

APPELLANT: MR CR

1st RESPONDENT: DEPARTMENT FOR COMMUNITIES

2nd RESPONDENT: MRS CR

THE CHILD SUPPORT (NORTHERN IRELAND) ORDERS 1991 AND 1995

Appeal to a Child Support Commissioner
on a question of law from a Tribunal's decision
dated 15 December 2022

DECISION OF THE CHILD SUPPORT COMMISSIONER

1. This is an appeal by a non-resident parent from the decision of an appeal tribunal with reference LD/5452/20/22/C.
2. An oral hearing of the appeal has not been requested.
3. For the reasons I give below, I disallow the appeal.

REASONS

Background

4. The appellant is the non-resident parent and father (I will subsequently refer to him as "the father") of two children. On 27 March 2018, the parent with care (I will subsequently refer to her as "the mother") applied to the Department for Social Development – now the Department for Communities (the Department) - for a maintenance assessment in respect of the children. The Department duly assessed the father as being liable to make maintenance payments. From 2 April 2020 on the basis of his gross income, reduced to reflect shared care, the father was assessed as liable to make payments of £69.22 per week. On 9 September 2020 the mother requested a reconsideration of the maintenance assessment. This was on the basis that the level of the father's shared care had declined due to trips overseas and related Coronavirus quarantine requirements. The maintenance calculation was reconsidered by the Department on 25 September 2020 but not revised. The mother appealed.
5. The appeal was heard on 15 December 2022 by a tribunal consisting of a legally qualified member (LQM) and a financially qualified member. The tribunal decided that the Department's decision of 25 September 2020 was

not correct and that the father should be placed in “Band B” of Schedule 1, Part 1, Paragraph 7 of the Child Support (NI) Order 1991 (the 1991 Order) with effect from 9 September 2020. The father requested a statement of reasons for the tribunal’s decision. This was issued on 12 September 2023. The father then made an application for leave to appeal to the Child Support Commissioner. The LQM granted leave to appeal by a determination issued on 28 November 2023. On 22 December 2023 the father’s appeal to a Child Support Commissioner was received. On 7 November 2024 the file was passed to a Commissioner for decision.

Grounds

6. Leave to appeal was granted by the LQM on three grounds. The father duly submits that the tribunal has erred in law on each of these grounds, namely that:
 - (a) It relied upon his personal bank statements which were disclosed to the mother in divorce proceedings and provided by her to the tribunal without his consent, contrary to the General Data Protection Regulation (EU) 2016/679 or the Data Protection Act 2018 (the DPA), and the tribunal relied upon information disclosed in them that damaged his credibility.
 - (b) Its decision exceeded the scope of the appeal as by stating that he should be placed in Band B from 9 September 2020 “to date” it had gone beyond the period lawfully under consideration.
 - (c) It misapplied regulation 45(5) of the Child Support Maintenance Regulations (NI) 2012 (the 2012 Regulations) when considering the element of care provided by the children’s step-mother, as opposed to him personally.
7. The Department was invited to make observations on the father’s appeal. Mr Finnerty of Decision Making Services (DMS) responded for the Department. He indicated that the Department did not support the appeal. The mother was similarly invited to make observations on the father’s appeal. She indicated also that she did not support the appeal.

The tribunal’s decision

8. The LQM of the tribunal has prepared a statement of reasons for its decision. From this I can see that it had documentary material before it consisting of the Department’s submission; the death certificate of the father’s father; the father’s marriage certificate; various requests related to the format of hearing; a copy of the father’s partner’s visa to the United Kingdom dated 7 September 2022; the father’s letter to the Appeals Service dated 8 September 2022 and an AT3 record of adjourned proceedings on 20 September 2022. I observe that the hearing proceeded by way of a video link with the father and mother both present and the Department represented by Mr Magee. All parties made oral submissions.

9. The mother essentially argued that the father had been absent from the United Kingdom for nine weeks to visit a new partner in the United States and had to undergo two weeks quarantine on return, meaning that the fraction of his shared care should be reduced from three sevenths to two sevenths. The tribunal accepted the evidence of the mother regarding the father's absence from the United Kingdom in 2020, finding that an absence of 39 nights fell to be discounted from the number of nights to be calculated under regulation 45(2) of the 2012 Regulations. It further accepted her evidence about further lengthy absences in 2021 and 2022, holding that he should be placed in the "two sevenths" band with effect from 9 September 2020.

