[2018] AACR 21

(MC v Secretary of State for Work and Pensions [2018] UKUT 44 (AAC))

Judge Wikeley
CUC/533/2018
08 February 2018

Universal credit − Child element − Regulation 4(2) and (4) − meaning of 'normally living with'.

In December 2015 the appellant made a claim for universal credit (UC) indicating 'yes' to the question "do you have any children that you are responsible for, living with you some or all of the time?". The appellant was paid UC including the child element. Secretary of State later decided that the appellant did not have main responsibility for his daughter and that the living arrangements for the daughter were such that she did not actually "normally live" with the appellant at all. The appellant's entitlement to the child element of the UC was withdrawn and this created an overpayment.

The appellant appealed to the First-tier Tribunal (F-tT). The F-tT upheld the Secretary of State's decision, agreeing that the appellant was not entitled to the child element of UC in respect of his daughter. The appellant appealed to the Upper Tribunal (UT). The issue before the UT was the proper interpretation and application of regulation 4(2) and 4(4) of the UC Regulations 2013 and the meaning of the phrase "a person is responsible for a child or qualifying young person who normally lives with them" as it appears in the UC legislation.

Held, allowing the appeal, that:

1. regulation 4(4) is wholly different to regulation 7(2) of the Family Credit (General) Regulations 1987. It does not presuppose equal shared care. Nor does it presuppose "there is a question as to which household he is living in". Rather, it proceeds on the entirely different footing that the child in question "normally lives with two or more persons who are not a couple", in which case "only one of them is to be treated as responsible and that is the person who has the main responsibility" (paragraph 38);

2. there is no reason why "normally lives with" should have one meaning in regulation 4(2) and a different one in regulation 4(4). It follows that the expression "normally lives with" should be applied with a focus on the *quality* rather than *quantification* of the normality. The amount of time spent living with a particular person may be a factor, but it cannot be the exclusive or determinative factor (paragraph 41);

3. the official (departmental) guidance is based on a misunderstanding and misapplication of case law that is not directly in point (paragraph 42);

4. the *Advice for decision makers: staff guide* is a good starting point for the test of main responsibility (paragraph 59).

The judge re-made the F-tT's decision, finding that the appellant was entitled to the child element of UC, subject to regulation 5.

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the appellant.

The decision of the Chester First-tier Tribunal dated 27 September 2016 under combined file reference SC947/16/00988 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> "The appellant's appeal is allowed.
>
> The Secretary of State's decision of 26 April 2016 is revised.
>
> Lucy normally lived with both her godparent and the appellant (regulation 4(2)). However, the appellant had main responsibility for her (regulation 4(4)).
>
> It follows that the appellant was entitled to the child element of universal credit, subject to regulation 5.
>
> The case is accordingly remitted to the Secretary of State to make a decision about whether Lucy was a 'qualifying young person' and, if appropriate, to revise the decision about the alleged overpayment."

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act").

REASONS FOR DECISION

Introduction

1. This case primarily concerns the meaning of the phrase "A person is responsible for a child or qualifying young person who normally lives with them" as it appears in the Universal Credit legislation (SI 2013/376) Regulation 4(2) and 4(4).

2. On one level that might be thought to be a straightforward question of fact. Given a certain scenario, we might all think we know when a child or young person "normally lives" with someone.

3. On another level the answer to the question as to with whom a child or young person "normally lives" may not always be quite that self-evident. This appeal is one of those more tricky cases.

A summary of the background to the appeal to the First-tier Tribunal

4. In December 2015 the appellant made a claim for universal credit (UC). One of the questions asked on the on-line claim form was "Do you have any children that you are responsible for, living with you some or all of the time?" The appellant selected the "Yes" option. That answer was correct, although – through no fault of the appellant – it did not tell

the full story. He was paid UC including the child element, but not from the outset of his claim.

5. So the appellant then asked for his entitlement to the child element to be backdated to the start of his claim. Instead, a decision maker concluded that the living arrangements for the appellant's daughter were such that she did not actually "normally live" with her father at all. Accordingly, the decision-maker withdrew the appellant's entitlement to the child element of the UC award, creating an overpayment.

A summary of the effect of this Upper Tribunal decision

6. I allow the appeal, set aside the First-tier Tribunal's (F-tT) decision and re-make the original decision. On the facts I decide that the appellant was responsible for his daughter. The case needs to be remitted to the Secretary of State to make a fresh decision about whether the appellant's daughter was a "qualifying young person" on the basis of her college enrolment. Whether or not there was a recoverable overpayment of UC will turn on the outcome of that decision. I also conclude that the official guidance on when a child or qualifying young person "normally lives with" a claimant is inadvertently misleading. It is wrong to state that "a child or qualifying young person normally lives with a person where they spend more time with that person than anyone else". A more holistic approach has to be taken, which includes the proportion of time spent living with an adult but that factor is not determinative.

The appellant's evidence in outline

7. The appellant explained the position about his daughter Lucy in a series of letters to the Department and to the F-tT. There has been no challenge to his evidence at any stage (and I note this appeal is <u>not</u> one of those cases where a separated couple argue about where and with whom their child is normally living).

