SM v SSWP (UHC)
[2023] UKUT 176 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000261-UHC**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

SM

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Judge Markus KC

Decision date: 18th July 2023

Representation:
Appellant: Mr D Martinez, Harrow Law Centre
Respondent: Mr R Howell, instructed by Government Legal Department

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. This is an appeal by the Appellant against a decision of the First-tier Tribunal ('FtT') that the Appellant was not entitled to universal credit in respect of an additional bedroom for an overnight carer.

2. Permission to appeal was given by Upper Tribunal Judge Wikeley on 25 April 2022. Following the exchange of written submissions, I directed an oral hearing which took place before me, by video, on 22 May 2023. I am grateful to both representatives for their helpful written and oral submissions.

Factual background

3. The Appellant and his wife live with their adult daughter, P, in a three bedroom house. The Appellant and his wife occupy one bedroom, P occupies another and the third is generally not occupied.

4. P (who was 22 years old at the relevant time) suffered from heart problems and was in receipt of the daily living and mobility components of personal independence payment. Her mother was her carer.

5. The Appellant and his wife claimed universal credit. Pursuant to the Universal Credit Regulations 2013 they were entitled to the housing costs element for two bedrooms unless they satisfied the additional room condition in paragraph 12(A1) of Schedule 4 to those Regulations. They claimed that P satisfied the overnight care condition because her mother sometimes required a break from caring which was provided by family or friends and that they stayed in the third bedroom on those occasions.

Legal framework

6. Universal credit was created by Part 1 of the Welfare Reform Act 2012 ('the WRA'). It abolished and replaced a series of other benefits including housing benefit. Under section 11 of the WRA an award of universal credit includes an amount in respect of liability for payments in respect of accommodation occupied as a home. The amount is determined in accordance with the Universal Credit Regulations 2013 ('the 2013 Regulations'). Regulation 25 sets out the conditions of entitlement to the housing costs element. There is no issue in this appeal in that regard. Regulation 26 provides for the amount of the housing costs element and gives effect to Schedule 4 in regard to liability for rent payments.

7. Paragraph 8(1) of Schedule 4 requires a determination to be made "as to the category of accommodation which it is reasonable for the renter to occupy, having regard to the number of persons who are members of the renter's extended benefit unit". It is common ground that P was a member of the extended benefit unit. Under paragraph 10, the Appellant and his wife were entitled to one bedroom for themselves and one bedroom for P.

8. Paragraph 12(A1) provides for entitlement to an additional bedroom. The relevant provisions in this case are:

> "12.— (A1) A renter is entitled to an additional bedroom if one or more of the following persons satisfies the overnight care condition (see sub-paragraph (3)) —
>
> …(b) a person in the renter's extended benefit unit;…
>
> (3) A person satisfies the overnight care condition if—
>
> (a) they are in receipt of—
>
> … (iii) the daily living component of personal independence payment
>
> (b) one or more persons who do not live in the renter's accommodation are engaged to provide overnight care for the person and to stay overnight in the accommodation on a regular basis; and

(c) overnight care is provided under arrangements entered into for that purpose."

The First-tier Tribunal's decision

9. The FtT dismissed the Appellant's appeal against the Secretary of State's decision that the overnight care condition was not satisfied.

10. The FtT's findings of fact were, in summary: P had a complex congenital heart condition, Tetralogy of Fallot. She had had several operations in the past, the most recent being a replacement pulmonary valve in 2017. She was prescribed medication and had an annual hospital review. She had variable and fluctuating symptoms including arrhythmia, shortness of breath, dizziness and tiredness but had had no recent hospital admissions and her parents had not called an ambulance for 6 or 7 years. P would have an overnight episode of arrhythmia once or twice a month, but it could be as often as 10 times a month. The episodes were unpredictable. The Appellant's wife would reassure P in the night if she woke up and experienced arrhythmia. She would calm P by rubbing her chest or legs. The Appellant considered that it would have been unreasonable for him to have rubbed his daughter's chest. No medical professional had recommended specialist massage or watching P overnight or any other treatment during night-time hours. The Appellant's wife would sometimes ask her sister to stay when there were more frequent episodes and she felt she needed a break, but there was no set arrangement for another person to provide care. During the day P was able to sit and calm herself down when her mother was not with her but this could cause her anxiety.

