit without reference to Judge Sutherland William's decision. Judge Church in *DB* cites only Judge Wikeley's decision in *CCS/1875/10* with its emphasis on the "immediate, short-term and mundane aspects of care" and goes on to make the point that what is relevant under regulation 50(2) is the amount of day to day care provided, and not the amount of love or attention that a parent demonstrates towards their child. Judge Church put it as follows at [17]-[19]:

> 17. As a decision of the Upper Tribunal [*CCS/1875/10*] 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.

32. Finally, I need to mention that the authorities have also considered regulation 50(3), which deals specifically with the relevance of receipt of child benefit to the

application of regulation 50. It provides that: "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". In *CF*, Judge Gray explained that regulation 50(3) will not have any material role to play in most cases. Judge Gray at [26] specifically rejected the submission that it operates as a "tie-break" provision so that, where there is evidence of some day-to-day care being provided by both parents, the parent in receipt of child benefit should 'win'. She held at [27]:

> Weight can be given to the receipt of child benefit only in the absence of evidence to rebut the presumption that the applicant is providing greater day to day care to a greater extent than any other person. If there is any evidence as to a division of care it must be assessed. If, on assessment it is found that either the day to day care is provided equally, or the non-applicant parent provides greater day to day care in fact, there is no need to apply the provision because regulation 50(2) is sufficient to prevent the non-applicant parent from being treated as a non-resident parent. Where, on assessment, the care provided by the applicant is found as a fact to be greater, the receipt of child benefit is irrelevant.

How I resolve the element of conflict in the previous case law

33. While there is no doubt that the legal position as arrived at in *JS*, *CF, MR* and *DW* requires the Tribunal to carry out a much more complicated legal exercise than would have been the case if Judge Jacobs' distinction in *R(CS)11/02* between "day to day care" and mere "care" had been maintained, I do not consider that it would be appropriate for me in this case to depart from the approach taken by Judges Ward, Gray, Jacobs and Sutherland Williams in those four cases. Although the decisions of Judge Wikeley in *CCS/1875/10* and Judge Church in *DB* take an approach that is more in line with that of Judge Jacobs in *R(CS)11/02,* Judge Wikeley's decision pre-dates *JS, CF, MR* and *DW* and Judge Church's decision does not refer to that line of four consistent cases and is decided on a short point which is, so far as it goes, consistent with Judge Sutherland Williams' observations in *DW*. Insofar as there is a direct conflict between Judge Jacobs' approach in *R(CS)11/02* and the approach in *JS, MR* and *DW*, it seems to me that it is also appropriate for me to follow the more recent cases given that they concern the current scheme rather than the previous one (albeit that it is difficult to see why as a matter of principle Judge Jacobs' distinction could not have applied under the current scheme too).

34. I add that it seems to me that the legal position arrived at in the more recent jurisprudence also has two significant benefits to commend it:

    a. It better reflects the reality that care of a child does not normally stop at the point that the child is left with a childminder, dropped at an after-school club or left to spend the night with a grandparent. The arrangements made for care are themselves part of day to day care, requiring effort and sometimes money, and the parent will normally remain 'on call' during those times and, in the case of a child with additional needs, may in fact be called on with some frequency.

    b. It enables financial commitment to be taken into account (up to a point) because a parent who pays for care to be provided by others is maintaining their child during that period. It is appropriate given that the legislative scheme deals with responsibility for the financial maintenance of children (and not responsibility for the care of children) that the law should not ignore financial responsibilities for a child that each parent has assumed. However, in making that observation, I emphasise (consistent with all the Upper Tribunal decisions I have referred to) that it does not follow that the *amounts* of money spent by a parent on a child are relevant to the regulation 50(2) assessment. They are not. All that is relevant is the amount of care that is provided, but in assessing that the Tribunal must take into account that the making of arrangements for care to be provided (whether paid for or not) is part of day to day care. The weight to be given to such periods of care is, however, a matter for the Tribunal to assess in each case. They are unlikely to weigh as heavily in the balance as periods during which care is provided personally by the parent.

