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Neutral Citation Number: [2021] EWCOP 2

Case No: 11578958

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

NG
(by his litigation friend, the Official Solicitor)

Appellant

and

(1) HERTFORDSHIRE COUNTY COUNCIL
(2) AG
(3) HG
(4) NDG

Respondents

- -
- -

Mr Parishil Patel QC (instructed by **Mackintosh Law**) for the **Appellant**
Mr Nazeer Chowdhury (instructed by **Hertfordshire County Council**) for the **First Respondent**
The Second Respondent represented herself
The Third Respondent was not **present** and **was not represented**
The Fourth Respondent represented himself

Hearing dates: **30 November 2020**

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Approved Judgment

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MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Lieven DBE :

1. This is an appeal brought by the Official Solicitor ("OS") on behalf of NG against the decision of HHJ Vavrecka ("the Judge") dated 24 July 2020. The issue in the appeal is whether NG's mother, the Second Respondent AG, and NG's step-father, the Fourth Respondent NDG, have a reasonable excuse to leave their homes to provide care to NG, pursuant to regulation 6(2)(d) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the first restrictions Regulations").

2. The OS raises three grounds of challenge - that the Judge was wrong in finding that NG was not in receipt of a shared care package; that the Judge erred in law in his interpretation of regulation 6(2)(d); and that the Judge asked himself the wrong question, namely whether the welfare deputy, HG, had a reasonable interpretation of the regulation.

3. I granted permission to appeal on 6 November 2020 and ordered the appeal to come before me on 30 November 2020.

4. There is a very significant history around the care of NG. NG is aged 30. He has moderate to severe autism with some mild learning difficulty. His ability to communicate is severely impaired and he is considered to be vulnerable to the influence of others. It is not disputed that NG lacks capacity to conduct proceedings in respect of decisions as to his residence, care arrangements and contact with NDG and AG.

5. For many years NG had a care package arranged by NDG and AG and managed jointly by them. NDG is NG's stepfather and has been a significant part of his life since he was two years old. NG regards NDG as his father and does not know his biological father. I will refer to AG and NDG as NG's parents. The parents served jointly until September 2017 as NG's deputy for welfare, health, property and affairs. No replacement Deputy was appointed or thought necessary by the Court until autumn 2019. I understand that throughout this period NG was receiving a package of care being provided by paid carers and his parents and being funded via direct payments from Hertfordshire County Council to AG.

6. At all material times NG has lived in his own flat with his carers coming to his flat and he has required 24 hour supervision and care.

7. There have been proceedings since 2017 relating to contact between NG and NDG involving very considerable dispute between AG and NDG. There was a long period when NDG was not having contact with NG. The dispute came before HHJ Waller in June 2018 and he gave judgment on 6 July 2018. The specific matter before HHJ Waller was NDG's application to have contact with NG. Throughout HHJ Waller's judgment there are references to "contact" between NDG and NG rather than to the care that was being provided by NDG by NG. Mr Chowdhury, for the Local Authority, places considerable reliance on these passages to support his argument that the parents were having contact with NG but were not providing a "shared care" package to him.

8. Following HHJ Waller's judgment, in August 2019 HG was appointed as NG's deputy for health and welfare and property and affairs on an interim basis. On 10 December 2019, HG's appointments as deputy for health and welfare and property and affairs was made final.

9. On 23 March 2020, in the light of the Covid-19 pandemic and the Government's announcement of a national lockdown, HG sent an email to AG and NDG stating as follows:

> *"It is really unfortunate I have to make some difficult decisions during these unprecedented times to ensure NG's well-being and that of others.*
>
> *...*
>
> *As of today I am suspending contact with NG except for his carers who will follow a very strict hand washing and cleanliness regime, whilst trying to encourage NG to follow this also. This will be continuously reviewed in line with government advice or instructions.*
>
> *NG will remain at his own flat in Rickmansworth, this is the best option and by starting as we mean to go on will hopefully not confuse NG.*
>
> *...."*

