**IN THE UPPER TRIBUNAL** **Appeal No. UA-2021-001029-CSM**
**ADMINISTRATIVE APPEALS CHAMBER**

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

**Between:** **DW**

**Appellant**

**- v –**

**Secretary of State for Work and Pensions**

**First Respondent**

**And JH**

**Second Respondent**

**Before: Upper Tribunal Judge Sutherland Williams**

Decision Date:16 January 2023
Decided on consideration of the papers

## DECISION

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

## REASONS FOR DECISION

**Summary**

1. This appeal concerns regulation 50 of the Child Support Maintenance Calculation Regulations 2012 and its effect when there is a division of care between two different households, with one parent being treated as the non-resident parent in circumstances where day to day care is provided by that parent, but to a lesser extent than the day to day care provided by the other parent.

2. The Upper Tribunal has a discretion whether to hold a hearing: rule 34(1) of the Upper Tribunal Rules. No party has requested an oral hearing and I am satisfied that this matter can be dealt with on the papers before me. The submissions from the parties are

clear and further oral submissions are unlikely to assist. I am not obliged to follow the reasoning of the parties in a supported appeal. This was explained in a letter dated 22 January 2022.

3. I have found no error of law in the First-tier Tribunal's decision. It directed itself correctly on the law. Its findings of fact were supported by the evidence. It did not err in relation to detail or motive. The reasons given are sufficient.

## Background

4. This appeal has something of a protracted history. The appellant is the father of the qualifying child [who, for the purposes of this appeal, I anonymise to 'G']. The second respondent is the mother of G. Both parents participate in her care. The appellant was found liable to pay child maintenance in respect of G at a rate of £37.33 per week from 24 July 2018.

5. The appellant asked the Secretary of State to look at this decision again following a court order regarding shared care for G, on the basis that day to day care was now equal. The Child Maintenance Service (CMS) considered the application but decided on 7 June 2019 that the appellant should continue to be liable to pay child maintenance of £37.33 per week from 22 May 2019.

6. The appellant challenged that decision and provided further evidence, which was then considered as part of the mandatory reconsideration exercise under section 16 of the Child Support Act 1991. The first respondent determined that there was insufficient evidence to revise the decision and that the appellant remained liable to pay £37.33 per week in respect of G.

7. On 1 July 2019, the appellant appealed that decision.

8. That appeal was listed before District Tribunal Judge Brownhill on 7 September 2020. The appellant and the first respondent's presenting officer took part in the hearing. The second respondent did not attend.

9. The judge found against the appellant, and it is from that decision this further appeal now arises.

## This appeal

10. The grounds of appeal may be summarised thus:

    i. In seeking to identify tiny areas of difference, the First-tier Tribunal has negated the concept of care and undermined the Upper Tribunal's own decisions that care by proxy can happen and that the child does not necessarily need to be in the presence of the parent for care to be taking place.

ii. Defining day to day care by use of minor elements was actively avoided by Parliament in the legislative scheme. Micro time allocations import either intentional or unintentional bias. The First-tier Tribunal erred in law by exceeding its authority and by overriding decisions of the Upper Tribunal.
iii. G stays with each parent for an equal amount of time. The Upper Tribunal has recognised this would afford each parent an equal opportunity of care. The First-tier Tribunal erred in law by failing to explain adequately why shared care does not give an equal opportunity for care.
iv. The First-tier Tribunal erred by attributing motive to the appellant, in particular, that the appellant obtained a court order simply to be able to stop paying his maintenance.
v. The duty to maintain should not be taken into account by the First-tier Tribunal when considering day to day care.

11. The Secretary of State supports this appeal. It is suggested the tribunal judge was biased and breached the rules of natural justice by making a judgement on the appellant's motive: "*as a result of this, the decision was not based on the facts before it*."

12. Conversely, the second respondent does not support the appeal. She recites mainly factual matters that are not at this stage central to my decision. I do however consider and refer to elements of her submission in this decision.

13. The second respondent's correspondence ends with the following statement:

> "In order to reduce unnecessary interactions with [the appellant] I am making the decision to cease claiming child maintenance and will remain fully willing and committed to independently financially supporting and fulfilling all aspects of G's needs."

