IN THE UPPER TRIBUNAL **Appeal No. CCS/2771/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Gray

This appeal by the claimant succeeds.

District Judge Cooper having granted permission to appeal on 6 September 2017, in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Norwich and made on 30 May 2017 under reference SC 142/17/00058 and remit the case to a freshly constituted First Tier Tribunal for re-hearing.

REASONS FOR DECISION

1. In this child support case the appellant is the father of Larry, who is in his teens. Larry's mother is the second respondent and she is in receipt of child benefit in respect of him. I will refer to Larry's parents as the father and the mother.
2. The Secretary of State for Work and Pensions is the first respondent, but I will refer to the body that has from time to time been administering child support maintenance as the agency.
3. Child support maintenance in this case is based on the 2012 statutory scheme.

The decision under appeal and the issue for the FTT

4. The issue for the First-tier Tribunal (FTT) was as to the extent to which each parent had the day to day care of Larry. The father's argument was that he had equal care with the mother, and in those circumstances the agency should not have accepted her application for child maintenance.
5. Whilst the father was contending that he and the mother provided equal care, and the tribunal accepted at paragraph 7 of the statement of reasons that care was equally divided 'in terms of the time spent with each parent' it also considered the fact that he had previously paid child maintenance for Larry under the 2003 scheme, and that the mother received child benefit.
6. The District Tribunal Judge granted permission to appeal on the basis that the judge may have failed properly to apply the somewhat different provisions of the new scheme, and in particular the use of the receipt of child benefit as the determinative factor where care was found to be provided equally.

The case before the Upper Tribunal

7. I made directions as to the filing of submissions following the grant of permission to appeal by District Tribunal Judge Cooper. The Secretary of State filed a response supporting the appeal on the issue of law as to the interpretation of regulation 50 of the Child Support Maintenance Calculation Regulations 2012 (hereafter, the regulations). I set out that regulation, and further relevant legislative provisions below.

The relevant legislation

Parent treated as a non-resident parent in shared care cases
50.— (1) Where the circumstances of a case are that–
(a) an application is made by a person with care under section 4 of the 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.

8. I also set out the relevant parts of section 3 Child Support Act 1991, the interpretation section.

3.-(1) A child is a "qualifying child" if –
(a) one of his parents is in relation to him, is a non-resident parent; or
(b) both of his parents are, in relation to him, non-resident parents.

(2) The parent of any child is a non-resident parent, in relation to him, if-
(a) that parent is not living in the same household with the child; and
(b) the child has his home with a person who is, in relation to him, a person with care.

9. The importance of non-resident parent status (which can be either de facto, or there are prescribed circumstances in which a parent is treated and a non-resident parent) comes from the duty to maintain set out in section 1 Child Support Act 1991.

> *(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 assessment was made to make those payments.*

The position of the parties

10. The Secretary of State, through the submission of Mrs Massie, supports the appeal and recommends remission to the FTT for its re-determination.
11. Neither the mother or the father are represented.
12. The mother, understandably, opposes the appeal, although her argument is really as to the facts.
13. The father asks me to re-decide the matter on the basis of the facts found by the FTT, and the proper application of the law to them. He cites the case of *JS v Secretary of State for Work and Pensions* [2017] UKUT 296 (AAC), (hereafter *JS*) a decision of Upper Tribunal Judge Ward.
14. No party has asked for an oral hearing, and I am able to determine the case fairly on the basis of the papers before me.

Discussion

Regulation 50

15. I have been assisted by the submission of Mrs Massie as to the analysis of regulation 50, and, essentially, I agree with her approach. As to the application of the regulation she cites *RC v Secretary of State for Work and Pensions* [2017] UKUT 296 (AAC), a decision of Judge Ward, but the point at issue is, I believe, more fully answered by his decision in *JS,* cited by the father and which I append to my decision.
16. In this case it is accepted that the father provides a level of care in his own home for Larry, and that he is not a non-resident parent as a matter of fact. In those circumstances he can only be liable to make child maintenance payments if he is able to be treated as a non-resident parent by virtue of a legislative provision.

