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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 689 (Admin)

CO/2715/2022

Royal Courts of Justice

Wednesday, 8 March 2023

Before:

MR JUSTICE ANDREW BAKER

B E T W E E N :

THE KING
on the application of
WA

Claimant

- and -

(1) DIRECTOR OF LEGAL AID CASEWORK
(2) THE LORD CHANCELLOR

Defendants

MR C BUTTLER KC and MISS E FOUBISTER (instructed by Public Law Project) appeared on behalf of the Claimant.

MR M BIRDLING KC and MS S O'KEEFE (instructed by the Government Legal Department) appeared on behalf of the First Defendant.

MR S SIBBEL (instructed by Government Legal Department) appeared on behalf of the Second Defendant).

J U D G M E N T

MR JUSTICE ANDREW BAKER:

<u>Introduction</u>

1 The claimant applies, with permission granted on paper, for judicial review of a decision by the Legal Aid Agency for which the first defendant Director is responsible ('the Decision'). The Decision refused the claimant's application for legal aid for the purpose of family proceedings which concerned custody arrangements in respect of the claimant's youngest son, G, and were being contested between the claimant and her ex-partner, G's father. The refusal of legal aid was on the basis of means, purportedly applying certain provisions of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (the 'Means Regulations') and following Guidance on the Means Regulations for which the Lord Chancellor is responsible (the 'Guidance').

2 The Lord Chancellor is the second defendant to this claim because the claimant's grounds involve a challenge to one part of the Guidance. It was published by the Legal Aid Agency under the title:

> "CIVIL REPRESENTATION
> Lord Chancellor's guidance on determining financial eligibility for certificated work (April 2021)"

3 In her application for permission to apply for judicial review, the claimant sought anonymity and costs capping, both of which were granted. Costs capping was granted by the order on paper granting permission. The costs capping order limits the claimant's liability for the defendants' costs to £10,000 and limits the defendants' liability for the claimant's costs to £50,000.

4 In the family proceedings, the claimant claimed, *inter alia,* that: (i) she was the victim of domestic abuse from G's father; (ii) he had acted in breach of a 50:50 custody agreement in respect of G and was seeking to move G across the country away from the claimant and his school; and (iii) his abusive behaviour included the obtaining, by coercive means. of the child benefit income in respect of G.

5 There is a statutory scheme in Schedule 10 to the Social Security Contributions and Benefits Act 1992, as modified under para.6 of that schedule by the Child Benefit (General) Regulations 2006, for sorting out which of two child benefit claimants in respect of the same child should receive the benefit. It allows for parental choice in two ways. Paragraph 5 of Schedule 10 allows for a joint election of recipient if the preceding rules in paras.1 to 4 do not identify the claimant with priority. Regulation 15 in the 2006 Regulations provides that, if a claimant with priority under the rules in Schedule 10 gives notice that they do not want it, that notice overrides the priority they would otherwise have had. I understand that G's father obtained the child benefit entitlement in respect of G by virtue of a Regulation 15 notification by the claimant that in the family proceedings she would be saying that she had been coerced into giving.

6 The claimant was seeking full custody of G or, in the alternative, the enforcement of what she said was the prior custody sharing agreement and, in any event, some appropriate order ensuring that G would stay settled at school. The claimant's legal aid application submitted on 22 March 2022 sought in-scope legal aid for continued legal representation in the family proceedings. Until that point, the claimant had been legally represented in those proceedings on a privately paid basis. She asserts that, as a trainee nurse with no substantial savings or investments, she could not have afforded to pay for continued legal representation for the family proceedings without selling her home. The defendants do not accept that the claimant has established that as a matter of fact.

7 In the event, the claimant was represented by solicitors throughout the family proceedings because, for the final stages and ultimate disposal, they agreed to act at risk as to the recovery of any fees on terms that they would be paid only if this judicial review claim succeeds.

8 It is common ground that:

(1) if G was the claimant's dependent child and a member of her household, then under the Means Regulations, in the calculation of her disposable income for the purpose of a decision on her application for legal aid,

(a) *prima facie* a deduction for maintenance of G had to be made at a fixed rate referred to in Means Regulation 25(2)(b)(i); and

(b) her accommodation costs had to be deducted in full;

(2) in the disposable income calculation in fact performed,

(a) no deduction was made under Means Regulation 25(2)(b) on the ground that G, although a dependent child, was not a member of the claimant's household; and

(b) therefore, the deduction of the claimant's accommodation cost was at the capped rate of £545 per month referred to in Means Regulation 28(7);

(3) if it was correct to treat Regulation 25(2)(b) as inapplicable to G, then the claimant was ineligible for legal aid on income grounds, whereas, if Regulation 25(2)(b) had been applied and thus the accommodation cost deduction had not been capped, the disposable income calculation would have shown her to be eligible.

Means Regulations 25 and 28

9 Means Regulation 25(2)(b) provides that, subject to Means Regulation 25(3), a deduction must be made in the disposable income calculation:

> "in respect of the maintenance of any dependent child or dependent relative of the individual, where such persons are members of the individual's household—
>
> (i) in the case of a dependent child or a dependent relative aged 15 or under… the amount specified at (a) in column 2 in the table in paragraph 2 of the Schedule; and
>
> (ii) in the case of a dependent child or a dependent relative aged 16 or over … the amount specified at (b) in column 2 in [the same table].".

The Schedule to which Means Regulation 25(2)(b) refers is Schedule 2 to the Income Support (General) Regulations 1987 (the "Income Support Regulations").

10 When the claimant's disposable income was calculated by the Legal Aid Agency for the purpose of her legal aid application, the amount specified at (a), likewise at (b), in column 2 in the table in para.2 of that Schedule ('the Table') was £68.60 per week. Appendix 4 to the Guidance said that, in a calculation of monthly disposable income, the deduction should, therefore, be £298.08. The weekly figure in the Table was amended to £70.80 per week from 11 April 2022 by the Social Security Benefits Up-rating Order 2022, and a Legal Aid

Agency "KEYCARD 58 (April 2022)" now gives a monthly equivalent for that of £307.64.

