IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

UT ref: UA-2023-000776-UHC
[2024] UKUT 256 (AAC)

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

CD

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 22 August 2024
Decided after a remote oral hearing on 14 May 2024

Appellant: The appellant represented himself.
Respondent: Ms Naina Patel of counsel instructed by GLD.

Further written submissions on 29 May 2024 and 11 June 2024.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. This appeal treads a legal challenge path that has been trod several times before. In all previous cases the challenge has not been successful. This appeal is no exception.

2. The essential argument in the appeal is that the appellant father has been unlawfully discriminated against under the universal credit rules in not being entitled to an amount of universal credit to enable his son to have a bedroom when living with the appellant. The appeal therefore raises the equivalent "shared care" issue as has been considered in, for example: *Humphreys –v- Her Majesty's Revenue and Customs* [2012] UKSC 18; [2012] AACR 46; *TD v SSWP and London Borough of Richmond-Upon-Thames* (HB) [2013] UKUT 642 (AAC), *JB v SSWP and Basingstoke and Deane BC* (HB) [2014] UKUT 223; *MR v North Tyneside Council and SSWP* [2015] UKUT 34 (AAC); and *R(Cotton) v SSWP* [2014] EWHC 3437 (Admin).

3. On 6 April 2023 the First-tier Tribunal ("the FTT") dismissed the appellant's appeal from the Secretary of State's decision of 19 November 2021. The effect of the Secretary of State's decision was that the appellant was not entitled to an additional bedroom when calculating the housing costs element of universal credit.

4. The FTT found as a fact the appellant had equal responsibility for his son, which was based on "the equal time the appellant spent with his son including nights, the shared approach to decisions relating to the child, and the clear picture of the separated parents being equal partners in the upbringing of their son". However, the FTT held that regulation 4 of the Universal Credit Regulations 2013 "had to be interpreted under the current case law" so as to allow the appellant's son to form only part of one "benefit unit", which in this case was with appellant's son's mother. The current case law to which the FTT referred is *MR v North Tyneside Council and SSWP* [2015] UKUT 34 (AAC) and *R(Cotton) v SSWP* [2014] EWHC 3437 (Admin).

5. The FTT continued in its decision notice (which, unusually, also stood as its statement of reasons for the decision and its determination on whether to grant permission to appeal to the Upper Tribunal) as follows:

> "6. As a result, the Tribunal could not set aside the DWP's decision dated 19 November [2021]. It was correct under the current law.
>
> 7. The Tribunal recognised the Article 8 protection of family life argument that [the appellant] put forward. Article 8 alone did not assist his case because of the decided case law. However, [the appellant] made cogent submissions that the Equality Act should be applied to the Universal Credit Regulations and/or the way the DWP (and therefore the Tribunal standing in the Secretary of State's shoes) applies the tests when deciding whether a second room was justified. The Tribunal also recognised the Article 14 right to not suffer discrimination in protecting other groups such as those under Article 8."

6. The FTT gave the appellant permission to appeal against its decision "in order to allow the Upper Tribunal to rule on this novel point of law".

7. I wish at this point to make a number of comments about the FTT's decision.

8. First, there are little if any findings of fact made in relation to any discrimination argument made by the appellant, whether that argument arose under the Equality Act 2010 or the Human Rights Act 1998. For example, no findings were made by the FTT as to the evidential basis for any argument made by the appellant that regulation 4 of the Universal Credit Regulations 2013 ("the UC Regs") indirectly discriminated against him as a male parent with exactly equal caring responsibility for his child.

9. Second, the 'cogent' arguments made by the appellant as to the effect the Equality Act 2010 was said to have to regulation 4 of the UC Regs and its application are not set out. That is unfortunate because it would seem that it was the Equality Act which the FTT seemed to consider was 'novel'. As I have indicated above, I am doubtful whether the Human Rights Act 1998 article 14 discrimination argument raises any novel point of law.

10. Third, given the FTT considered that decision of the Secretary of State under appeal to it was "correct under the current law", it is not apparent why the FTT considered it may arguably have erred in law in upholding that decision so as to merit giving permission to appeal to the Upper Tribunal. Save possibly for the Equality Act

argument (which can go nowhere on an appeal to the Upper Tribunal for the reasons I explain below), the FTT does not indicate on what basis the Upper Tribunal might find that the "current law" is either wrong in law or can be distinguished.