35. I make one further observation: the phrase "day to day care" appears both in the previous regime and in the current regulations without hyphenation. The phrase "day to day care" without hyphens might strictly be interpreted as referring to the provision of care from day to day, i.e. from one day to the next. It does not in ordinary English have quite the same meaning as the hyphenated "day-to-day care", where "day-to-day" carries the unambiguous ordinary meaning of being mundane, regular, everyday, routine. The case law I have reviewed above has not made anything of this potential distinction, treating the meaning of "day to day care" as being effectively synonymous with "day-to-day care". I see no reason to depart from this established approach.

The approach to be taken to regulation 50(2)

36. In the light of the authorities and my conclusions above, therefore, the approach to be taken by a Tribunal to shared care cases under regulation 50 may be summarised as follows:-

    a. The starting point is that the parent not in receipt of child benefit is deemed by regulation 50(3) to be providing day-to-day care to a lesser extent and thus deemed to be the non-resident parent by virtue of regulation 50(2). However, if there is any evidence put forward to rebut that assumption, then (*per* Judge Gray in *CF*) the whole of the evidence must be assessed and findings of fact made about the amount of day to day actually provided by each parent. Regulation 50(3) is not a 'tie-break' provision.

    b. What constitutes "day to day care" for a child requires a focus on the provision of practical care.

    c. Merely being responsible for a child for a period is not the same thing as providing care (although there may be an overlap).

    d. Nor is it sufficient that the parent has the opportunity to provide care, what matters is what care is actually provided.

    e. Deciding what amount of "day to day care" each parent provides is not a matter of counting up the hours for which each parent has responsibility for a child, although counting up the hours may provide the answer in cases where the number of hours is significantly different.

    f. The bestowing of love and affection, or the spending of money, on a child is not the same thing as providing "day to day care".

    g. However, a parent does not have to be with the child in order to be providing "day to day care"; a parent can provide "day to day care" by arranging for others to provide it, whether in return for payment or not.

    h. Nights are not more important than days and days are not more important than nights.

    i. Some periods of time for which a parent is responsible for a child may involve the provision of more "day to day care" than others. For example,

a parent in sole charge of a toddler is likely to be providing a lot of care, while periods where a child (particularly an older child) is asleep or sitting in front of the television or is at school, may involve the provision of very little by way of care by the parent. Likewise, where a parent arranges for someone else to provide care (whether a childminder or by attendance at an after-school club), the care provided by the parent is the making of the arrangements for that, together with any care provided during that period as a result of the parent being 'on call' for the child. All these periods of time may constitute periods during which a parent is providing "day to day care" for the purposes of the Regulations, but it will be a matter for the Tribunal to assess how much day to day care is actually provided in each period of time.

j. The Tribunal may find it helpful to adopt a balance sheet approach by considering a list of elements, such as: time spent by the child with each parent; arrangements for, or provision of, health or personal care; provision of recreational activities; provision of clothing and belongings; provision of food; arrangements for schooling. However, not all elements will be relevant in all cases and the Tribunal will not err in law if it takes a different approach to the exercise.

k. In relation to each relevant element, the Tribunal will need to make findings of fact about what each parent does for or with the child, applying the usual balance of probabilities standard. The Tribunal will need in its findings of fact to identify how much "day to day care" is actually provided by each parent as part of the things that they do for the child or the time they spend with the child.

l. How precise the Tribunal is able to be will depend on the facts of the case, but given that the statutory test focuses only on whether one parent provides day to day care "to a lesser extent" than the other, the Tribunal can reasonably limit its conclusions in relation to any particular element of care to a finding that one parent does "more" or "less" than the other, providing that the Tribunal makes findings where appropriate as to the extent of the difference between the two parents. The Tribunal must not treat minor differences in the amount of care provided in the same way as it treats major differences when it comes to making an overall evaluation of the 'balance sheet'.