8. The appellant stated that Lucy had lived with her mother until July 2015, when she was "disowned". Lucy had then moved to stay with her godparent some 30 miles away (as the crow flies) on the other side of the Greater Manchester conurbation, where she was about to start college. The appellant said that he regularly transferred funds into Lucy's bank account for her support as well as buying her a laptop and paying for her mobile phone contract. He also collected her from college on alternate Fridays, after which she stayed with him for the weekend before being delivered back to the godparent's home. Lucy's relationship with her mother had broken down completely, with no financial or other support being provided. The appellant also put in train a claim for child benefit (CHB), which was duly paid to him from October 2015 (the earliest date possible).

9. It should be noted at this juncture that CHB works on a different test to UC. In summary, a person is entitled to CHB if <u>either</u> the child is living with them <u>or</u> they are contributing to the cost of providing for the child at a rate which is not less than the relevant weekly rate of CHB (Social Security Contributions and Benefits Act 1992, section 143(1)). So financial support in the absence of co-residence can found a successful claim for child benefit.

The decision-maker's reasoning

10. The decision-maker accepted the appellant's account of the facts but found as follows:

> "Guidance states that the responsible person is the person with whom the child or qualifying young person normally lives or where the child or qualifying young person normally lives with two or more persons who are not a couple, the person who has main responsibility: UC Regulations (SI 2013/376) (the 2013 regulations), regulation 4(2); regulation 4(4).
>
> 'Normally lives' is not defined in legislation and should be given the meaning that a child or qualifying young person normally lives with a person where they spend more time with that person than anyone else and that the person receiving CHB should not be taken into account.
>
> The information provided by [the appellant] in his letter shows that his daughter, Lucy, is looked after by a family relative. His letter indicates that his daughter stays with him on alternate Fridays and he drops her back over the weekend.
>
> Given the evidence provided, I consider that [the appellant] does not have main responsibility for his daughter. Therefore, I do not consider that he is the lead carer for his daughter. There is no doubt that he provides financial support for his daughter. The question of which person gets CHB is not taken into account.
>
> **Therefore my revised decision is that [the appellant] is not entitled to child element for his daughter Lucy. UC regulation "4."**

11. In consequence, a decision was also taken on 26 April 2016 to the effect that the appellant had been overpaid £554.16 in respect of the child element of UC, a sum which was recoverable from him.

The appellant's mandatory reconsideration request

12. The appellant sought a mandatory reconsideration, stating as follows:

> "Although Lucy does not live with me, I am solely responsible for her financial and general well-being. I deal with all her doctor and dentist appointments and matters relating to her bursary or other college related matters. I buy the things she needs – like clothing and other essentials. The person she lives with (a family member) does not provide anything for Lucy, apart from allowing her to live there and have meals. The only reason Lucy lives where she does is because this is closer to her college than where I live. I am the person who takes prime responsibility for her. I pick Lucy up every Thursday to take her shopping for things she needs and every other Friday she comes home for the weekend."

13. I simply make this observation about the appellant's statement in his mandatory reconsideration request. He might at first sight appear to be conceding that Lucy did not live with him – but he closes by saying that "she comes home" alternate weekends. Moreover, the decision-maker's reasoning had focussed on both the relative time spent with each person and the main responsibility test, so it is understandable that the appellant framed his counter-argument in terms of seeking to show that he in fact took the main responsibility for his daughter's welfare.

14. The decision-maker refused the mandatory reconsideration request. The key passage in the reconsideration decision read as follows:

> "The legislation is clear in the fact that the main consideration is where the qualifying young person or child normally lives and in this circumstance it is with her godfather for 12 out of 14 nights. The question of who can have main responsibility can only be considered if the question of 'normally lives with' is in doubt."

15. The appellant then appealed to the tribunal, providing further evidence in a letter explaining what he did by way of providing for Lucy and in the form of detailed expenditure sheets showing such outgoings over several months. Again, this response was understandable given the mandatory reconsideration decision letter had set out in some detail what was meant by having main responsibility for a child or young person.

The First-tier Tribunal's decision

16. The F-tT dealt with the appeal on the papers. The tribunal upheld the Secretary of State's decision of 26 April 2016, agreeing with the decision-maker that the appellant was not entitled to the child element of UC in respect of his daughter. The tribunal stated that the issue the decision-maker had to decide was "with whom Lucy normally lives, then decide who has main responsibility where Lucy is living with more than one person" (paragraph 4). In the following paragraph, the tribunal summarised the undisputed facts (referred to above). In paragraph 6 the tribunal found as follows:

> "6. The issue for the tribunal was whether or not it could be said that Lucy normally lives with [the appellant]. In [the] view of the tribunal she did not, she was living with a relative in a different town. There may have been good reason for this in that the relative's house was near a college but the fact of the matter was that she was spending at least 12 nights [a fortnight] with him. The tribunal accepted that [the appellant] made a contribution and saw Lucy every other weekend. The tribunal also accepted that [the appellant] would be responsible for arranging doctor/dentist appointments for her and would attend school or college meetings and provided her food costs."