11. Section 10 of the Welfare Reform Act 2012 ("the Act") deals with responsibility for children within universal credit and provides as follows:

> "**Responsibility for children and young persons**
>
> 10.-(1) 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.
>
> (1A) But the amount mentioned in subsection (1) is to be available in respect of a maximum of two persons who are either children or qualifying young persons for whom a claimant is responsible.**]**
>
> (2) Regulations may make provision for the inclusion of an additional amount for each child or qualifying young person for whom a claimant is responsible who is disabled.
>
> (3) Regulations are to specify, or provide for the calculation of, amounts to be included under subsection (1) or (2).
>
> (4) Regulations may provide for exceptions to subsection (1) or (1A).
>
> (5) In this Part, "qualifying young person" means a person of a prescribed description."

12. Regulation 4 of the Universal Credit Regulations 2013 ("the UC Regs") is made under section 10 and provides, so far as is relevant, 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."

13. In terms of housing costs, with which this appeal and the appeal to the FTT was concerned, section 11 sets out that "the calculation of an award of universal credit is to include an amount in respect of any liability of a claimant to make payments in

respect of the accommodation they occupy as their home". Regulations 25 and 26 and paragraphs 8-10 in Part 3 of Schedule 4 to the UC Regs then have the effect that housing costs may apply in respect of members of the "renter's extended benefit unit", and for those purposes the renter's extended unit includes "any child for whom the renter is responsible".

14. As for the evidence relevant to these statutory tests, the appellant's son's mother received child benefit for their son and would be retaining the child on her award of universal credit. Accordingly, and it is any event accepted that, under the above statutory provisions the appellant did not have responsibility for his son, per regulation 4(4) of the UC Regs, and so he could not claim housing costs for a bedroom in respect of his son because, per paragraph 9(1)(b) in Part 3 of Schedule 4 to the UC Regs, his extended benefit unit could not include his son (because the appellant was not responsible for his son under the UC Regs).

15. The appellant, as I understood his arguments, accepted the above. However, he argued that regulation 4(4) of the UC Regs was contrary to the Equality Act 2010 and the Human Rights Act 1998 because it indirectly discriminated against him as a male parent with equal shared care of a child as compared to female parents with equal shared care of a child.

16. The Equality Act cannot assist the appellant on this appeal to the Upper Tribunal. This is because the Upper Tribunal does not have jurisdiction to rule on such arguments (whatever their merits) on a statutory appeal given the terms of section 113 of the Equality Act: see *JA-K v Secretary of State for Work and Pensions* (DLA) [2017] UKUT 420 (AAC); [2018] 1 WLR 2657 and *TS (by TS) v Secretary of State for Work and Pensions* (DLA); *EK (by MK) v Secretary of State for Work and Pensions* (DLA) [2020] UKUT 284 (AAC); [2021] AACR 4. This has been the settled law, at least at Upper Tribunal level, since 2017 or at least 2020. It seems to me that had the FTT been aware of these decisions, it is unlikely to have thought that the appellant's Equality Act arguments, whatever their novelty, could take him anywhere on a further appeal to the Upper Tribunal. Given the Upper Tribunal's decided case law, I need say no more about the Equality Act 2010.

17. The indirect discrimination argument under the Human Rights Act 1998 was based on article 14 of the European Convention on Human Rights ("ECHR"). There was some legal skirmishing in the arguments before me about whether the basis for the human rights discrimination argument under article 14 of the ECHR was article 8 of the ECHR. Such argument was and is unnecessary. This is because it was not disputed that the appellant's argument that regulation 4 of the UC Regs (and the rest of the UC scheme as set out above) discriminated against him as the parent without 'main' responsibility, with the consequence that his son was not part of his 'extended unit' for housing costs purposes, brought him within the ambit of Article 1 of the First Protocol to the ECHR ("A1P1"): see *PR v Secretary of State for Work and Pensions* (UC) [2023] UKUT 290 (AAC) and the cases discussed therein on the ambit of "possessions" under A1P1.

18. However, in the submissions he made after the oral hearing before me, the appellant on the face of it has conceded the appeal. He does so on the basis that "previous Upper Tribunal cases render indirect discrimination under the Equality Act 2010 and Article 14 of the ECHR redundant, due to achieving a legitimate aim of reducing financial costs to administer equal payments between equally responsible and cost-bearing parents".

