IN THE UPPER TRIBUNAL **Appeal No: CCS/605/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal disallows the appeal of the appellant.

The decision of the First-tier Tribunal made in Leeds on 14 December 2016 under reference SC007/16/00004 did not involve any error on a material point of law. That decision therefore remains in place.

This decision is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007

REASONS FOR DECISION

1. This appeal is brought by the father who, in child support language, is the "non-resident parent" of the child concerned and was the appellant in the appeal below. I will refer to him simply as "the father". The first respondent is the Secretary of State, and I shall refer to her as that. The second respondent here and in the appeal below was the mother. In child support language she is the "parent with care" of the child. I will refer to her simply as "the mother".

2. The factual issue at the heart of his appeal concerns shared care. The legal issue is how regulation 46 of the Child Support Maintenance Calculations Regulations 2012 operates. That regulation provides as follows:

> "46.—(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.
>
> (3) The Secretary of State may have regard to a period of less than 12 months where the Secretary of State considers a shorter period is appropriate (for example where the parties have an agreement in relation to a shorter period) and, if the Secretary of State does so, paragraphs 7(3) and 8(2) of Schedule 1 to the 1991 Act are to have effect as if—
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> (a)the period mentioned there were that shorter period; and
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> (b)the number of nights mentioned in the Table in paragraph 7(4), or in paragraph 8(2), of that Schedule were reduced proportionately.
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> (4) When making a determination under paragraphs (1) to (3) the Secretary of State must consider—
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> (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 is not in play in this case.)

3. It is noteworthy that this regulation differs in one significant respect from regulations under earlier child support schemes dealing with assessing the incidence of shared care. The difference is that pursuant to regulation 46(2) the assessment looks <u>forward</u> for 12 months from the effective date. What has to be determined is the number of nights

for which the non-resident parent *is expected* to have care of the child overnight during that 12 month period. It is thus an exercise in predictive assessment of the likely incidence of overnight care by the non-resident parent in the 12 month period from the effective date.

4. This does not offend, or sit oddly with, section 20(7)(b) of the Child Support Act 1991 and its injunction that in deciding an appeal the First-tier Tribunal shall not take into account any circumstances not obtaining at the date of the decision under appeal. The reason for this is that regulation 46(2) does not require the First-tier Tribunal (or the Secretary of State making his decision) to take account of what in fact happened in terms of overnight care with the non-resident parent after the date of the decision under appeal. The focus of regulation 46(2) is on what is expected to be the case, not what is in fact or has come to be seen in fact to be the case in terms of overnight care.

5. There was therefore no error of law on the part of the First-tier Tribunal, as the Secretary of State seemingly seeks to argue, in taking account of the parents' views and evidence as to what the incidence of overnight care with the father was expected to be for the 12 month period from the effective date in this case. The tribunal was doing what regulation 46(2) required it to do.

6. In this case the application for child support maintenance was made by the mother to the Child Maintenance Service (i.e. the Secretary of State) on 17 August 2015. For reasons that are neither in issue nor are material, that gave an effective date of 23 August 2015. (A reference in the papers to the effective date being 10 June 2015 was wrong and plainly in error. The effective date cannot arise on a date before an application for child support maintenance is first made. See regulations 11 and 12 of the Child Support Maintenance Calculations Regulations 2012.) The decision under appeal to the tribunal was made on 11 September 2015. Accordingly, adopting the language of regulation 46(2), the task of the decision maker, and then on appeal the First-tier

Tribunal, was to determine as at 11 September 2015 what the number of nights were for which the father was expected to have the care of his son overnight during the 12 month period from 23 August 2015 to 22 August 2016. In so doing, as I have said, the tribunal was entitled to take into account, indeed it would have erred in law had it not taken it into account, what both the father and mother provided as evidence of what they expected their son's overnight stays would be with his father in the 12 month period from the effective date.

7. The decision maker and the First-tier Tribunal is not left just looking forward however. Regulation 46(4) provides that in determining the number of nights for which the non-resident parent is expected to have the care of the child during the 12 months beginning with the effective date, consideration must be given to the terms of any contact agreement or court order in respect of the non-resident parent and the child or, if there is no such agreement or order, whether a pattern of shared care has already been established over the past 12 months or such other period as is considered appropriate.