17. In its final paragraph, the tribunal went on to decide that the appellant did not as a matter of fact have main responsibility for Lucy. The basis for this conclusion appeared to be that (i) Lucy lived with the godparent, not with the appellant; (ii) it was not unreasonable for the appellant, as her father, to make a financial contribution to her outgoings; (iii) Lucy was of an age at which she would not need collecting from college if taken ill and she could arrange her own doctor's and dentist's appointments. In conclusion, "Whilst the tribunal accept [the appellant] was making a financial contribution to her living expenses and college expenses, it appears at the end of the day that Lucy lives with her godparent and that address she regards as her permanent home."

The application for permission to appeal and the Upper Tribunal proceedings

18. The appellant applied for permission to appeal to the UT, reiterating his arguments as to why he considered that he had main responsibility for Lucy. A District Tribunal Judge gave permission to appeal as "the case concerns the interpretation of regulation 4 of the 2013 Regulations".

19. There have since been two rounds of written submissions on the appeal. Mr Roger Jennings has helpfully responded on behalf of the Secretary of State. The appellant has repeated his frustration and unhappiness with the decision which he sees as belittling the contribution he has made to his daughter's life. He concludes as follows:

> "We have moved on now. We have got Lucy through college and into the University of her choice undertaking a 3 year course in English Language with a student loan sponsored, yes you guessed it, by me (not her godparent) and with a maintenance grant set up, yes you guessed it, by me based on my income (not her godparent)."

The Upper Tribunal's analysis: the legal framework

20. The starting point is section 10(1) of Welfare Reform Act 2012, (the 2012 Act), which provides that "the calculation of an award of universal credit is to include an amount for each child or qualifying young person for whom a claimant is responsible". The notion of responsibility is not further defined by the statute; the remainder of section 10 sets out certain regulation-making powers.

21. The relevant regulations are the 2013 Regulations. Regulation 24(1) (as amended) provides that "the amount to be included in an award of universal credit for each child or qualifying young person for whom a claimant is responsible and in respect of whom an amount may be included under section 10 ('the child element') is given in the table in regulation 36". Regulation 4 (again, as amended) then provides as follows:

> *When a person is responsible for a child or qualifying young person*
>
> 4.—(1) Whether a person is responsible for a child or qualifying young person for the purposes of Part 1 of the Act and these Regulations is determined as follows.
> **(2) A person is responsible for a child or qualifying young person who normally lives with them.**
> (3) But a person is not responsible for a qualifying young person if the two of them are living as a couple.
> **(4) Where a child or qualifying young person normally lives with two or more persons who are not a couple, only one of them is to be treated as responsible and that is the person who has the main responsibility.**
> (5) The persons mentioned in paragraph (4) may jointly nominate which of them has the main responsibility but the Secretary of State may determine that question–
> (a) in default of agreement; or
> (b) if a nomination or change of nomination does not, in the opinion of the Secretary of State, reflect the arrangements between those persons.
> (6) Subject to regulation 4A, a child or qualifying young person is to be treated as not being the responsibility of any person during any period when the child or qualifying young person is–
> (a) looked after by a local authority; or
> (b) a prisoner.
> (7) Where a child or qualifying young person is temporarily absent from a person's household the person ceases to be responsible for the child or qualifying young person if–
> (a) the absence is expected to exceed, or does exceed, 6 months; or

> (b) the absence is from Great Britain and is expected to exceed, or does exceed, one month unless it is in circumstances where an absence of a person for longer than one month would be disregarded for the purposes of regulation 11(2) or (3) (medical treatment or convalescence or death of close relative etc.).

22. This appeal turns on the proper interpretation and application of regulation 4(2) and 4(4), which have been highlighted in bold in the extract above. These provisions establish two propositions. The first is that "A person is responsible for a child or qualifying young person who normally lives with them" (regulation 4(2), emphasis added). The second is that "Where a child or qualifying young person normally lives with two or more persons who are not a couple, only one of them is to be treated as responsible and that is the person who has the main responsibility" (regulation 4(4), again emphasis added).

23. The starting point, as a principle of statutory interpretation, must be that unless there is a good reason to the contrary, the expression "normally lives" has the same meaning in both places where it appears in regulation 4. As *Bennion on Statutory Interpretation* (5th edition, 2008, p.1160) put it:

> "It is presumed that a word or phrase is not to be taken as having different meanings within the same instrument, unless this fact is made clear. Where therefore the context makes it clear that a term has a particular meaning in one place, it will be taken to have that meaning elsewhere."

24. That statement (from an earlier edition of *Bennion*) was approved by the Court of Appeal (Criminal Division) in *R v David Benjamin Bradley* [2005] EWCA Crim 20 at paragraph [28]. The current edition of *Bennion* does not include precisely the same passage, but certainly refers to the starting presumption that "where the same words are used more than once in an act they have the same meaning" (D. Bailey and L. Norbury, *Bennion on Statutory Interpretation* (7th edition, 2017, Part 6, Chapter 21, Section 21.3).