14. The above statement of intent does not end this appeal, not least because the appeal concerns a backdated period.

## The granting of permission to appeal

15. Upper Tribunal Judge Jacobs, in his written reasons for granting permission to appeal, summarised the basis as follows:

> 'I have not limited my grant of permission, but identify two reasons for doing so. First, was the father's motive in seeking particular arrangements a relevant factor under regulation 50 of the Child Support Maintenance Calculation Regulations 2012? Second, were the differences identified by the judge matters relating to care?'

## The law and practice

16. A 'non-resident parent' has a duty to maintain the child.

17. Non-resident parent status derives from the duty to maintain set out in section 1 of the Child Support Act 1991 ('the Act'):

> (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.

18. Section 3 of the Act defines a qualifying child as having one parent who is, in relation to the child, a non-resident parent.

19. The Act treats shared care as a special case (under section 42). Such arrangements are governed by regulation 50 of the Child Support Maintenance Calculation Regulations 2012 (SI No 2677). Regulation 50 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.

20. The effect of regulation 50 is where there is a division of care in two different households (reg 50(1)), the non-applicant parent is to be treated as the non-resident parent under reg 50(2) in circumstances where day to day care is provided by that person *to a lesser extent* than the day to day care provided by the applicant - see *CF v SSWP & CG (CSM)* [2018] UKUT 276 (AAC).

21. Reg 50(3) deals with the significance of an award of child benefit 'in the absence of evidence to the contrary'.

22. The operation of the law in this regard is important because, if there is no non-resident parent under regulation 50(2), the child support scheme does not apply. The weekly liability for the appellant (if successful in establishing that he was no longer a non-resident parent) would be extinguished. See *MR v Secretary of State for Work and*

*Pensions and LM* [2018] UKUT 348 AC, where Upper Tribunal Judge Jacobs confirmed:

"2. The basic structure of the Child Support Act 1991 assumes that a child is cared for by one parent. That parent is the parent with care; the other is the non-resident parent. If the child doesn't have a non-resident parent, the scheme doesn't apply: that is the effect of section 3(1) of the Act…."

*Day to day care*

*23.* In *JS v SSWP and another (CSM)* [2017] UKUT 296 (AAC) Upper Tribunal Judge Ward concluded (at paragraph 20) that the expression "day to day care" in regulation 50 *"is a phrase in common usage and does not require definition"*. He added: *"…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 First-tier Tribunal in the light of all the evidence available to it."*

24. I respectfully concur with such an approach. Day to day care does not require definition. As Judge Jacobs observed at paragraph 17 of *MR*, what matters is the practical (and, I would add, personal) day to day care that is provided by each parent. Judge Jacobs adds at para 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 the parents provided.'

25. Further, Upper Tribunal Judge Jacobs in *R (CS) 11/02* found 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. As Judge Jacobs said in *MR* (at 22):

> 'The First-tier Tribunal does not just have to make a decision; it has to explain how it made it. That can be difficult when the reasoning is, at least partly, impressionistic. As with all cases, it is essential to make findings on all the facts that matter. The difficult part is to explain how the tribunal extracted the pattern from the details. The law requires that the reasons be adequate and the Upper Tribunal has to take account of the reality that it is not possible to explain precisely the thought process that led to the conclusion. One way to do that is to explain the more significant factors that influenced the tribunal's judgment.'

*The facts are for the tribunal below to decide*

26. Bearing in mind, as I do, how long this appeal has been in the system, with delays through no fault of the parties, including as a result of the pandemic, it may be helpful if I reiterate some established principles regarding in particular the limited scope of this Upper Tribunal to supplant, limit or fail to respect factual findings made by the First-tier Tribunal.

*27.* In this regard, I repeat what Baroness Hale said in *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and others (FC) (Respondents) [2007] UKHL 49* in relation to tribunals sitting in their specialist field and that they: *"should be*

*respected unless it is quite clear that they have misdirected themselves in law. Appellant courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."*

28. While the Upper Tribunal should be ready to lay down broad guidelines and interpret and apply the relevant law, which may include providing specialist guidance on issues of law arising in the First-tier Tribunal, the Upper Tribunal is likely to be slow to interfere with findings of fact or remit on that basis, save in exceptional circumstances; see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002 ] 3 All ER 279, para 16. This is because the First-tier Tribunal and the First-tier Tribunal alone decides the facts. This will usually mean the Upper Tribunal only has jurisdiction to make findings of fact if it finds an error of law in the First-tier decision.