10. HG explained this in his statement to the Judge as follows:

> *"6. When the pandemic was confirmed and the lockdown was implemented, it fell to me as welfare deputy to make decisions about what arrangements for NG's care and contact with his family would be in his best interests. I contacted the care agency who said to me that they will be sending a letter to all their clients that if family visits were to continue, they would have to withdraw care, as this would expose their care staff as well as the client to additional unnecessary risk. The letter was sent on the 27th March 2020 and both AG and NDG received that letter."*

11. Between that date, which was at the start of the first Covid-19 lockdown in the UK, and September 2020 the parents had no direct contact with NG and his care was entirely provided by paid carers.

12. NDG challenged HG's decision in his email. He issued an application in the Court of Protection on 1 April 2020. There was some delay in the Court of Protection and the application was not heard by HHJ Vavrecka until 1 June 2020. At that hearing, the Official Solicitor (who had, by then, been appointed to act as NG's litigation friend) supported NDG's application. The Judge produced a written judgment on 24 July upholding HG's decision. The OS then sought permission to appeal that decision.

13. The principal issue turns on the correct construction of regulation 6(2)(d) of the first restrictions Regulations.

<u>The First Restrictions Regulations</u>

14. In considering the proper construction of regulation 6(2)(d) it is important to see the regulation as a whole and consider some of the other exceptions in regulation 6. Regulation 6 states:

> *"6.— Restrictions on movement*

(1) During the emergency period, no person may leave the place where they are living without reasonable excuse.

(2) For the purposes of paragraph (1), a reasonable excuse includes the need—

(a) to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, [...] 2 including from any business listed in Part 3 of Schedule 2;

…

(b) to take exercise either alone or with other members of their household;

….

(d) to provide care or assistance, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006, to a vulnerable person, or to provide emergency assistance;

(e) to donate blood;

(f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;

(g) to attend a funeral of—

(i) a member of the person's household,

(ii) a close family member, or

(iii) if no-one within sub-paragraphs (i) or (ii) are attending, a friend;

…

(ga) to visit a burial ground or garden of remembrance, to pay respects to a member of the person's household, a family member or friend;

….

(j) in relation to children who do not live in the same household as their parents, or one of their parents, to continue existing arrangements for access to, and contact between, parents and children, and for the purposes of this paragraph, "parent" includes a person who is not a parent of the child, but who has parental responsibility for, or who has care of, the child;

…"

[emphasis added]

15. I have included certain parts of regulation 6 because it is immediately clear that in some of the exceptions the concept of "need" is a hard edged one, capable of objective judgement, such as the need to buy food; whereas in others, there is necessarily an element of subjective judgement, such as the need to visit a cemetery or burial ground.

16. Regulation 9 makes it a criminal offence to act in breach of regulation 6.

17. As is well known, the first restrictions Regulations have changed on a number of occasions since the first lockdown. The first restrictions Regulations came into force on 26 March 2020. The history of the first restrictions Regulations thereafter is as follows. On 21 April 2020, regulation 2(4)(a) of the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 (SI/2020:447) inserted the words *"or be outside of"* into the opening words of regulation 6 of the first restrictions Regulations, so now the restriction on movement reads *"… no person may leave or be outside of the place where they are living without reasonable excuse".* No other relevant amendments were made.

18. On 1 June 2020, the Health Protection (Coronavirus, Restrictions) (Amendment) (No. 3) (England) Regulations 2020 (SI/2020:558) made a number of relevant amendments:

    a. Regulation 6 of the first restrictions Regulations now read " … no person may, without reasonable excuse, stay overnight at any place other than the place where they are living" (inserted by regulation 2(6)). The reasonable excuse in relation to care or assistance remained in identical terms.

    b. Regulation 7 of the first restrictions Regulations now read " …. No person may participate in a gathering which takes place in a public or private place – (a) outdoors, and consists of more than six persons, or (b) indoors, and consists of two or more persons (inserted by regulation 2(7)). The exceptions in relation to gathering of members of the same household and care or assistance remained in identical terms.

