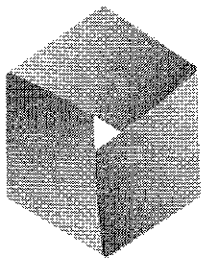
Public Law Project

PUBLIC LAW REMEDIES IN WELFARE BENEFITS

Public Law Project training
5th July 2018
Bridport Citizens Advice Bureau



Public Law Project

Introduction to the Public Law Project and to our sanctions project

About PLP

The Public Law Project ('PLP') is an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers.

Within this broad remit PLP has adopted three strategic priorities in our strategic plan for 2017-2022:

- Promoting and safeguarding the Rule of Law during a period of significant constitutional change.
- Working to ensure fair and proper systems for the exercise of public powers and duties, whether by state or private actors.
  Improving practical access to public law remedies.

PLP undertakes research, policy initiatives, casework and training across a range of public law remedies.

Within the above framework, a key focus area is tackling benefit sanctioning, with a view to ensuring that, at minimum:

- Sanctions are imposed fairly, lawfully and in a non-discriminatory manner
- Benefit claimants have effective access to appropriate and timely remedies when things go wrong

Problems with the sanctions system

Although many decisions about benefit entitlement and sanctioning can be appealed to the First-Tier Tribunal, an appeal may not always be an effective remedy given the need to apply for a mandatory reconsideration first, delays in the appeals procedure, and difficulties in accessing hardship/interim payments pending the outcome of appeals.

Benefit claimants often do not seek advice at the early stages of the conditionality system (i.e. when decisions on eligibility are taken and when mandatory requirements are imposed). There may be a number of reasons why this is the case.

The available statistics show that a very small proportion of decisions to impose a sanction are challenged or appealed.

Therefore there is a need to increase the availability and accessibility of information about rights and entitlements in the context of welfare conditionality for individual claimants and those who work directly with them.

As a fundamental principle, the sanctions system (distinguished here from the conditionality system) seems to be manifestly unfair in two key respects:

- It is a system of imposing a punishment immediately, without adequate opportunity for claimants to provide explanations or objections until after a sanction has already been imposed.
- Sanctions are often a disproportionately severe punishment for perceived transgressions.

PLP has identified four key stages of the conditionality regime at which the fairness of the system and of decisions taken within it can have a significant impact on claimants:

(1) The initial decision about benefit entitlement which dictates the degree to which a claimant is subject to conditionality. For instance:
   a. Decisions about whether ESA claimants are placed in the 'support group' or the 'work related activity group' ('WRAG')
   b. Decisions that a person does not have limited capability for work so is not entitled to ESA and must claim JSA/UC
   c. Decisions as to which of the four conditionality groups UC claimants are placed within

(2) The agreement/imposition of mandatory requirements through negotiation of the claimant commitment or equivalent and/or decision to refer an ESA claimant to the work programme/agreement of action plan with work programme provider

(3) The opportunity provided to claimants to provide an explanation for any alleged non-compliance with a mandatory requirement

(4) Remedies once a decision has been taken to impose a sanction

We have also identified a number of particularly vulnerable groups who are disproportionately likely to be sanctioned and/or for whom sanctions may have disproportionately adverse consequences:

(1) People with mental health problems

(2) Lone parents

(3) Care leavers
(4) Homeless people
(5) EEA nationals

What can be done to challenge it

PLP's sanctions project is engaged with a range of different activities, involving looking at 'legacy benefits' as well as Universal Credit:

- Providing casework support with appeals and complaints in individual cases where claimants have been, or are at risk of being, unfairly sanctioned;
- Bringing or supporting strategic litigation to challenge systemic issues through judicial review, appeals or county court claims under the Equality Act 2010;
- Focusing our resources on working with groups of claimants who are either more likely to have a sanction imposed, or who would be more vulnerable in the event of a reduction in income;
- Focusing on geographical areas where sanctions are particularly prevalent;
- Publishing information leaflets, guidance notes and tools such as templates for individuals and advisers on sanctions, conditionality, and means of challenging decisions;
- Providing training about public law remedies to welfare rights advisers and advocacy organisations;
- Increasing knowledge and awareness of how to get legal aid in cases relating to welfare benefits and sanctions.

What we are hoping to achieve

PLP wants to ensure that benefits claimants are not subject to conditionality when they are too unwell or too disabled to comply, or their caring responsibilities make this impractical. We want to ensure that claimants understand the conditions of their claim fully and from the beginning, and are able to request changes to the requirements to take account of their circumstances. By doing this we hope to minimise the risks of a claimant getting sanctioned in the first place, as well as ensuring that sanctions are not imposed unlawfully or in a way that is discriminatory.

We also want to make sure that claimants have access to appropriate and effective remedies when things do go wrong, and that advisers and front-line support workers are aware of these remedies and how to access them.

2: Introduction to judicial review

Introduction

This paper covers:

a. What is judicial review;
b. How judicial review is different from an appeal;
c. Grounds for judicial review;
d. Remedies available;
e. Timescales and other practicalities.[1]

A: What is judicial review?

Judicial review is a means of challenging a decision, action or failure to act by a public body in the courts.

Where a public body, such as the DWP, acts unlawfully, there may be a number of ways that those affected can challenge that behaviour or decision. The most common of these are complaining using public bodies' complaints procedures, and exercising rights of appeal to a tribunal (if such rights exist in relation to the particular decision to be challenged, such as in welfare benefits cases).

In cases where these remedies aren't available, or would not be effective, judicial review provides a way of challenging the behaviour of a public body. It is a court procedure, brought in a branch of the High Court known as the Administrative Court, or in relation to some types of case, in the Upper Tribunal.

Under the judicial review procedure, judges examine (or 'review') the decision being challenged in the claim, and consider whether the law has been correctly applied by the public body. Often, the exercise being conducted comes down to the *way* in which a decision was made, rather than looking at whether the decision itself was right.

The court's judgment then sets out the law which the public body, and all similar public bodies, must follow in this and all future cases.

Judicial review is therefore a powerful way of challenging public bodies when they act unlawfully. By bringing a judicial review claim, an individual claimant can get a court to set aside a *decision, practice or policy* of a public body that affects not just the individual claimant but also everyone else in the claimant's position. So one judicial review case can affect thousands of people.

There have been a number of examples of judicial review cases recently in the context of welfare benefits:

[1] PLP has written a more comprehensive guide to judicial review, which is freely available in the 'Resources' section of our website.

Recent judicial reviews in welfare benefits cases

In ***R (RF) v Secretary of State for Work and Pensions*** **[2017] EWHC 3375 (Admin)** the claimant brought a challenge to amendments made by the government to the statutory criteria for claiming Personal Independence Payment. Reg. 2(4) of the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 effectively sought to prevent those suffering from psychological distress from scoring points within the PIP framework under the activity 'Planning and Following Journeys'. The High Court found that this change to the PIP system was discriminatory, against the purpose of the overall PIP scheme, and should have been consulted on.