11 Means Regulation 25(3) provides that the Director may reduce any rate provided by virtue of Means Regulation 25(2):

> "by taking into account the income and other resources of the dependent child or dependent relative to such extent as appears to the Director to be equitable."

That is, in substance, a corollary to Means Regulation 25(4), which requires regard to be had to the income and other resources of the child or other relative in ascertaining whether they are a dependant in the first place.

12 Means Regulation 28(2) provides that, subject to Means Regulation 28(4), which is not relevant to this case, in the disposable income calculation, the net rent payable by the individual in respect of their main or only dwelling must be deducted. Means Regulation 28(8) defines net rent, for that purpose, to include monthly mortgage payments if the individual is a homeowner rather than a tenant. However, Means Regulation 28(7) provides that:

> "If no deduction has been made under regulation 25(2), the maximum amount to be deducted under paragraph (2) … must be £545 [per month]."

13 Section 5.6 of the Guidance deals with dependants' allowances under, *inter alia*, Means Regulation 25(2). Guidance in the terms of section 5.6 is of long standing under predecessors to the current legal aid legislation, at least as far back as the Legal Aid Act 1988 and the Civil Legal Aid (Assessment of Resources) Regulations 1989. Paragraphs 3 to 7 of section 5.6 of the Guidance concern allowances for children and para.7 says this:

> "Adjustments to the allowance:
>
> (a) Allowance for parents whose means are not aggregated.
>
> A decision will need to be made whether to grant the dependant's allowance to the individual (it cannot be granted to both the individual and their partner). It would be normal to grant the allowance to the individual if they are receiving the child benefit. If this is not clear the allowance will be granted if the individual appears to be supporting the child from their money.
>
> …
>
> (b) Regulation 25(3) provides that the amount of the dependant's allowance may be reduced by the income and other resources of the child dependant. It would be normal to assume (unless information is given to the contrary) that a child under sixteen would not have any income but children over that age who are in full-time education or training may for example be receiving a grant or if in an apprenticeship will be receiving a wage. This income should be declared by the individual within their application and the amount of the dependant's allowance will be reduced accordingly.
>
> **Note**: Any excess of the child's income over the allowance will not be treated as the individual's income."

14 Means Regulation 26 provides that where:

> "the individual is making and … has regularly made payments for the maintenance of … (b) a child … who is not a member of the individual's household, a reasonable amount must be deducted in respect of such payments."

15 It will be appreciated that the individual referred to in the Means Regulations and the Guidance is here the claimant; the dependent child is G. It was not disputed that at the material time G was a dependent child of the claimant. The question is whether he was part of her household.

The Decision

16 The Decision, dated 28 April 2022, was made upon a request by the claimant for a review of the means assessment carried out in respect of her legal aid application. The material part of the Decision reads as follows:

> "3. In relation to [G] we cannot treat the child as dependent on both the client and the opponent and so we must establish who is the childs [sic] main carer. This is usually done by establishing who is in receipt of the child benefit for the child. In this situation the client does not receive child benefit for the child and the child resides at her home 2 out of 14 days therefore it is not considered his main residence. The dependents [sic] allowance is therefore not available for this child.
>
> 4. We have allowed a deduction for maintenance payments that the client is making towards [G]".

17 The meaning of the last sentence of para.3 of the Decision, given the context, is that, on review, the refusal to make any deduction under Means Regulation 25(2)(b) and, in consequence, the capping of the accommodation cost deduction under Means Regulation 28(7) in the disposable calculation that had been undertaken in respect of the claimant, was upheld on the basis that G did not fall within Means Regulation 25(2)(b).

18 Paragraph 4, read in context, confirmed that the application of Means Regulation 26(b) in respect of the claimant's financial contribution towards G's maintenance was, therefore, upheld on the same basis.

19 The underlying refusal of legal aid that was upheld on review by the Decision came by a letter dated 5 April 2022 from the Legal Aid Agency (Civil Case Management) on behalf of the Director. It stated that Legal Aid was refused on the ground that the claimant's disposable income made her ineligible for legal aid. It gave the claimant's monthly disposable income, as calculated by the Legal Aid Agency, with a breakdown of the calculation. The breakdown included a deduction for housing cost at the capped amount of £545 and explained that "allowances for dependants should not be given, housing costs capped at £545.00 per month …".

20 The other deduction included was £91.10 per month in respect of the claimant's contributions towards G's maintenance, treating him as a child not in her household (i.e. a deduction under Means Regulation 26(b)). The claimant had suggested in her legal aid application that she had monthly expenditure towards G's maintenance of £146. Her claim

for judicial review does not challenge the deduction in the disposable income calculation of the lesser monthly amount of £91.10 if Regulation 26(b) applied and not Regulation 25(2)(b), which was the approach adopted by the Legal Aid Agency.

21 The refusal letter was correct to refer to dependants (plural). The claimant has two adult children from a previous relationship, one of whom (L) was a student for whom the claimant said her home was still a permanent home address, albeit he was away for much of the year. The refusal letter and the Decision dealt with L's position as regards the disposable income calculation for legal aid purposes, but no challenge to the Decision arises out of that.

22 If G should have been treated as a member of the claimant's household, so that the accommodation cost deduction should not have been capped, then Means Regulation 26(b) should not have been treated as applicable. That would reverse the deduction of £91.10 per month in the Legal Aid Agency's calculation, partially offsetting the impact of allowing accommodation cost in full. The accommodation cost put forward by the claimant was £717.15 per month. Deducting that cost in full, rather than applying Means Regulation 28(7), but making no deduction under Means Regulation 26(b), would reduce the bottom line in the disposable income calculation by £81.05 per month, which would leave it still above the eligibility threshold, although only just so.

23 For the legal aid disposable income calculation to produce a result showing the claimant to be eligible, she needed both an uncapped deduction of her housing cost and a maintenance deduction in respect of G under Means Regulation 25(2)(b) that was either not reduced at all or not reduced too far under Means Regulation 25(3).