19. The appellant had been allowed to make these later submissions because, for reasons I do not now need to recount, he had not received the Secretary of State's bundle of legal authorities before the oral hearing before me on 14 May 2024. The appellant did not want to adjourn the hearing on 14 May and was content to make his submissions to me without the benefit of having read any of the case law in the 'authorities bundle' and then make written submissions on that case law later. The appellant's apparent concession is thus one he has made having had time to read and digest the relevant case law. None of that case law has found in favour of male parents in a similar situation to the appellant. In my judgement, the concession is well founded.

20. Given the appellant's apparent concession, I can set out my reasons for rejecting his arguments based on article 14 of the ECHR quite shortly.

21. Before I do so, however, I address briefly further arguments and issues the appellant has sought to raise on this appeal. These concern the child element of universal credit, entitlement to child benefit and the work allowance within universal credit. I agree with the Secretary of State that none of these matters were issues on the appellant's appeal to the FTT. The appellant's appeal to the FTT, as he set out in his appeal letter, was about the "2-bed housing allowance", the imposition of the size criteria and the "decision to reduce my housing benefit award due to the social housing sector size criteria". It was that 'second bedroom for his son' issue that was the only issue under challenge before the FTT and which the appellant sought to further challenge (but now apparently concedes) on this appeal to the Upper Tribunal. No part of the appellant's appeal to the FTT was about the child element of universal credit. Nor could it have been about child benefit as that benefit is an HMRC administered benefit and is not, therefore, a benefit about which the Secretary of State could have made any entitlement decision. As for the work allowance argument, manifestly that was not an issue the FTT was asked to, or did, decide. Moreover, the journal entries on which the appellant relies in respect of the work allowance all fall well after the 19 November 2021 date of the decision under appeal to the FTT: see further section 12(8)(b) of the Social Security Act 1998. If the appellant wants to argue about his entitlement to the work allowance under regulation 22 of the UC Regs, that will have to be in a separate appeal in which his eligibility to that allowance is squarely in issue.

22. Reverting to the issue with which this appeal **is** concerned, the appellant's A1P1 and article 14 of the ECHR discrimination argument has two main difficulties.

23. The first difficulty is establishing by way of evidence that regulation 4(4) of the UC Regs does in fact have a disproportionately adverse effect on men or male parents. In other words, showing that regulation 4(4) is indirectly discriminatory on the basis of sex. (Its terms plainly do not discriminate directly against men or male parents as they just refer to persons. And no direct discrimination argument was made by the appellant in any event.)

24. The evidence on which the appellant seeks to rely as showing regulation 4(4) indirectly discriminates against male parents was limited and is as follows:

(i) according to 'Families Need Fathers', 40% of separated parents have a shared care arrangement on a 50:50 shared time basis; and

(ii) it has also been found that 6.17 million (87%) of child benefit recipients are female and only 920,000 (13%) of recipients are male.

25. The evidential sources for these conclusions has not been provided by the appellant, even though he was directed to do so after the hearing. The appellant did after the hearing provide additional evidence said by him to make good the 40% figure in paragraph 24(i) above, but that was not the evidence from Families Need Fathers on which that organisation came to its 40% conclusion. In any event, that 40% figure on its own, even if accurate, is just about the percentage of separated parents who have between them exactly equal shared care of their child(ren). Of itself it tells one nothing about (i) how many of those parents claim universal credit, and (ii) of the class of parents who have claimed universal credit, how many of the male and female parents have and have not been allowed a housing costs element for the child in their award of universal credit. No further evidence has been provided by the appellant to substantiate the alleged finding set out in paragraph 24(ii). Again, however, even if that statistical information is accurate, it does not address, let alone disaggregate, the gender of those separated parents in an exactly equal shared situation who have (or do not have) a housing costs element in their award of universal credit in respect of their child(ren).