In ***R (DA & Ors) v Secretary of State for Work and Pensions*** **[2017] EWHC 1446 (Admin)** the High Court found the benefit cap to be unlawful for single parents with children aged under 2 on grounds of indirect discrimination. The DWP appealed to the Court of Appeal which overturned the High Court decision and found that the benefit cap did not unlawfully discriminate: see [2018] EWCA Civ 504.

R (Carmichael and others) v Secretary of State for Work and Pensions **[2016] UKSC 58** was a successful challenge to aspects of the bedroom tax (so actually a challenge about Housing Benefit). The Supreme Court held that it was manifestly without reasonable foundation to restrict Housing Benefit for an additional bedroom that was required where a child needed an overnight carer, and where an adult could not share a room because of disability, although the majority held that the cap was not unlawful where the spare room was a 'panic room' for a vulnerable victim of domestic violence.

R (SG & Ors) v Secretary of State for Work and Pensions **[2015] UKSC 16** was an ultimately unsuccessful challenge to the overall benefit cap. The Supreme Court held that the cap did indirectly discriminate against women, but by a slim majority found that the discrimination was justifiable. The Court also held that the cap's operation contravened the UK's obligations under the UN Convention on the Rights of the Child. Benefits generally were held to engage the right to property in Article 1, Protocol 1 of the ECHR.

In ***Hurley & Ors v Secretary of State for Work And Pensions*** **[2015] EWHC 3382 (Admin)** the High Court held that the fact that those in receipt of Carer's Allowance were subject to the benefit cap was unlawful, because it discriminated indirectly against disabled people, in a way which could not be justified. The law around the benefit cap was changed shortly after this judgment.

In ***R (C and W) v Secretary of State for Work and Pensions, Zacchaeus 2000 Trust intervening*** **[2015] EWHC 1607 (Admin)** the High Court held that the delays that claimants had experienced in having their PIP claims processed were unacceptable and unreasonable to the extent that the delays had become unlawful. The claimants in this case had been waiting 10 months and 13 months respectively for a decision.

R (Reilly) v Secretary of State for Work and Pensions **[2013] UKSC 68** was a successful challenge to the lawfulness of the 'workfare' programme as it operated before the 2011 Regulations were repealed and replaced. The Court found that the Regulations were *ultra vires* and that the written notice given to claimants was insufficiently clear so as to invalidate them, but did not find that the 'workfare' scheme breached the claimants' Article 4 ECHR rights.

Other recent cases to be aware of are the challenge to the way in which claimants in receipt of disability premiums are treated when they move on to Universal Credit,[2] and the unsuccessful challenge to the 'two-child rule'.[3]

B: How judicial review is different from an appeal to the Tribunal

In welfare benefits cases, an appeal to the First-Tier Tribunal (following reconsideration) is effectively a fresh look at the whole decision. The Tribunal will make findings of fact as to whether or not a claimant meets the conditions for claiming a benefit. A judicial review will only look at whether the law was correctly applied by the decision maker, and whether the procedure was fair.

This does not prevent questions of law being raised in the First-Tier Tribunal. There have been several significant recent examples where this has happened (see the box below).

While most judicial reviews are about the lawfulness of particular decisions taken in individual cases, the cases listed in the box above show how judicial review can be used effectively to challenge broader systems and bring about systemic change.

One of the differences between a statutory appeal and a judicial review is that with appeals you are *always* challenging a decision taken on an individual case, whereas with judicial review you may be challenging a decision to implement a policy or practice *before* a decision on an individual case has been taken.[4] In other words, with judicial review you can challenge a policy or practice without having to wait for it to be applied in a particular person's case.[5] You can also challenge a failure to do something, such as a delay in deciding a claim or hearing an appeal.

This is because of the difference between what an appeal and a judicial review has the power to do. In a judicial review the exercise is to look at the lawfulness of a decision, policy or practice. This means looking at whether the decision was made in accordance with UK and EU legislation, including human rights and equality law, and public law principles found in judgments from case law (known as the 'common law').

So it is the way in which a decision was made that is being examined, and not necessarily the outcome itself. How the court goes about this exercise in a judicial review case is set out in the next section.

---

[2] *TP and AR, R (On the Application Of) v Secretary of State for Work And* Pensions [2018] EWHC 1474

[3] *SC & Ors v Secretary of State for Work And Pensions & Ors* [2018] EWHC 864 (Admin)

[4] For example, the challenge to the proposed 'residence test' for accessing legal aid: see *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39.

[5] This is what happened in *R (RF) v SSWP* [2017] EWHC 3375 (Admin).

Upper Tribunal cases that looked at broader questions of law and policy

In ***MM and SI v SSWP*** **[2016] UKUT 149 (AAC)** the appellants successfully challenged the lawfulness of the 'past presence' test for DLA in cases where the claimants are child refugees. The 'past presence' test was found to be discriminatory under both Article 14 ECHR and EU law in such instances.

SSWP v MB (JSA) (and linked cases) **[2016] UKUT 372 (AAC)** was a case brought by CPAG challenging the 'genuine prospect of work' test and the need for EEA nationals to show 'compelling evidence' of finding employment. The Tribunal found that the DWP's Guidance to Decision Makers that a genuine chance will only exist where the claimant has an offer of work due to start within the next 3 months was overly restrictive, and that an EEA national will have a right of residence as a jobseeker for as long as they meet the EU law test for this (the definition set down by the European Court of Justice in Case C-292/89 *Antonissen*).[1] The need for 'compelling evidence' essentially became a matter of context, and a decision-maker (or indeed a Tribunal) will have to bear in mind how long the claimant had been looking a job.

The *MB* case had been preceded by ***KS v Secretary of State for Work and Pensions*** **[2016] UKUT 269 AAC**. In *KS* the judge held that the requirement for 'compelling evidence' did not mean that a higher standard of proof was required than the normal civil standard.

Mathieson v Secretary of State for Work and Pensions **[2015] UKSC 47** was a successful challenge to rule that a terminally ill child was no longer entitled to receive DLA after being hospitalised for more than 84 days. This challenge started as an appeal to the First-tier Tribunal against the suspension of the claimant's DLA.

R (CJ) and SG v SSWP **[2017] UKUT 324 (AAC)** – SG's case was an appeal from the First-tier Tribunal; CJ's was brought by judicial review and transferred from the Administrative Court. The Tribunal held that where a claimant makes a mandatory reconsideration request at any time within 13 months of the original decision, she will, if dissatisfied, subsequently be entitled to pursue her challenge to a tribunal.