The Upper Tribunal's analysis: nuances of meaning

25. As a matter of ordinary English, the expression "normally lives with" may have different shades of meaning. This may be clearer by using an example. Say twins (T1 and T2) have parents who have separated. Assume further that throughout the year, and regardless of school holidays, the twins live with their mother during the week and their father at weekends. On being asked who they normally live with, T1 might say "I normally live with my Mum during the week and with my Dad at weekends", in other words "I normally live with my Mum during the week and I normally live with my Dad at weekends". In answer to the same question, T2 might reply "I normally live with my Mum, but I stay with Dad at weekends". T1 is using "normally lives" in the sense of what is their normal pattern of living (Meaning 1, or the quality of normality meaning). T2, on the other hand, is using "normally lives" in the sense of what is more often than not arithmetically normal (Meaning 2, or the quantification of normality meaning, based on the proportion of time).

26. Both usages of "normally lives" are perfectly reasonable uses of the English language. But there is a crucial difference. Meaning 1 necessarily assumes that a person, and in particular a child, can normally live with more than one person and in different places. Meaning 2, however, linguistically presupposes that there can be only one 'right' answer and so a person (or here, a child) can normally live only in one place.

27. So the question then is which meaning is used in regulation 4?

The Upper Tribunal's analysis: The departmental guidance

28. The decision-maker (and indeed subsequently the tribunal) proceeded on the basis that a child or young person "normally lives" with the person with whom they spend more time than any other person. In other words, the decision-maker (and the tribunal) adopted Meaning 2 or the quantification of normality meaning. On that basis, and on the undisputed facts, Lucy normally lived with her godfather. But was that approach right? What is the basis for saying that "normally lives" is judged on the basis of how many nights (a week, or as here, a fortnight) a child or young person lives with an adult?

29. The departmental official guidance *Advice for decision makers: staff guide* includes the following statement (Chapter F1 at paragraph F1060):

> "Normally lives" is not defined in legislation and should be given the meaning that a child or qualifying young person normally lives with a person where they spend more time with that person than anyone else.

30. That official guidance was repeated word for word in the decision-maker's reasoning in the present case (see paragraph 10 above). However, the guidance cites no authority for that proposition. So what does the case law say?

The Upper Tribunal's analysis: revisiting the case law and *CFC/1537/1995*

31. It is certainly true that Mr Commissioner (now Upper Tribunal Judge) Rowland has held that "a person has a child or young person normally living with him if that child or young person spends more time with him than anyone else" (see *CFC/1537/1995* (at paragraph 11). This is a family credit decision which only seems to be readily accessible on the internet in the Rightsnet archive of Commissioners' decisions at https://www.rightsnet.org.uk/resources/family-credit). On the face of it, the decision would seem conclusive: so "normally lives with" should be meant in the second sense, with the emphasis on the quantification of normality in terms of the proportion of time. However, on closer scrutiny the context in *CFC/1537/1995* was by no means on all fours with the present case.

32. *CFC/1537/1995* involved the archetypical dispute between two separated parents who each provided a home for their daughter. The child in question was the subject of what were effectively equal shared care arrangements although the mother received CHB for her. The adjudication officer and the tribunal decided that the father was not responsible for the girl under the terms of the relevant legislation. Regulation 7 of the Family Credit (General) Regulations 1987 (SI 1987/1968) (the 1987 regulations) then provided as follows:

> *Circumstances in which a person is to be treated as responsible or not responsible for another*
>
> 7.—(1) Subject to the following provisions of this regulation, a person shall be treated as responsible for a child or young person who is normally living with him.

(2) Where a child or young person spends equal amounts of time in different households, or where there is a question as to which household he is living in, the child or young person shall be treated for the purposes of paragraph (1) as normally living with—

(a) the person who is receiving child benefit in respect of him; or

(b) if there is no such person—

(i) where only one claim for child benefit has been made in respect of him, the person who made that claim, or

(ii) in any other case the person who has the primary responsibility for him.

(3) For the purposes of these Regulations a child or young person shall be treated as the responsibility of only one person during the period of an award and any person other than the one treated as responsible for the child or young person under the foregoing paragraphs shall be treated as not so responsible.

33. The father's grounds of appeal in *CFC/1537/1995* were essentially two-fold. First, he argued his daughter normally lived both with him and also (but separately) with his ex-partner, and so regulation 7(1) was satisfied, making consideration of regulation 7(2) unnecessary. Second, he claimed that the tribunal had erred in finding that there was in fact equal shared care. In their submissions on the appeal, both the father and the adjudication officer had argued that a child could normally live in more than one household at a time (see *CFC/1537/1995* at paragraph 7). The Commissioner considered the competing arguments, and acknowledged that in other contexts it was entirely possible for a person to be ordinarily resident in more than one place (see e.g. *Levene v Inland Revenue Commissioners* [1928] AC 217). However, in relation to income-related benefits a different approach had been taken (see e.g. *R(SB) 8/85*, where the Commissioner had held that a claimant could not be "living with" one woman during the week and with his wife at weekends). Moreover, in the specific context of regulation 7, the Commissioner added:

> … the language of regulation 7(2) implies a far narrower meaning to regulation 7(1) than that advanced by both parties in this case. The phrase "a question as to which household he is living in" implies that the child or young person can live in only one household which in turn implies that a person cannot at the same time normally live with two people who are not themselves living together.