19. On 13 June 2020, the Health Protection (Coronavirus, Restrictions) (Amendment No. 4) (England) Regulations 2020 (SI/2020:588) introduced the concept of linked households, colloquially known as "support bubbles". Regulation 2(7) inserted regulation 7A into the first restriction Regulations, which set out the basis upon which two households could form linked households. In short, one of the two households had to be a single-person household, and the adult members of the other household (which could comprise any number of adults and children) each had to agree. Once you formed a linked household, and then ceased to be a linked household, you could not form another linked household. The exception in relation to care or assistance remained in identical terms.

20. On 4 July 2020, Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (SI/2020:684) ("the second restrictions Regulations") came into

force. The first restrictions Regulations were revoked in their entirety, other than in relation to any offence committed before the second restrictions Regulations came into force.

21. On 14 October 2020, a tier system was introduced in England which created three tiers, tier 1 (Medium), tier 2 (High) and tier 3 (Very High). Hertfordshire (the area where NG, NDG and AG live) was placed in tier 1. There was no restriction on movement but there were restrictions on gatherings of more than six people. Tier 2 and tier 3 contained greater restrictions on gatherings. In Tier 2, no gathering could take place indoors which consist of two or more people (see paragraphs 1 of Schedule 1), and no gathering could take place outdoors of more than six people (see paragraph 2 of Schedule 1). In Tier 3, the same basic restrictions applied as in Tier 2. The restrictions were subject to exceptions in relation to linked households and the provision of care or assistance to a vulnerable person in relation to each of the tiers.

22. On 5 November 2020, a second national "lockdown" was imposed which restricted persons (i) leaving or being outside the place where they were living and (ii) gathering in groups of two or more. This national "lockdown" ended on 2 December 2020. Those restrictions were subject to exceptions in relation to linked households and care or assistance to a vulnerable person.

23. When the second national "lockdown" ended on 2 December 2020, the tier system was re-imposed. The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI/2020:1374) ("the All Tiers Regulations") were published. Hertfordshire was placed in Tier 2 (High). The restrictions on gatherings to be imposed were identical to those which were imposed under the tier system previously (see paragraph 21 above). The restrictions were subject to exceptions in relation to linked households and to the provision of care or assistance. The latter exception was widened to include care or assistance to a vulnerable person and a person who has a disability. The latter person is not expressly defined in the legislation. The Secretary of State is under an obligation to review the need for the restrictions once every 28 days and the tier which each area should be placed in once every 14 days (see regulation 14(1)). It can be seen that this case continues to be relevant because the "care" exception in the first restrictions Regulations remains extant.

24. By reason of The Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England)(Amendment) Regulations 2020, Hertfordshire inter alia was placed into Tier 4 restrictions which imposed upon persons in the area an obligation not to leave or be outside the place where they leaving except for specified purposes, and restricted gatherings to two persons outdoors in relation to persons not in the same or linked household. The care exception to the restriction on movement/gatherings are set out in identical terms: see paragraph 2(5)(c) of Schedule 3A.

25. On the day after the hearing before me, the Court of Appeal issued its judgment in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1606. This was a challenge to the vires of the first restrictions Regulations. The Court set out a brief overview of the context in which the first restrictions Regulations were made. This context is strongly relied upon by Mr Chowdhury in his submissions about the mischief of the first restrictions Regulations. At [3]-[8] the Court of Appeal said:

> *"3. On 31 December 2019, the World Health Organisation ("WHO") was notified by China of a cluster of unusual pneumonia cases. These cases were later identified as being caused by a novel coronavirus now referred to as Covid-19, although it is technically called "severe acute respiratory syndrome coronavirus 2" or "SARS-CoV-2".*
>
> *4. On 30 January 2020 the Director General of WHO declared a public health emergency of international concern over the global outbreak of Covid-19. He announced that there had been an outbreak of a previously unknown pathogen. There were by then 98 cases in countries outside China, in Asia, Europe and North America.*
>
> *5. On 31 January 2020, the United Kingdom reported its first cases of Covid-19.*
>
> *6. On 16 March 2020 the Government advised the public to avoid non-essential contact with others, to stop all unnecessary travel and to work from home wherever possible.*
>
> *7. On 18 March 2020 the Government requested that schools should stop providing education to children on school premises. This did not apply to children of those classified as key workers or to vulnerable children.*
>
> *8. On 23 March 2020 the Prime Minister announced that England was being placed in what became known as the "lockdown". The regulations to give effect to that announcement were made on 26 March 2020."*

26. At [96]-[97] the Court gave its view, obiter, on the argument raised on article 8 ECHR and said:

> *"96. There can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate.*
>
> *97. In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters."*

27. This judgment was concerned with the vires of the first restrictions Regulations. It is therefore helpful in setting out the background to the first restrictions Regulations but is of limited assistance in the interpretation of regulation 6(2)(d).

The judgment

28. HHJ Vavrecka set out a long and detailed judgment which referred back to the judgment of HHJ Waller on 6 July 2018. The principal issue before HHJ Waller, as he records at [2], was NG's contact with NDG. The dispute was that there had been a complete breakdown in the relationship between AG and NDG and AG submitted that NG did not wish to have contact with NDG and it was not in his best interests to do so. There are a large number of references in HHJ Waller's judgment, which both HHJ Vavrecka and now Mr Chowdhury rely on, which refer to the issue of "contact" between NDG and NG. However, in my view it is important to appreciate that it was always the intention that when NDG (or indeed AG) had contact with NG they would provide him with care at the same time as contact. NG requires 24/7 care including encouraging him to eat and helping him with personal care. The use of the word "contact" in HHJ Waller's judgment therefore must be read in this context.

29. Judge Vavrecka's judgment is a long and careful one and he fully sets out the position of the parties and the factual background to NG's care. At [81] onwards he sets out the position of the Deputy, including recording that NG has a team of carers who support him 24/7 *"apart from periods of time spent visiting his mother AG and his stepfather NDG".* At [89] he records that he considered whether additional carers would need to be recruited, when the parents could no longer visit and provide care, but the *"existing carers were willing to alter their shifts to ensure NG's care provision was maintained."*

30. The Judge set out his analysis at [133] onwards. He starts by referring to the legal framework set up by the orders of Judge Waller. At [143]–[145] he says:

> *"143. In looking at the judgment and structure of the order, Judge Waller was clearly satisfied that it was in NG's best interest to reside at his present flat with the current care package in place. The arrangements for seeing NDG were throughout the judgment and order referred to as 'contact'. Although the annex to the judgment dated 11 July 2019 (K29-34) clarified the terms of the order and that NG 'should be transferred to NDG's full care and responsibility', in my view there is nothing in the annex or the wording of this additional paragraph that in any way alters the framework of the time NG spends with NDG being described as contact.*
>
> *144. It is not a question of preferring the 'words' of the judgment and ignoring the substance of the arrangement. I do not accept the suggestion that the care package always included an element of family care as well as professional care. NDG describes it as 'an integrated care package'. That does not accord with Judge Waller's entire approach and judgment. The fact that the LA has commissioned a 24/7 care package is relevant and the nature of NG's care package makes clear it is not a 'shared care package' rather that there is a care package and that the family have contact.*
>
> *145. I accept the submissions of HG and the LA as to the framework established by the court. In describing it as contact, I do not intend to diminish its significance for NG, but it does distinguish the arrangement from the care package which was otherwise in place to meet NG's 24/7*

needs. I am also aware of the NHS guidance and the key importance of family links and continued visits for people with autism. This does not however alter my interpretation. The description that NDG has put to the court regarding the nature of what he sees as an 'integrated care arrangement' is not reflected in the judgment of HHJ Waller or the actual provision of the current care package as set out in the evidence of HG."

