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Use it or lose it: welfare benefits

Desmond Rutledge and Tom Royston explain what remains of public funding in social security cases.

Desmond Rutledge

Tom Royston

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed legal help in First-tier Tribunal (FTT) welfare benefits appeals. However, legal aid remains available in welfare benefits cases involving:

- an appeal on a point of law to the Upper Tribunal (UT) or above;
- exceptional situations (in relation to any court or tribunal proceedings) where legal aid is necessary to enable a claimant's case to be presented effectively;
- public law challenges by way of judicial review; or
- a contravention of the Equality Act (EA) 2010.

Appeals on a point of law

LASPO excludes legal services relating to welfare benefits from legal aid except appeals in the UT, the Court of Appeal or Supreme Court, and council tax reduction scheme appeals in the High Court and beyond (Sch 1, Pt 1, para 8; Sch 1, Pt 2, para 15).

If you are a legal aid firm wanting to run a welfare benefits case yourself, but you do not have a welfare benefits contract, you will need to apply for an individual case contract, which requires you to show that the 'effective administration of justice test' is met. The criteria are set out at Civil Legal Aid (Procedure) Regulations 2012 SI No 3098 reg 31(5).

Most cases are funded initially as legal help matters and are UT appeals. The funding, however, is unavailable until the FTT has either granted or refused permission.* Therefore, the claimant is expected to request a statement of reasons, identify a material error of law, and seek permission to appeal from the FTT, without any assistance at all. In practice, many of the organisations holding a LAA welfare benefits contract will offer pro bono assistance at that preliminary stage.

While the funding available under the terms of the welfare benefits LAA contract is limited to a relatively small number of cases, it nevertheless has the potential to contribute to the development of the law by the creation of useful precedents. Recent examples of social security cases decided at the appellate level include rulings on:

- the stopping of disability living allowance for a severely disabled child (see box right);
- whether an agency worker from the EU retained the status of a worker when she became pregnant such that she was able to claim income support: *Saint-Prix v Secretary of State for Work and Pensions* Case C-507/12, 19 June 2014; [2014] AACR 18.

Once you get your case to the Court of Appeal or above, welfare benefits cases are straightforwardly in scope, although the authors' experience is that administrative problems may still occur. Careful record-keeping of your interaction with the LAA is therefore important, in order to substantiate any consequential application for an extension of court deadlines.

In the UT, there is, as a rule, no funding for advocacy. However, funding may be provided if the case meets the criteria for exceptional funding.

Exceptional funding

Legal aid for advocacy in UT appeals (and in all FTT hearings) is only available via exceptional funding. A case is exceptional principally if the failure to provide legal aid would result in a breach of the individual's fair hearing rights under European Convention on Human Rights art 6.

The original overly restrictive definition of exceptionality has been amended. The Lord Chancellor, following defeat in *R (Gudanaviciene and others) v Director of Legal Aid Casework and another* [2014] EWCA Civ 1622, 15 December 2014; [2015] 1 WLR 2247 and *IS v Director of Legal Aid Casework and another* [2015] EWHC 1965 (Admin), 15 July 2015, now accepts that the 'overarching question' is simply 'whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings' (Lord Chancellor's Exceptional Funding Guidance (Non-Inquests), para 42).

Regarding advocacy in the UT, it is worth noting the observations in *JC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 352 (AAC), 30 July 2014, paras 61–63, about the particular importance of making public funding available in cases due to be heard by a three-judge panel. One may argue, by extension, that funding should generally be granted where the UT has directed that there be an oral hearing, this being a clear indication that oral argument would be of assistance in resolving the issue of law raised by the appeal, which it would be highly unusual for a litigant-in-person to be able to provide.

Notwithstanding the relaxation of the lord chancellor's position, the statistics look bleak. For the period January to March 2015, six applications were made for welfare benefits exceptional funding, of which one was granted (*Legal Aid Statistics in England and Wales - January to March 2015*, fig 23).

However, persistence is rewarded. The authors' experience is that, while the initial funding application in UT cases is often declined, in the end (sometimes following threat of judicial review), the application in this type of UT case has been granted.

Despite dealing with something like a million appeals since LASPO, there have been no FTT exceptional cases *at all*. There is no good reason for that state of affairs, since the FTT is no better (indeed worse) equipped than the UT to determine difficult points of law without sometimes hearing professional oral argument.