Grounds

24 The claimant advances three grounds. Ground 1 avers that the Decision and the Guidance misconstrue Means Regulation 25(2)(b). As a result, it is said that they are wrong in law to state that the Legal Aid Agency could not treat G as dependent on both the claimant and her ex-partner, respectively that the dependants' allowance could not be granted both to a legal aid applicant whose application is being considered and to their partner. There was no obligation, as asserted in the Decision, to choose between the claimant and her ex-partner by asking which of them was then G's main carer or at all. They could both have been parental carers such that G was a dependent child who was a member of both separate households for the purpose of a legal aid means assessment.

25 The claimant does not suggest that, where the child of a separated couple has a split living arrangement, that means, as a matter of law, that the child is always a member of both households. The submission is only that there is no rule or law, and specifically it is not the meaning and effect of Regulation 25(2)(b), that the child cannot be a member of both households.

26 That said, it seems to be likely that, if the claimant's case on Ground 1 is correct, that may often be the right conclusion. How regularly in such cases that will then be the difference, as it was in this case, between eligibility and ineligibility on means grounds for a grant of legal aid in support of a cause that qualifies by reference to subject matter and merits is a separate matter and not something on which I have material to make any firm finding. A witness statement from the claimant's family law solicitor suggests, however, that in her firm's practice alone it could be many times per annum.

27 Ground 2, as pleaded, averred that the Decision was wrongly reached because it was wrongly treated as irrelevant that, (i) the claimant had an existing right to custody of G, (ii) legal aid was being sought to enforce that right, (iii) the only reason G was not living more of the time with the claimant was because of the abusive ex-partner's breach of that right, and (iv) the only reason the claimant was not the recipient of child benefit in respect of G was because of the ex-partner's coercive abuse.

28 An immediate difficulty with that is that none of those matters was an established fact in front of the Legal Aid Agency. They were all matters being alleged by the claimant in the family proceedings, the strength or weakness of which would be relevant to the legal aid merits assessment of her family law claim. It would have been rational for the Legal Aid Agency to treat the allegations in that way in the means assessment, if relevant at all in that context, i.e. as allegations having such strength as the merits assessment had assigned to them for the purpose of considering legal aid.

29 I do not agree with a particular submission advanced on behalf of the Director in Mr Birdling's helpful skeleton argument that, being allegations rather than established facts and being matters of relevance or potential relevance to the merits assessment, the matters relied on in respect of Ground 2 "are plainly not permissible considerations when making a Means Regulations determination because the means and merits tests are meant to be cumulative filters." As it seems to me, as I have just already expressed it, if (other things being equal) matters being advanced or proposed to be advanced, in the proceedings in respect of which legal aid was sought, could logically have a bearing upon a question raised by the means assessment, here the question whether a dependent child is a member of a household, then the fact that those matters also – and it may be logically at a prior stage – have a relevance to the merits assessment does not somehow negative that other relevance.

30 Ground 3 avers that the refusal of legal aid was apt to infringe the claimant's Article 6 or Article 8 ECHR rights. The claimant's case is that those rights would have been infringed but for her solicitors' willingness, given the existence of this judicial review claim, to act at risk, and that the lawfulness of the Decision by reference to those rights should be determined on the situation that would have obtained in the absence of this claim: *viz*, so she claims, that she would have been without legal representation for the family proceedings. The suggestion then is that, in the particular circumstances of this case, the absence of legal representation in the family proceedings would have denied the claimant fair access to the Family Court in breach of Article 6.1.

31 If Ground 1 succeeds, that is to say if on the proper construction of Means Regulation 25(2), a dependent child can be a member of two households, then the Decision will fall to be quashed without reaching Ground 2 or Ground 3. In that case, it will have been a flawed decision that wrongly required the claimant to show that G was a member of her household *and not a member of her ex-partner's household*. The Decision would need to be made afresh on the basis of the court's direction of law that a child can be a member of more than one household. In that case, I do not consider that it would be appropriate to purport to direct in advance how the fresh decision should be approached beyond correcting the error of law actually made first time round.

32 Success for the claimant on Ground 1 would also be sufficient for an order quashing and directing the Lord Chancellor to reconsider para.7 of section 5.6 of the Guidance.

33 The defendants' pleaded case, on the proper construction of Means Regulation 25(2)(b), is that (a) the allowance to which it refers can only be granted to one person at a time, and (b), to quote the Lord Chancellor's Detailed Grounds adopted by the Director in hers, that person "is the person 'responsible' for the child to be ascertained by reference to [i] whether they are receiving child benefit for that child or [ii] where no child benefit is paid, where the child 'usually lives'." (Numbering added for convenience.)

34 If that is the proper construction, then, since the claimant's ex-partner was in receipt of the child benefit payable in respect of G, and for that matter had G living with him except over alternate weekends, he had created a situation that necessarily took G outside Means Regulation 25(2)(b). In that reading of the Means Regulation, the factors now relied on by the claimant under Ground 2 would be irrelevant.

35 In that reading of the Means Regulation also, however, the Guidance would be wrong in suggesting that, (i) if child benefit is being paid, its destination is not always determinative, and (ii) if child benefit is not being paid, the decisive criterion is the provision of financial support for the child. That said, for this Claim, the Guidance is challenged only under Ground 1.

36 For completeness, I note that the Lord Chancellor's Detailed Grounds are inconsistent in that, whilst pleading the case I have just quoted, they also say, contrary to that case, but in keeping with the Guidance, that where child benefit is not being paid, the decisive criterion is "who appears to be supporting the child" rather than where the child usually lives, and also that "the Director can consider any relevant circumstance, although the focus of the enquiry at least normally is upon who is receiving child benefit and who is supporting the child." To like effect, Mr Sibbel in his skeleton contended that the Director has a degree of latitude in the sense that "when choosing which partner gets the allowance, the starting point is who gets the child benefit, but the Director is entitled to consider any other relevant circumstance."

