ADDENDUM

How to get legal aid for discrimination advice (2)

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Welfare Benefits and the Human Rights Act 1998

When do duties under the Human Rights Act 1998 ('HRA') arise?

1. First, it has been held that a dispute concerning an entitlement to a welfare benefit concerns the claimant's "civil rights and obligations", and therefore amounts to "proceedings" under s.6 of the 1998 Act (**Feldbrugge v The Netherlands (1986) 8 EHRR 425** and **Salesi v Italy (1998) 26 EHRR 187**). Hence, the claimant is entitled to have the dispute determined ultimately by an independent and impartial tribunal, with full jurisdiction over both facts and law (**Tsfayo v UK (2006) 48 EHRR 457**).

2. Secondly, it is unlawful for a public body to act in a way that is incompatible with the claimant's Convention rights (HRA s.6). "Public authority" includes tribunals (6(3)).

3. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights (HRA s.3).

Secondary Legislation

4. Where the human rights challenge is to a rule contained in secondary legislation, then the court or tribunal has the power to provide a remedy by reading down the legislation to render it compatible with the Convention: (**R (Bono) v Harlow DC [2002] EWHC 423 Admin** at [34] (housing benefit regulations) and **R (Quila) and others v Secretary of State for the Home Department [2011] UKSC 45, [2011]** at [61] (the immigration rules). Consequently, in cases involving a challenge to secondary legislation either a tribunal or a court can grant a remedy to the individual appellant in a social security case by disapplying the offending provision in the relevant regulations (**CIS/540/2002 and LA v Bury MBC (HB) [2013] UKUT 546 (AAC**)).

5. In **SSWP v Carmichael and Sefton BC (HB) [2017] UKUT 174 (AAC)**, however, the Secretary of State challenged the idea that a First-tier Tribunal had the power to provide a remedy within a statutory appeal under the HRA, arguing that the FFT had to apply the secondly legislation as it stood; and that the only permissible way of rectifying any incompatibility with the Convention was by way of amendments to the statutory scheme by the legislator (i.e. the Secretary of State). The UT rejected this approach, but the Secretary of State has been granted permission to appeal. In **SSWP v Carmichael & Anor [2018] EWCA Civ 548,** the Court of Appeal found, by a majority decision of two to one that the F-tT and Upper Tribunal do not have the power to devise their own solution to a violation of the ECHR.

Primary legislation

6. Where there is no compatible reading of a provision under s 3 HRA, and it is in primary legislation, then the only remedy available is a declaration of incompatibility: (**PL v SSWP (JSA) [2016] UKUT 177 (AAC**)). However, neither a First-tier Tribunal, nor the Upper Tribunal, has the power to make such a declaration (**SH v SSWP (JSA) [2011] UKUT 428 (AAC))**.

Summary of the arguments that have been deployed under the HRA to challenge benefits decisions

7. The European Convention on Human Rights ('the Convention') is historically concerned with civil and political rights, rather than social and economic rights. The doctrine of a 'living instrument', and the need to give practical effect to Convention rights have, however, created a limited form of protection to those claiming social security benefits. The case law that developed this protection had to rely on the principle that the prohibition on discrimination in article 14 may be engaged where a measure falls within the ambit of a substantive article, even though that latter article itself is not breached (**Belgian Linguistic Case (1979-80) 1EHRR 241))**.

No substantive right to welfare benefits

8. Article 8 of the Convention does not impose an obligation upon the State to provide a home (**Chapman v. UK (2001) 33 EHRR 18**), or to provide benefit, nor any particular amount of benefit (**Anufrijeva v LB of Southwark [2003] EWCA Civ 1406)**), save in exceptional circumstances.

9. Whilst welfare benefits are possessions for the purposes of article 1 of protocol 1 (**Stec and others v UK (Admissibility)(2005) 41 EHRR SE18**), the article does not guarantee the right to acquire a benefit or to any amount of benefit

(**Muller v. Austria5849/72 (1975) 3 DR 25**, applied in **SC & Ors v SSWP &Ors [2018] EWHC 864 (Admin**) - the challenge to the two-child policy.

Discrimination prohibited

10. If, however, the State voluntarily decides to create an entitlement to welfare benefit for some, it must not, under article 14, withhold it from others in the same or in analogous situations without good reason (**Stec and others v UK (Admissibility) (2005) 41 EHRR SE18**).

11. Article 14 is not confined to the differential treatment of similar cases: "discrimination may also arise where states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different" (**Thlimmenos v Greece (2001) 31 EHRR 15**).

12. The European Court has also accepted that a difference in treatment may be inferred from the effects of a measure which is neutral on its face (**DH v Czech Republic (2008) 47 EHRR 3**, at [175]).

13. In short, discrimination under article 14 occurs when, in terms of enjoyment of other Convention rights, there is, directly or indirectly, adversely differential treatment of individuals in analogous or "relevantly similar" situations (or, in a *Thlimmenos*-type case, similar treatment of individuals whose situations are relevantly and significantly different); and there is no objective and reasonable justification for the distinction in treatment (or, in a *Thlimmenos*-type case, for the application of similar treatment): (**R (Knowles & Anor) v SSWP [2013] EWHC 19 (Admin)** at [65]).