26. The appellant did not have permission to file further evidence in relation to the 40% (alleged) finding as set out in paragraph 24(i) above. Nor has the appellant provided a clear source for that further evidence, and I agree with the Secretary of State that a lot of it appears to be incomplete and thus is not entirely intelligible. The further evidence does not on its face provide any statistical evidence relating to separated parents who have exactly equal shared care for their child(ren). There is reference in some of the figures in the further evidence to the difference between "parents with care" and "non-resident parents" accessing universal credit, with 41% of the former doing so as against 20% of the latter. However, these percentage figures are not further broken down by gender, so do not themselves show that more separated female parents access universal credit compared to separated male parents. Moreover, the figures are just about accessing universal credit *per se*. They therefore provide no secure evidential basis for how the housing costs element of universal credit may have been awarded in respect of the child(ren) of such separated parents. In addition, insofar as 'parent with care' and 'non-resident parent' are terms of art read across from the child support legislative scheme, strictly speak they may not apply to separated couples with exactly equal shared care arrangements for their child(ren). I make this last point because if the child care is <u>exactly</u> equal then under regulation 50(2) of the Child Support Maintenance Calculation Regulations 2012 there may be no 'non-resident parent' (and so no 'parent with care' either).

27. I should add that the Secretary of State did not accept either figure in paragraph 24 above. For example, she referred to the Social Security Advisory Committee's report of 22 October 2019 *Separated parents and the social security system*, which at page 6 provided evidence that only around 2-3% of non-resident parents had exactly equal shared care (50:50) of the child(ren) with the other parent.

28. Given the above problems, the appellant's evidence does not, in my judgment and per *DH –v- Czech Republic* (2008) 47 E.H.R.R. 3, raise a strong prima facie case of regulation 4(4) of the UC Regs indirectly discriminating against male parents with exactly equal and shared care of the child(ren). The evidence does not support that this class of male parents is disproportionately likely to be determined not to have main responsibility for the child(ren) under regulation 4(4) of the UC Regs when

compared to the female parents in the same situation. The statistical evidence in the *TD* case referred to above, and which I decided over ten years ago, was more detailed and authoritative than anything the appellant seeks to rely on. In consequence, as no discrimination has been made out by the appellant, it does not fall to the Secretary of State to either explain away or justify any discrimination.

29. The second and most fundamental difficulty for the appellant arises in the alternative to his first difficulty. The second difficulty is that the Secretary of State has shown that any indirect discrimination that there *may* (contrary to what I have said above) be against male parents generated by regulation 4(4) of the UC Regs in an exactly equal shared care case is justified. It is not manifestly without reasonable foundation and has an objective and reasonable justification. It is this aspect of the argument on which the previous decisions referred to above have foundered, and this appeal is no different.

30. The following factors show that any discrimination in the appellant's case is justified.

31. First, as Baroness Hale put it in *Humphreys* (at paragraphs [29] and [31]):

> "29. However, the statistical definition of child poverty may reflect a wider truth. If funds are targeted at one household, it is likely that a child living in that household will be better off than he or she would be if the funds are split between two households with modest means. The state is, in my view, entitled to conclude that it will deliver support for children in the most effective manner, that is, to the one household where the child principally lives. This will mean that that household is better equipped to meet the child's needs. It also happens to be a great deal simpler and less expensive to administer, thus maximising the amount available for distribution to families in this way.
>
> 31. It is also reasonable for a government to regard the way in which the state delivers support for children, and indeed for families, as a separate question from the way in which children spend their time. The arrangements which separated parents make for their children are infinitely various and variable. They depend upon a multitude of factors, such as the children's ages and preferences, where they go to school, how close the parents live to one another, and what the parents can afford. Most parents can and do sort out these arrangements for themselves. Only a small minority have to have these imposed upon them by a court, and even then they are free to change them if they both want to do so."

32. I can see no good reason, and importantly no reason was advanced by the appellant, why that same principle should not apply in respect of the universal credit scheme and the housing costs element within it.

33. In fact, the Government expressly stated in 2010 when consulting on the universal credit legislative scheme in "*Universal Credit: welfare that works*" that it intended "to keep the current principle in benefits and Tax Credits that, where parents are separated and provide shared care, only one of them will be eligible to receive the child element of Universal Credit". That principle can be traced at least as far back as in relation tax credits (see *Humphreys* at paragraph [9]) and in relation to housing benefit (see *TD* at paragraphs [50]-[52] and *Cotton* at paragraph [34]). Although the Government's statement from 2010 refers to the child element of

universal credit, it too is grounded in regulation 4 of the UC Regs. Similar statements are found in the respondent's Explanatory Memorandum to the Social Security Advisory Committee of June 2012 in relation to the then draft UC Regs.