34. Thus in rejecting the father's first ground of appeal, the Commissioner ruled as follows (emphasis added, highlighting the passage now relied on in *Advice for decision makers: staff guide*):

> 11. In the light of these considerations, I have come to the conclusion that **a person has a child or young person normally living with him if that child or young person spends more time with him than with anyone else**. That may not be the most natural construction of the phrase "normally living with" but it is the only one that make sense when the regulation is read as a whole. Such a construction makes it clear why regulation 7(2) makes provision for cases where a child or young person spends equal amounts of time in different households. It also makes clear what is meant in regulation 7(2) by "a question". There is "a question as to which household he is living in" when that question cannot be resolved by the application of regulation 7(1) because it cannot be said where the child or young person spends most time because there is no established pattern. In some cases, it will be possible to apply regulation 7(1) even though the pattern of residence is highly irregular, because it is nonetheless clear where the child spends

> most time. It is only in cases of real doubt that regulation 7(2) applies. The mere fact that there is a factual dispute between, "say", a child's parents as to the amount of time the child spends with each of them is not enough to bring regulation 7(2) into play. Adjudication authorities must determine what the facts are and apply regulation 7(1) unless the facts reveal that the child does spend equal amounts of time in more than one household or that there is no established pattern of residence and it is for that reason impossible to apply regulation 7(1).

35. However, the passage highlighted in the extract above must be read in context, and in particular in the context of both the sentence that follows and the terms of regulation 7 itself. It will be observed that the Commissioner acknowledged that the quantification of normality meaning "may not be the most natural construction of the phrase" but "it is the only one that make sense when the regulation is read as a whole". Furthermore, regulation 7 of the 1987 Regulations and regulation 4 of the 2013 Regulations are simultaneously both similar and dissimilar.

36. They are similar in that there is no material difference between the general proposition set out in regulation 7(1) and regulation 4(1) and (2) respectively. The drafting differences are inconsequential. Either way, responsibility for a child is adjudged according to whether the child normally lives with the claimant:

> **7**.—(1) Subject to the following provisions of this regulation, a person shall be treated as responsible for a child or young person who is normally living with him.

> **4.**—(1) Whether a person is responsible for a child or qualifying young person for the purposes of Part 1 of the Act and these Regulations is determined as follows.
> (2) A person is responsible for a child or qualifying young person who normally lives with them.

37. There the similarity ends, as regulation 7(2) and regulation 4(4) are very different. Regulation 7(2) of the 1987 Regulations sets out a rule that deems a child to be normally living with either the CHB recipient/claimant or in default the person with primary responsibility. But this deeming rule applies only where the child "spends equal amounts of time in different households, or where there is a question as to which household he is living in". As the Commissioner explained in *CFC/1537/1995*, that pointed to the quantification of normality meaning of "normally lives with".

38. However, regulation 4(4) is wholly different to regulation 7(2). It does not presuppose equal shared care. Nor does it presuppose "there is a question as to which household he is living in". Rather, it proceeds on the entirely different footing that the child in question "normally lives with two or more persons who are not a couple", in which case "only one of them is to be treated as responsible and that is the person who has the main responsibility". The language of regulation 4(4) is thus entirely inconsistent with the quantification of normality meaning of "normally lives with", but rather assumes that the first or quality of normality meaning of that expression is being deployed. Very obviously, to start by saying that the provision is concerned with the scenario where a child "normally lives with two or more persons who are not a couple" necessarily presupposes that a child may normally live with a minority carer – there being no reference here to equal shared care, unlike in the old regulation 7(2).

The Upper Tribunal's analysis: summing up on regulation 4

39. Pausing there, is there an alternative construction whereby "normally lives with" in regulation 4(4) is being used exclusively in the sense that the child is living only in one home? There is one such scenario. As Mr Jennings for the Secretary of State hypothesised, three generations may live under the same roof, say daughter, father and grandmother. On those facts the child "normally lives with two or more persons who are not a couple". The father and the grandmother might each have their own separate awards of UC, but they could not both claim the child element for the daughter/granddaughter. In such circumstances the adult with main responsibility would receive the child element.

40. However, that cannot be the sole scenario envisaged by regulation 4(4). Three generations living together under the same roof do occur, but they are nowhere near as typical as shared care arrangements between separated parents. Shared residence of children (and hence the prospect of competing claims for the child element) has become far more common since the advent of the Children Act 1989 (the 1989 Act) and it must be assumed that regulation 4(4) is in large part directed at providing a solution for those types of cases. If that is so, it follows that "normally lives with" in regulation 4(4) must include both majority and minority carers in different households, precisely because it provides a mechanism (the main responsibility test) for resolving disputes between them. To adopt (but also to adapt) Mr Commissioner Rowland's formulation from *CFC/1537/1995*, this *is* the most natural construction of the phrase "normally living with" *and* it is the only one that makes sense when the regulation is read as a whole. It is just that the outcome is different given the statutory and linguistic context.