The powers of the First-Tier and Upper Tribunals were examined further in two recent cases:

> ***Secretary of State for Work and Pensions v Carmichael and Sefton BC (HB)*** **[2017] UKUT 0174 (AAC)** – a case about the power of the Tribunals to not give effect to secondary legislation that it found to be incompatible with a claimant's Convention rights. This decision was appealed to the Court of Appeal and the appeal heard in February 2018 – judgment is awaited at the time of writing.
>
> ***JA-K v SSWP (DLA)*** **[2017] UKUT 420 (AAC)**, where it was confirmed that the Upper Tribunal, in the exercise of its statutory appellate jurisdiction (but not its judicial review jurisdiction), cannot rule on whether the Equality Act 2010 has been breached.

C: Grounds for judicial review

The grounds for judicial review are the basis on which you can bring a claim. They serve to frame how the court assesses whether a decision, policy or practice is lawful. The grounds are normally categorised into three groups:

a) Grounds relating to **illegality**
b) Grounds relating to **irrationality or proportionality**, and
c) Grounds relating to **procedural fairness**.

Illegality grounds relate to whether a decision, policy or practice, or an action or failure to act, was taken or implemented in accordance with the law. Public bodies are generally only free to do what the law expressly says they can do. With some exceptions, the law is set out in Acts of Parliament, EU law, and in secondary legislation (typically things like regulations, rules and orders) made by government Ministers. So, nearly every decision a public body takes must be authorised by a piece of legislation, which will define any limits on the public body's powers.

Public bodies must correctly understand and apply the law that regulates and limits their decision making powers. If they do not follow the law correctly any resulting decision, act, or failure to act will be unlawful.

As well as the limits placed on public bodies' powers in legislation, the courts have developed public law rules over many years that impose further restrictions on what public bodies can do. For example, where the law gives a public body a **power or discretion** to do something (i.e. not a *duty* to do something), public law regulates the public body's power in a number of ways, including by requiring it:

to take into account only relevant information and to disregard all irrelevant information;

to address the right question, and take reasonable steps to obtain the information necessary to make a properly informed decision; and,

to make sure they have not limited, or fettered, their discretion by applying a very rigid policy as if it were the law.

There may be relevant **external guidance** (for example guidance from government departments about how local authorities exercise certain powers), and a **policy** issued by the public body itself, to make sure that powers are used consistently and fairly in each case. Public bodies should take such guidance and policy into account when they exercise their legal powers.

Guidance and policy are not law, and do not have to be followed, but they should be followed unless there is good reason not to. If a public body decides not to follow its own policy, or not to follow external guidance, it should normally give reasons.

Similarly if a public body is required to produce a policy on how its decision-makers are expected to act and fails to do so, this may be amenable to challenge.

Irrationality grounds arise where the courts are asked to intervene to quash a decision where it is considered to be so demonstrably unreasonable as to be "irrational" or "perverse". The classic test is whether a decision "is so unreasonable that no reasonable authority could ever have come to it".[6] In practice this is usually very difficult to show, and it is often argued alongside other grounds.

In some cases, particularly where European law or human rights law regulates the public body's powers, a public body is required to act **proportionately.** The concept of proportionality involves a balancing exercise between the legitimate aims of the state on one hand, and the protection of the individual's rights and interests on the other. The test is whether the means employed to achieve the aim correspond to the importance of the aim, and are no more intrusive on the rights of the individual affected than is necessary to achieve the aim. The classic example given in student textbooks is that to use a sledgehammer to crack a nut (when a nutcracker would do) would not be acting proportionately.

Procedural fairness grounds typically cover the processes by which decisions are made. These can include problems that may have occurred in consultation exercises or in the way in which a hearing was conducted. Cases where the individual has been given a 'legitimate expectation' that a public body will act in a certain way may are also usually categorised as challenges to procedure.

[6] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] I KB 223 HL

D: Remedies in judicial review cases

All remedies in judicial review are a matter of the court's discretion.

Quashing orders are by far the most common remedies in judicial review. They essentially nullify the decision under review so that it is void and has no legal effect. If the decision was improperly taken, the court will sometimes order the decision-maker to retake it. Very rarely the court will substitute its own decision. Quashing orders can also be made where the decision-maker had no power to make that decision.

Prohibiting orders are similar to a quashing order but act at an earlier stage, prohibiting a public body from acting unlawfully in the future.

A **mandatory order** enforces the performance of a public duty. For example, the court might make a mandatory order to oblige a local authority to carry out a community care assessment where the court considers that the local authority would otherwise not carry one out. It should be noted that although the court can require a power to be exercised, the court cannot determine the outcome of the exercise of the public body's discretion.

An **injunction** is an order compelling the person to whom it is addressed to perform, or not to perform, a specified act.

A **declaration** is an authoritative ruling on the rights of the parties, or the state of the law. This is a non-coercive form of relief by which the court declares the law or the respective rights of the parties without making any order against the decision-maker to do a particular thing. A declaration might be made, for instance, concerning the proper way to interpret a piece of legislation in future. Normally, though, the court will let its judgment speak for itself.

Where the higher courts find a piece of primary legislation (and in some circumstances secondary legislation) cannot be read compatibly with the Convention they can make **a declaration of incompatibility** under section 4 of the Human Rights Act 1998. This triggers a fast track procedure, enabling Parliament to make an Order in Council addressing the incompatibility. This power is not available to the Upper Tribunal.

Damages are available in judicial review cases only if there is a separate and recognised private law claim for damages, for example, in negligence or breach of statutory duty, which is proven. For example, a claim for damages can be made at the same time as a judicial review to challenge a period of immigration detention at the hands of the state, on the basis that the damages for false imprisonment is dependent on the public law claim that the detention was unlawful. Damages for maladministration are not normally available, and a claim for judicial review can't be brought solely to obtain damages.

In addition to giving directions about the future conduct of the proceedings, at the same time as granting permission the court may also make **interim orders** under CPR 26 and the corresponding practice direction. Such orders typically address a state of affairs which, without an order being made, would change to the detriment of one or the parties or render the proceedings academic.

New rules introduced under the Criminal Justice and Courts Act 2015, mean that the court cannot grant any of the remedies above, if it is 'highly likely' that if the decision had been made lawfully, it would have been the same. This amendment effectively provides defendants with a new ground of defence. The position is now as follows (emphasis added):

Section 31, Senior Courts Act 1981

(2A) The High Court –

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) [damages] on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirement in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.

(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.

This amendment is unsurprisingly unpopular with judges, who are effectively required to step into the shoes of decision-makers.