37 The inconsistency between the suggested construction of the language of Means Regulation 25(2) and the suggested overall effect foreshadowed what I have concluded, with respect, is a lack of coherence in the Lord Chancellor's position that could not be defended, for all the skill of Mr Sibbel's attempt to do so. The overall effect contended for by the Lord Chancellor potentially supports the claimant on Ground 2, because, if the claimant is wrong on Ground 1, meaning that a dependent child can only be a member of one household, for the purpose of a legal aid means assessment, but, if also, as Mr Sibbel submitted, the household in question need not be identified by a restricted criterion of receipt of child benefit, or usual residence where no child benefit is paid, then the Decision might be considered flawed on its face for having treated only child benefit and predominant residence as relevant.

38 Ground 3 arises for determination only if the Decision does not fall to be quashed by reference to Ground 1 or Ground 2. There is no systemic challenge on human rights grounds, either to the existence of a means assessment for legal aid that includes a number of hard-edged eligibility thresholds, or to the particular rules adopted by the Means Regulations for such a means assessment. The complaint, rather, is that, in the specific circumstances of the claimant's case, refusing her legal aid infringed her Article 6 or Article 8 rights, so that the Director had to treat herself as entitled to exercise an overarching discretion to grant legal aid to the claimant even if she was ineligible under the terms of the

Means Regulations, otherwise properly construed.

Ground 1

39 As was true in the Detailed Grounds filed by the defendants, so also in the argument for the hearing, the Lord Chancellor took the lead on Ground 1 and the Director, for the most part, adopted his submissions.

40 In my view, the Lord Chancellor's position on Ground 1 was not coherent. It was said that,

> "The approach under Regulation 15(1) of the IS Regs is not imported wholesale and the wording of the Guidance does not exclude the consideration by the Director of other relevant circumstances"

and that the Lord Chancellor

> "reads membership of a household in Regulation 25(2) in the same way that the IS Regs use that term, subject to child benefit being the 'normal' indication of responsibility in the Guidance rather than the sole indication."

But that "subject to" means in truth that the Lord Chancellor does not read membership of a household in Means Regulation 25(2) in the same way that the Income Support Regulations use that term.

41 The restriction of a child to membership of a single household for the purpose of income support payments is a creature of that purpose, concerned, as it is, with where to direct welfare payments. It means that the notion of "household" is used in a particular way specific to that purpose in the Income Support Regulations. The Lord Chancellor's argument seeks to import into Means Regulation 25(2) the effect (one child. one household) without the cause (the provisions of the Income Support Regulations creating that effect), although neither effect nor cause is mentioned in the Means Regulations, the effect is bound up with the cause in the Income Support Regulations, serving their purpose of identifying where to send a single set of income support payments that a child can generate, and that is not the purpose of Means Regulation 25(2).

42 Means Regulation 25(2) does not refer to any of the provisions of the Income Support Regulations on which the Lord Chancellor relies. It does not refer to any provision in the Regulations themselves at all, rather Means Regulation 25(2):

> (i) requires a deduction to be made in respect of the maintenance of dependent children or other relatives who are members of the legal aid applicant's household in the disposable income calculation to be undertaken in a legal aid means assessment;
>
> (ii) fixes the amount of that deduction, subject to Regulation 25(3), at the amount stated in the Table.

Reference is not required to anything in the Income Support Regulations other than column 2 in the Table for the amount in order to understand or apply Means Regulation 25(2).

43 Prescribing a rate for the deduction to be made avoids the need for every case to involve a factual investigation of levels of actual expenditure and/or value judgments as to the reasonableness thereof, such as might create an administrative burden disproportionate to the exercise of assessing an applicant's means in a way that is fair for a legal aid eligibility decision. Picking for that purpose the rates that appear from time to time in the Table is convenient and sensible, since they may be taken to represent a standardised legislative

view, updated annually, of the current cost of meeting the essential needs of dependent children or other relatives.

44 The drafting technique used in the Income Support Regulations is to say that a child is a member of a person's household only if the person is responsible for the child, as that notion is defined by those Regulations. It would have been straightforward, if intended, to restrict the deduction under Means Regulation 25(2)(b) in the case of a child to the person treated as responsible for the child by the Income Support Regulations. That would naturally be effected by providing that the deduction is to be made only where the individual is that person. Equally, it would have been straightforward, if intended, to define who is a member of a household under the Means Regulation by cross-reference to the Income Support Regulations, which would have had the same effect, but that was not done.

45 Instead, the criterion under the Means Regulation is whether the dependent child is a member of the individual's household without further explanation or definition of terms. If, although nothing in the Means Regulations prompts the reader to do so, the Income Support Regulations were consulted – and not just the figures in column two in the Table – in order to consider the meaning of the Means Regulation, then, so far as material, the impression would be created that a number of detailed provisions were made and a concept was introduced that a child could not be a member of more than one household, for the purpose of income support payments, that it was not thought appropriate to apply for the purpose of legal aid means assessments. In particular, the impression would be created that specific provision is made where the intention is to treat it as impossible for a child to be regarded as a member of both parents' households, where those are, or have become, separate households, and it would be noted that no such provision was included in the Means Regulations.

46 That would only serve to reinforce an understanding, if otherwise created by the language of Means Regulation 25(2), that a child can be a member of more than one household. If that is not what the language otherwise conveys, then the claimant is wrong on Ground 1 for that simple reason, not because of the decision to use the Table as a reference source for amounts. Conversely, if that is what the language of Means Regulation 25(2) otherwise conveys, then the detailed provisions of the Income Support Regulations not incorporated into or referred to by the Means Regulations do not provide reason to conclude that the language does not mean what it appears to say.

47 In that regard, Mr Sibbel submitted that cross reference to the Table to the Income Support Regulations for amounts would inform the reader that an amount had been chosen that was intended to represent the cost of covering all of a child's essential needs. The submission was that, if that impression were created, the conclusion formed would be that it must be designed only to be given to one household. In my judgment, that impression would not be given and the conclusion would not follow, in any event.