17. The effect of regulation 50, a deeming provision, is that where there is any division of care in two different households (50(1)), the non-applicant parent is treated as the non-resident parent under 50(2))
    - only where day to day care is provided by that person but
    - to a lesser extent than the day to day care provided by the applicant.

18. Where day to day care is provided equally between the parents, or where the non-applicant parent is found as a fact to provide the greater extent of that care, then, within that application there will be no non-resident parent under regulation 50 (2), and where there is no non-resident parent no maintenance is payable. That is because maintenance is only payable in respect of a qualifying child under section 1 Child Support Act 1991 (above), and section 3 of the same Act defines a qualifying child in terms that one of his parents is, in relation to him, a non-resident parent.
19. Judge Ward explains in *JS* that regulation 50 is the 'starting point' in cases such as this where there is clearly some division of care, and, as to its application it must be noted that it deals with the concept of 'day to day care'. In discussing that concept at paragraph 19 Judge Ward quotes from a decision of Upper Tribunal Judge Wikeley, *GR v CMEC (CSM)* [2011] UKUT 101 (AAC) in which Judge Wikeley refers to *R(CS) 11/02*, and Upper Tribunal Judge Jacob's judgment in that case is extensively quoted in Mrs Massie's submission at her paragraph 8.

Regulation 50(3)

20. I turn to the matter upon which District Tribunal Judge Cooper granted permission to appeal, the circumstances in which regulation 50 (3) applies, and whether it can be used, as it seems to have been by the judge in this case, as a 'tie-break' provision where care is equally divided.
21. Regulation 50 (3) provides a rebuttable presumption that where the applicant for child maintenance is in receipt of child benefit for a qualifying child then the day to day care that parent provides is greater than that of any other person. The rebuttable nature of this presumption is clear from the phrase *"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".* (My emphasis).
22. I pause to mention the use of the term *'qualifying child'* in regulation 50 (3): to talk in terms of a qualifying child in a deeming provision which may, but may not, result in there being a qualifying child through the treating of a parent as a non-resident parent seems to put the proverbial cart before the horse. Regulation 8(2) Child Support (Maintenance Calculation and Special Cases) Regulations 2000, the similar deeming provision under the 2000 scheme (discussed further below) speaks of *'a child in respect of whom an application is made'.* That would appear more correct.
23. Returning to the main theme, once evidence is put forward to the effect that the non-applicant parent also provides a home for the child in a different household (see regulation 50 (1) (b)), and divides the day to day care of that child with the applicant then all the evidence as to day to day care must be evaluated, and a conclusion arrived at as to the division of care.
24. The judge came to the view here that care was equally divided, but I agree with the concerns of DTJ Cooper that, in reaching that conclusion, the judge was not necessarily applying the correct test as to day to day care, and I explain the effect of that below.
25. Given the equal care finding, however, the judge could not use regulation 50(3), because it does not operate to assume that the parent who receives

child benefit is the parent who has care to a greater extent if, on the facts, care is assessed as equal: it assumes that only in the absence of evidence to the contrary. The judge having accepted evidence that the care was equal, the presumption in regulation 50(3) was rebutted.

Is regulation 50 (3) a 'tie break' provision at all?

26. Regulation 50 (3) cannot be used, in my judgment, to enable an overall view to be taken so that where there is evidence of some day to day care on both sides the provision operates as a rough and ready tie-break, and that point must be appreciated by the agency as the main assessor of this issue. The evaluation of the extent of day to day care provided by each parent must be done on all of the evidence, and note should be taken of my remarks in paragraphs 33-41 below.

Is regulation 50 (3) otiose?

27. Given that, there seems little, if any use for regulation 50(3). 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.
28. I have considered whether, if an application is made and the non-applicant does not co-operate with the agency in providing details as to the extent and nature of the care they provide the provision might be applicable. However, for the issue as to whether or not care is divided to arise at all it would need to have been mentioned in the application, and there is still a need for evaluation of what is put forward there as evidence regarding the extent of the day to day care that each parent provides, even where no further evidence emerges. Once again there appears no need for the operation of regulation 50(3).