m. In some cases, the Tribunal may feel the task of comparing how much care each parent is providing in different ways and in different situations is like trying to compare the proverbial 'apples and pears'. In such cases, the Tribunal must not strain to reach a conclusion that one parent is providing less day to day care than the other unless there is a reasonable basis for doing so. The assessment must be realistic, not artificial and it must be evidence-based and not driven (as was the case in *DB*) by value-driven perception as to who 'cares' more.

n. The legislative default under the CSA 1991 and regulation 50 is that both parents are responsible for the maintenance of their child and, where a child has homes with both parents, neither of them is required to pay child maintenance to the other. It is only if it is established on the evidence, on the balance of probabilities, that one parent is providing day to day care to a lesser extent that regulation 50 deems that parent to be the non-resident parent. This is not a matter of burden of proof because this is an inquisitorial jurisdiction in which the burden is neutral, it is simply the effect of the statutory provision. What it means is that, if the Tribunal finds itself in a situation where it is not able properly to conclude on the balance of probabilities that one parent is providing care to a lesser extent, it must dismiss the application.

o. That said, Tribunals should also not be too eager to resort to the legislative default of dismissing the application. Any conclusion the Tribunal reaches must be properly founded in the facts and adequately reasoned. It should also be remembered that, whereas an application that fails will result in the putative non-resident parent not incurring any liability for child maintenance, if the application succeeds, and liability is established, application of regulations 46 and 47 will mean that (in rough and ready terms) liability will be proportionate to the amount of care actually being provided by each parent.

p. Having set the principles out in this way, the exercise required of the Tribunal may sound as if it will require long, difficult hearings, lots of evidence and a lengthy decision, but that should not be the case. I appreciate that these are often cases in which feelings run high and the parties are tempted to resort to minutiae in their efforts to demonstrate who provides the most care. However, the Tribunal must use its case management powers, in accordance with the overriding objective, to limit

the evidence it hears and the facts it needs to decide to the points of substance. I emphasise that the overriding objective in rule 2 includes dealing with cases "in ways which are proportionate to the importance of the case" and "the complexity of the issues". Regulation 50 cases are not (normally) cases involving complex issues as the principles I have set out above attempt to make clear: they are (or should be) purely fact-finding exercises in relation to which the Tribunal is required only to make broad, sometimes impressionistic, "more" or "less"-type judgments.

q. Finally, as the assessment of the amount of care that each parent provides is a question of fact (for the Secretary of State in the first instance and the First-tier Tribunal on appeal), the Upper Tribunal will not interfere with the First-tier Tribunal's conclusion provided the Tribunal has taken account of all material relevant factors, left out of account irrelevant factors, reached a conclusion that is not perverse, and given adequate reasons for its conclusions.

LP's and EM's evidence in this case

37. EM was the applicant to the Secretary of State in this case. LP and EM both appeared before the Tribunal in person. They also set their positions out in writing in advance of the Tribunal and their positions have not changed significantly on this appeal. In her submissions in response to the appeal, EM has explained the history of her relationship with LP from her perspective, insofar as it concerns their child (E) and maintenance. She explains that E is with her on Saturdays (from 3pm), Sundays, Mondays, Tuesdays and she drops the child at LP's mother's house on a Wednesday morning on her way to work. During the week E is at school (she is currently in Reception). EM says she provides eight or nine of E's meals each week while LP provides eight and E otherwise eats at school. She maintains that they pay 50/50 for E's extracurricular clubs. She submits that the number of nights E spends in her care, and the overall time that she spends in her care, is greater than the time she spends in LP's care. She accepts that LP spends more money on E, but submits that is because he is financially better off.