48 There is, or might be, a coherence to that logic if it was apparent from the Means Regulations that the amount intended to be deducted in the disposable income calculation was an amount that was variable, or potentially variable, by reference to the degree to which the applicant in question was, in fact, taking care of the dependent child's or other relative's essential needs, but that is not the position. Rather, as I have indicated, for (it may be) administrative convenience or the reflection of other policy choices, a fixed rate deduction is mandated, subject only to the discretion in Means Regulation 25(3). Thus here, even on the Lord Chancellor's case, the fact might be that, by reference to the other circumstances of the

case, G's father took financial responsibility for hardly any or none of G's essential needs, yet, so long as his household was to be regarded as including G, the full deduction under Regulation 25(2)(b) would fall to be made.

49 The question, then, raised by Ground 1, is simply whether the language of the Means Regulations, given their object and purpose, conveyed that a dependent child or other dependent relative can be a member of the individual's household and a member of another household. In particular, in the case of a child of parents maintaining separate households, can they be a member of both of those households at the same time? As a matter of ordinary language, I have no doubt that the answer is "yes".

50 A typical definition of "household" might be a home and its occupants regarded as a unit and, in that ordinary meaning, it may be entirely natural for a child of separated parents, depending on their exact circumstances, to regard themselves, and to be regarded as, part of each parent's separate household at the same time; at all events, if they have a regular pattern of living some of the time in one home and some of the time in the other. Questions of fact and degree will arise and it may be important to bear in mind that "whether a child remains a member of a household is just as much a function of attitude (and perhaps emotion) as an application of a simple test of hours spent in the home": *per* Leveson J, as he was then, in *R(Richards) v. Legal Services Commission* [2006] EWHC 1809 (Admin) at [17].

51 Mr Buttler KC submitted that *Richards* is authority determining Ground 1 in the claimant's favour, unless the court were persuaded not to follow it. I agree with Mr Sibbel that that takes *Richards* too far. The question in that case was whether the Legal Services Commission had been entitled to treat Mrs Richards' sons as still part of her household, although they were living most of the year in Glasgow: one at university, the other studying for a post-graduate legal professional qualification.

52 So far as eligibility for legal aid was concerned, Mrs Richards preferred her sons not to be still members of her household, given that they were living most of the time away from her in Glasgow, whereas in the present case it would have assisted the claimant if G had been treated as a member of her household, although he was living away from her with his father during the week and every other weekend. That could not affect any point of principle decided by Leveson J or the point of principle I have to decide as to the meaning of "household" in this context. It does, though, illustrate a point to which I shall return that whether, ultimately, it favours the legal aid applicant for Regulation 25(2)(b) to apply, rather than Regulations 26 and 28(7), may vary from case to case, depending on the precise facts.

53 Given the question before the court in *Richards,* Leveson J did not consider, let alone decide, whether a child of separated parents can be a member of only one of those separate households, so it is not a strict precedent for the present case, quite apart from the fact that it is a decision at first instance from which I could, in principle, be persuaded to depart.

54 However, the reasoning of principle is persuasive and, in my view, correct, and it is authority directly against Mr Sibbel's specific submission that the ordinary and natural meaning of the language of the Means Regulations is unhelpful. In essence, that submission was that in the Means Regulations the language of "membership of a household" is obviously used in a specialised legal sense of a benefit unit, a known creature of social welfare law. That is contrary to the *ratio* of *Richards*, as articulated by Leveson J at [16] to [17]. In any event, even without *Richards*, I would not have identified any support for Mr

Sibbel's specific submission in the Means Regulations.

55 I also agree with Mr Buttler KC that the reasoning in *Richards* is to the effect that the nature and extent of a child's continuing ties to a parent's home can be sufficient that they remain a member of that parent's household, although they are at the same time a member of a different household, located elsewhere. There is no reason of language or principle why that different household located elsewhere cannot be that of the child's other parent.

56 In the witness evidence served by the Lord Chancellor, it was said that, in his view, a decision by the Director to whom to apply the deduction under Means Regulation 25(2):

> "is not a finding as to the significance of the relationship that a particular parent/carer has with the child. It is merely acknowledgement of the individual's financial situation at the time of the legal aid application."

Given the potential relevance, in principle, of the nature and strength of a parent/child relationship to the question whether the child is a member of the parent's household, that seems to me to betray a misunderstanding of law as to the meaning and effect of the Means Regulations.

57 Mr Sibbel argued that Means Regulation 26 was the legislative solution in this context to shared custody rather than an extended meaning of "household". In my view, the claimant's argument does not propose an extended meaning of "household", it just relies on its ordinary meaning; and Means Regulation 26 has plenty of scope for operation, on the claimant's construction. The situation of a dependent child or other relative supported financially, although they do not live at all with the provider of that support and would not be thought by anyone to be part of their household, is a sufficient target to explain the existence and terms of Means Regulation 26.

58 I agree with Mr Buttler KC in his submission that the application of the natural and ordinary meaning of the concept of membership of a household, as I have described it and as it was described by Levesen J in *Richards*, involves for the Legal Aid Agency only a type of evaluation or assessment that is similar to evaluations or assessments required by a number of other provisions of the Means Regulations. Mr Buttler highlighted, in particular, Regulation 25(3), Regulation 26, Regulation 17(1)(b), Regulation 28(6), and Regulation 30(1)(b). As he said, those were five examples only. I take it that they were, in his submission, the best examples, or he would have picked others, but, nonetheless, there is force in the submission that they are not the only examples.