31. At [150–153] Judge Vavrecka says:

"150. Whilst it is clear that when NG was with NDG he was being provided with 'care', this was an arrangement for contact and has to be seen in the context of there being a care package which provided 24/7 care for NG. The Deputy quite properly in my view come to the conclusion that the parents did not need to 'provide care and assistance' given the care package (with adjustments) would ensure all of NG's care needs were met.

151. In HG's position statement for 11 May hearing, the Deputy confirmed that 'since 23 March 2020 NG has not had direct contact with NDG or AG and has been cared for by his familiar staff team who have amended their shift patterns to ensure the stability of his care arrangements' (para 4, A2).

152. For these reasons, I agreed with the view that neither AG or NDG were needed to provide essential care or assistance to NG.

153. In looking at paragraph 6 of the Regulations, and whether NDG needs to 'provide care' within the terms of regulation 6, the factual position and the legal framework are both relevant. The decision of HG and the restrictions placed on contact by deputy and Home Instead were in my judgment appropriate and proper, and reflect a reasonable reading of the regulations and the contact order of HHJ Waller. The view that direct contact between NG and NDG is prevented by the "lockdown" rules in my judgment properly interprets the wording of the regulation as well as its spirit. I do not accept the submission that the Deputy has misinterpreted the regulations."

Submissions

32. The OS submits that the Judge erred in law in three regards. Firstly, that his finding that NG was not receiving "shared care" and that Judge Waller's order was concerned with contact and not care is plainly wrong. Secondly, that the Judge's interpretation of regulation 6(2)(b) was incorrect because it incorporated a test that the provision of care must be "essential" (see J152) and it gave a priority to paid care over unpaid family care. Thirdly, that HG was wrong in saying that the test was whether HG's approach was reasonable, this being a matter of the interpretation of the regulation and not rationality. Mr Patel accepted in the course of the hearing that the third ground added nothing, because if HG's interpretation of the regulation was wrong, he would succeed on ground two. It is therefore not necessary to consider the third ground any further.

33. In support of the first ground, Mr Patel points out that on average NG's parents provide three out of seven days care to him, including NG spending three overnight periods with either AG or NDG. The distribution of time is somewhat complicated, but the three days out of seven is the evened out position. When NG spends time with his parents, they provide him with all his care needs and those care needs are and were extensive. At no time prior to the March 2020 lockdown was NG provided with a 24/7 paid care by the local authority. Up until August 2019, and the appointment of HG, arrangements for care were made by AG on the basis of direct payments from the local authority to her. This arrangement broke down because HHJ Waller concluded that AG was using her role to impede contact between NG and NDG, not because the care was not being provided by family members.

34. The nature of the arrangements and the provision of care by his parents is made clear in the report of the independent social worker which was before HHJ Waller. That report recommends a move from AG organising the care, and the parents being the primary carers, to Home Instead being the organiser of the care and the primary provider. However, it is clear in the report that the intention is that the parents continue to provide care during the times when NG is with them, either in his home or theirs. There is therefore a distinction between the organisation of the care, which shifted to Home Instead and HG, and the provision of the care at different times either from paid carers or the parents. Mr Patel submits that it is important to look at the substance of the arrangements and not the label that HHJ Waller was using.

35. On the second ground, Mr Patel submits that regulation 6 should be interpreted on its clear language, particularly as it creates a criminal liability. There is no requirement in the regulation for the care being provided to be "essential" and for there to be no prospect of the potential provision of paid care instead of family care. He says that the "need" identified in the opening words of regulation 6 must focus on the needs of the provider of the care, i.e. the person who is seeking to leave their home. If, as here, the person providing the care is doing so pursuant to a court order where the court has found it is in the vulnerable adult's best interests for that care to be provided, then that is the end of the matter. Such care is plainly the provision of care which falls within the terms of regulation 6(2)(d).