38. LP's position is that he and EM set out to achieve practical equality in terms of the care they provide for E, although as a result of their respective work commitments and E's own needs that did not result in a completely equal division in terms of hours or nights. He submits that he provides 80 hours of care per week for E (which is, he says, 80% of the week's care), including three days of school drop-offs and pick-ups (60% of the week's school runs). He submits that

the remaining 40% of school runs are not provided directly by EM but by her partner/family. He says he has E "1 majority weekend day" (50% of the weekend days), that he provides 11 meals per week (52% of the meals), 50 hours of day-time care (51% of the day-time care based on her average consistent waking hours of 6am to 8pm), 66% of extra-curricular clubs, pays for three pre-school breakfast clubs per week, and takes her on more holidays.

The First-tier Tribunal's decision

39. The Tribunal's reasons in this case were set out in the Decision Notice. They are brief. At [4] the Tribunal stated:

> I find that the care given by both parents is excellent and that the division of day to day care is almost evenly balanced but I find that [EM] does provide more day to day care for their daughter.

40. The Tribunal referred to Judge Ward's decision in *JS* and Judge Jacobs' decision in *MR*. The Tribunal indicated (at [6]) that it considered the present case was factually "almost the same" as *MR*.

41. The Tribunal set out its findings of fact and conclusions at [10]-[13] as follows:-

> 10. … I find that there is equal love and affection and that both parties provide financially for their daughter when she is in their care. If there is a financial disparity between the contributions made by [LP] or [EM], I do not find that difference has much weight on the question of day to day care.
>
> 11. It is agreed by [LP] and [EM] that their daughter spends 4 nights per week with [EM] and 3 nights per week with [LP]. That was the pattern at the effective date when their daughter was in Pre-school and continues during her current primary school during term time. [LP] takes his daughter away on holidays; he states that his daughter stays with him for 180 nights per year and 188 nights with [EM]; [EM] has care of her daughter for 88 hours per week and he does that for 80 hours per week. Taking into account all the evidence I find that [EM] did have more day-to-day care. As confirmed in *MR*, the care given during those extra nights must be considered.
>
> 12. The Law states that receipt of Child Benefit is decisive where all other matters are equal; I understand fully why for tax reasons [LP] did not apply for Child Benefit but I do not need to consider that aspect as I find that although finely balanced, day to day care was not equal as at 22-06-22.

> 13. I do follow the cases set out above. The extra night per week (or even 8 nights more per year) have persuaded me that [EM] does have more day to day care of their daughter and so [LP] is the non-resident and paying parent."

The proceedings in the Upper Tribunal

42. In his grounds of appeal to the Upper Tribunal, LP set out his position on the facts as I have summarised above and argued, in effect, that there should be a "de minimis" principle applied under regulation 50 so that where the parties are providing essentially equal care, there should be no maintenance liability.

43. In granting permission to appeal, I observed as follows:-

> 10. In my judgment it is arguable that the First-tier Tribunal has erred in law by, as appears from [13] of the SoR, regarding an extra eight nights' care per year as determinative, rather than carrying out, as required by [20] of *MR v SSWP and LM* [2018] UKUT 340 (AAC) a "broad and impressionistic evaluation".
>
> 11. It is also arguable that the First-tier Tribunal has misunderstood the decision in *MR* as being authority for the proposition that responsibility for a child during a greater number of nights means that a parent is providing more "day-to-day care". However, *MR* is not, as I read it at this permission stage, authority for that proposition. That just happened to be the facts of that particular case. Further, Judge Ward in *JS v Secretary of State for Work and Pensions and anor* [2017] UKUT 296 (AAC) made clear that overnight care was *"not a trump card … but … one factor, along with others"*.
>
> 12. What Judge Jacobs said about overnight care in *MR* at [18] was:
>
> > "The time that a child spends with their child is important, but not just for itself. The longer a parent spends with their child, the greater **the chances to provide care**. That is **why overnight care is relevant – because protecting children and responding to their needs at night is part of day-to-day care – and why it is not decisive** – because the night is only part of the time."
>
> 13. It is arguable that what Judge Jacobs meant in that paragraph is merely that it must not be forgotten that opportunities to provide care arise at night as well as during the day. It is a matter for the Tribunal to assess, on a broad and impressionistic basis, what day-to-day care is in fact provided by both parents. Although the carrying out of