Relevant legislation

10. The provision governing the assessment of the decrease in child support maintenance to reflect shared care is regulation 45 of the 2012 Regulations. This provides:

Decrease for shared care

45.—(1) This regulation and regulation 46 apply where the Department determines the number of nights which count for the purposes of the decrease in the amount of child support maintenance under paragraphs 7 and 8 of Schedule 1.

(2) Subject to paragraph (3), the determination is to be based on the number of nights for which the non-resident parent is expected to have the care of the qualifying child overnight during the 12 months beginning with the effective date of the relevant calculation decision.

(3) The Department may have regard to a period of less than 12 months where it considers a shorter period is appropriate (for example where the parties have an agreement in relation to a shorter period) and, if the Department does so, paragraphs 7(3) and 8(2) of Schedule 1 are to have effect as if—

(a) the period mentioned there were that shorter period; and

(b) the number of nights mentioned in the Table in paragraph 7(4), or in paragraph 8(2), of that Schedule were reduced proportionately.

(4) When making a determination under paragraphs (1) to (3) the Department must consider—

(a) the terms of any agreement made between the parties or of any court order providing for contact between the non-resident parent and the qualifying child; or

(b) if there is no agreement or court order, whether a pattern of shared care has already been established over the past 12 months (or such other period as the Department considers appropriate in the circumstances of the case).

(5) For the purposes of this regulation—

(a) a night will count where the non-resident parent has the care of the qualifying child overnight and the child stays at the same address as the non-resident parent;

(b) the non-resident parent has the care of the qualifying child when the non resident parent is looking after the child; and

(c) where, on a particular night, a child is a boarder at a boarding school, or an inpatient in a hospital, the person who would, but for those circumstances, have the care of the child for that night, shall be treated as having care of the child for that night.

11. In regulation 45, the reference to Schedule 1 is a reference to that Schedule in the 1991 Order. As it applies to applications made after 29 July 2013, this provides at paragraph 7:

Shared care - basic and reduced rate

7.—(1) This paragraph applies where the rate of child support maintenance payable is the basic rate or a reduced rate or is determined under paragraph 5A.

(2) If the care of a qualifying child is, or is to be, shared between the non-resident parent and the person with care, so that the non-resident parent from time to time has care of the child overnight, the amount of child support maintenance which he would otherwise have been liable to pay the person with care, as calculated in accordance with the preceding paragraphs, is to be decreased in accordance with this paragraph.

(3) First, there is to be a decrease according to the number of such nights which the Department determines there to have been, or expects there to be, or both during a prescribed twelve-month period.

(4) The amount of that decrease for one child is set out in the following Table—

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

(5) If the person with care is caring for more than one qualifying child of the non-resident parent, the applicable decrease is the sum of the appropriate fractions in the Table divided by the number of such qualifying children.

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

(7) If the application of the preceding provisions of this paragraph would decrease the weekly amount of child support maintenance (or the aggregate of all such amounts) payable by the non-resident parent to the person with care (or all of them) to less than £7, he is instead liable to pay child support maintenance at the rate of £7 a week, apportioned (if appropriate) in accordance with paragraph 6.

Submissions and assessment

12. The appellant relies on the three grounds set out above. The first of these concerns the evidence considered by the tribunal. The appellant submits that the tribunal was improperly given access to his private data and that this was contrary to his rights under the GDPR or the DPA.
13. The GDPR took effect on 25 May 2018 as a measure of European Union law. However, the United Kingdom (UK) ceased to be a member state of the European Union on 31 January 2020. The GDPR continued to apply during a transition period to 31 December 2020. It was then modified as part of the retained EU legislation under the EU (Withdrawal) Act 2018. Under the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, it was renamed the UK GDPR. This was the provision in force at the time of the present tribunal proceedings, alongside the DPA. I will evaluate the appellant's first ground on the basis that his references to the GDPR should be read as references to the UK GDPR, which is largely to the same effect.
14. Broadly speaking, the by Article 2, the UK GDPR applies to the automated or structured processing of personal data. However, it also applies to the manual unstructured processing of personal data held by a public authority. This was not a case of automatic or structured processing of data. I will assume for the sake of this argument that the tribunal was a public authority for the purposes of the UK GDPR and the DPA and that it carried out unstructured processing of the appellant's data.
15. The context in which the appellant's private data was given to the tribunal was that the mother produced in evidence a number of the father's bank statements. These were personal data belonging to the appellant that had come into the mother's possession in the course of discovery in separate divorce proceedings. Mr Finnerty for the Department did not support this ground of appeal, submitting that this evidence was admissible and relevant. He further submitted that the availability of the bank statements