E: Timing, funding and other practicalities

When bringing a judicial review claim, claimants must comply with Part 54 of the Civil Procedure Rules ("CPR") and accompanying Practice Directions. Failure to follow Part 54 can result in significant consequences, including a negative costs order or a claim being refused permission to proceed. There is also a detailed Administrative Court Guide which is worth consulting, as it contains lots of practical information, although it does not have the same status as the CPR or Practice Directions. https://www.gov.uk/government/publications/administrative-court-judicial-review-guide

An application for judicial review must be brought **promptly, and in any event within 3 months of the decision being challenged**. Special time limits apply in certain kinds of case; the most relevant for present purposes is judicial review of refusal of permission to appeal by the Upper Tribunal, in which case applications must be filed 16 days after the date on which the Upper Tribunal sent notice of its decision.

Pre-action protocol

Before making an application for judicial review, the claimant should follow the **Pre-Action protocol** for judicial review. The pre-action protocol requires a potential claimant to send a letter before claim and to attempt alternative dispute resolution. The Protocol sets out a code of good practice and contains the steps that parties should "generally follow" before making a claim for judicial review. There is also a template letter before claim at Annex A of the protocol: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

The Protocol should not be seen as a 'tick-box exercise'. A good letter before claim can (and in cases against the DWP or HMRC often does) prompt a defendant into conceding. Equally, a well-drafted letter in response can point out weaknesses in your case that need addressing and can assist you in considering whether to proceed with a claim.

Even in judicial review cases, **alternative dispute resolution (ADR)** should be considered. Whilst in practice ADR may not be realistic, reasons for coming to this conclusion will still be required. Refusal to engage in ADR can have consequences later on, such as with costs.

A failure to agree to ADR can also be taken into account when deciding whether a claim for judicial review should proceed at all. In *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935 [2002] 1 W.L.R. 803, the Court of Appeal stated that:

> "The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process.[7]

The importance of ADR and the Pre-Action Protocol should not be underestimated. In *R (S) v Hampshire County Council* [2009] EWHC 2537 (Admin), the court held that a claimant's failure to comply with the Pre-Action Protocol and failure to seek to avoid litigation at all could warrant a refusal of permission to pursue a judicial review claim.

Claimants in judicial review cases must have 'sufficient interest' or 'standing' in order to bring their claim. This does not prevent NGOs and charities from bringing cases on behalf of their clients as a group, but such organisations will need to show that they are an appropriate and well-placed organisation to do so.

Claims for judicial review can be made on an urgent basis. A separate form requesting urgent consideration is required to be completed when lodging the claim. Reasons for the urgency must be provided.

The Pre-Action Protocol recognises that in urgent cases where the permission hearing needs to be expedited, it may not be appropriate or feasible to follow the Protocol, but you should still try to give the defendant as much notice as practical in the circumstances.

Permission

The first stage in a judicial review claim is the 'permission' stage. A claim cannot proceed unless it has been granted permission by a judge. Permission is normally decided on the basis of the paper application lodged with the Court, as well as any "Acknowledgement of Service" filed by the Defendant setting out their summary grounds for resisting the claim. Interim relief (ie a short term solution pending full consideration of the claim) may also be granted at this stage. The court may also, or in lieu of a paper decision, convene a hearing to consider interim relief. Permission will usually be dealt with at the same time in such a case.

Cases must not be brought on an urgent basis inappropriately or in an attempt to abuse the procedure for judicial review. The courts have been very keen to stress this. See the latest Administrative Court Guide at Chapter 16 as well as the warning from the High Court in *R. (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin) [2013] C.P. Rep. 6:

> If any firm fails to provide the information required on the form and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first appreciated, and the efforts made to notify the defendant, the court will require the attendance

[7] At [14].

> in open court of the solicitor from the firm who was responsible, together with his senior partner. It will list not only the name of the case but the firm concerned...[8]

Funding

Legal aid is still available for bringing a judicial review, including in welfare benefits cases, subject to fulfilling criteria about financial eligibility and the merits of the case. For clients who are not eligible, judicial review can be both expensive and risky in terms of potential adverse costs orders.

In contrast, legal aid is not normally available for welfare benefits appeals except for appeals to the Upper Tribunal, although may be possible to get exceptional case funding in certain circumstances.[9]

[8] At [7].
[9] PLP has written a guide on getting exceptional case funding in welfare benefits cases. At the time of writing this guide is being finalised and has not yet been published.

3: How to spot a potential judicial review in welfare benefits cases

A: Introduction

This paper will examine situations relating to welfare benefits cases where the normal available remedies may not be available, effective or adequate. In these cases, judicial review may be a suitable remedy for claimants.

Advisers and legal practitioners will need to consider carefully whether to initiate judicial review proceedings in such a scenario. The convenience, costs and adequacy of the remedies not pursued may be taken into account when the court makes a decision whether to grant permission or relief.

It should generally be assumed that, **unless there are good reasons for not doing so, alternative remedies should be exhausted first**.

For welfare benefits cases, judicial review may be appropriate in three categories of cases:

- where there is no other right of appeal or remedy;
- where the alternative remedy is not suitable; and/or
- where the alternative remedy is not effective.

B: Some cases on permission for JR and alternative remedies

To provide some context, this section sets out a selection of recent cases on the use of judicial review where alternative remedies may be available.

R (Glencore Energy UK Ltd.) v Revenue and Customs Commissioners [2017] EWCA Civ 1716, at paras. 53 to 56:

> 53.The principle that judicial review will be refused where a suitable alternative remedy is available is not in doubt...
>
> 55. In my view, the principle is based on the fact **that judicial review in the High Court is ordinarily a remedy of last resort**, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a

statutory procedure will be less significant as a factor.

56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.

See also para 61:

...Parliament must of course have contemplated that sometimes HMRC would make errors of law in their assessment of DPT as set out in a Charging Notice, and the appeal process laid down by Parliament allows any error of assessment to be rectified. It is not any and every arguable error of law by a Designated Officer in issuing a Charging Notice which takes a case outside the contemplation of Parliament that an appeal is the appropriate remedy and which outweighs the general arguments why ordinarily judicial review should not be available, but only where there is some serious error amounting to an abuse of power. It is only in that exceptional type of case that there is a compelling need for the court to intervene by way of judicial review in order to vindicate the rule of law, overriding the usual considerations which ordinarily mean that the appeal should be treated as the suitable remedy to be pursued.

The box below sets out a number of other examples of the courts giving guidance on this point.