Use it or lose it

There is a widespread public perception (in some cases shared by advisers and community organisations) that legal aid is no longer available for anything other than criminal cases. *Legal Action*'s 'Use it or lose it' series aims to highlight where legal aid remains for civil cases.

Exceptional funding
TG v Secretary of State for Work and Pensions [2015] UKUT 50 (AAC), 30 January 2015
TG was refused pension credit because when working in the UK between 2009 and 2011, she had not been registered with the worker registration scheme. She appealed to the Upper Tribunal and successfully obtained exceptional funding for the oral hearing. The tribunal found there was no lawful power to operate the worker registration scheme between 2009 and 2011, and consequently allowed her appeal. The decision affects several hundred thousand EU workers.

Appeals on a point of law
Cameron Mathieson, a deceased child (by his father Craig Mathieson) v Secretary of State for Work and Pensions [2015] UKSC 47, 8 July 2015
Cameron Mathieson was a gravely disabled young child whose disability living allowance was terminated after he had been a hospital in-patient for a period in excess of 84 days. He appealed against that decision on the ground that it violated his human rights to peaceful and non-discriminatory enjoyment of property, and, after losing at every stage, the Supreme Court unanimously allowed his appeal. The effect for hospitalised children is likely to be very significant.

Public law challenges

Judicial review for welfare benefits remains in scope (LASPO, Sch 1, Pt 1, para 19(2)(a)) provided that the usual criteria are satisfied (see the Civil Legal Aid (Merits Criteria) Regulations 2013 SI No 104).

Challenges by way of judicial review come under the public law category; however, the challenge may overlap with other categories if it 'relates to the underlying substance of the case' (see Standard Civil Contract 2014, Category Definitions paras 8 and 13). This means if a judicial review claim for welfare benefits arises out of a matter that is in scope in some other category, the solicitor can bring a claim if they have a contract in that category.

Despite the statutory right of appeal, judicial review remains an option: (i) where there is no right of appeal; or (ii) where the appeal route cannot provide a suitable or effective remedy.

Cases where there is no right of appeal

Welfare benefits cases where there is no right of appeal fall into three main categories:

- *Decisions within the welfare benefits scheme that do not carry a right of appeal* (Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI No 991 Sch 2; for housing benefit decisions, see Housing benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 SI No 2002 Schedule). These include decisions: (i) suspending payment of benefit (see the Department for Work and Pensions' (DWP) 'Suspension and termination of benefits: staff guide'); (ii) whether to waive recovery of an overpayment (see *R (Larusai) v Secretary of State for Work and Pensions* [2003] EWHC 371 (Admin), 12 February 2003); (iii) the refusal to carry out an any-time revision (see *Beltekian v Westminster City Council and another* [2004] EWCA Civ 1784, 8 December 2004; R(H)8/05; and (iv) refusals to carry out a late 'mandatory reconsideration'.
- *Refusal of permission by the UT*. A judicial review in these circumstances is subject to the restrictions laid down in *R (Cart) v Upper Tribunal*; *R (MR (Pakistan)) (FC) v Upper Tribunal (IAC)* and another [2011] UKSC 28, 22 June 2011 and the application must be made in accordance with CPR 54.7A. Note that the usual deadline of three months is reduced to 16 days.
- *Interim decisions made by a FTT judge*. An application for judicial review can be brought direct to the UT (AAC) in respect of interim decisions of a FTT judge made under its procedure rules, the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI No 2685. There is no right of appeal to the UT because it is an excluded decision (Tribunals, Courts and Enforcement Act (TCEA) 2007 s11(5)). Issues that can arise under this category include: (i) a refusal to extend the time limit for a late appeal (see *R (CD) v First-tier Tribunal (CIC)* [2010] UKUT 181 (AAC), 1 June 2010; [2011] AACR 1); and (ii) the improper exercise of the power to review a FTT's decision (TCEA 2007 s11) (see *CG v Secretary of State for Work and Pensions (IS)* [2011] UKUT 28 (AAC), 21 January 2011).

Public law challenges
R (SG and others (previously JS and others)) v Secretary of State for Work and Pensions [2015] UKSC 16, 18 March 2015
SG had her housing benefit reduced because she was subjected to the benefit cap. She sought judicial review of the cap, arguing that it unlawfully discriminated against her on gender grounds. The Supreme Court dismissed her appeal, but held that the cap's operation contravened the UK's obligations under the UN Convention on the Rights of the Child. The court's views about the circumstances in which international conventions are interpretative tools for domestic legislation are likely to be significant in future litigation.