11. The FtT concluded as follows:

> "37. I accept that Mrs [M] does reassure her daughter and may rub her chest and legs to calm her daughter. It is clear that [P] has been particularly unwell as a child and has a condition which could be unpredictable with serious implications if not reviewed and managed correctly. It is understandable that the family do not want their daughter to be overly anxious.
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> 38. Having said this, parties agreed that the chest rubbing is not a specialist massage or treatment. It has not been recommended by a medical professional and Mrs [M] confirmed that her daughter does not require watching over. It is also true that when her mother is not available, [P] is able to sit and calm herself down until her symptoms pass. Equally, I was told that there is nothing anyone can do and the family has not called an ambulance for 6-7 years. [P] continues to take medication and is reviewed yearly by consultants but her condition has been stable, and medication has remained unchanged. The award of PIP confirms that [P] was awarded points for aids. She was therefore deemed able to manage her daily living activities independently using aids and did not require supervision or assistance from another person. For these reasons, I concluded that [P] does not require overnight care.
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> 39. If I am wrong about this, [P] would still not satisfy the conditions because, taking into account Mr [M]'s evidence, a friend or relative might stay 'occasionally' or 'sometimes'. They were not staying overnight in the

> accommodation on a regular basis. There was no pattern of care and it was infrequent. This does not amount to regular."

The grounds of appeal and the parties' submissions

12. There are two grounds of appeal. Ground 1 is that the FtT erred in considering whether overnight care was needed because the overnight care condition contains no such requirement. Ground 2 is that the FtT erred in its approach to "on a regular basis" in paragraph 12(3)(b) of Schedule 4.

13. In respect of Ground 1, Mr Martinez for the Appellant submits that the regulation contain no definition of "care" and that it should not include any assessment of the nature of the care provided. Such a requirement would be burdensome administratively and would be unduly prescriptive against those who are providing care while on benefits or on an unpaid basis. Being in receipt of the relevant benefit (daily living component of PIP) means that care is needed. The provisions are to be contrasted with those governing entitlement to personal independence payment, which do call for a detailed assessment. Moreover, the 2013 Regulations do not call for consideration of whether the care is required, as compared to the predecessor housing benefit provisions which did include a requirement for overnight care.

14. Mr Howell, for the Secretary of State, submits that "care" is an ordinary word which is to be construed and applied in its context, that the natural and ordinary meaning is to provide personal services to a person who requires them. He relies on the legislative history of the overnight care condition, starting with the housing benefit conditions of entitlement to an additional bedroom and the approach of the courts including in the important decisions of the Court of Appeal in *Burnip v Birmingham City Council* [2013] PTSR 117 and of the Supreme Court in *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550. He submits that the 2013 Regulations gave effect to the policy which had been introduced in respect of housing benefit and which had been confirmed by the courts, which is that an additional bedroom should be available where overnight care is required.

15. In respect of Ground 2, Mr Martinez relies on *SD v Eastleigh Borough Council HB)* [2014] UKUT 325. The Upper Tribunal considered the definition of the term "requires overnight care" in the housing benefit provisions applicable in that appeal. The definition included that the relevant authority was satisfied that the person reasonably required and had in fact arranged that one or more persons who did not occupy the dwelling should be engaged in providing overnight care and "regularly stay overnight at the dwelling for that purpose". The Upper Tribunal said that "regularly" can mean "habitually", "customarily" or "commonly", could cover provision that is erratic, that the assessment of regularly must be made over a fairly long period, and that there is no requirement that it is provided on a majority of nights.

16. Mr Howell submits that regularly means "sufficiently often", which is something more than intermittent. It is an ordinary word not subject to strict definition and it is necessary to consider all the circumstances. The FtT's approach in this case was consistent with this. It took into account a range of factors, but did not direct itself that a pattern of care was a requirement of the condition. Its approach was consistent with the decision in *SD.*

Discussion and conclusions

17. Before addressing the two grounds of appeal, it is helpful to refer to the legislative history and context of the additional bedroom provision which is the subject of this appeal. Mr Howell has provided a detailed exposition of this history but it is sufficient to summarise the key aspects.

18. In the original legislation creating housing benefit the general rule was that each claimant who did not live in social housing was entitled to a single bedroom for each category or occupier. In *Burnip* the Court of Appeal held that, contrary to Article 14 of the ECHR, the provisions discriminated against those who required an overnight carer. Henderson J noted that the exception sought was "for only a very limited category of claimants, namely those whose disability is so severe than an extra bedroom is needed for the carer to sleep in" (paragraph 64). From 1 April 2011 legislative amendments provided for an additional bedroom where the claimant or their partner "requires overnight care", which was defined as a person in receipt of certain allowances or who the authority was otherwise satisfied required overnight care, and reasonably requires and has in fact arranged for one or more non-occupiers to provide it and stay overnight for that purpose (regulation 2 of the Housing Benefit (Amendment) Regulations 2010, SI 2010/2835). The Explanatory Memorandum to those regulations explained that the intention was that an additional bedroom should be available for those with "a proven need for overnight care…provided by a non-resident carer" and an "established need" for such care.