***R. (Gifford) v Governor of Bure Prison* [2014] EWHC 911 (Admin)** at paragraph 37 and 43: High Court held that the claim should never have been brought by way of judicial review. There was an alternative and more appropriate remedy by way of reference to the prison ombudsman. Importantly, the fact that the ombudsman could only make recommendations was not a reason that it did not afford a more appropriate remedy. Coulson J reviewed the main authorities on the question of when an alternative remedy should be used in preference to judicial review and noted that [36] (emphasis added): [ADD IN QUOTE? OR REMOVE END OF PREVIOUS SENTENCE]

In ***R v Huntingdon District Council ex parte Cowan* [1984] 1 WLR 501**, Glidewell J (as he then was) said:

> "Where there is an alternative remedy available but judicial review is sought, then in my judgment the court should always ask itself whether the remedy that is sought in the court, or the alternative remedy which is available to the applicant by way of appeal, is the most effective and convenient, in other words, which of them will prove to be the most effective and convenient in all the circumstances, not merely for the applicant, but in the public interest."

In ***R v Devon County Council ex parte Baker* [1995] 1 All ER 73**, Simon Brown LJ (as he then was) put the point in this way:

> "Which of two available remedies, or perhaps more accurately, avenues of redress, is to be preferred will depend ultimately upon which is the more convenient, expeditious and effective. Where ministers have default powers, application to them will generally be the better remedy, particularly where, as so often, the central complaint is in reality about the substantive merits of the decision. The minister brings his department's expertise to bear upon the problem. He has the means to conduct an appropriate factual enquiry. Unlike the court, moreover, he can direct a solution rather than merely leave the authority to re-determine the question. Where, on the other hand, as here, what is required is the authoritative resolution of a legal issue... then in common with Dillon L.J., I would regard judicial review as the more convenient alternative remedy."

***R (C) v Financial Services Authority* [2012] EWHC 1417 (Admin)**, in which Silber J after reviewing the authorities observed at [89]:

> "These cases show (a) that judicial review will not be granted where there is an alternative remedy available as long as it is in Lord Widgery's words in the Royco case 'equally effective and convenient' or in Taylor LJ's words in Ferrero 'suitable to determine' the issue and (b) judicial review can be brought where the alternative remedy is in Lord Denning's words in the Peachey case 'nowhere near so convenient, beneficial and effectual'."

He accepted at [90] a submission by counsel for the Claimant that the Court should ask itself three questions, namely:

(a) what is the nature of the wrong that is alleged to have been done by the public authority?

(b) Is the alternative statutory remedy capable of remedying that wrong (i.e. is it capable of resolving the issue at all?); and

(c) If so is the alternative statutory remedy suitable for remedying that wrong?

On the facts, the availability of a reference to the Upper Tribunal was not a suitable alternative remedy because it could not grant the remedy he sought (quashing the decision on the ground of inadequate reasons) and because there were considerable risks attached to making a reference to the Upper Tribunal which had the power to raise more serious allegations or impose a greater penalty.

***Ex p Waldron* [1986] QB 824** - not recent, but a helpful authority as to the factors to be taken into account, see [852F-853A]:

> "whether the alternative statutory remedy will resolve the question at issue fully and directly, whether the statutory procedure will be quicker, or slower, than procedure by way of judicial review, whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body, these are amongst the matters which a court should take into account whether to grant relief by way of judicial review when an alternative remedy is available"

Cases where there is no other right of appeal or remedy

What follows are some examples of cases in the welfare benefits context where there is no statutory right of appeal and judicial review might therefore be available.

- There is no statutory right of appeal against a decision to suspend payment – e.g. HB when ESA stopped following a Work Capability Assessment. In practice claimants are best advised to report changes of circumstance and provide updated financial details as soon as possible, which may involve or include asking for Housing Benefit to be assessed on a 'nil income basis'. Delay in reinstating payment once all information reasonably required has been supplied may be challengeable.

- There is no statutory right of appeal against a decision not to exercise discretion to waive recovery of an overpayment - see *R (Larusai) v Secretary of State for Work and Pensions* [2003] EWHC 371 (Admin).

- Nor is there a statutory right to appeal against a local authority's decision to refuse an application for a Discretionary Housing Payment. At the least, local authorities should have a policy and decisions should take into account national

guidance. Some councils, such as Westminster, will convene a panel of councillors to hear an appeal against an adverse decision taken on a DHP application. The panel's decision would still be amenable to judicial review.

- Judicial review could also be sought against a refusal of permission to appeal to the Upper Tribunal – see *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 – although note that in these cases there is a high threshold for permission to be granted and a modified procedure with a shorter time limit for applying for judicial review and no right to oral renewal: See CPR 54.7A. In a Cart-type case, permission will only be granted where:

  - There is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First-Tier Tribunal against which permission to appeal was sought are wrong in law; and,
  - Either:
    - The claim raises an important point of principle or practise; or
    - There is some other compelling reason to hear it.

- Challenges to interim decisions made by a First-Tier Tribunal judge can also be brought straight to the Upper Tribunal as judicial reviews. See, e.g., *R (CD) v First-tier Tribunal (CICA)* [2010] UKUT 181 (AAC), an unsuccessful challenge to a FTT's refusal to extend time for lodging an appeal.

Sanctions cases

In the context of benefit sanctioning, the following are some areas which could be challenged by judicial review:

- Failure or refusal to make interim payments pending mandatory reconsideration/appeal;

- Failure to take into account the circumstances of sick and disabled claimants in the claimant commitment, or to provide information to claimants about adjustments which they are entitled to request;

- Failure to take account of caring responsibilities in the claimant commitment;

- Failure to notify an appealable decision;

- Refusal to accept a request for a late revision;

- Failure properly to notify work related requirements; see s 24(4) WRA, ADM J3005 and *R(Reilly and Wilson) v SSWP* [2013] UKSC 68.

"[65] Fairness requires that a claimant should have access to such information about the scheme as he or she may need in order to make informed and meaningful representations to the decision-maker before a decision is made..."

"[66] Properly informed claimants, with knowledge not merely of the schemes available, but also of the criteria for being placed on such schemes, should be able to explain what would, in their view, be the most reasonable and appropriate scheme for them, in a way which would be unlikely to be possible without such information..."

Cases where the alternative remedy is not suitable

- Where the remedy required is not something that the FTT can grant, such as remedying systemic problems with how a claim is handled or processed, judicial review may be an option. Examples of these are given in Paper 2.

- Where the object is to challenge an unlawful and/or discriminatory policy expressed in statute, judicial review is usually the most effective course of action. In *Morris v Westminster CC* [2005] EWCA Civ 1184, a housing case, it was held that a discriminatory measure is no less discriminatory simply because there are other means by which the adverse treatment might be ameliorated: "[a]n incompatibility [with Article 14 ECHR] remains an incompatibility whatever other forms of recourse are or become available" (at para. [54]).

Cases where the alternative remedy is not effective

For clients in receipt of means-tested benefits or disability benefits, delays can be catastrophic either immediately or in the very near future. Sanctions could present an immediate risk of destitution.