29. Such an approach is well established and is flexible enough to allow the Upper Tribunal to intervene when a tribunal has made a material error of law (see *BBC v Sugar (No 2)* 2010 1 WLR 2278 at 27); while equally ensuring when the tribunal below has made wrong distinctions or misdirected itself, the Upper Tribunal can say so or remit for rehearing.

30. It is important that First-tier Judges know that they will have the support of the Upper Tribunal in their decision-making when they direct themselves correctly on the law and provide a well-reasoned decision with findings of fact which are supported by the evidence – not least because judges at first-instance will otherwise fall back on defensive decision writing due to a concern that they risk being overturned when the matter reaches the Upper Tribunal.

## Grounds and reasons

*Grounds i. and ii. Micro time allocations, care by proxy and bias*

31. The appellant seeks to advance that in 'seeking to identify tiny areas of difference,' 'defining day to day care by use of minor elements' and 'micro time allocations', the First-tier Tribunal has negated the concept of care.

32. The appellant's representative does not specifically refer to any particular case in support of the proposition, but the point is partly reflected by Judge Jacobs in *MR* (at 19) where it was stated *'...it is important not to lose sight of pattern…Fluctuations may cancel themselves out…'*

33. In the instant appeal, however, I am less than persuaded that the concern the judge used 'micro time allocations' stands up to scrutiny or has any proper application. The judge accepted that the appellant and the second respondent had equal overnight care of G. The judge therefore had the difficult task of considering whether the day to day care of G was provided equally between the parents, or whether one parent in fact, at the time of the decision, provided care to a lesser extent.

34. This matter was not without its factual complexities. Correctly in my view, the judge sub divided the evidence into broad areas of routine practical and personal care to reach

a decision. These areas included time spent with each parent; healthcare; recreational activities; clothing and belongings; and schooling.

35. While not an exhaustive list in terms of what amounts to day to day care, she made certain findings, some in the mother's favour, some in the fathers, and some set in the middle, to assist her in her task.

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.

37. As Judge Jacobs observed in *MR* at 19: *'Details can be significant'*. The judge was not attempting to 'manufacture a difference' (as the appellant suggests); she was identifying legitimate differences and using them to assist her in coming to a final decision.

38. How a judge approaches the above exercise is a question of fact for the First-tier Tribunal in the light of the evidence available. As Upper Tribunal Judge Gray stated in *CF v SSWP and CG (CMS)* 2018 UKUT 276 (AAC) at paragraph 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.' [My emphasis].

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.

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.

42. I do not therefore accept that the judge has focussed on micro time allocations. She has considered the pattern and its impression at the relevant time. The argument that her approach led to either intentional or unintentional bias thereby falls away.

43. I remind myself that the judge at first instance generally has the benefit of knowing how a particular issue fits into the broad picture of child support law. In my view, the judge is likely to be best placed to apply the facts in a purposive way to the legislation in question.

44. As a result, I reject the appellant's representative's submission that the tribunal was seeking to find 'an hour here or there.' I equally reject the proposition that the judge was attempting to identify tiny or minor elements of care or assign micro time allocations. That is a misreading of the decision. The judge was entitled to look to see what other factors might suggest greater or lesser day to day care, and the pattern of that care.

45. I similarly reject the care by proxy ground. It appears to me to be makeweight. The judge deals with specifics within her decision, and care by proxy could generally be said to apply to both parties equally. It is the differences and the 'lesser extent' test that the judge was primarily concentrating on.

*Ground iii. – equal opportunity of care*

46. The judge at first instance was not considering whether shared care gave an equal opportunity for care. That is not the test in regulation 50. Shared care may afford each parent an equal opportunity of care, but that is not the same as having equal day to day care. To find otherwise would be to negate the operation of the regulation itself.

47. Having reviewed the evidence, the judge concluded that the level of day to day care was not equal. That does not mean she did not recognise the father contributed towards Gs day to day care – she did. Equally, the judge found that there was a range of activities and elements of day to day care that both parents contributed to equally.

48. I therefore dismiss the proposition that the judge made an error of law in improperly exercising her judgment. It is plain the second respondent disagreed with the appellant's position, and if the appellant was in any doubt, a review of the mother's response to this appeal clarifies the matter.

