IN THE UPPER TRIBUNAL **Case No** CCS/2014/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr M Smith, solicitor

For the First Respondent: Mr H James, solicitor

The Second Respondent: in person

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Exeter on 16 February 2016 under reference SC194/15/00178 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal. I direct that the file is to be placed before a salaried judge of the First-tier Tribunal for case management directions, including as to whether the present case should be heard together with the further appeal to the First-tier Tribunal between the same parties which is understood to have been stayed pending this decision of the Upper Tribunal.

REASONS FOR DECISION

1. The Appellant is the father (F) and the Second Respondent the mother (M) of a teenage boy (S). The First Respondent is the Secretary of State, responsible for the child support scheme.

2. F had appealed to the First-tier Tribunal ("FtT") against a decision of 27 March 2014 requiring him to pay £55.14pw in respect of S. This had been calculated on the footing that he had care of S for 175 nights or more. His contention was that he shared the care of S equally with M and so should not be treated as a non-resident parent at all, with the consequence that he should not have any liability for child support maintenance.

3. This was a case under the 2012 scheme and it is with the Child Support Maintenance Calculation Regulations 2012/2677 ("the 2012 Regulations") that the case is above all concerned, although in places it is instructive to compare provision made by the Child Support (Maintenance Calculations and Special Cases) Regulations 2000/155 ("the 2000 Regulations").

4. Regulation 50 of the 2012 Regulations provides:

> **"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.
…"

It is not in dispute that the effect of reg 50(2) is that if a person can establish that he provides day to day care to no lesser extent, he will not count as an non-resident parent and a maintenance calculation would result in no liability.

5. Regs 46 and 47 provide:

"46.— Decrease for shared care

(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—
(a) the period mentioned there were that shorter period; and
(b) the number of nights mentioned in the Table in paragraph 7(4), or in paragraph 8(2), of that Schedule were reduced proportionately.

(4) When making a determination under paragraphs (1) to (3) the Secretary of State must consider—
(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.

47.— Assumption as to number of nights of shared care

(1) This regulation applies where the Secretary of State is required to make a determination under regulation 46 for the purposes of a calculation decision.

(2) If it appears to the Secretary of State that—
(a) the parties agree in principle that the care of a qualifying child is to be shared during the period mentioned in regulation 46(2) or (3) (decrease for shared care); but
(b) there is insufficient evidence to make that determination on the basis set out in regulation 46(4) (for example because the parties have not yet agreed the pattern or frequency or the evidence as to a past pattern is disputed),
the Secretary of State may make the decision on the basis of an assumption that the non-resident parent is to have the care of the child overnight for one night per week.

(3) Where the Secretary of State makes a decision under paragraph (2) the assumption applies until an application is made under section 17 of the 1991 Act for a supersession of that decision and the evidence provided is sufficient to enable a determination to be made on the basis set out in regulation 46(4).”

6. Schedule 1, para 7 of the Child Support Act 1991 (referred to in reg 46(1)), deals with shared care in the following terms:

> "(1) This paragraph applies where the rate of child support maintenance payable is the basic rate or a reduced rate or is determined under paragraph 5A.
>
> (2) If the care of a qualifying child is, or is to be, shared between the non-resident parent and the person with care, so that the non-resident parent from time to time has care of the child overnight, the amount of child support maintenance which he would otherwise have been liable to pay the person with care, as calculated in accordance with the preceding paragraphs of this Part of this Schedule, is to be decreased in accordance with this paragraph.
>
> (3) First, there is to be a decrease according to the number of such nights which the Secretary of State determines there to have been, or expects there to be, or both during a prescribed twelve-month period.
>
> (4) The amount of that decrease for one child is set out in the following Table–

Number of nights	Fraction to subtract
52 to 103	One-seventh
104 to 155	Two-sevenths
156 to 174	Three-sevenths
175 or more	One-half

> (5) …
>
> (6) If the applicable fraction is one-half in relation to any qualifying child in the care of the person with care, the total amount payable to the person with care is then to be further decreased by £7 for each such child.
>
> (7) …"

7. Para 8 of Schedule 1, likewise referred to in reg 46(1), is not relevant to the present case.

8. Before leaving the 1991 Act, I further note that under section 3(3), one of the conditions for being a "person with care" in relation to a child is that the person "usually provides day to day care for the child."