The DWP may argue that delay in processing an objection to a sanction can be offset by the availability of hardship payments. However:

- hardship payments are not always granted;
- they can take time to process;
- hardship payments are harder to get under Universal Credit; and,
- decisions on applications have the same appeal route as any other benefits decisions (i.e. MR and FTT appeal).

Where clients are vulnerable it may be arguable that a hardship payment would be insufficient to offset the harm caused, for example for clients with certain mental health problems.

Other decisions may present situations where a delay could easily become disastrous:

- where Housing Benefit stops or is suspended (and rent arrears build up);
- where UC stops (e.g. following adverse decision on eligibility/right to reside);
- where client becomes subject to benefit cap and HB/UC is reduced.

4: Equality Act claims

Why a discrimination claim may arise in welfare benefits cases

This paper will focus on when a discrimination claim under the Equality Act 2010 might arise in relation to mandatory activity imposed on a claimant. Universal Credit claimants, Jobseekers Allowance claimants and Employment and Support Allowance claimants in the Work Related Activity group are all subject to conditionality, meaning that a sanction can be imposed if claimants fail to take reasonable steps to undertake mandatory work-related or work-seeking activity.

Directing such activity in the Claimant Commitment is likely to constitute carrying out a 'public function' by the DWP for the purposes of s 29 Equality Act 2010, as is the decision to impose a sanction. Where a claimant has been referred into the Work Programme (or the new Work and Health Programme) for the purpose of work-related activity, it is likely that the Work Programme Provider is carrying out a public function, or if not, is providing a service to the public for the purpose of s29 Equality Act 2010. Either way, the DWP and Work Programme Providers are under a duty not to discriminate against claimants.

A high proportion of claimants subject to conditionality are likely to have protected characteristics under the Equality Act 2010, for example in respect of their gender (as lone parents) or disability. What is reasonable for an individual claimant will have to be determined with care in order avoid discriminating against them.

However, we are aware that there are many cases where a claimant is required to carry out inappropriate activity and where a sanction is subsequently inappropriately applied. It appears that DWP staff and Work Programme Providers often fail to make fair decisions about what is 'reasonable' for individual claimants. Decisions which could lead to discrimination claims could include, for example:

- a failure to make reasonable adjustments when recording work search requirements within a Claimant Commitment;
- a failure to make reasonable adjustments when mandating a claimant to carry out work preparation requirements;
- decisions to sanction a claimant without taking into account their disability or other protected characteristic.

How to bring a claim

County court or judicial review

A discrimination claim relating to public functions can be brought as a private law action in the county court: s 114 Equality Act 2010. Judicial review may also be available given the character of the decision making at issue, and may be preferable where a broad policy issue is raised and a substantial factual dispute is unlikely: *R (on the application of MM & DM) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1565, [2014] 1 WLR 1716. Identifying where judicial review is an appropriate remedy for a claimant is discussed in more detail in Paper 3.

Key case: *R (MM and DM) v SSWP* [2013] EWCA Civ 1565

The claimants were persons with mental health problems who claimed ESA. They claimed that the process for applying for ESA, including the questionnaire and the Work Capability Assessment, put claimants with mental health problems at a substantial disadvantage compared to people who did not have such problems. The claimants sought a judicial review in the Administrative Court which was transferred to the Upper Tribunal, arguing that the Secretary of State for Work and Pensions had breached his duty under sections 20(3), 21(1)(2) and 29(6) of the Equality Act 2010 to make reasonable adjustments so as to avoid that disadvantage. The claimants also suggested two reasonable adjustments that the SSWP could have made.

The Upper Tribunal granted a declaration that the assessment process for ESA placed mental health patients at a substantial disadvantage, but rejected the claimants' first suggested adjustment. In its second judgment the tribunal found that the claimants' second suggested adjustment was reasonable and directed the Secretary of State to investigate the reasonableness of that adjustment and to present evidence to the tribunal at a further hearing.

The SSWP appealed to the Court of Appeal. The Court of Appeal allowed the appeal in part, finding that while the Upper Tribunal could determine whether or not an adjustment was reasonable, it was not the Tribunal's duty to determine for itself what constituted a reasonable adjustment or to supervise the process of evidence-gathering by issuing directions to the Secretary of State. The Upper Tribunal had been entitled to grant the declaration that it had made.

Where judicial review is not an appropriate remedy a county court claim may be available to a claimant who has been inappropriately sanctioned. **A county court discrimination claim must be brought within 6 months of the discriminatory act: s 118 Equality Act 2010**. Conduct extending over a period over time is treated as done at the end of the period (s118(6)(a)). So, for example, a requirement for a claimant to carry out an inappropriate activity could be treated as a 'continuing act', which only ends when the claimant is no longer required to carry out the activity. An open-ended sanction could also be seen as a continuing act.

Public funding

Public funding will normally be essential: discrimination claims are generally too complex to run without a lawyer, your client is unlikely to have the means to pay privately (though check whether they might have legal expenses insurance), and claims of this kind will not usually be suitable for 'no win no fee' arrangements.

The Equality and Human Rights Commission also has power to fund claims for breaches of the Equality Act 2010. Generally it will only fund cases that have the potential to have a wider strategic impact beyond the individual case. It has published its strategic litigation policy here: https://www.equalityhumanrights.com/en/publication-download/strategic-litigation-policy-publication and we understand that it has a particular interest in the impact of welfare reform. It is currently running a Legal Support Project to fund advice and representation in Equality Act claims in housing and social security, even if they do not fall within the strategic litigation policy, see: https://www.equalityhumanrights.com/en/legal-casework/legal-support-project/legal-support-project-housing-and-social-security

Where EHRC funding is not available, legal aid may be the only option. Discrimination claims are in scope of legal aid under paragraph 43 of Part 1 Schedule 1 LASPO. Discriminations claims funded by legal aid can normally only be run by one of the three holders of the discrimination contract, and

legal aid must in the first instance normally be accessed via the 'Civil Legal Advice' telephone helpline: the 'Gateway'.

The first stage of seeking advice under the Gateway is via a telephone call with the operator service. This will include an assessment of the client's means to determine whether they are financially eligible for legal aid, as well as an assessment of whether the matter is in scope for legal aid.

If the operator is satisfied that the matter is in scope and that the client is financially eligible they will be transferred to one of the three specialist providers, currently Howells Solicitors, Stephensons Solicitors and Merseyside Employment Law. The specialist provider then determines again whether the client is financially eligible for legal aid and whether the matter falls within the scope of legal aid, as well as whether it meets the requisite merits criteria for the provision of legal aid advice. At the time of writing, the future of how this system will work in education and discrimination cases is uncertain. The LAA announced on 5th February 2018 that it is cancelling the procurement process for the Civil Legal Advice contracts in education and discrimination, which were due to start in September 2018.