Does the previous Special Case assist?

29. I have considered the similar Special Case under the previous scheme (the 2000 scheme), set out in regulation 8 of the Child Support (Maintenance Calculation and Special Cases) Regulations 2000.
30. This is a more complex provision, dealing, inter alia, with circumstances where people other than a child's parents are providing day to day care. Regulation 8(2) provides for the non-receipt of child benefit to be the decisive factor where each parent provides equal day to day care. In that event the parent who does not receive child benefit is treated as a non-resident parent. That differs markedly from the situation under the 2012 scheme and there is no helpful read-across. Under regulation 50 (2) the wording is clear that the

non-applicant *'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.'* (My emphasis).

31. As is adumbrated by Judge Ward in *JS* at paragraph 21, there are structural differences between the two deeming provisions which appear deliberate. In my judgment the 2012 scheme indicates a policy shift from the previous position where the non-receipt of child benefit was decisive and child maintenance payable where day to day care was equally divided between the parents, to the position that child maintenance is no longer payable where day to day care is provided equally by both parents.
32. Accordingly, there may be no use for regulation 50(3), but I have not had direct argument on this point, and I am conscious of the principle that Parliament does not legislate in vain, so my view might therefore best be described as provisional.

Bu what is day to day care?

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.

My decision to remit

35. The point is well made by Mrs Massie at paragraph 9 of her submission, that although the judge made findings as to equal **shared care**, her findings did not address the issue of **day to day care**, the test in regulation 50. It seems probable, or at least distinctly possible, that she was applying the test as to shared care set out in regulations 46 and 47. That failure to apply, or to demonstrate through the reasoning that it had applied the correct statutory test was an error of law by the tribunal.

36. Both the probable misapplication of the day to day care test and the impermissible use of regulation 50 (3) as a determinative factor on the basis of a finding of equal care were material errors of law which justify the setting aside of the decision of the FTT.

37. In those circumstances, although I can appreciate the father's standpoint, the findings of fact as to equality of care are not sufficiently robust for me to

adopt them and apply the law to them. It is more appropriate for the evidential issues to be re-decided by a fresh tribunal using the correct statutory test.

38. The submissions of the parties before me will be before that tribunal, as will the decision of Upper Tribunal Judge Ward in *JS* which I append to this decision.

Directions on the law to the fresh FTT

39. There is no issue in this case that Larry has a home with each of his parents and that each provide care for him. The question is as to the proportions in which they do so. Accordingly, there is no actual non-resident parent and in order for there to be a person liable to make child support payments for Larry, and for Larry to be a qualifying child at all, there must be a deemed non-resident parent; that is a parent who is treated as a non-resident parent under the Special Case set out in regulation 50.
40. Applying *JS,* (in particular paragraphs 19-22) the fresh tribunal will first determine whether the father is to be treated as a non-resident parent under regulation 50. It will do so by considering the provision of "day to day care", a phrase in common usage, on the available evidence, overnight care being but one factor along with others, and not the determinative factor. In relation to this aspect of the decision, where overnight care is provided by one parent either personally or through arrangements made by them and under their control, that parent is exercising day to day care.
41. Only if a decision is made that the father is to be treated as a non-resident parent under regulation 50 will regulations 46 and 47, which concern overnight care within the context of the **shared care** provisions, need to be considered. In those circumstances the wording of those regulations should be examined as to what constitutes relevant care, including, importantly, the different requirement that, for those purposes, a night's care must occur at the same address as the non-resident parent.

A note of caution

42. The fact that the father has succeeded at this stage on a point of law is no indication as to what the result may be on the facts that the FTT find at the rehearing. I give case management directions below.

CASE MANAGEMENT DIRECTIONS

(i) The rehearing will be an oral hearing before a different judge.

(ii) The fresh tribunal will reconsider the evidence. It may not consider matters not obtaining at the date of the decision under appeal, 18 November 2016.

(iii) The matter is to be brought to the attention of a District Tribunal Judge as soon as possible after the issue of these directions, to deal with local listing issues.

Upper Tribunal Judge Gray **Signed on the original on 2 August 2018**