41. Finally, and in any event, if "normally lives with" is read in regulation 4(2) in the sense of its second meaning, being the quantification of normality meaning, it would make no sense to read it in the same way in regulation 4(4). Thus if "normally lives with" is defined solely by reference to with whom the child lives for the majority of time, then the answer to the responsibility question is nearly always going to be provided by regulation 4(2) itself – a child cannot "normally live with" two or more people using that sense of the term (except in the three generations type of case). There is, furthermore, no reason why "normally lives with" should have one meaning in regulation 4(2) and a different one in regulation 4(4) (see paragraph 23 above). It follows that the expression "normally lives with" should be applied with a focus on the *quality* rather than *quantification* of the normality. The amount of time spent living with a particular person may be a factor, but it cannot be the exclusive or determinative factor.

42. Returning to the official guidance (see paragraph 29 above), it will be seen that this is based on a misunderstanding and misapplication of case law that is not directly in point. It is correct to say that "normally lives" is not defined in the legislation. However, it is wrong to say it "should be given the meaning that a child or qualifying young person normally lives with a person where they spend more time with that person than anyone else". That statement is based on the supposition that the dicta in CFC/1537/1995 can be read across directly from regulation 7 of the 1987 Regulations to regulation 4 of the 2013 Regulations. They cannot.

43. Remaining with the official guidance, paragraph F1063 of *Advice for decision makers: staff guide* states as follows:

> Where the child or qualifying young person normally lives with two or more persons who are not a couple, because they have an equal or near equal arrangement, the deciding factor will be the person who has main responsibility. Who has that main responsibility should be decided between the persons with whom the child or qualifying young person normally lives.

44. The authority cited for that guidance is regulation 4(4). However, it is again mistaken and misleading. There is no warrant for the introduction of the phrase "because they have an equal or near equal arrangement" as a qualifier to the condition that the child normally lives with two or more persons. As seen above, that was a condition precedent for the application of the old regulation 7(2) in the family credit legislation. That expression does not appear anywhere in regulation 4, and certainly not in regulation 4(4). As Upper Tribunal Judge Jacobs observed in *PG v HMRC and NG (TC)* [2016] UKUT 216 (AAC); [2016] AACR 45, "the departure from the legislation previously in force and the different terms of the legislation must be significant" (at paragraph 37). A child may well be subject to a shared care arrangement which is some way short of being equal (e.g. a regular 2 nights a week) and still, as a matter of fact, "normally live with" each separated parent.

45. Summing up, responsibility for a child or young person (and so entitlement to the child element of UC) rests with the person who the child or young person normally lives with (regulation 4(2)). In most situations the child will only live in one place and so regulation 4(2) will determine the issue of responsibility. If it is one of the relatively unusual situations where a child normally lives in one place with two (or more) adults who are not a couple, e.g. three generations living together, then the main responsibility test under regulation 4(4) is the 'tie breaker'. If the child or young person normally lives in two (or more) places, then again the main responsibility test acts as the 'tie breaker' under regulation 4(4). The proportion of time that a child or young person lives with an adult is a relevant factor in deciding both (a) where and more particularly with whom that child or young person normally lives and (b) who has the main responsibility, but it is not determinative of either question.

The approach of the First-tier Tribunal in this case

46. The approach of the tribunal in this case was fatally flawed. I acknowledge at the outset that it was not assisted by the Secretary of State's submission to the tribunal, based as it was on the mistaken guidance in *Advice for decision makers: staff guide*. The tribunal failed to appreciate the nuances of meaning in "normally lives with" and elided the statutory tests. For example, in paragraph 3 of its statement of reasons it confirmed the Department for Work and Pensions decision "mainly because Lucy was not living with [the appellant] for most of the time" and then went on directly to assert that "the issue in this appeal was who had main responsibility". Paragraph 4 of its reasons (see paragraph 16 above) also did not quite state the legal test correctly. It is, in addition, entirely unclear from the evidence before the tribunal how it came to the conclusion (as regards the italicised text) "that Lucy lives with her godparent *and that address she regards as her permanent home*" (paragraph 7). That latter point was a finding with no apparent evidential basis.

47. If the correct approach to the application of "normally lives with" was the quality of normality meaning, then the tribunal had to ask itself first whether Lucy normally lived with both her godfather and her father, and, if so, then the issue would have come down to "main responsibility".

48. If the correct approach to the application of "normally lives with" was the quantification of normality meaning, then the question was simply whether Lucy normally lived for most of the time with her godfather.

49. The tribunal elided and confused the issues. It should have adopted the approach in paragraph 47. In the event it combined the approaches in paragraphs 47 and 48.

50. I therefore conclude that the tribunal erred in law in adopting its confused approach. Mr Jennings for the Secretary of State argues that the tribunal came to the right decision on the facts and so any error was not material. I do not agree. In particular, I do not accept that this was a decision with only one possible outcome, namely a refusal to award the father the child element of UC.

51. As such I allow the appeal and set aside the tribunal's decision. There is absolutely no point in remitting (or sending back) this appeal for re-hearing. No new facts are going to emerge and I am in just as good a position as the F-tT to make a final decision. I therefore proceed to re-make the decision under appeal.

The upper tribunal: re-making the decision under appeal to the tribunal below

52. Subject to the point of construction resolved above, it is trite law that the application of the "normally living with" test is ultimately a question of fact (see e.g. *GJ v Her Majesty's Revenue and Customs* (*TC*) [2013] UKUT 561 (AAC) at paragraph 19).