The test for justification

14. The general test for justification has four aspects: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right? (ii) is the measure rationally connected to that aim? (iii) could a less intrusive measure have been used? and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community? (**R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57**, at [33]).

15. In **Humphreys v Revenue and Customs Comrs [2012] 1 WLR 1545** the Supreme Court has held that the correct approach to justification in “cases involving discrimination in state benefits” is that found in **Stec v UK 43 EHRR 47,** where the Grand Chamber ruled that a wide margin is usually allowed to the State under the Convention when it comes to general measures of

economic or social strategy, and the Court will generally respect the legislature's policy choice unless it is *"manifestly without reasonable foundation"*.

16. Lord Toulson, in **R (Daly & Ors) (formerly known as MA and others) v SSWP [2016] UKSC 58**, affirmed what was said in Humphreys, saying that: "Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities" (para [32]).

17. What has to be justified is not the scheme of the relevant social security benefit as a whole, but rather "the difference in treatment resulting from the application of *the relevant* criteria which has been held to infringe Article 14" (**Burnip v Birmingham CC [2012] EWCA Civ 629** at [26]). In other words, it is the discriminatory effect of the measure which must be justified, not the measure itself.

18. This means that if claimants to a social security benefit are in a comparable situation, and there is less favourable treatment of one group of claimants by virtue of a domestic law rule, the measure may, *nevertheless, be lawful* under the Convention if the adverse impact on that group has an objective and reasonable justification. In other words, the test requires the court to carry out a balancing exercise of the severity of the discrimination as against the importance of the objective, and to decide whether the achievement of the objective outweighs the former (**SC & Ors v SSWP & Ors [2018] EWHC 864 (Admin**), at [150]).

19. Factors that the courts have taken into account when carrying out this balancing exercise in the field of welfare benefits include:

- administrative efficiency may require that so-called "bright-line" distinctions are to be drawn between different groups (**R (Carson) v SSWP[2006] 1 AC 173**);

- the fact that the drawing of lines inevitably means that hard cases will arise does not necessarily invalidate the rule (**R (RJM) v SSWP [2008] UKHL 63**).

20. A summary of the way in which challenges concerning welfare benefits are dealt with under the HRA can be found in Lady Hale's dissenting judgment in **R (SG & Ors) v SSWP [2015] UKSC 16,** which was a challenge to the benefit cap:

156. The "benefit cap" is one of a package of measures provided for in the Welfare Reform Act 2012. The total amount of benefit to which a couple or a single person is entitled is capped at a prescribed sum, irrespective of how much they would otherwise be entitled to. The bare bones of the scheme are provided for in the 2012 Act, but its detailed implementation is contained in the Benefit Cap (Housing Benefit) Regulations 2012.

157. The appellants do not challenge the compatibility of the Act with their rights under the European Convention on Human Rights, but they do challenge the compatibility of the way in which it has been implemented by the 2012 Regulations. They argue that it has a disproportionate impact upon lone parents and upon the victims of domestic violence; both groups are predominantly, although not exclusively, composed of women; hence the scheme is indirectly discriminatory on grounds of sex. As the scheme falls within the ambit of the protection of property rights in article 1 of the First Protocol to the Convention, this violates their right, under article 14 of the Convention, to enjoy such rights without discrimination unless it can be justified. The Secretary of State accepts that the scheme falls within the ambit of article 1 of the First Protocol and that it is indirectly discriminatory against lone parents and thus against women. The question, therefore, is whether it can be justified. A further question, which has only emerged after the hearing in April 2014, is the extent to which, if at all, the obligations of the United Kingdom under the United Nations Convention on the Rights of the Child is relevant to that issue.

158. Both the Divisional Court and the Court of Appeal held that it can be justified: [2013] EWHC 3350 (QB) and [2014] EWCA Civ 156. This raises several questions: whether the justification advanced relates to the scheme as a whole rather than to its discriminatory effect; what is the test to be applied in deciding whether the discrimination is justified; and what is the part played by the international obligations of the United Kingdom under the United Nations Convention on the Rights of the Child in assessing that.

159. The benefit cap is, of course, quintessentially a matter of social and economic policy. In such matters, as Lord Hope of Craighead observed in *R v DPP, Ex p Kebilene* [2000] 2 AC 326, at p 381, it will be easier for the courts to recognise a discretionary "area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention". As Lord Reed explains, the introduction of the cap was indeed extensively debated in Parliament and various amendments were proposed and resisted which would have mitigated the adverse effects with which we are here concerned. But the details of the scheme, including those adverse effects, were deliberately left to be worked out in regulations. It is therefore the decisions of the Government in working out those details, rather than the decisions of Parliament in passing the legislation, with which we are concerned.

160. Furthermore, as Lord Hope went on to say in In re *G (Adoption: Unmarried Couple)* [2009] 1 AC 173, para 48, protection against discrimination, even in an area of social and economic policy, falls within the constitutional responsibility of the courts:

> "Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."

Therefore, even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so. In many cases, the result will be to leave it to the legislature to decide how the matter is to be put right.

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