59 I also agree with Mr Buttler KC's submission that the claimant's argument cannot be said to give rise to unjustified over-provision of legal aid. Here, in particular, I return to the point to which I have already adverted, namely, that whether, when all of the different moving parts of the disposable income calculation, as required by the Means Regulation, have been worked through, the application to a particular applicant and a particular dependent child or other relative of Regulation 25(2)(b) will make the difference between eligibility on means grounds and ineligibility, will vary from case to case. I have already observed in that regard that the other decided case on the specific Regulations to which my attention has been drawn, namely *Richards,* is an example of a set of detailed circumstances in which the conclusion as to membership of a household had the opposite effect, as regards the bottom line of the disposable income calculation and eligibility on means grounds, from that of the

present case. In those circumstances, I am not satisfied that it can be said whether, or, if so. as a whole, then to what extent, a conclusion that the claimant is correct under Ground 1 will ultimately result in more applicants being found eligible on means grounds than if the claimant were wrong on Ground 1. Even if it could be shown that it will have that effect, the conclusion that that amounts to an unjustified or untoward or unreasonable over-provision of legal aid or, for that matter, as a concept, over-provision of legal aid at all, in my judgment, does not follow. It simply means that, on what the Lord Chancellor and the Director have both emphasised is a complex, calibrated scheme with, as I have put it already, a number of more or less interrelated moving parts, the disposable income figure, as calculated properly in accordance with the Regulations, itself, to a certain extent, a notional figure not necessarily reflecting the precise reality for the particular applicant, will demonstrate eligibility in terms of the Means Regulations in some more cases than would have been the situation if a different provision had been made as regards maintenance deductions and accommodation cost in respect of dependent children or other relatives.

60 In defence, if he required it, to the charge of seeking to create an over-provision of legal aid, Mr Buttler KC advanced a submission that Regulation 25(3), the discretion to reduce the maintenance deduction under Regulation 25(2)(b) from the fixed figure in the Table to take account of the child's or other dependent relative's own income or other resources, could be used by reference not to any financial resources of, in this case G, but by reference to the degree to which G was provided for, practically speaking, in terms of residence and/or in financial terms, by his father. I agree with the response to that defence on the part of the Lord Chancellor, adopted by the Director, that it gives an unnatural and unintended scope to the language of Regulation 25(3). On its own terms – and read as a corollary to Means Regulation 25(4) as I have already indicated that it is – in my view, Regulation 25(3) has reference to the child's or other dependent's own income or other financial resources. They may, if this be a proper view on the particular facts of a given case, be such as to negative the notion that the child or relative is a dependent member of the legal aid applicant's household at all. That is Means Regulation 25(4). If, however, the child or other relative has their own income or other financial resources, but not of such nature and extent as to negative the proposition that they are dependent, then it is plainly rational and reasonable for there to be a policy reflected and embodied by Regulation 25(3) of allowing the Director to take that into account in the disposable income calculation. The natural way of doing so, as enacted by Means Regulation 25(3), is to allow that, to such extent as may appear to the Director to be fair in the particular circumstances of the case, to reduce (potentially even to nil) the deduction otherwise mandated by Regulation 25(2)(b).

61 For that reason, I reject the defence, if defence had been required, to the charge of the claimant's case tending towards inappropriate over-provision of legal aid. The charge, however, is not made out for the reason I previously gave.

62 Mr Buttler KC also prayed in aid, in support of the claimant's reading of Means Regulation 25(2)(b), which reading, as I have already indicated, aligns, in my judgment, with the ordinary and natural meaning of its language, upon the terms and evident policy behind the accommodation cost deduction cap under Means Regulation 28(7). Mr Buttler took the submission this far, namely, so he argued, that it implies that the applicant, in fact incurring accommodation cost in excess of the cap is, in effect, expected to be able and willing to move to cheaper accommodation to free up resources before looking to the State for legal aid funding. The consequential implication, it was said, of applying that cap only where there are no dependent children or other relatives who are members of the household was that the potential upheaval for those dependants of the relevant home having to be changed

should not be imposed.

63 I agree, with respect, with Mr Sibbel's submission that that takes the implications of Means Regulation 28(7) rather too far. However, the bottom line, if I may put it that way, of the submission is, in my judgment, sound, at least to this extent, namely, that in, for example, a separated parents' case, with, for example, a 50:50 or something close to it custody and living arrangement, there is no reason to say that one parent's actual housing cost should be treated differently to the other's in the context of either of them being a legal aid applicant, whether that be legal aid sought for the purposes of family law or other proceedings referable to the dependent child or other relative, or legal aid sought in relation to some cause or the defence of some legal process that has no connection at all to the dependant.

64 On further analysis, in my view, the import of Regulation 28(7) does go somewhat beyond that, helpfully for the claimant's argument. Mr Sibbel accepted, rightly, that it expresses a policy that the housing cost of a legal aid applicant, with at least one dependent child or other relative who is part of their household, should be treated differently from the housing costs of an applicant with no such dependants. The context is that of a standardised method intended to be fair to all, without pretending to a level of precision that it would be disproportionate to try to achieve, of assessing how much of a legal aid applicant's income should be treated as disposable. In that context, housing costs will be, by nature, a deduction from income. That is, it will measure a portion of the applicant's income that is treated as not disposable for the purpose of considering the affordability of legal representation. That being the context, Means Regulation 28(7) represents or gives effect to three cumulative policy views:

(1) first, a view that the portion of an applicant's income treated as not disposable, because of housing cost, should be capped at a standard rate where they have no housing need in respect of any dependent child or other relative;

(2) second, a view that the housing cost of an applicant, one feature of whose household is the housing of a dependent child or other relative, should not be capped at that level;

(3) third, a view that such an applicant's housing cost should not be capped at all as a measure of a portion of income to be treated as not disposable for present purposes.

65 The third of those views represents a fair and reasonable choice. It may not be the only choice that could have been made. In theory, there might have been a choice to require an assessment of how much of the actual monthly rental or mortgage cost of the applicant's home was marginal cost generated by housing the relevant dependant or dependants and allow that marginal cost to increase the cap for that applicant – that might be administratively cumbersome to the point of being disproportionate – or, again, a choice might have been made still to cap accommodation costs but on a sliding scale by reference to the number, age and/or other characteristics that it could be fair to take into account of the relevant dependants. Instead, a simple binary choice was adopted. There is a basic rule of actual accommodation cost measuring a portion of income to be treated as not disposable, capped at a standardised fixed rate, where there are no relevant dependants, uncapped when there is at least one.