53. The primary facts in this appeal are not in dispute. Lucy used to live with her mother until July 2015. She then moved to stay with her godparent, whose home was near the college she was due to attend. Thereafter she also stayed two nights a fortnight with her father, on a regular basis. Her father also took her shopping every Thursday and provided a high level of financial support. He also attended parents' evenings at college and arranged medical and dental appointments. We do not have information about where Lucy kept her belongings, but it is a reasonable assumption that she had some at her godparent's house and some at her father's home – the breakdown of her relationship with her mother suggests that nothing was kept there.

54. Based on those facts, it is conceivably arguable that (after July 2015) Lucy normally lived only with her father. On that view, she did not *normally* live with the godparent at all, precisely because she was staying there purely for the convenience of easy access to college. In a sense she was *lodging with* the godparent, rather than truly *living with* the godparent. In the same way, an undergraduate student from Plymouth attending college in Newcastle-upon-Tyne might say "I'm in a hall of residence in Newcastle but I normally live in Plymouth" – the student may be living in Newcastle seven nights a week during term-time but this is a temporary exception to the normal long-term state of affairs of living in Plymouth. Lucy, of course, was only 16 at the material time. She was estranged from her mother. Insofar as she had a "home" it was plainly with the appellant, albeit that she stayed for the majority of nights with her godparent.

55. However, the statutory test is not where her home was, but rather with whom she was normally living. The undoubted fact remains that Lucy was staying with her godparent for 12 nights out of every 14, sleeping there and having meals there. As Lord Slynn of Hadley held in *Abdulrahman Mohamed v. The London Borough of Hammersmith & Fulham* [2002] AC

547; [2001] UKHL 57, where the issue was the meaning of "normally resident" in the context of homelessness legislation, "so long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides" (at paragraph 18).

56. *Mohamed* was a case in which the context presumably demanded that a person be normally resident in no more than one place. As Lord Slynn also observed, "it is clear that words like ordinary residence and normal residence may take their precise meaning from the context of the legislation in which they appear" (also at paragraph 18). Given the drafting of regulation 4(2) and (4), and the fact that for UC purposes a child or young person may be normally living with an adult in more than one place, I conclude that as a matter of fact the better view was that Lucy normally lived with her godparent and also normally lived with her father.

57. I also bear in mind that "living with" has been helpfully described as "a settled course of daily living" (Social Security Commissioner's decision R(F) 2/81 at paragraph 12 *per* Mr Commissioner Goodman). On the facts of R(F) 2/81 itself, the child in question spent Saturday and Sunday afternoons with her father, and in those circumstances the Commissioner found that she could not be said to be "living with" her father. However, that is materially different from the present appeal both in that it concerned child benefit legislation and the child never stayed overnight with her father.

58. It follows that in this case regulation 4(2) does not provide the answer to the question of responsibility, as Lucy normally lived with two people in two different places. Accordingly, resort must be had to regulation 4(4). She came within that rule as she normally lived with two people (her godparent and her father) who were not a couple. It followed that the person with the main responsibility for her was to be treated as responsible for her.

59. The test for main responsibility is not defined in the 2012 Act or in the 2013 Regulations. The guidance in the *Advice for decision makers: staff guide* states as follows (at paragraph F1065), and seems to me a good starting point:

> If the DM [decision maker] is required to determine who has main responsibility they should note that main responsibility is not defined in regulations and should be given the meaning of the person who is normally answerable for, or called to account for the child or young person. In determining who has the main responsibility for a child or young person consideration should be given to:
>
> 1. Who the child normally lives with
> 2. Who makes day to day decisions about the child's welfare including, for example, arranging and taking them to visits to the doctor or dentist or enrolling and taking the child to and from school?
> 3. Who provides the child with clothing, shoes, toiletries and other items needed for daily use?
> 4. Who is the main contact for the child's school, doctor and dentist?
> 5. Who cares for the child when the child is ill?
>
> This list should not be considered exhaustive.

60. The only factor on that list which weighs in favour of concluding that the godparent had "main responsibility" for Lucy relates to point (1) and the fact that she stayed there for 12 out of 14 nights, and so normally lived there for most of the time. However, obviously during the day she was at college and every other weekend she was staying with her father. There is no evidence as to point (5), but the evidence as to points (2), (3) and (4) all point strongly to the father having the main responsibility. There are two other inter-related factors which I consider to be relevant in the circumstances of this case. The first is that the test under the legislation is a "main responsibility" test, and not a "main care" test (see also *KN v HMRC (TC)* [2009] UKUT 79 (AAC) at paragraph 5). The second is that Lucy was 16 at the material time, and not 6. The way in which the main responsibility for a 16 year old manifests itself is necessarily very different from the way it does for a 6 year old, which will necessarily be more 'hands on'. Taking all those considerations into account, I have no hesitation in finding that Lucy normally lived with both her godparent and her father but that her father had the main responsibility for her.