did not vitiate the fairness of the proceedings. This was because they were not actually relied upon by the tribunal in the context where the appellant confirmed that his absences from the United Kingdom were as the mother had stated in her evidence. The mother similarly submitted that there was no merit in this ground.

16. By way of background, it is my understanding that the mother had been told by the Department that the father had said that he did not travel to the United States of America (the USA) between 2016 and 2020. She introduced the bank statements for the purpose of establishing that the father had made financial transactions in the USA in that period in order to undermine the credibility of the father's statement. For his part, the father said that the Department had misreported what he had said – namely that he had not been in the USA for work – and that the mother was well aware that he had taken the children on holiday to the USA in 2018.
17. The father submits that the tribunal's admission of the bank statements in evidence breached Article 5(1)(b) of the UK GDPR – the principle that “personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that it incompatible with those purposes...”. He submits that the consequent misuse of this evidence unfairly and detrimentally impacted the tribunal's perception of his credibility.
18. I observe that by Article 6(1)(e) of the UK GDPR, processing shall be lawful if “necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller”. However, by Article 21, the UK GDPR affords the data subject the right to object to processing of personal data relating to him which is based on Article 6(1)(e).
19. Nevertheless, by Article 6(3) of the UK GDPR, “the basis for the processing referred to in point (e) of paragraph 1 shall be laid down by domestic law”. Further, by Article 23(1)(f) and (j) of the UKGDPR, the rights in Article 5 and 21 may be restricted by the Secretary of State,

“when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: ... (f) the protection of ... judicial proceedings; ... (j) the enforcement of civil law claims”.
20. This in turn leads to the domestic law provision at section 8 of the DPA that provides:

“In Article 6(1) of the UK GDPR (lawfulness of processing), the reference in point (e) to processing of personal data that is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's

official authority includes processing of personal data that it necessary for – (a) the administration of justice;...”

21. Further, section 15 of the DPA provides that Schedule 2 makes provision for exemptions from, and restrictions and adaptations of the application of, rules of the UK GDPR. This includes at Schedule 2, paragraph 6(i), the right to object to processing. Thus, it appears to me, the father’s reliance on the UK GDPR and the DPA is not well-founded. More generally, the remedy for a breach of the UK GDPR and the DPA would lie in a claim for compensation. It does not appear to me that the father could effectively rely upon it to establish that the tribunal had erred in law.
22. A more directly enforceable argument might have relied upon the right to private life and correspondence given by Article 8 of the European Convention on Human Rights and Fundamental Freedoms. This was analysed by me in the case of *PMcC v Department for Communities* [2020] NI Com 65. In short, improperly obtained evidence may be excluded from tribunal proceedings if it renders the proceedings unfair as a whole.
23. Whether or not the bank statement evidence can be considered to have been improperly obtained, from the statement of reasons it does not appear to me that the tribunal has based its findings on that evidence. The father was able to clarify the context of his statement to the Department, namely that he was not in the USA for work between 2016 and 2020. The tribunal’s findings concerning the father’s absence from the UK related to 2020, where it was accepted by all parties that he had been away from the UK for 39 days. I do not consider that any adverse inference was drawn by the tribunal from the evidence, or indeed that any particular reliance was placed upon it. It does not appear to me that the father’s credibility was in issue. I do not consider that the proceedings were unfair for that reason and I do not consider that the tribunal has erred in law as submitted in this ground.
24. The second ground relied upon by the father is that the tribunal’s decision exceeded the jurisdictional scope of the appeal when stating that he should be placed in Band B from 9 September 2020 “to date”. He submits that the tribunal’s decision “exceeds the scope of the original appeal, which was focused on 2020” and that since December 2022, the previous pattern of 6 nights care out of 14 has resumed.
25. For the Department, Mr Finnerty submitted that the tribunal did not decide that the father should be placed in Band B “to date”. Rather, he submitted, it found that Band B was to apply “with effect from 9 September 2020”. He submitted that this did not preclude the Department from superseding the decision at a later date such as at the annual review of 2 April 2021 or 2 April 2022 or other such time as either parent reported a further change in the care arrangements for the children. The mother agreed with the Department’s submission.

