

Everyday Equality Conference 10 May 2018

Challenging discrimination in welfare benefits

How to get legal aid for discrimination advice (2)

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

1. Judicial review permits the courts to review the lawfulness of the conduct of public bodies. The role of the Courts when carrying out a judicial review is said to be *supervisory*. The Court considers the way in which the decision was made, rather than determining for itself what decision the authority should have made. It is not an appeal on the merits of the case.
2. Social security law is a rule-based system, where decisions on benefits are based on 'entitlement to', rather than 'discretion' or 'need'. Acts of Parliament contain the broad conditions and rules concerning benefits, but it is the regulations which formulate and set out the detailed rules and procedures. The benefit authorities must apply the law as it is enacted (**R(DLA) 2/96**, para [14].)
3. Under a rule-based system, the claimant will only qualify for benefit if he or she fulfils the relevant statutory criteria. An appeal to a First-tier Tribunal is not confined to a review of the reasonableness of the decision (or the decision making process). It is a full merits hearing of both the facts and the law. The tribunal is said to 'stand in the shoes' of the original decision maker, and is able to do whatever the Secretary of State should have done at the date of his decision (**R(IB) 2/04**, paras 25 and 55(2)).
4. Welfare reform has resulted in changes to the social security system which will result in more discretionary, as opposed to rules-based, decisions being made in the future, most notably, with the introduction of Universal Credit.
 - Under the UC system, awards for both in-and out-of-work claimants are conditional on behaviour which will be set out in a 'Claimant Commitment'. Work coaches have been given more discretion to decide what conditions it is reasonable to impose on a particular individual.

- If a claimant does not abide by the terms of their Claimant Commitment and cannot show 'good reason' for their failure to do so, they may be sanctioned, and will see their benefit reduced as a result. In contrast to the current system, there will be no detailed description of what constitutes 'good reason' and instead, decision-makers will have discretion to decide on the facts.
 - Related changes include the role of discretionary housing payments (DHP), which were designed to provide short-term help to claimants struggling with financial hardship, but DHPs are now being used to address general cuts to entitlement. Consequently, the DHP system is under considerable pressure as a result of increased demand.
5. Against this background, the Administrative Court has an important role to play across three areas:
- (i). cases where the challenge is to the decision to introduce a new policy – e.g. the benefit cap, the bedroom tax, the PIP amendments and the two-child limit;
 - (ii). cases where there is a systemic failure in the way in which benefits are being administered – e.g. the delay in processing new PIP claims;
 - (iii). cases where claimants are exposed to the risk of destitution due to a combination of delays, conditionality and sanctions.

Funding welfare benefit challenges post-LASPO

6. One of the policy aims of Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') was to remove legal help for welfare benefits cases from the scope of civil legal aid. However, legal aid remains available in welfare benefits cases involving:

- an appeal on a point of law to the Upper Tribunal or above;
- 'exceptional' situations where it is necessary to enable a claimant's case to be presented effectively;
- public law challenges by way of judicial review;
- a contravention of the Equality Act 2010.

7. It is sometimes thought that judicial review has no role to play in the field of welfare benefits, given the availability of a statutory right of appeal. But a series of high profile challenges to welfare reform demonstrate that judicial review remains an important legal option:

- **R (SG and Others (previously JS and Others) v Secretary of State for Work and Pensions [2015] UKSC 16** - challenge to the Benefit Cap (Housing Benefit) Regulations 2012, in which it was argued that they were incompatible with ECHR article.14 because they affected a greater number of women than men without an objective and reasonable justification;
- **R (Carmichael & Ors) v SSWP (formerly known as R (MA) v SSWP [2016] UKSC 58)**– challenge to the introduction of the bedroom tax in the social sector, based on the adverse impact the policy has on those with disabilities and on women living in "sanctuary scheme" accommodation;
- **R (RF) v SSWP [2017] EWHC 3375 (Admin)** - challenge to the PIP amendments (SI 2017/194) which excluded eligibility to aspects of the mobility activity 1 (planning and following journeys) if the cause was psychological distress.
- **SC & Ors v SSWP & Ors [2018] EWHC 864 (Admin)** – challenge to the two child limit including the lawfulness of the kinship care exception.

The need to meet the funding criteria

8. Legal aid will only be granted where the requirements of **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);
 - 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)).

Judicial review and welfare benefits - Some practice issues

Identifying the target for the claim

9. In order to bring judicial review proceedings against a benefit authority, it is necessary to identify the action or decision that is unlawful which will form the 'target' of the claim. The **Civil Procedure Rules** refer to a claim to review the

lawfulness of “an enactment” or “a decision’, action or failure to act” (CPR 54.5(2)).

When does the time-limit start to run?