61. The two-stage test for first identifying who the child or young person normally lives with, and then ascribing main responsibility if more than one adult is involved, is also used in the child tax credit legislation (see regulation 3 of the Child Tax Credit Regulations 2002 (SI 2002/2007)) (2002 Regulations). The drafting of regulation 3 of those regulations is rather more complex and prolix, but in broad terms regulation 4(2) and 4(4) of the 2013 Regulations appear to be a compressed version of the steps set out in Rules 1 and 2 of regulation 3 of the 2002 Regulations. Certainly there appears to be no obvious substantive difference between the two regimes in terms of the approach taken. To that extent, the guidance of Upper Tribunal Judge Jacobs in *PG v Commissioners for HM Revenue and Customs and NG (TC)*: [2016] UKUT 216 (AAC); [2016] AACR 45 is instructive. Thus, amongst other matters:

- The test for responsibility in the child benefit is different (paragraphs 25 and 27);
- The main responsibility must refer to the practical exercise of responsibility rather than a legal concept – such as parental responsibility under section 3 of the 1989 Act (paragraph 28);
- Caring for a child is a major component of responsibility (paragraph 29);
- As well as providing care for a child, taking practical responsibility also involves as Upper Tribunal Judge Jacobs said (paragraph 31):

  - making decisions from the mundane (what brand of trainers to buy for them) to the most significant (which school should they attend);
  - providing for their needs by feeding and clothing them;
  - nurturing them and protecting them in their physical, mental, educational and social development;
  - being available in case of need.

  Naturally, the extent to which there is a need for decisions and actions will vary according to the age of the child. I do not intend this list to be exhaustive.

- The main responsibility test must be applied to the reality of what happens, and not what a court order may state should happen (paragraph 39).

62. Upper Tribunal Judge Jacobs concluded (at paragraph 38):

> The proper approach is to collect information about all aspects of responsibility, to resolve any conflicts in the evidence, and then to form a balanced judgment on where the main responsibility lies. No factor predominates; all must be taken into account.

63. Adopting that approach in the round on the facts as found here, and for the reasons as set out above, I conclude that the appellant had main responsibility for Lucy.

64. However, the fact that I have found the appellant to be responsible for Lucy is not the end of the matter.

65. Lucy was 16 at the relevant time. Section 40(1) of the 2012 Act defines a "child" as a person under the age of 16. So Lucy was not a child. Was she then a "qualifying young person"? A "qualifying young person" is a person of a prescribed description (sections 10(5) and 40(1)). That description is to be found in regulation 5 of the 2013 Regulations (as amended):

> **Meaning of "qualifying young person"**
>
> 5.—(1) A person who has reached the age of 16 but not the age of 20 is a qualifying young person for the purposes of Part 1 of the Act and these Regulations—
> (a) up to, but not including, the 1st September following their 16th birthday; and
> (b) up to, but not including, the 1st September following their 19th birthday, if they are enrolled on, or accepted for, approved training or a course of education—
> (i) which is not a course of advanced education,
> (ii) which is provided at a school or college or provided elsewhere but approved by the Secretary of State, and
> (iii) where the average time spent during term time in receiving tuition, engaging in practical work or supervised study or taking examinations exceeds 12 hours per week.
> (2) Where the young person is aged 19, they must have started the education or training or been enrolled on or accepted for it before reaching that age.
> (3) The education or training referred to in paragraph (1) does not include education or training provided by means of a contract of employment.
> (4) "Approved training" means training in pursuance of arrangements made under section 2(1) of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990 which is approved by the Secretary of State for the purposes of this regulation.
> (5) A person who is receiving universal credit, an employment and support allowance or a jobseeker's allowance is not a qualifying young person.

66. It may very well be that Lucy met the criteria under regulation 5(1)(b) at the relevant time, but there is no information on the file about the nature of her college course. The Secretary of State should make the necessary enquiries of the appellant and/or the college. The decision maker will then be in a position to conclude whether Lucy was indeed a qualifying young person.

67. As well as allowing the appeal to the Upper Tribunal and setting aside the F-tT's decision, I therefore re-make the decision of the F-tT in the following terms:

> "The appellant's appeal is allowed.

> The Secretary of State's decision of 26 April 2016 is revised.
>
> Lucy normally lived with both her godparent and the appellant (regulation 4(2)). However, the appellant had main responsibility for her (regulation 4(4)).
>
> It follows that the appellant was entitled to the child element of UC, subject to regulation 5.
>
> The case is accordingly remitted to the Secretary of State to make a decision about whether Lucy was a 'qualifying young person' and, if appropriate, to revise the decision about the alleged overpayment."

68. There has been no separate appeal against the UC overpayment decision. However, if the outcome is that Lucy is a qualifying young person, then the appellant is responsible for her and so was entitled to the child element of UC. It should necessarily follow that any overpayment decision will need to be revised in consequence. If so, any amounts that have already been recovered will need to be refunded to the appellant.

Conclusion

69. For those reasons the decision of the F-tT involves an error of law. I therefore allow this appeal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, section 11) and set aside the decision of the F-tT (section 12(2)(a) of the 2007 Act). However, I can re-make the decision (section 12(2)(b)(ii) of the 2007 Act), and do so as above at paragraph 67.