8. Three observations are warranted about regulation 46(4).

9. First, there is no requirement to adopt what is set out in the agreement or order, or any shared care pattern that may have occurred in the past 12 months, as the number of nights of overnight care the non-resident is expected to have of his or her child in the 12 months from the effective date. All that is required is that consideration be given to any such order or past pattern of shared. However, if an order has provided for a pattern of overnight care by the non-resident parent, or such pattern is shown by the past 12 months, there would need to be some proper basis for concluding that such an arrangement would not be expected to reoccur in the 12 months from the effective date. (For example, in the case of a court order, evidence that in fact it had not been adhered to and the actual pattern of shared care had in fact been different. Or in the case of a past 12 month pattern of shared care,

evidence of a change of circumstance that indicated it was not expected to remain in place.)

10. Second, although this is not entirely clear, given the reference at the start of regulation 46(4) to the time of making the 'shared-care' decision, it would seem that the "past 12 months" in sub-paragraph (b) is to the 12 month period immediately *before* the date of the Secretary of State's maintenance calculation decision.

11. Third, the factors that must be considered under regulation 46(4) are still nonetheless meant to assist in answering the regulation 46(2) (and regulation 46(3)) "expected" issue.

12. None of this in fact is of importance or disputed by the appellant father in his appeal to the Upper Tribunal; though the above analysis is necessary to understand whether the tribunal erred materially in law in the decision to which it came. This is because the father's argument is that the tribunal was wrong not to apply regulation 46(3). His case was and remains that the tribunal ought to have applied regulation 46(3) so as to split the shared care arrangements into one period of four months and one period of eight months.

13. The tribunal's Decision Notice explains this issue clearly. The relevant parts of it read as follows:

> "There was no real issue between the parties as to the number of [the child's] overnight stays with [the father] during the 12 month period.....
>
> The central issue is the length of the period to be taken into account for the purposes of Regulation 46.....Should it be a 12 month period or a period of less than 12 months as provided for in Regulation 46.
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> [I have] to decide whether I take the 4 month period or a full 12 months as demonstrated at page 179.
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> Both parties accept that during a course of a 12 month period there is an element of fluctuation.

> In my judgment the Regulations, whilst being a blunt instrument, were designed to iron out such fluctuations and whilst I recognise that that taking a 12 month period is more disadvantageous to [the father] then taking the 4 month period *which would be disadvantageous to [the mother]*, on balance I prefer the 12 month period for the purpose of calculating overnight care as this levels out the peaks and troughs *and produces a result which is fair and equitable to <u>both</u> parties in the spirit of the regulations*" (the words in italics are additional words which were used by the First-tier Tribunal in its statement of reasons).

14. The basis on which the First-tier Tribunal gave the father permission to appeal against this decision was the father's grounds of appeal. Stripped to their essential these argued that "the pattern on which I had custody of [the child] over a consecutive 4 month period was very different from the balance of the year and that the 4 month period should be considered in isolation" with the 'shared-care' rules then applying to the 4 month period and then the 8 month period separately. "thereby ironing out the peaks and troughs in each of these periods". The father argued that averaging over a 12 month period did not achieve "a fair and equitable result" because the far greater time he had the child with him during the four month period was watered down when it was added into the 8 month period. On his own case as made to the First-tier Tribunal, the father argued that he would have had no liability to pay child support maintenance during the 4 month period.

15. It is perhaps worth noting that the application for child support maintenance was made in August 2015, though the mother and father had separated in 2010. Even though it may not have been correct that the mother and father had agreed the level of shared care, outwith the 4 month period on which the father sought to rely (from July to October 2015), it appears from his own case that the father did agree with the mother that he had, and had had, care of the child every Thursday and Friday night and each alternate Saturday night (see, for example, his letter of 19 April 2016).

16. It is also worth noting that the mother stated in her appeal to the First-tier Tribunal, and continues to state on the father's appeal to the Upper

Tribunal, that the above 4 month period from July to October 2015 was a one-off (she described it to the First-tier Tribunal) as "an isolated case" as her work pattern was not consistent and varied from year to year. She sought to emphasise the last point by submitting evidence of her overseas work pattern for July to October 2016, which she said differed from the previous year, and which would therefore affect differently her ability to have overnight care of the child in that 2016 period compared to 2015. On this basis she argued that 12 months was an appropriate period for assessing the overnight care she had with her son and the father had with him.

17. I have set out these excerpts from the evidence of both parents not because it is for me to assess the accuracy or consequence of that evidence but just to give a sense of the evidence on which the First-tier Tribunal had to make its decision.

18. I agree with the Secretary of State's representative that the First-tier Tribunal was entitled to come to the decision which it did about the 12 month period and not apply a 4 month and then a 8 month period. Two considerations are here relevant.