If the client is financially eligible, and the matter is in scope and meets the merits criteria, the specialist provider will open a 'Legal Help' matter, under which they can carry out pre-action correspondence on behalf of the client. This could include writing to the DWP to request reasonable adjustments to enable a client to carry out mandated activity. It is worth noting that it may not be enough for the DWP or a provider to *stop* requiring a claimant to carry out inappropriate mandated work. Claimants are entitled to reasonable adjustments to enable them to carry out *appropriate* work-seeking activity.

If work beyond the pre-action stage is required, it will be necessary for the specialist provider to apply to the Legal Aid Agency for 'full representation'. The merits criteria which must be met for full representation are set out in regulations 41, 42 and 43 of the Civil Legal Aid (Merits Criteria) Regulations

2013. Regulation 42 is the one likely to cause problems for discrimination claims in welfare benefits cases:

> ***42. Cost benefit criteria for determinations for full representation***
> *(1) The cost benefit criteria are as follows.*
> *(2) If the case is primarily a claim for damages or other sum of money and is not of significant wider public interest—*
> *(a) if the prospects of success of the case are very good, the Director must be satisfied that the likely damages exceed likely costs;*
> *(b) if the prospects of success of the case are good, the Director must be satisfied that the likely damages exceed likely costs by a ratio of two to one; or*
> *(c) if the prospects of success of the case are moderate, the Director must be satisfied that the likely damages exceed likely costs by a ratio of four to one.*
> *(3) If the case is—*
> *(a) not primarily a claim for damages or other sum of money; and*
> *(b) not of significant wider public interest,*
> *the Director must be satisfied that the reasonable private paying individual test is met.*
> *(4) If the case is of significant wider public interest, the Director must be satisfied that the proportionality test is met.*

If the claim is one which is "primarily a claim for damages", the Legal Aid Agency will apply the cost-benefit ratios set out in 2(a)-(c). This will be a very difficult test to meet; discrimination claims are complex and expensive to bring, but the likely damages may not be very high. It is therefore essential to think about whether there are any **non-financial remedies** that your client is seeking, and whether these are the primary reason for bringing the claim.

Where a case is not primarily a claim for damages the '**reasonable private paying individua**l' test applies:

Does the potential benefit to be gained justify the likely costs, such that a reasonable private paying individual would be prepared to start or continue the proceedings having regard to the prospects of success and all the other circumstances of the case?

Where a case is of significant wider public interest, the 'proportionality' test applies. Significant wider public interest is defined in the Merits Regulations as a case appropriate to realise real benefits to the public at large, other than those which normally flow from cases of the type in question, and benefits for an identifiable class of individuals, other than the person, or his or her family, to which the funding is provided.

Exceptional case funding is not available for Equality Act claims which don't meet these criteria because such claims are in scope. The non-availability of funding for meritorious cases on costs/benefit grounds may be incompatible with Article 6, particularly where without legal representation the individual will be completely denied their right of access to the court.

Remedies

In a claim brought under the Equality Act, the county court can grant any remedy which could be obtained in the High Court in tort proceedings or in proceedings for judicial review: s119 EA 2010. If you client is seeking an urgent non-financial remedy, such as overturning a sanction decision, you may decide that judicial review is a more appropriate remedy for your client. However, there will be cases where judicial review is not an appropriate remedy, and your client is seeking something in addition to financial compensation. Remedies a client can get from bringing a discrimination claim include:

- **damages** for injury to feelings and other loss;
- a **declaration** that they have suffered unlawful discrimination;
- an **order** that SSWP must do, or not do, particular things (for example, take particular steps to accommodate your client's disability or revising a sanction decision).

If you are trying to obtain public funding for your client, it is therefore worth thinking about what is most important to the client before referring them. If it is not damages, make this clear, if possible, to the specialist provider that you refer your client to.

Note on Article 6 and welfare benefits

Query: In non-EU right to reside/eligibility cases, is Article 6 ECHR engaged at mandatory reconsideration stage for welfare benefits cases? If so, could a client get ECF for help with drafting an MR request?

Article 6(1)

Article 6(1) of the Convention provides as follows (emphasis added):

> In the **determination** of his **civil rights and obligations** or of any criminal charge against him, everyone is entitled to a fair and public hearing **within a reasonable time** by an **independent and impartial tribunal established by law**. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

In order for Article 6 to be engaged, therefore, there must be (1) a determination of (2) civil rights and obligations.

Article 6, housing and *Poshteh*

Before turning to how Article 6 might be engaged in social security cases and MR. it is worth considering briefly how Article 6 has been held to apply in housing cases. Housing is a useful comparison because it has a two-tier review system (s.202 review by a local authority officer and then s.204 appeal in County Court) and because welfare reform and housing are inseparable. Losing one's entitlement to ESA often results in losing entitlement to Housing Benefit.

In *Poshteh* [2017] UKSC 36, a case concerning the reasonableness of a refusal of accommodation offered following a homeless application on grounds of suitability, the Supreme Court said that duties of local authorities under Part VII Housing Act 1996 (i.e. obligations on applications, offers and reviews relating to homelessness) did not engage Article 6. Part VII includes the s.202 review framework and the s.204 appeal to the County Court on an error of law.

However, as the Supreme Court complained in *Poshteh*, there is no clear line of authorities in Strasbourg that housing constitutes a 'civil right', unlike social security (see below).

Article 6 and social security as a 'civil right'

There are a number of authorities as to whether welfare benefits engage Article 6.[1] The European Court of Human Rights has held that proceedings concerning social-

[1] An example of a useful, if slightly dated, overview of the Strasbourg jurisprudence on social security, is Ana Gómez Heredero, 'Social security as a human right', Human rights files, No. 23, Council of

security benefits (*Feldbrugge v. the Netherlands*),[2] even on a non-contributory basis (*Salesi v. Italy*),[3] and also proceedings concerning compulsory social-security contributions (*Schouten and Meldrum v. the Netherlands*)[4] can engage Article 6.

Civil 'rights and obligations'

In order to engage Article 6, there must be entitlement as a matter of legal right for those who qualify – disputes about benefits or assistance given by the state in its discretion are not included.[5] The UK's social security law framework is a rule-based system, which means that while a claimant will only qualify for a benefit if they fulfil the statutory criteria, once they meet those criteria the authorities have no discretion in the matter, i.e. they must apply the law as it is enacted.

This means that while a decision-maker may come to a view about whether a claimant does meet the statutory criteria when assessing, for example, whether a disabled person scores sufficient points to get ESA, the dispute is not about an exercise of discretion but about how the law applies to the facts.