19. Paragraph 12 of Schedule 4 to the 2013 Regulations as originally made provided for an additional bedroom where the renter required overnight care. This was subsequently amended, as a result of the decision of the Supreme Court in *MA,* to include a person other than the renter. The Supreme Court referred to disabled people who have "a transparent medical need" or an "objective need" for an additional bedroom. The Explanatory Memorandum to the amending regulations explained that the amendment was to permit an extra bedroom where a disabled person requires and has overnight care from a non-resident carer.

Ground 1

20. There are three separate components of the overnight care condition in paragraph 12(3). The components in subparagraphs (b) and (c) are additional to that in (a). It is not possible to read the provision as meaning that (b) or (c) are satisfied where (a) is satisfied. It would not make sense to do so as receipt of a relevant benefit will not necessarily reflect a need for overnight care. Moreover, and for the same reason, the receipt of an award of the relevant benefit cannot be conclusive evidence that conditions (b) or (c) are satisfied. See, similarly, paragraph 18 of *SD.*

21. I reject the submission that, because there is no definition of "care" in the regulations, there should be no consideration of the nature of what is provided. Regulation 12 requires a decision to be made as to whether overnight care is provided, and the decision-maker therefore has to give meaning to the word "care". It is an ordinary word which must be construed in its context. Mr Martinez accepted in oral argument that not everything which someone does for another would be "care".

22. In R(IS) 8/02, Commissioner Parker addressed the phrase "engaged in caring for another person" in the context of income support. At paragraph 36 she said: "The nub of caring for a disabled person is perhaps whether the carer performs those

duties with which the disabled person needs assistance because of their disability or exercises that oversight which arises for a similar reason."

23. The House of Lords in *R (M) v London Borough of Slough* [2008] 1 WLR 1808 considered the meaning of "care and attention" in section 21(1)(a) of the National Insurance Act 1948. At paragraph 33 Baroness Hale, giving the leading speech, observed that the natural and ordinary meaning of "care and attention" was "doing something for the person being cared for which he cannot or should not be expected to do for himself". In *R (BG) v Suffolk County Council* [2021] EWHC 3368 (Admin) Lang J held that, in the context of the Care Act 2014, "the natural and ordinary meaning of the word "care" is the provision of personal services to someone in need" (paragraph 111).

24. Each of these observations reflect a consistent approach, giving a common sense meaning to the word "care". In each instance, the judge has recognised that care involves providing a service which is needed by the person being cared for, and this is so whether or not the legislation states that the care must be needed (eg as in *R(IS) 8/02*).

25. The fact that paragraph 12 of Schedule 4 does not include a provision that the care is required or reasonably required is not significant. As explained in the paragraph above, the need for care is inherent in the meaning of "care". More significantly, it is apparent from the legislative history and the decisions in *Burnip* and in *MA* that there has been a continuous policy behind the statutory provision for an additional bedroom in regard to both housing benefit and the housing costs element of universal credit, which is to focus resources where they are needed. There is no indication that the universal credit provisions were intended to be more generous in this regard. If that had been intended, one would expect to have seen this noted in the pre-legislative materials. To allow for an additional bedroom where the care is not required would be wholly inconsistent with the clear policy.

26. The FtT was therefore correct to address whether the overnight care in question was required by P. There is and can be no challenge to the FtT's findings of fact in this case and, on the basis of those findings of fact, the conclusion that it was not required is unassailable. The FtT took into account a range of relevant factors and reached a proper conclusion. In particular, the FtT had found that, if her mother was not available to assist P when she had an episode of arrhythmia, P could calm herself down. In other words she could do for herself what her mother did for her at night.

Ground 2.

27. In the light of my conclusion on Ground 1, I do not need to decide Ground 2. Nonetheless, it has been fully argued and it is appropriate to address it here so as to cover all bases should I be wrong on Ground 1 and also to give what I hope will be helpful guidance.

