

Judicial Review and Welfare Benefits

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SECTION ONE: IDENTIFYING WELFARE BENEFIT DECISIONS WHICH ARE AMENABLE TO JUDICIAL REVIEW

1. – Introduction and a preliminary question - Can judicial review be an appropriate remedy given the existence of a statutory right of appeal?

The welfare benefits system as a whole is “enormously complex”¹. The legislation is often highly technical and subject to constant amendment. Members of the Court of Appeal have described it as “notoriously labyrinthine”². However, judicial review does not feature strongly in social security. The main reason given for why challenges are not made to the Administrative Court in relation to welfare benefit decisions is the existence the statutory right of appeal against disputed decisions to a First-tier Tribunal. This means the first objection that the benefit authorities³ are likely to raise against a threat of judicial review is the existence of a suitable alternative remedy:

“Judicial review has less importance than might be expected in the field of social security law. This is due to the comprehensive appeals system which exists in relation to decisions concerning most benefits.”⁴

It nevertheless remains the case that there are a range of circumstances in which judicial review may be an appropriate remedy. For the adviser it is a question of identifying the appropriate case. However, a good starting point is to bear the following points in mind:

- That some decisions made by the benefit authorities do not attract a right of appeal.⁵ These include:
 - whether to exercise discretion not to recover an overpayment;
 - whether to make an interim payment;
 - a decision to suspend payment of benefit; and

1. R 1/04 (SF) (Kerr v Department for Social Development [2004] UKHL 23.

2. Secretary of State for Work and Pensions v Borrowdale & Morina [2007] EWCA Civ 749.

3. This phrase includes, the Department of Work and Pension, e.g. Jobcentreplus, Pension Service etc, HM Revenue & Customs, which administers Child Benefit and Tax Credit and local authorities which administer Housing and Council Tax Benefits.

4. Judicial Review Proceedings – A Practitioner’s Guide – Jonathan Manning LAG 2nd ed (2004), Chapter 11

5. Social Security Act 1998, Sch 2. Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, (2001/1002), reg 16 and Schedule.

- a decision to refuse a request to carry out a revision of an earlier decision e.g. for official error.⁶
- It is not uncommon for benefit authorities to make internal decisions purporting to remove the claimant's entitlement to benefit without sending any proper notification of that decision to the claimant - such that they cannot exercise their right of appeal to an independent tribunal.⁷
- As the average time for an appeal to be prepared and then listed before a First-tier Tribunal is around 24 weeks,⁸ where there is an urgent need for benefit, such as financial hardship or a threat to the claimant's home, then an application to the Administrative Court for interim relief may be appropriate.

2 New judicial review jurisdiction of the Upper Tribunal in social security law

Following the coming into force of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), applications for judicial review can be brought direct to the Upper Tribunal in respect of interim decisions of the First-tier Tribunal made under its Procedure Rules where there is no right of appeal to the Upper Tribunal against the decision in question.⁹

In addition, the 2007 Act introduced a more general power to transfer other judicial review cases from the High Court to the Upper Tribunal.¹⁰ When hearing the case the Upper Tribunal will be headed by either a High Court Judge or another judge specifically nominated to hear those cases (TCEA 2007, s.18(6)).¹¹

When deciding judicial review cases in England and Wales, the Upper Tribunal judges are required to apply the same principles of law that the High Court would apply to those cases.

6. *Beltekian v City of Westminster and Secretary of State for Work and Pensions* [2004] EWCA Civ 1784 (reported as R(H) 8/05).

7. See decision of Deputy Commissioner MacLynn in Northern Ireland (C3/07-08 (IS)).

8. According to the figures reproduced in the "Report by the President of Appeal Tribunals on the standards of decision-making by the Secretary of State for 2004-2005", the average time in weeks from receipt of an appeal by the Department of Work and Pensions until it is received by the Appeals Services was 12.9 weeks in 2002/03; 12.9 weeks in 2003/04 and 11.8 weeks in 2004/05. Similar figures occur in the more recent reports, e.g. according to the Tribunal Service Annual Report 2008/09, there is a target of 14 weeks for the first hearing to take place within receipt from the DWP; this was met in 78% of cases (Annex B page 118).