10. CPR rule 54.5 provides that a claim for judicial review must be filed (a) promptly; and (b) in any event, not later than 3 months after the grounds to make the claim first arose. Hence, there is a duty to act promptly in addition to meeting the 3-months deadline.
11. Time starts to run from the unlawful event or decision upon which the claim is based. As a rule of thumb, it can be said that:
 - 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**, a request should have been made to the benefit authority for it to exercise that power within a specified time (e.g. in pre-action correspondence). The time-limit will start to run from the deadline set in the letter making that request.
12. Note: The time limit does not start again every time further correspondence is received from the benefit authority. It will only start to run again if the benefit authority gives a clear undertaking that it will make a 'fresh consideration' of the matter and it issues a 'further decision'.

Alternative remedy

13. There is a strong presumption that an application for judicial review will be refused if there is a statutory route available: **R v IRC ex parte Preston [1984] UKHL**. Whilst judicial review is intended to be a remedy of last resort, it remains an important legal option in welfare benefit cases where:

- there is **no right of appeal** attached to the welfare benefit decision;
 - the appeal route does not provide a **suitable** remedy; or
 - the appeal route does not provide an **effective** remedy.
14. A statutory right of appeal might not provide a *suitable* remedy where the claimant is seeking a remedy that a First-tier Tribunal cannot provide – such as a declaration that a policy or practice is unlawful.
 15. A statutory right of appeal may not provide an *effective* remedy where the consequences of having to wait for the statutory appeal to be heard would be so serious as to render the statutory appeal pointless. For example, where there is an imminent threat to the home due to rent arrears in a housing benefit case, or where the claimant is exposed to severe financial hardship due to the withdrawal of benefit.
 16. Judicial review may be the only way of obtaining a suitable and effective remedy due to the need to obtain injunctive relief – an order requiring the benefit authority to look at the case urgently, or the power to expedite the statutory appeal.
 17. Against the background of Welfare Reform and the introduction of Universal Credit, individuals in receipt of benefits are frequently being left without sufficient income to cover their essential living costs. This means challenges by way of judicial review may become more frequent. These could involve a combination of discrimination and traditional public law grounds. For example, where a claimant with a moderate learning disability has been sanctioned for failure to fulfil a Claimant Commitment which includes undertaking a task that she has never learned to do, this challenge could be based on disability discrimination, plus a failure to take a relevant factor into account.

18. This type of case is more likely to settle without the need for a full hearing. However, examples of reported cases in the field of welfare benefits which make use of traditional public law principles include:
- **R (Hardy) v Sandwell MBC [2015] EWHC 890 (Admin)** – Where the Court held that the local authority's blanket policy of taking the care component of DLA into account as income when assessing the amount of a DHP was based on a misunderstanding of its powers; a failure to have due regard to the DHP Guidance, a failure to exercise its discretion and placing a fetter on any future exercise of that discretion.
 - **R (C and Anor) v SSWP [2015] EWHC 1607 (Admin)** - a challenge to the administration of the Personal Independence Payment (PIP) scheme and the lawfulness of delays in the processing of two claimants' applications for PIP.
 - **R (Halvai) v London and Borough of Hammersmith and Fulham [2017] EWHC 802 (Admin)** - a local authority had acted unlawfully in refusing discretionary housing payment to a disabled woman by not understanding that DHPs could be a long-term solution.

Investigative Help

19. At the pre-permission stage, any application for Legal Aid will need to address whether it is an application for Investigative Help, or for Full Representation. An application for Investigative Help will be more appropriate when it is not possible to determine the prospects of success without undertaking substantial¹ investigative work (reg 39). Given that public challenges based on welfare benefits issues is a developing area of the law, there may be cases where the prospects of success are unclear, and an application for Investigative Help will be necessary. The Certificate is usually limited to the

¹ The guidance defines 'substantial' as at least 6 hours of fee earner time or disbursements of £400.00, excluding VAT); Lord Chancellor's guidance (under section 4 of LASPO) para 6.11

investigation of the strength of the proposed claim and the drafting of a letter before claim.

Payment for work undertaken at the Permission Stage

20. Where an application for judicial review is issued, the **Civil Legal Aid (Remuneration) Regulations 2013/422** prevent payment for the work in making that application unless, (inter alia), the court gives permission. But the restriction on payment only applies where the application for judicial review has been issued. Otherwise all preparatory work will be remunerated. The amount of work at risk can be reduced if:

- when instructing counsel, the relevant facts of the case are set out in the form of a draft witness statement;
- the bundle of documents provided with instructions could be provided in a structure and order which can easily be converted into a Claimant's Permission Bundle.

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Further Reading:

Use it or lose it: welfare benefits, D Rutledge & T Royston, Legal Action October 2015

Short Guide 05 How to Apply for Legal Aid Funding for Judicial Review, PLP (Sept 2016).