Alternative remedy not suitable

There will be cases where the statutory appeal route is not appropriate because it would be unable to address a substantive part of the client's challenge. For example, where there is systemic failure in the way benefits are being administered, there may be no decision to appeal and, even if there is, the decision itself may not be the cause for complaint. *R (Ms C and another) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin), 5 June 2015 was a successful challenge of that kind to the delay of 10 months in dealing with the claimants' personal independence payments claims.

Less easy to identify, but of very substantial importance, are cases where challenges are really policy decisions. So, for example, the arguments made in the benefit cap case of *R (SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16, 18 March 2015; [2015] 1 WLR 1449 could have been made in a statutory appeal, but were allowed to be made by judicial review. The same goes for the ongoing challenge to the introduction of the spare room subsidy rule for social sector tenants of working age based on its discriminatory impact on those with disabilities (*R (MA and others) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, 21 February 2014; [2014] PTSR 584).

Alternative remedy not effective

There will also be 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 alternative remedy. Judicial review may be the only way of obtaining an effective remedy due to the availability of injunctive relief.

Thanks to austerity and welfare reform, individuals in receipt of benefits are frequently being left without sufficient income to cover essential living costs. Against this background, the Administrative Court has an important role to play in those cases where claimants are exposed to the risk of destitution due to a combination of delays, conditionality and sanctions.

The ongoing introduction of universal credit is likely to make challenges of this kind more important. Historically, a family's benefit income has come from multiple simultaneous sources (HMRC, DWP and local authorities). If a problem occurred with one of those, the family might be able to survive for a time on the others. Under universal credit, all money will generally come from the DWP, so if it stops (or fails to start on time), the affected family will be completely destitute.

According to official figures, a total of 23 civil representation applications were made in respect of welfare benefits in 2013–14, compared to 46 in 2012–13 (see *Legal aid statistics in England and Wales – Legal Aid Agency, Apr to Jun 2014*, table 6.1, p49). This can be contrasted with the 959 applications made in respect of community care over the same period, which suggests there is an unmet need in the field of welfare benefits.

The Equality Act 2010

Funding is still available for cases that involve a contravention of the EA 2010, which includes disability discrimination, especially a failure to make reasonable adjustments (LASPO Sch 1 Pt 1 para 43(1) and (2)(a). Normally, such cases will be private law claims in the county court.

Benefits discrimination claims fall into two major categories: (i) discriminatory processes or premises; and (ii) discriminatory decisions.

Regarding processes and premises, one frequently encounters housebound disabled claimants who have been refused a home visit.

The main source of discriminatory decisions is sanctions. The huge rise in benefit 'sanctions' decisions has been widely reported. Not infrequently, the sanctioned conduct arises out of a person's disability and, in those circumstances, a private law discrimination claim may be brought.

Rather as with statutory appeals, where a claim raises a significant policy issue the availability of a private law cause of action is no bar to judicial review. For example, *R (MM and another) v Secretary of State for Work and Pensions* [2012] EWHC 2106 (Admin), 26 July 2012 was a challenge to the practice of not obtaining further medical evidence for claimants with mental health problems undergoing an assessment of their employment and support allowance.

The Equality Act 2010
Secretary of State for Work and Pensions v R (MM and another) [2013] EWCA Civ 1565, 4 December 2013
MM claimed that the work capability assessment failed to make reasonable adjustments for people with mental health problems. The UT and Court of Appeal agreed that the current process for assessing eligibility for employment and support allowance did place such persons at a substantial disadvantage compared with other claimants (though the eventual claim was dismissed on its facts), and also permitted the challenge to be made by way of judicial review rather than in the county court.

Conclusion

The government would doubtless prefer social security litigation to wither and die. In our adversarial system, that would not only kill off an important area of public law: it would seriously impair the concept of a rights-based social security scheme. But there is no need to let that happen. There is no shortage of cases (quite the reverse) and although the administrative hurdles are sometimes daunting, they can be beaten in the end. ■

* This is the effect of Civil Legal Aid (Preliminary Proceedings) Regulations 2013 SI No 265 reg 2.

Desmond Rutledge is a barrister at Garden Court Chambers, London. Tom Royston is a barrister at Garden Court North, Manchester.