



Getting legal aid to challenge discrimination in welfare benefits cases (2)

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The difference between a public law challenge and a social security appeal



- A judicial review claim reviews the lawfulness of the decision making process – a review
- A social security appeal consider the merits of the claim – a full rehearing



Public law

- Judicial review permits the courts to review the lawfulness of the conduct of public bodies
- The Court considers the way in which the decision was made
- Its role is supervisory
- It is not an appeal on the merits of the case



Social security

- Social security law is a rule-based system
- The benefit authorities must apply the law as it is enacted
- In order to qualify for benefit the claimant must fulfil the relevant statutory criteria.
- An appeal to a First-tier Tribunal is a full merits hearing of both the facts and the law

Impact of welfare reform on the social security system



- There are more discretionary as opposed to rules-based decisions being made.
- For example, Personal Work Coaches have been given more discretion to determine the terms of the Claimant Commitment and whether someone abides by it.
- Against this background, the Administrative Court has an important role to play.



JR can make a difference in:

- cases where the challenge is to the decision to introduce a new policy – e.g. the benefit cap, the bedroom tax, the PIP amendments, the two child policy;
- cases where there is systemic failure in the way benefits are being administered – e.g. the delay in processing new PIP claims;
- cases where claimants are exposed to the risk of destitution due to a combination of delays, conditionality and sanctions – *watch this space.*



Legal aid post-LASPO

- Legal aid remains available in welfare benefits cases involving:
 - an appeal on a point of law to the Upper Tribunal or above;
 - exceptional funding;
 - public law challenges by way of judicial review;
 - a contravention of the Equality Act 2010.

But does JR have any role in welfare benefits?

- How can you use JR given the availability of a statutory right of appeal?
- In the majority of welfare benefit cases JR is not an option as a right of appeal will suffice.
- But recent high-profile challenges to ‘welfare reform’ demonstrate that JR remains an important remedy in this area of law.



Test cases

- ❖ **R (SG and Others) v SSWP** [2015] UKSC 16 – the ‘Benefit Cap’ litigation
- ❖ **R (Carmichael & Ors) v SSWP, (formerly known as R (MA) v SSWP** [2016] UKSC 58 – the ‘Bedroom Tax’ litigation
- ❖ **R (RF) v SSWP** [2017] EWHC 3375 (Admin) - to the PIP amendment case
- ❖ **SC & Ors v SSWP & Ors** [2018] EWHC 864 (Admin) – challenge to the two-child limit including the lawfulness of the kinship care exception



The funding criteria

Legal aid will only be granted where the requirements of the **Civil Legal Aid (Merits Criteria) Regulations 2013 SI No 104** are met. In broad terms the regulations make it a requirement that: -

- ❖ sufficient benefit to the client (and/or the wider public) has been demonstrated (reg 6);
- ❖ it meets the reasonable private paying individual test (reg 7);
- ❖ that the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances (reg 8);



Funding criteria – cont.

- ❖ the prospects of success must be 50 percent or above (reg 43);
- ❖ the claim is susceptible to challenge by way of judicial review (reg 53(a));
- ❖ alternative remedies (i.e. before a tribunal) must be used first unless it would be ineffective (reg 53(b));
- ❖ a letter before claim has been sent and a reasonable time to respond has been given (reg 56(2)(a)).



Some practice points

- The need to identify the target for the JR claim
- 3 months deadline and the need to act promptly



When does time start to run?

- if the claim is based on ***a decision or action*** - then the time limit starts to run from the date the decision was notified to the claimant;
- if the claim is based on ***a failure to exercise a power***, then the time limit runs from the deadline set in the letter which has requested that the power be exercised (usually the Letter before Claim).
- Note: The time limit does not start again every time further correspondence is received from the benefit authority.


The alternative remedy issue - again



- There is a strong presumption that an application for JR will be refused if there is a statutory route available: **R v IRC ex parte Preston** [1984] UKHL 5.
- JR may nevertheless be appropriate in welfare benefits, despite the existence of a statutory right of appeal in: -
 - a) cases where a statutory appeal would not provide a remedy that is only available in JR e.g. a declaration that a policy or practice is unlawful.
 - b) cases where the consequences of having to wait for the statutory appeal to be heard would be so serious that it would not amount to an 'effective' remedy.



- Examples where a statutory appeal may be ineffective remedy include where there is an imminent threat to the home due to rent arrears in a housing benefit case or the claimant is exposed to severe financial hardship due to the withdrawal of benefit.
- Challenges of this kind may include grounds based on traditional public law principles.
- Reported cases in this category include: -

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- ❖ **R (Hardy) v Sandwell MBC** [2015] EWHC 890 (Admin) - failure to have due regard to the DHP Guidance when taking DLA (care) into account as income for DHP;
 - ❖ **R (C and Anor) v SSWP** [2015] EWHC 1607 (Admin) - excessive delay in the processing of two claimants' applications for PIP;
 - ❖ **R (Halvai) v London and Borough of Hammersmith and Fulham** [2017] EWHC 802 (Admin) - refusal to make an DHP to a disabled woman on a long-term basis unlawful.

Still unsure – then use investigative help

- An Investigative Help Certificate is appropriate when it is not possible to determine the prospects of success without undertaking substantial investigative work (reg 39).
- The Certificate is usually limited to the investigation of the strength of the proposed claim and the drafting of a letter before claim.



Payment at the permission stage

- The legal aid rules prevent payment for work undertaken to issue the application for JR *unless* the court grants permission for the claim to proceed.
- The restriction on payment only applies once the claim for JR has been issued.
- Try to front-load the preparatory work in order to reduce the amount of work done at risk.

THE END



- THANK YOU