34. Although these materials cannot be attributed to Parliament, they are relevant as background information in ascertaining the relevant objectives of the universal credit legislative scheme and regulation 4(4) of the UC Regs in particular: see Lord Reed's summary at paragraph 2(7)(iii) of *R(SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 following Lord Nicholls in Wilson v First Country Trust (No.2) [2003] UKHL 40; [2004] ! AC 816 at paragraph [64].

35. Second, there is no obviously definable category of persons where an exception ought to be made in shared care cases. For example, should it apply only where both parents are on universal credit? Moreover, to what extent should the parent who has less than exactly equal shared care benefit from an exception to the main responsibility rule in regulation 4(4) of the UC Regs? This then relates back to the points made by Baroness Hale in *Humphreys* and not "splitting" the benefits in respect of a child, and the increased administrative (and other) costs of ensuring the benefit 'follows the child'. It also further touches on a point I raised in *TD*. This is that awarding the appellant the housing costs element in respect of a bedroom for his son for the (50%) of time his son is living with him is unlikely to cover the full costs of that room. If the same rule were to apply to the appellant's son's mother, she too may find herself only having some of the son's bedroom costs covered by her universal credit award. This could have the result that neither parent can meet the costs of a bedroom for their son. The alternative is that the State pays the full weekly costs for two bedrooms for the son, for one bedroom with either parent. However, that would financially favour the parents, as against a couple with a child who have not separated, and would involve extra cost, and itself give rise to potential discrimination under article 14 of the ECHR: see paragraph [198] of *SC* where a similar point was made.

36. Third, and following on from the last point, the rule in regulation 4(4), even if it does disproportionately adversely affect male parents, has an objective and reasonable justification when: (a) the additional costs of not having a rule are borne in mind; (b) it is recognised that discretionary housing payments under section 69 of the Child Benefit, Pensions and Social Security Act 2000 may assist to aid the housing costs shortfall for someone like the appellant (and have in fact assisted him), and (c) bearing in mind that it was rationally open for Parliament to legislate that in separated couple, shared care cases, it was primarily for the couple to take responsibility for deciding who receives the child element of universal credit (and who receives the child benefit).

37. Fourth, the UC Regs were passed by affirmative resolution, and thus debated in Parliament. This is relevant to the UT's intensity of review of the scheme, given the need for respect for Parliament's constitutional function: see *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 at paragraph [94] and *SC* at paragraphs [180] and [182]. Although the impact of regulation 4(4) of the UC Regs on separated parents with equal shared care in relation to the housing costs element of universal credit does not appear to have been specifically raised or debated in Parliament, I accept the Secretary of State's argument that this should not be treated as a factor supporting a finding of incompatibility: see *SC* at paragraphs [176] and [184] following *Wilson* at paragraph [67]. On the contrary, given the

principle identified in paragraph 33 above which has been applied by Parliament consistently across successive social security legislative schemes, the absence of concerns raised may be viewed as an indication of Parliament's approval of the approach in principle.

Postscript

38. As I have noted in paragraphs 9 and 10 above, the FTT gave limited reasons for why it was giving permission to appeal to the Upper Tribunal. I would respectfully suggest that permission ought not to have been given on the Equality Act 2010 arguments, for the reason identified in paragraph 16 above. Furthermore, and in parallel with the views set out by the Court of Appeal at paragraph [74] of *MOC v Secretary of State for Work And Pensions* [2022] EWCA Civ 1, I would suggest that it should have been left to the Upper Tribunal to decide whether to give permission to appeal in this case on the human rights discrimination arguments. Even prior to apparently conceding the appeal, the appellant had not suggested any reason the universal credit housing costs regime should admit of a different answer to that given in *Humphreys* (on tax credits) and in *TD* and *Cotton* (in respect of housing benefit) on A1P1 and article 14 discrimination grounds. Given the consistent line of binding authority that it is justified for the UK's social security system not provide the means by way of benefits to fund a bedroom for a child in both of the homes of the child's separated parents, I suggest that it ought to have been for the Upper Tribunal to decide whether permission should be given to seek to obtain a different result in this case.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 22 August 2024