'Determination'

In *Ringeisen v Austria*[6] Strasbourg held that Article 6 extends to proceedings which do not have the determination of 'civil rights and obligations' as their purpose, but which nonetheless are decisive for them. This was narrowed slightly in the later case of *Le Compte, Van Leuven and De Meyere v Belgium*,[7] where the ECtHR held that the proceedings must be 'directly decisive' and that a 'tenuous connection or remote consequences do not suffice'.

Cases in which an applicant must exhaust a preliminary administrative remedy under national law before having recourse to a court or tribunal have been held to engage Article 6,[8] particularly in respect of disputes as to the 'reasonable time' element (see below). In other words, a matter need not have reached the stage of court proceedings before Article 6 is engaged.

Applying the above to MRs, it would be an unattractive proposition to argue that MRs only have 'remote consequences' on the basis that a claimant can appeal to the FTT if dissatisfied. Not only would this undermine the purpose of the MR scheme, but it would ignore the fact that benefits are not paid while a request for an MR is being considered. An MR that overturns a finding of no entitlement, particularly for means-

Europe Publishing, 2007. The European Court of Human Rights' Guide on Article 6 (updated 30th April 2017) provides a broader overview.
[2] Application no. 8562/79.
[3] Application no. 13023/87.
[4] Application no. 19005/91; 19006/91.
[5] *Salesi v Italy* and *Mennitto v Italy* 2000-X; 34 EHRR 122 GC; *Gaygusuz v Austria* 1996-IV; 23 EHRR 364.
[6] (1971) 1 EHRR 455
[7] (1981) 4 EHRR 1, at para. 47.
[8] *Konig v Germany* (No. 1) (A/27) (1978) 2 EHRR 170 PC.

tested and disability benefits (which may exempt a claimant form the benefit cap), therefore does have significant consequences, as indeed does an MR that upholds an adverse decision in these cases.

Conclusion is Article 6 engaged with MRs?

There are arguments for and against the proposition that the mandatory reconsideration stage of a benefits appeal engages Article 6. The key questions are whether civil rights and obligations are being determined at MR stage.

Arguments against:

- No prescribed way of submitting a request and no evidence is required to be submitted. It could be argued that this indicates a 'review' as opposed to a determination and/or that there is nothing to prevent an appellant from participating effectively. A counter to that would be that evidence can be submitted and considered that was not before the original decision-maker.
- Low rates of decisions being overturned compared to success rates of FTT appeals, which may suggest something of a 'rubber stamp' exercise and/or a delaying tactic as opposed to a considered determination. A counter to that would be that this would undermine the stated purpose of the MR stage.

Arguments for:

- MR cannot be avoided; a claimant has to be in possession of a mandatory reconsideration notice before lodging an appeal with HMCTS.
- The significant consequences, both for the appellant and for HMCTS, that a decision contained in an MR can have mean that an MR should not be treated as a formality.

Case studies

Consider:

- What remedies are available to the client? Which remedy would you go for?
- What more would you need to know in order to consider bringing a judicial review or discrimination claim?

1. John has severe arthritis and a mild learning disability. He has migrated on to Universal Credit as a result of moving to a full service area, and has been found not to have limited capability for work. He has signed a Claimant Commitment which requires him to carry out 35 hours work search each week. John tries to explain to his work coach that because of the pain from his arthritis he will struggle to spend 35 hours per week on work search, but his work coach declines to make any deductions to John's expected number of hours.

   John fails to carry out the expected number of hours of work search and is sanctioned for 28 days. He does not appeal the decision. A month later he fails to meet his work search requirements again and receives another sanction, which is escalated to 91 days. By the time he approaches you for advice about the sanctions his health has deteriorated as a result of not eating and not being able to heat his house.

2. Sarah has various mental health conditions, including anxiety, depression and agoraphobia. She has recently stopped working as a result of her condition and has claimed Universal Credit. She has been found not to have limited capability for work and has been referred to a work programme provider.

   At her first interview with her work programme provider, Sarah tells her adviser about her mental health conditions. The DWP has a policy of not passing on details of disability to providers, so the provider does not know any of her medical history. She explains that she is extremely anxious about leaving the house, and that she struggles to travel alone on public transport. Her work programme provider is based 20 miles away from her home and Sarah has to take two buses to get there.

   The work programme provider mandates Sarah to attend an appointment at their office. She manages to travel there by bus, but finds the experience extremely distressing. Afterwards, she explains again to her work programme provider that she finds travelling by public transport extremely difficult, and asks if they can conduct her appointments by telephone. The work programme provider refuses to consider her request and mandates her to attend another appointment. Sarah does not attend and the work programme provider raises a compliance doubt.

   Sarah receives an open ended sanction as a result of the compliance doubt. She is so distressed by her experience with her work programme provider that she feels unable to contact them in order to re-comply. She approaches you for advice about the sanction.

This article is a part of the *Legal Action* 'Use it or loose it' series. Visit www.lag.org.uk for more details.

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

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.

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.

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.

Public Law Project

The Baring Foundation

PLP Sanctions Project

Who are PLP?

The Public Law Project ('PLP') is an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers.

Why is PLP working on sanctioning issues?

Changes to the benefits system, particularly with the continuing roll-out of Universal Credit, have brought renewed focus on the idea of conditionality in benefits claims. For example, the introduction of 'in-work' conditionality in Universal Credit has increased the risk of claimants being sanctioned even when they are already in employment. PLP is also concerned that there are certain types of claimants who may be particularly likely to be sanctioned, or who may be especially vulnerable if their income is reduced, for example disabled people or those with caring responsibilities.

What is PLP doing?

The overarching aims of PLP's project are that:

(i) Sanctions are imposed fairly, lawfully and in a non-discriminatory manner

(ii) Benefit claimants have effective access to appropriate and timely remedies when things go wrong

This work is kindly funded by The Baring Foundation.

How can PLP help?

As part of our work on this issue, we are able to take referrals of individual cases where there are concerns that a person is being – or is at risk of being – unfairly or unlawfully sanctioned. We can provide advice on the range of remedies available: MRs, appeals, complaints and judicial review. In some cases we may be able to provide an advocate for a hearing. Issues on which we may be able to assist include:

- Challenging decisions to sanction, including assisting with requesting reconsiderations and representation for appeals
- Problems relating to interim payments or hardship payments
- Assisting to modify or amend claimant commitments (for example due to disability or caring responsibilities)

PLP is also able to deliver training on sanctions and related issues, including public law remedies, access to legal services, and funding for legal advice. To refer a case to us, or to contact us about any other issue relating to sanctioning, please email sanctions@publiclawproject.org.uk or call 020 7843 1260.

PLP is a small charity with limited resources. We may not be able to take on every case referred to us. We aim to respond to all referrals within 7 days, and try to respond more quickly in urgent cases.