66 The inapplicability of the cap, if there is at least one relevant dependant, is needs blind, as it were, as regards how much impact there is, in fact, on the accommodation cost of the applicant in their home being also a home for a dependent child or other relative.

67 It is of the essence of a successful shared custody arrangement, in the case of a child of separated parents, if that arrangement has the child's welfare at heart, as it should, that for the child, each home is qualitatively their home, whether or not their time in residence is split 50:50. It seems to me that the policy choices embodied in Means Regulation 28(7) tend by nature to point in the same direction for both such parents as putative legal aid applicants. They do not, by nature, only ever apply to one of them.

68 Moving away from separated parents and their children, suppose three siblings, one with a significant disability rendering independent living unrealistic, and a family arrangement under which that sibling lives with the other two (who live separately from each other), Monday to Thursday with one, Friday to Sunday with the other, with associated increased housing need for both. Either sibling might be a legal aid applicant for legal work that may or not have anything at all to do with their disabled sibling. The policy choices underlying Means Regulation 28(7) to my mind tend naturally to apply equally in favour of both siblings, such that one would expect it not to apply to either of them, rather than only one of them with some choice then having to be made, for example, as between the significance of hosting for four days per week and hosting over weekends.

69 It follows from all that I have been saying that I do not accept a submission by Mr Sibbel that it should be thought undesirable for two individuals, whose means are not aggregated, as he put it, "each [to] receive the full dependant's allowance under Regulation 25(2) at least where one of them does not care for the relevant child for 'much of the time'."

70 The submission was developed, by reference to the language of awarding allowances to individuals, that it would in some way be unfair as between those two individuals for both to be awarded an allowance and even more unfair, as it was put, as between either of those individuals and, if there is such a person separate to those individuals, the sole carers of children. Taking the last of those first, of course, if there is a case in which, in the context of children of separated parents, neither parent is, other things being equal, in a position to say that the child is a member of their household because, rather, in relevant respect, somebody entirely different is or has become the sole carer of the child or children in question, then the point does not arise at all: in those circumstances, neither parent will be in a position, depending, of course, on the questions of fact and degree that arise in the assessment of any individual case, to say that the child or children was or were in their household.

71 However, even leaving aside that degree to which Mr Sibbel took his logic to an extreme too far, the essential point made, in my judgment, misunderstands the purpose and effect of making deductions of a notional or standardised nature in certain instances in the context of a standardised form of disposable income calculation for the purposes of assessing whether an individual, given the financial circumstances of their household, is a case of sufficient need in the eyes of the legal aid provision funded by the taxpayer to qualify for support. There is nothing unfair, as it was put, as between, in this case, the claimant and her ex-partner, if both of them were advancing causes in the same proceedings that were in scope for legal aid, both satisfied a merits assessment in respect of their opposing causes and, in considering their household circumstances, in particular financial circumstances, the standardised maintenance deduction under Regulation 25(2)(b), on a proper construction of

the Means Regulations, fell to be made for both of them.

72 For completeness, I should mention that Mr Buttler KC, if he needed them, advanced additional submissions. First, he submitted that the defendants' construction would tend to reduce access to justice and, all things being equal – that is to say if some tiebreaker were needed between relatively equally available constructions of the language – the court should tend towards that construction of the Regulation as generated a lesser reduction in access to justice. For the same reasons as I articulated, but on the other side of the relevant coin, as regards the Lord Chancellor's submission of unjustified over-provision of legal aid, in my judgment Mr Buttler is not in a position to satisfy me that the overall effect of the defendants, rather than the claimant, being correct, if they were, on the meaning and effect of the language of Means Regulation 25(2), would be to reduce access to justice. In any event, however, as it seems to me, this is not a case in which the deployment of tiebreakers is required. I regard the language as plain and clear.

73 Second, Mr Buttler KC invoked the principle, as it is sometimes called, of "doubtful penalisation". I mean no disrespect to the sophistication and skill of the argument in saying no more about it than that in my view the doctrine simply does not apply in this context to the parts of the disposable income calculation which operated, if this is an appropriate use of language at all, adversely to the claimant in the particular circumstances of this case.

74 Summing up: in the ordinary and natural use of language, a child is a member of a parent's household if, quantitatively and qualitatively, the parent's home is sufficiently the child's home that they would be identified as one of the occupants of that home, thinking of it and its occupants as a unit; that is not incapable of being true simultaneously for the households of both of a child's separated parents; indeed, to the contrary, it may often be a natural use of language to say of such a child, who is normally resident for some of the time with each parent, that they are part of both households, subject to considering the circumstances of the individual case and any questions of fact and degree that arise. That is not, I emphasise, to articulate some presumption or to add some gloss on the legislative language, it is just to indicate the sort of thing the language used is readily apt to convey. There is nothing in the language, object or purpose, of the Means Regulations to indicate that a different, more restrictive or specialised meaning was intended. Therefore, to insist that a child can only ever be a member of one household is to misread the Means Regulations.

75 The Guidance is unhelpful, with respect, in using the language of "granting allowances", which is not the language of Means Regulation 25(2) and has the capacity to create a wrong impression. More fundamentally and pertinently, it misreads that Regulation so as to be wrong in law in stating in para.7 of section 5.6 that "the dependant's allowance … cannot be granted to both the individual and their partner." (I add, acknowledging that this was not a point addressed by the parties, that it seems also confused and wrong in guiding the Director to treat as decisive in some cases whether the legal aid applicant "appears to be supporting the child from their money". That could be true, although the child was not, on anyone's interpretation, a member of the applicant's household, in which case the financial support would fall within Means Regulation 26.)