28. In *Isle of Wight Council v Platt* [2017] 1 WLR 1441 Baroness Hale noted that there are at least three possible grammatical meanings of the word "regular": "evenly spaced" (as in "he attends Church regularly every Sunday"; "sufficiently often" ("as in he attends Church regularly, almost every week"); or "in accordance with the rules". As is clear from the decision in *SD* which I address below, in the present context the

first meaning is inapplicable. The third is also clearly inapplicable. Thus the only one that could apply here is the second, "sufficiently often".

29. In *SD* (see paragraph 15 above) the Upper Tribunal was considering the provision in the Housing Benefit Regulations for an additional bedroom and the requirement that overnight care be provided on a regular basis. The relevant passages from the decision of Upper Tribunal Judge Rowland are:

> "13. The present case, as was recognised by the First-tier Tribunal, turns entirely on the meaning of the word "regularly" in head (b)(ii) of the definition of a "person who requires overnight care". That is a word that has many different meanings, or shades of meaning, in ordinary English usage. The sense in which it is used in any instance has to be discerned from the "syntax, context and background" (per Lord Hoffman in Secretary of State for Work and Pensions v Moyna [2003] UKHL 44; [2003] 1 W.L.R. 1929 (also reported as R(DLA) 7/03) at [24]). The First-tier Tribunal held that the word "denotes something which happens at intervals which, if not precisely fixed, are at least reasonably even" but the judge was unhappy with that construction because whether or not the need for overnight care was regular in that sense might not reflect the relative extent of the need. In my judgment, that difficulty suggests that the word does not, in this instance, have the meaning ascribed to it by the First-tier Tribunal. The word can also be used as a synonym for "habitually" or "customarily" or "commonly" and this seems a more sensible understanding of the word in the context of this legislative provision than that adopted by the First-tier Tribunal. Whether the intervals between a person's need for overnight care are uniform or not is, as the First-tier Tribunal pointed out, immaterial to his or her need for a bedroom in which to accommodate a carer.
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> 14. What the legislation is concerned with is whether the need for care arises often and steadily enough to require a bedroom to be kept for the purpose. A bedroom cannot be switched on and off and, if the object of the legislation is to encourage claimants to move to smaller accommodation or take lodgers into their spare rooms, it is to be presumed that whether overnight care is regular or not has to be considered over a fairly long period. Moreover, there is nothing in the word "regularly" that requires that the carer must be required to stay overnight on the majority of nights for the claimant to meet the criterion. That may be why that word was chosen. It does not mean the same as "normally" or "ordinarily". A bedroom may be required even if the help is required only on a minority of nights. Whether a carer must "regularly" stay overnight must be considered in that context.
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> 15. That question – whether or not the claimant reasonably requires, and has in fact arranged, that one or more people who do not occupy as their home the dwelling to which the claim or award for housing benefit relates should "regularly" stay overnight at the dwelling for the purpose of providing care – is a question of fact. Provided that the First-tier Tribunal does not fall outside the bounds of reasonable judgment, the Upper Tribunal, to whom an appeal lies only on a point of law, should not entertain an appeal against the First-tier Tribunal's decision on that question (see Moyna at [25]). However, that is subject to the First-tier Tribunal having correctly understood the sense in which the word "regularly" is used. Ascertaining the sense in which a word is

> used in a particular statutory provision is a matter of construction and therefore a question of law (R. v National Insurance Commissioner, ex parte Secretary of State for Social Services [1994] 1 W.L.R. 1290 (also reported as an appendix to R(A) 4/74)).”

30. The FtT in the present case relied on two factors in deciding that the care in question was not regular – “There was no pattern of care and it was infrequent”. Frequency is a relevant factor. It is not clear what the FtT meant by there being “no pattern of care”. Did it mean that the care was not provided by a third party at uniform intervals? Or did it mean that the provision was not customary or steady? It seems most likely that the FtT meant the former. That would be the most obvious meaning to be attributed to “pattern of care”. I conclude that the FtT had not understood “regular” correctly in the context of this appeal. Moreover, the findings of fact in regard to the provision of care by a third party are insufficient to enable me to conclude that the error in the formulation of the conclusion is immaterial. In particular the findings to do not give sufficient indication as to how often P’s mother would ask her sister to stay. Words such as “sometimes”, “occasionally” and “infrequently” do not by themselves provide a sufficient basis for reaching a conclusion in this regard, and the FtT’s findings of fact do not shed further light on those words.

31. However, the error by the FtT in this regard is immaterial. The FtT correctly found that the additional bedroom condition was not satisfied because P did not require overnight care.

32. Accordingly I dismiss this appeal.

Authorised for issue
on 18th July 2023

Kate Markus KC
Judge of the Upper Tribunal