26. As can be seen from regulation 45(2) of the 2012 Regulations above, the determination regarding the appropriate shared care Band is to be based on the number of nights for which the non-resident parent is expected to have the care of the qualifying child overnight during the 12 months beginning with the effective date of the relevant calculation decision. The tribunal addressed the mother's evidence relating to the father's absences from the UK in 2020, amounting to 39 days, but also accepted that there were lengthy absences in 2021 and 2022 that were not contradicted by the father in evidence. It found that he fell into Band C for that reason.
27. A decision relating to child support maintenance is made under the statutory authority of Article 13(2) of the Child Support (NI) Order 1991 (the Child Support Order). Such a decision determine whether any child support maintenance is payable and, if so, how much. The effective date of such a decision is provided for by regulation 12 of the 2012 Regulations.
28. It appears to me that such decisions take effect from the effective date, but are open-ended. Nevertheless, decisions can be revised under Article 18 or superseded under Article 19 of the Child Support Order. The 2012 Regulations make further provision at regulation 14 and 17 for the circumstances in which decisions may be revised or superseded and their effective dates. Such reviews or supersessions can be conducted by the Department of its own initiative or on the application of a party.
29. The tribunal has the same powers as the Department. I consider that it has made its decision correctly with reference to an effective date and that its decision was an open-ended decision. Such a decision remains subject to applications for revision or supersession. That is the mechanism for ensuring that decisions reflect changing circumstances in regard to shared care or variations in income. I consider that the focus of the appeal was properly the 12 month prospective period referred to in regulation 45(2) of the 2012 Regulations. However, that provision does not limit the duration of the decision. I do not consider that the tribunal has erred in law as submitted in this ground.
30. The third ground relied upon by the father is that the tribunal misapplied regulation 45(5) of the Child Support Maintenance Regulations (NI) 2012 when considering the element of care provided by the his mother, as opposed to him personally. He submits that this would exclude care given under his roof by the children's grandmother or their step-mother from consideration, which he submits is wide-reaching and damaging to parents.
31. Mr Finnerty firstly submits that this point is moot, on the basis that the evidence did not suggest that the children were receiving care from their grandmother in the father's home in the period under consideration. He points out that regulation 45(5) provides that (a) a night will count where the non-resident parent has the care of the qualifying child overnight and the child stays at the same address as the non-resident parent; (b) the non-resident parent has the care of the qualifying child when the non-

resident parent is looking after the child; and (c) where, on a particular night, a child is a boarder at a boarding school, or an inpatient in a hospital, the person who would, but for those circumstances, have the care of the child for that night, shall be treated as having care of the child for that night.

32. The mother agreed that this issue was not relevant to the period under consideration by the tribunal and submitted that, for the 39 nights in issue in 2020 when the father was in the USA, the children stayed with her and no one else. She submitted that it was a later development that the father's own mother would assume primary care on some occasions.
33. It appears to me that the father may well seek to question the policy behind the legislation, but that the legislation itself is clear. The boarding school and hospital exceptions have no application to the case. The remainder of regulation 45(5) makes clear that a night will only count for the purpose of Schedule 1 of the 1991 Order where the non-resident parent is looking after the child overnight and the child and the non-resident parent are staying at the same address. The consequence is that a night spent at a grandparent's house - or a night spent at the non-resident parent's own house under the care of another person - but in the absence of the non-resident parent, cannot count for the purpose of assessing the amount of overnight care given by a non-resident parent.
34. In any event, I accept the submissions of the Department and the mother that the tribunal addressed evidence relating to the father's visits to the USA in 2020. There was no involvement in the children's care by another party at that time, whether or not the tribunal failed apply regulation 45(5) correctly. However, I do not consider that the tribunal has misinterpreted or misapplied regulation 45(5) in any event. It follows that I must reject the appellant's third ground.
35. As I do not accept that the appellant has established that the tribunal has erred in law on any ground, I must disallow the appeal.

(Signed): O STOCKMAN

COMMISSIONER

23 January 2025