36. He submits that there has to be an individualised assessment as to whether the person requires care, not a blanket approach that if paid care is available then it takes precedence over unpaid care and therefore reg 6(2)(d) does not apply.

37. On ground one, Mr Chowdhury also points to the terms of the Independent Social Worker's report, but to the references to the parents not being the primary carers and not being involved in the care arrangements. He relies heavily on the terms of HHJ Waller's judgment and the consistent references to NDG having "contact" with NG. The terms of that judgment, particularly [133]-[143], is he suggests a complete answer to the case. The purpose and nature of the order that followed the judgment was to make provision for contact and not for care. Had the court been minded to make an order for care and contact, i.e. a shared care order, then it would have said so.

38. On ground two, Mr Chowdhury starts with the context in which the first restrictions Regulations were made and the very great importance of preventing the mixing of households to stop the spread of Covid-19. He relies on what was said in ***Dolan*** about that context and the mischief that the first restrictions Regulations were seeking to

combat. He argues that the "need" in regulation 6(2) when read in the context of regulation 6(2)(d) must amount to a "necessity", and that in regulation 6(2)(d) the provision of care has to be for "essential" care. He also disagrees with Mr Patel by arguing that the focus of the question must be on NG's subjective needs. Therefore, if the care could and would be provided by someone else, i.e. the paid carers, then there was no need for NDG or AG to provide care within the meaning of regulation 6(2)(d). Here, NG did not need his parents to provide the care because from late March 2020 full time paid care had been put in place.

39. Both AG and NDG now support the position of the Official Solicitor. NDG had strongly disagreed with HG's approach from the beginning, whereas AG was initially more prepared to accept the restrictions on her contact with NG.

40. NDG argued that NG's best interests were relevant in assessing his needs, and his best interests plainly required an element of family care. He argued that the first restrictions Regulations plainly made no distinction between paid and unpaid care.

Conclusions

41. In my view, the Official Solicitor is correct on grounds one and two. NDG and AG are beyond any doubt providing care to NG when they are spending time with him. At those times, which amount to approximately three out of seven days per week, they are his sole carers. NG requires 24/7 care by reason of his disability and at the times the parents are having contact with him, the care he needs is being provided by his parents and not by paid carers.

42. Both the Local Authority and the Judge have placed undue weight on the language of the judgment and order of HHJ Waller without properly considering the nature of the dispute that was in issue. The dispute at that time was about what contact NDG would have with NG and whether AG was acting to prevent that contact. Therefore, the language, both of the judgment and the order focused on the word "contact" and on how such contact could be ensured and supported going forward. During the course of those proceedings the nature of the care that was being provided by the parents was simply not part of the dispute. It was both the intention of the order, and the factual position, that when the parents were exercising their contact rights under the order, they would also be providing sole care to NG. However, this did not need to be spelled out by Judge Waller because it was both obvious, but also not in dispute.

43. The factual position is that NG's parents have been providing him with a significant part of his care throughout his life, and in particular since he became an adult. There is, so far as I am aware, no magic in the words "shared care", it is merely a reflection of the reality of the care that is being provided. On the facts of NG's case, there was undoubtedly shared care between that provided by Home Instead as paid care and that provided by his parents. When considering the issue in this case, the important matter is the actual provision of the care rather than who arranged and managed the provision of the care. Therefore, in my view, Mr Chowdhury's reliance on those parts of the Independent Social Worker's report where he refers to Home Instead managing the care is irrelevant to the issue in play before me.

44. For these reasons, in my view the Judge was wrong to say that this was not a shared care package and that the parents were just having contact and were not providing care.

45. On the second ground, the starting point when interpreting the regulation is to consider its words. Neither the opening words of regulation 6, nor the words in regulation 6(2)(d), provide for the care to be "essential". I note that when the first restrictions Regulations intended to place a high test of the matter being essential, as in regulation 6(2)(a) relating to obtaining basic necessities, the word "essential" was used.