9. The FtT's decision notice indicates that:

> "Whilst the Tribunal accepts that [F] and [M] agreed that care of [S] should be shared equally, this is not what has actually happened. For the purposes of Regulation 46 of the Child Support Maintenance Regulations 2012 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. It is clear from [F's] calendars that there were a number of nights when [S] was in [F's] care but they did not stay at the same address. When these are taken into account, for the purposes of shared care, [F] has only had [S] for 172 nights. The level of care is not shared equally between the parents and Regulation 50 does not apply."

10. In its statement of reasons, the FtT noted the provisions of the 1991 Act, sch 1, para 7 and of regs 46 and 47 of the 2012 Regulations. It went on to note the submission by F that the care provided was such that neither parent could be regarded as the non-resident parent. It set out reg 50 and noted that if the evidence showed that F provided what the FtT termed equal shared care, F would not be liable to pay any child support maintenance in respect of S.

11. The FtT had earlier noted that the parents agreed that they share the care of S and its decision notice shows that it was aware that the agreement was for an equal sharing. It directed itself that:

> "the Tribunal has had to consider the nature and extent of the care provided by both parties, taking into account not only the stated intention of the parties but what actually happened."

It made clear its view that S received the same "level of" of care from both parents (which in context must be taken as going to "nature").

12. It reviewed the available evidence, noting that F had counted as part of his totals a number of days when S had not stayed with him overnight but had gone back to M for the night. It also noted a number of days had been claimed when F had been away and S had stayed with F's partner, L. It found as fact that the number of nights S was away from M was 177.

13. At this point it recorded its view that Regs 46 and 47

> "set out how the level of shared care is to be calculated. Whilst this is envisaging a slightly different set of circumstances, it would be illogical not to apply the same principles when looking at shared care in this case."

14. Fortified by that view, it concluded that nights when S had stayed with L did not count as nights when F had the care of S, because those circumstances were not analogous to the hospital or boarding school contemplated by reg 46(5) and that thereby the number of nights was reduced to 172. It concluded:

> "The Tribunal, therefore, decided that consideration of the calendars showed that F did not have equal shared care of S. M was in receipt of

> child benefit, and the Secretary of State was right to regard F as the non-resident parent."

15. It then went on to adjust the schedule 1 para 7 calculation to reflect the number of nights which it had concluded should be taken into account.

16. Mr Smith for F properly abandoned a number of arguments he had raised in earlier written submissions. At the oral hearing he made the following points:

> a. the first question to examine is whether a person is a non-resident parent after applying reg 50; only if a person is, should one then go to consider the impact of regs 46 and 47;
>
> b. "day to day care" as used in reg 50 is a new concept in the 2012 Regulations and is to be given a meaning different from the existing concept of "shared care";
>
> c. he invited me to construe "day to day care" by reference to the concept of the person one would go to for consent if one was seeking to arrange for the child to do something. It was not entirely clear if this was being proposed as a form of definition. No positive reason was advanced why the Upper Tribunal should in effect define what the legislator has chosen not to;
>
> d. day to day care is a matter which has to be looked at round the clock. Responsibility overnight is not a trump card;
>
> e. the FtT failed to apply reg 50 adequately, instead applying regs 46 and 47 by analogy and thereby becoming (wrongly) preoccupied with the arrangements for overnight care to the exclusion of other matters;
>
> f. in applying reg 46, the FtT in any event erred by discounting the 5 nights S had spent in the care of L. "Address" should be understood as the address used for correspondence by the non-resident parent. The provision does not require the child and the non-resident parent to be there at the same time. It should be construed in a way so as to provide for parents who are on call for work purposes or other events which may require temporary expedients to be put in place;
>
> g. the FtT further erred in its application of reg 46 by looking at the pattern of shared care pursuant to reg 46(4)(b), something which it can only do "if there is no agreement or court order" – but here there was such an agreement; and
>
> h. in reply, he associated himself with the submission made by Mr James (see [17g]) in relation to "care by proxy".

17. Mr James for the Secretary of State submitted:

a. the FtT did deal first with reg 50;

b. actual delivery of care is the correct test, as the FtT found: statement, para 15;

c. however, here there was an agreement for equal care. Such an agreement provides a key to interpreting the events which occurred. Departures - to a degree - from an agreement for equal care should not be seen as undermining the principle that there was still equal care. The FtT should have given the agreement more weight;

d. responsibility for overnight care is a relevant matter but not a trump card. Days and nights alike are relevant. Responsibility for nights in the reg 50 context is not subject to the particular legislative conditions of regs 46 and 47;

e. the FtT went wrong in law in applying regs 46 and 47 by analogy to the reg 50 question. There is no reason why, as the FtT considered, it would be "illogical not to". The provisions exist for different purposes.

f. the expression "day to day care" is a phrase in common usage, not requiring judicial definition. It is essentially concerned with the routine care of a child, something which needs to be examined in the round; and

g. as to care provided to the child by someone else on behalf of a parent ("care by proxy"), that can be taken into account under reg 50 where they are arrangements which the parent has set up and oversees.