*Ground iv. - motive*

49. In the granting of permission to appeal, and in the grounds of appeal, I am invited to consider whether the father's motive in seeking particular arrangements was a relevant factor that the tribunal was entitled to take into account.

50. I would agree that the motive of the appellant in seeking a reassessment of his child support liability and the timing of his application cannot subjugate the operation of regulation 50 and the 'lesser extent' test.

51. I pause however to consider what the judge said in this regard, and to what extent it was material to the overall decision. The appellant points to two paragraphs in what was a lengthy and detailed statement of reasons.

52. Paragraph 22 in my view adds little to the appellant's argument. It merely records a statement of fact. There is no proper indication at that point that the timing of the father notifying the CMS was determinative in the decision making process.

53. Paragraph 62 records that the tribunal asked the father why he had chosen at that time to write a letter to G's dentist asking to be notified of any important medical information relating to his child. The judge then went on to state:

> "The tribunal cannot help but notice the timing of this, given the approaching family court hearings in March 2019 and May 2019 as well as his subsequent contact with CMS two days after the final family court hearing. It did, to the tribunal, look like Mr W was taking these steps in November 2018 in order to try to subsequently support his argument to the CMS that he was not a non-resident parent, rather than because of any lack of communication between G's parents, as he claimed in his oral evidence to the tribunal."

54. A finding or expression of opinion in relation to why a party may have written to a dentist is not determinative, and a mere observation is not pivotal. While not directly relevant in applying regulation 50, it 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. Looking after the child's dentistry is an element of day to day care, but here the judge also appears to doubt the explanation being given, as she had done at paragraph 31 in relation to the transmission of clothes, which, in the tribunal's view, 'cast some doubt on how reliable [the appellant's] memory of events was or his accuracy as a historian".

55. Either way, I am not persuaded it was material to the decision the judge had to make. It is perhaps important to note that in a letter in November 2018, the appellant had stated that it was due to him starting court proceedings that he wrote to the dentist.

56. Even when paragraphs 22 and 62 are read together, I cannot elevate this to the motive point the appellant seeks to assert. There was considerable other evidence that the tribunal relied upon when coming to its conclusion. I therefore reject this ground of appeal also.

57. In supporting this element of the appeal, the Secretary of State submits that the tribunal wrongly made its decision "on bias" and has breached the rules of natural justice by referring to the appellant's motive and "*as a result of this, the decision was not based on the facts before it*."

58. I disagree. It is well established that the test for bias is a matter of law as well as fact: whether a fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased. Allegations of bias must be justified objectively by things the judge has said or done (or associations they have sought), which would make it difficult for them to consider the case impartially.

59. The basis for this claim is that the judge doubted the credibility of the appellant's explanation when it came to him writing to his daughter's dentist in 2018; but the judge has given her reasons for that.

60. An unwarranted allegation of bias by the Secretary of State for which there is no proper evidential basis dents the integrity of the judicial process. I can find no proper reason to assume bias in this case, be it actual, presumed or subconscious, particularly in the light of the other evidence available, which the judge correctly had regard to.

61. I thereby dismiss this submission also.

*Ground v. – the duty to maintain*

62. The duty to maintain is set out in section 1 of the Act (see above) and is relevant to outcome. As the appellant's representative correctly identifies, regulation 50 is about day to day care. It is not the duty to maintain that led to the decision in this matter, it was the facts as found by the tribunal in considering regulation 50 that tipped the balance in favour of the mother in this instance.

63. I dismiss this ground accordingly.

## Conclusion

64. In issue between the parents was a disagreement about what each was doing in relation to the provision of day to day care for G and whether one parent was providing day to day care to a lesser extent.

65. The judge acted appropriately as the specialist factfinder when presented with the question of whether either party had day to day care for the child to a lesser extent. The findings of fact made by the judge was in the role as a specialist in child support legislation, having assessed the evidence and the weight given to it. The judge took care to make sure she was familiar with the law and how it should be applied. She applied that to the facts as she found them to be.

**The appeal is dismissed.**

**M. SUTHERLAND WILLIAMS**
**Judge of the Upper Tribunal**

**Signed on the original on 16 January 2023**