76 Paragraph 7 of section 5.6 of the Guidance, therefore, should be quashed. The Decision, as Mr Birdling rightly accepted, was reached on the basis that a choice had to be made whether G was a member of the claimant's household or a member of her ex-partner's household, because, in line with the Guidance, he could not be both. As he also accepted, again rightly, that was wrong in law and the Decision must be quashed if, as I have concluded, a child can

be a member of both of their parents' separate households, on a proper reading of Regulation 25(2) of the Means Regulations. Therefore, the Decision will be quashed.

Ground 2

77 Since Ground 1 is upheld, I shall take Ground 2 quite shortly, aiming only to say enough to explain to the parties, with their familiarity with the detail of the case, why I would have quashed the Decision even if I had decided under Ground 1 that a child can only be a member of one household at a time.

78 Mr Birdling helpfully showed me *R(Friends of the Earth Ltd and Another) v. Secretary of State for Transport* [2020] UKSC 52 at [116] to [121] for a very recent confirmation and explanation at the most authoritative level concerning the general nature of and requirements for a successful public law complaint of failure to have regard to a relevant factor.

79 There is some tension, in my judgment, within the Director's Detailed Grounds, and the evidence filed along with them, as to how the factors relied on by the claimant in respect of Ground 2 were actually treated. There is reference, on the one hand, to them having been disregarded and, on the other hand, to them having been assigned no weight, which, potentially at least, might convey the notion that they were taken into account but treated as of no significance.

80 I regard it as relevant in both respects – that is both as regards the Detailed Grounds (see para.49) and as regards the witness evidence in support (see Ms Nicholls at para.25) – that the actual treatment of those factors is prefaced with an explanation of a view at the Legal Aid Agency that it is not pertinent to consider what the position might be as regards, for example, G's residence, the recipient of child benefit, or other matters, in the future if the claimant's allegations, as they were at the time when the legal aid assessment was done, had prevailed, either through judicial determination or in the sense that they assisted in a negotiated and agreed result that changed the *status quo* being considered by those assessing the legal aid application. That strongly suggests, as does the Decision itself on its face – as for that matter does the evidence, such as it is, as to the approach taken to the original means assessment in respect of which the Decision was a refusal to reconsider it on review – that, indeed, the factors invoked by the claimant under Ground 2 were treated as analytically incapable of affecting matters and, in that sense, disregarded utterly, and that is different, in my judgment, to the category of case described in the *Friends of the Earth* judgment at [121] into which Mr Birdling submitted that this case fell.

81 In my view, the factors relied on by the claimant were, in logic and substance, capable of founding a conclusion that the then current state of affairs, as regards child benefit and living arrangements for G, were, as Mr Buttler KC put it, a temporary blip rather than the norm; and that might cause a rational decision maker to conclude that G was, in reality, a member of the claimant's household, not that of her ex-partner, if a choice between the two had to be made.

82 Put another way, those factors were the claimant's answers to the question, why, given that she claimed to regard G as part of her household, he was spending only one weekend a fortnight staying with her and his child benefit was going to her ex-partner, and those answers were regarded, on behalf of the Director, as *prima facie* credible, given that her cause was taken to have satisfied the merits assessment. That question was raised, not

answered, by the bare facts relied on in the Decision; and a conclusion whether G was a member of the claimant's household could not sensibly be reached in those circumstances without addressing that question. There might be room for different rational decision makers to reach different conclusions upon that question, but I do not see how any such decision maker could conclude that the claimant's answers, unless completely lacking in credibility, were irrelevant or carried no weight at all in reaching a conclusion.

83 I am reinforced, both in my interpretation of the Detailed Grounds and the evidence, as indicating what happened, and in my conclusion, by the way in which the Director's case was articulated by Mr Birdling, in those circumstances entirely fairly in light of the supporting material, in his skeleton argument at para.20. He there submitted that it was not obviously wrong to the means determination in this case to have no regard or, as the case may be, place no weight at all on the factors relied upon:

> "that success in the underlying proceedings may at some point in future affect the child's living arrangements or the financial implication for the applicant. The means assessment does not account for any other future financial implications …"

84 As I have said, that seems to me both to reinforce the correctness of my interpretation of the material supplied by the Director to explain how the factors were dealt with in the Decision as made and also reinforces my conclusion that what has happened in this case, in that regard, is that their significance or potential significance to the question that has to be addressed of choosing between the claimant and her ex-partner, if such a choice was required, contrary to my conclusion on Ground 1, was simply missed by the decision makers at the Legal Aid Agency.

85 In those circumstances, I would have concluded that this is a case in which an obviously material factor had been disregarded or treated as of no weight in circumstances where it ought to have been properly considered and, in that way, the Decision was flawed on public law grounds even if the Means Regulations had been correctly interpreted as requiring that a child could only ever be a member of one household.

<u>Ground 3</u>

86 In the circumstances, anything I say about Ground 3 is not determinative in this Claim and I prefer not to lengthen this judgment by saying much at all about it. In fairness to the defendants, I should record that, having listened carefully to Mr Buttler KC's opening and bearing in mind the written pleadings and skeleton arguments, I was not persuaded that there was a case for saying that the absence of legal representation for the claimant after mid-March 2022 would have infringed her ECHR rights on the facts. Therefore, I indicated at the start of the defendants' oral argument that I would not require them to address Ground 3.

87 I was also not persuaded that the claimant was entitled to maintain a human rights challenge to the Decision by considering what would have happened if her family law solicitors had terminated their retainer, which they never did. It is, if I may say so, to their credit that they were willing to continue on a bespoke conditional fee basis, the condition being whether legal aid would be granted retrospectively after a successful judicial review of the Decision rather than whether the family proceedings resulted in success and a favourable costs order. But the plain fact is that the Decision, therefore, did not cause the claimant to be unrepresented, and the sole allegation of breach of the claimant's ECHR rights was founded upon the alleged consequences for her of being unrepresented.

Result

88 Ground 1 is upheld. In consequence, para.7 of section 5.6 of the Guidance and the Decision should be and will be quashed. If I had not upheld Ground 1, I would have upheld Ground 2 and quashed the Decision on that basis. I would not have quashed the Decision by reference to Ground 3.

CERTIFICATE

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