46. The different limbs of regulation 6 relate to very different matters and the approach to "need" will to some degree vary depending on the different limbs. However, the first restrictions Regulations make little sense if a hard edged objective test of necessity is to be applied to each one. There must be a "need", and not simply a subjective "desire", to undertake the activity in each limb or the restrictions in the first restrictions Regulations would become impossible to enforce. However, the Government has not chosen to use the word "essential" anywhere other than in relation to provisions in (a); and where a particularly high test is being required, such as in (i) and the access to "critical" public service, that is expressly stated.

47. The context and mischief of the first restrictions Regulations is, of course, highly important. The background to, and purpose of, the first restrictions Regulations is fully explained in *Dolan*. There can be no possible doubt that in enacting the first restrictions Regulations the Government was placing a very great emphasis on the importance of people staying at home and not mixing unnecessarily and without very good reason. However, it is equally clear that the Government intended to ensure that those who needed to leave their home to provide care or assistance to a vulnerable person should be allowed to do so. In this context it is important to have in mind that there are an enormous number of family carers providing care to persons outside their household. It is essential that care can continue to be provided throughout the course of the pandemic. The fact that it would be theoretically possible, or indeed practically possible, for that unpaid family care to be replaced by paid care does not mean that the family care is not meeting a need.

48. If one considers the need for the care from NG's perspective then, in my view, it is clear that he needs parental care as well as paid care. His physical needs can be met by 24/7 paid care, but his emotional needs and best interests are met by having a mix of family and paid care. It is wrong in my view to focus simply on the fact that his physical needs can be met by paid care. As NDG and the OS submitted, NG's best interests must be relevant to meeting his needs and those best interests include being cared for, at times, by his parents.

49. This interpretation is supported by the words of regulation 6(1) and the defence of reasonable excuse. The fact that a person is delivering care pursuant to a court order to a family member must in my view amount to a reasonable excuse to leave the home.

50. In looking at the broader issues in play when interpreting regulation 6(2)(d) it is also important to have regard to article 8 ECHR and the protection of family life, subject to the justifications in article 8(2). A ban on family members being able to provide care to loved ones, in any circumstances where paid care is available, would be a very serious interference with the right to family life. That does not mean that such an interference would be incapable of justification, but it does in my view mean that a court should be very careful before reaching an interpretation which would give such precedence to paid over family care. There is nothing in the first restrictions Regulations, Guidance, or any Government document which would suggest the Government intended to

prioritise paid over family care in this way or to interfere with article 8 rights in such a broad manner.

51. The Local Authority's submissions, and the Judge's interpretation, do create the effect of giving such a priority to paid care. NG's physical needs can undoubtedly be met by his paid carers, but his wider emotional and psychological need is to see and be cared for by his parents. Further, care from a loving family is not a one way street in which the focus is only on the person being cared for. Both NDG and AG plainly feel that they "need", in the sense that it is important both to them and to NG, to provide NG with care. The very nature of this bond is undermined by the somewhat mechanistic approach of considering that there is no need for the parents to provide care because someone else can be paid to do so.

52. Further, this conclusion is supported by the approach to the interpretation of statute or statutory instrument encompassed in the principle against doubtful penalisation. Regulation 9 creates a criminal offence if regulation 6(1) is breached. As is set out in *Bennion on Statutory Interpretation (6th ed): "It is a principle of legal policy that a person should not be penalised except under clear law",* see p. 748. If the care had to be essential, or there was a priority given to paid over unpaid care, then the first restrictions Regulations needed to make that clear. The wording of regulation 6(2)(d) is broad and unspecific in respect to the nature of the care. It would therefore be wrong to create a criminal offence for someone providing care in the circumstances of AG and NDG.

53. For these reasons I allow the appeal on both grounds one and two.