19. First, the choice of period is not one at large, in the sense that any period may be chosen. The starting point is as set out in regulation 46(2) (I will come back to the "expected" element) that "the determination is to be based on the number of nights…..during the 12 months beginning with the expected date" (my underlining added for emphasis). Accordingly, the starting point is a 12 month period. It is true that this is subject to regulation 46(3), which allows the Secretary of State (and on appeal the First-tier Tribunal) to choose a period of less than 12 months where the Secretary of State (or First-tier Tribunal) considers a shorter period is appropriate, but this is an exception to the 12 month rule found in regulation 46(2). And no period of more than 12 months may be used

20. Second, and perhaps of most significance for the purposes of this appeal, the use of the word "appropriate" vests a broad discretion in the Secretary of State or First-tier Tribunal in deciding whether a period of less than 12 months should be applied. In such circumstances, and bearing in mind the error of law jurisdiction of the Upper Tribunal, showing that a decision of a First-tier Tribunal not to choose a shorter period than the period of 12 months was wrong as a matter of law will involve showing either that the First-tier Tribunal failed to take into account all the relevant circumstances or the interests of all the parties (see *CCS/1892/2018*) or that the decision was legally perverse. The latter is an exceptionally high hurdle to surmount: see *Murrell –v- Secretary of State for Social Services* (appendix to social security commissioner's decision (R(I)3/84); *Yeboah –v- Crofton* [2002] ILR 634; *BBC –v- Information Commissioner* [2009] EWHC 234 (Admin); and *DWP –v- Information and Zola* [2016] EWCA Civ 758; [2017] 1 WLR 1.

21. None of these "error of law" tests are satisfied simply by arguing, as the father in essence does, that the four month period and then the eight month period was on the evidence appropriate. To do so would be for the Upper Tribunal to improperly interfere in the fact-finding and evaluative functions which have been entrusted to the First-tier Tribunal. Further, on the face of the First-tier Tribunal's reasoning I do not consider that it either failed to take account of any relevant matters or interests, or arrived at a decision that no rational tribunal could have arrived at on the evidence. The decision was rationally based on the evidence the First-tier Tribunal had before it bearing in mind the 12 month starting point and the wide latitude given by the word "appropriate" to found moving away to a shorter period.

22. Moreover, I am not satisfied that the First-tier Tribunal made any material error of law by not referring in its reasoning to the focus of the legal test it had to apply being on the "expected" incidences of shared care in the 12 months (or shorter period, if appropriate) from 23

August 2015. First, as I have said, this was not any part of the father's appeal. Second, even though both parents by the time of the final hearing before the First-tier Tribunal in December 2016 were perhaps quite naturally referring to what in fact had occurred in the 12 month period from 23 August 2015, I cannot see that anything materially had changed in terms of what had been expected in terms of shared care looking forward from 23 August 2015.

23. It is true that the First-tier Tribunal did not refer to regulation 46(4) of the Child Support Maintenance Calculations Regulations 2012 or whether here was an agreement between the parties for a shorter period: per the example given in brackets in regulation 46(3). Its doing either would not, however have assisted the father, and so cannot amount to a material error of law. This is because:

    (i) per regulation 46(4)(b), on the face of the evidence a pattern of shared care had been established over the past 12 months (see paragraph 15 above), from which the July to October 2015 period was an exception; and

    (ii) there was no agreement between the parents as to a shorter period than 12 months (as their stances in the appeal proceedings show).

24. I should add in relation to point (i) in the immediately preceding paragraph that even if the July to October 2015 period was expected to be a 'one-off' period, this does not mean that it ought necessarily to have been found by the First-tier Tribunal to have been an appropriate shorter period under regulation 46(3). (I should stress that this point did not feature in any of the arguments made to me on this appeal.) A one-off period could quite rationally be subsumed in a 12 month period, particularly where it did not arise under any agreement between the mother and father and where it was an exception to a previously existing settled pattern of shared-care. Its very exceptionality on the other hand may provide a basis for applying

regulation 46(3). There are, however, no hard and fast rules. It will depend on all the circumstances of the case and will be a matter for the evaluative judgment of the fact-finding body taking into account all relevant considerations.

25. It is for all the reasons set out above that this appeal by the father must fail. I note that there may be, or have been, a continuing issue arising from the First-tier Tribunal's decision about a separate matter concerning the treatment of pension contributions. I simply record that that separate issue has never arisen as an issue to be decided on the appeal, nor was it an issue on which permission to appeal was either sought or granted.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 24th May 2018