> a "broad and impressionistic evaluation" cannot arguably require a Tribunal to go into the level of detail that the appellant has gone into in his notice of appeal, it nonetheless seems to me to be arguable that the evaluation a Tribunal is required to make by regulation 50 is also not merely a 'numbers game' as this Tribunal has treated it.
>
> 14. Much less care may be required for a child at night than during the day; on the other hand, little if any is required while a child is at school. In other words, not all hours of responsibility for a child necessarily involve equal amounts of provision of care. It is arguable that, in line with *MR*, the Tribunal needs when carrying out a "broad and impressionist evaluation" to take into account not just the number of hours, but also, in the most general of ways, the amount of care that is provided during those hours, either by the parent themself or by arrangement with a childminder, club or other service provider.
>
> 15. I also consider it arguable that the appellant is right that it may constitute an error of law for a Tribunal to strive too hard to find that one parent provides less or more care than the other when, if a truly broad and impressionist approach were taken, the only rational conclusion would be that care is equal. If that is arguably an error of law, then it is arguable on the facts of this finely balanced case that the Tribunal has fallen into that error.
>
> 16. However, I stress that all these points are merely arguable. The parties' further submissions are invited and I indicate here that this may be a case in which an oral final hearing will be appropriate.

44. The Secretary of State in response to the appeal agreed that the First-tier Tribunal had erred in law for essentially the reasons I identified in the grant of permission. The Secretary of State emphasised that the First-tier Tribunal did not appear to have considered all the relevant evidence, or to have made the necessary findings of fact, and submitted that the Tribunal had erred by treating overnight care as a 'trump' card.

45. EM in her response resisted the appeal in strong terms. She is understandably distressed by the length of time these proceedings have taken and by what she perceives as LP's perfidy in resisting her application for child maintenance. She set out at length why, as a matter of fact, she submits the First-tier Tribunal was correct to find that she provides care to a greater extent than LP. She did not, however, in her submissions take the opportunity to address (even in lay terms)

the potential legal error that I identified as being arguable when granting permission to appeal.

46. LP in his reply welcomed the Secretary of State's support for his appeal and made clear that he did not accept much of what EM had said in her response, although he indicated that as he understood the Upper Tribunal would not be dealing with the facts of the case, he would not reply in detail to the factual allegations she had made.

Why this case has been decided without an oral hearing

47. Having read the parties' submissions, and reflected further on the law as set out above, I have considered carefully whether there is a need to hold an oral hearing in this case, or to revert to the parties for further submissions in relation to the principles applicable to regulation 50 cases. I have decided that there is no need to delay resolution of this case further by doing so. It is apparent from both the Secretary of State's and LP's submissions that they consider that *JS* and *MR* properly reflect the law that the Tribunal must apply and the guidance I have set out above in turn reflects the law as it was held to be in those cases, albeit that I have endeavoured to set it out in a way that I hope will be of practical assistance to Tribunals dealing with these cases in future.

The errors of law in the Tribunal's decision

48. In the light of the law as I have set it out above, it can readily be seen that the Tribunal in this case has erred in law by:-

    a. Confining its consideration of the amount of day to day care provided to the question of the number of hours during which each parent is responsible for E, rather than considering how much practical care is provided by each parent;

    b. Failing to make findings of fact in relation to many of the significant elements of care that were in issue between the parties including alleged differences in terms of school pick-ups and drop-offs, holidays, meals and provision of clubs;

    c. Treating additional nights' care as a 'trump card'; and,

    d. Relying on figures for nights that do not make sense, since it is not explained how an extra night per week with EM can result in only an

additional 8 nights' care per year, while the figures of 180 nights with LP and 188 nights with EM cannot be right as there are not 368 nights in a year.

Conclusion

49. I therefore conclude that the decision of the First-tier Tribunal involves errors of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal applying the law as set out in this decision and subject to the directions above.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 24 September 2024