18. The submissions made by M were in part directed to submitting that the decision of the FtT should be upheld on the evidence. As to care by proxy, she expressed her personal feelings rather than making a submission on the legal issue. She did however submit:

a. that it was not possible to conclude that care was equally shared when the FtT had concluded, correctly, that the number of nights was not equal;

b. the FtT based its decision on nights, the extent of contact and the fact that M received child benefit and was entitled to do so;

c. shared care has to be 50/50 or close to it; and

d. the FtT did not go wrong in relying on regs 46 and 47.

19. I am not persuaded that "day to day" care as an undefined term in the context of child support legislation is as untrodden ground as the submissions tended to suggest. When the expression is used in the 2000 Regulations, it is as a term defined by reg 1 of those Regulations, specifically by reference to (to simplify) care of not less than 104 nights in a specified 12 month period. However, the term also features as part of the definition of "person with care" in section 3(3) of the 1991 Act. In this latter context, Upper Tribunal Judge Wikeley held in *GR v CMEC (CSM)* [2011] UKUT 101(AAC) that:

> "the meaning of "day to day care" for the purposes of section 3(3)(b) carries the same practical connotations as Mr Commissioner Jacobs set out in R(CS) 11/02, albeit not subject to the 104 night rule which is contained in regulation 1(2) of the [Child Support (Maintenance Assessment and Special Cases) Regulations 1992/1815] and which applies for the purpose of those specific rules governing various special cases such as shared care."

20. I agree with Mr James that 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* 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 (contrary to what M's point (a) at [17] is in essence suggesting) but is one factor, along with others.

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.

23. While I accept that reg 50(3) makes special provision in relation to receipt of child benefit, I do not regard that as enough to save the FtT's decision. It does not say in para 25 of its statement that it is using child benefit in effect as a tie-break in the absence of evidence to the contrary. In any case, there was evidence in this case which might have been to the contrary, had the FtT not wrongly viewed it through the prism of regs 46 and 47.

24. As I have found there to be an error of law in relation to the FtT's reliance on regs 46 and 47 I need not rule on the use made by the FtT of the agreement between F and M. It does, though, seem to me that Mr James' submission comes very close to, if it does not actually cross, the line of suggesting that a tribunal of fact ought to have ascribed diferent weight to the evidence before it than it in fact did, which would not amount to an error of law.

25. I had earlier invited the parties to consider whether, if I were to find the decision of the FtT to have been in error of law, I should remake the decision rather than remit it. At the oral hearing I was told that there is a second case in the FtT between the same parties stayed behind this one. Mr Smith submitted that given that time remaining in the hearing appeared short if consideration were to be given to remaking the decision and given the existence of the other pending case, it would be preferable to remit the present case to be heard together with the other one. Mr James was content with that approach. M was understandably concerned that litigation should not drag on for ever.

26. Regs 46 and 47 will only arise in this case, if at all, if F is found, despite the application of reg 50, to be a non-resident parent. Lest that stage be reached, and in an effort to minimise the risk that the litigation between M and F in relation to child support be prolonged yet further, I rule as follows on Mr Smith's remaining submissions:

> a. reg 46(4) directs one first to an agreement or court order, if there is one. Only if there is not is it appropriate to go to the pattern of shared care referred to in reg 46(4)(b). A similar reference to a agreement or court order is not to be found in the equivalent provision in the 2000 Regulations (reg 7) and must be taken to have been introduced deliberately into reg 46; and
>
> b. for a night to count under reg 46(5), (leaving aside the particular circumstances addressed by sub-paragraph (c), which are not relevant

> to the present case) it is (inter alia) a requirement for a night to count that "the child stays at the same address as the non-resident parent". Grammatically, that does not refer to staying at the non-resident parent's usual address (whether the non-resident parent is there or not); it requires that for the night in question the child stays at the same address as the non-resident parent does. I accept that this may work hardship in the case of people with unusual working patterns, but that is what the regulation says.

27. The decision on the re-hearing is a matter for the First-tier Tribunal and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

CG Ward
Judge of the Upper Tribunal
13 July 2017