9. The Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698, Part 4.

10. See Sharon Currie (Petition for Judicial Review of decisions of the First-tier Tribunal) [2009] CSOH Civ 45 [2010] AACR 8 - on whether application to be transferred to the Upper Tribunal.

11. See Tribunal Service website <http://www.tribunals.gov.uk/Tribunals/Rules/rules.htm> under the heading: Rules, Legislation, Practice Directions & Statements.

3 Typical errors in the administration of welfare benefits which amount to public law grounds for Judicial Review

The welfare benefits system is extremely complex but it is nevertheless possible to identify some common scenarios where the actions or omissions of the benefit authorities can amount to public law errors which are amenable to judicial review:

- A failure to follow an express statutory procedure - e.g. not providing proper notification of a decision terminating or reducing the claimant's entitlement to benefit.¹²
- Fettering a discretion¹³ - e.g. a refusal to consider making interim payments pending the determination of a new claim for benefit or a refusal to make any award of discretionary housing payments.¹⁴
- Unlawful sub-delegation¹⁵ - e.g. where the DWP insists that the claimant obtain replacement status documents from the Home Office when there is evidence already in existence which shows that the claimant is not 'a person from abroad'.
- Undermining a legislative purpose¹⁶ - e.g. a local authority's persistent failure to refer Housing Benefit appeals to the Tribunal Service so that its disputed decision cannot be adjudicated upon by an independent body.
- Misdirection as to its statutory powers or duties - e.g. where the authority refuses to accept that a claimant falls within a prescribed legal category based on a misunderstanding of the law or of its decision making powers.

SECTION TWO: EXAMPLES OF WELFARE BENEFIT DECISIONS AMENABLE TO JUDICIAL REVIEW WHICH HAVE RESULTED IN DECIDED CASES

4 Examples from case law

Case law contains a number of cases where judicial review was used to challenge a benefit decision where this had wider implications for a class of claimants:

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12. Housing Benefit Regulations 2006 (SI 2005/213, reg 90, Sch 9. Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) reg 89. See CG/37/2008, para 24.
 13. R v North West Lancashire Health Authority ex parte A, D and G [2000] 1 WLR 977, CA.
 14. Making better use of Discretionary Housing Payments: Gareth Mitchell: Adviser 136 Nov/Dec 2009, p 9.
 15. R v Devon Country Council ex parte G [1989] AC 573).
 16. Padfield v MAFF [1968] AC 977, HL.

- *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604 - Whether the DWP's decision to withdraw Income Support based on an internal note from the Home Office could be effective when the claimant has had no notification of the asylum decision by the Home Office;
- *R (on the application of the National Association of Colliery Overmen, Deputies and Shot Firers) v Secretary of State for Work and Pensions* [2003] EWHC 607 (Admin) - Whether the DWP's failure to issue guidance on the use of the 'Cold Water Provocation Test' in relation to prescribed industrial injuries disease PDA11 (vibration white finger) was unlawful;
- *Secretary of State for Work and Pensions v Balding* [2007] EWCA Civ 1327 - Does the DWP have the power to continue to recover an overpayment debt by deductions from benefit after a claimant has been discharged from bankruptcy when the overpayment was decided before the date of bankruptcy;
- *R (on the Application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 - Whether the removal of the disability premium from a claimant's award of Income Support because they are homeless amounts to a breach of Article 14 and Article 1 of Protocol ECHR;
- *R (on the application of KR) v Secretary of State for Work and Pensions and Social Fund Inspectors* [2008] EWHC 1881 (Admin) - Whether travelling expenses to facilitate contact where no handover by parents under the Social Fund excluded by Direction 23(1)(a)(iv);
- *R (on the application of Gargett) v London Borough of Lambeth* [2008] EWCA Civ 1450 - Whether the local authority has the power to make discretionary housing payments towards payment of rent arrears where the applicant is currently in receipt of full Housing Benefit entitlement;
- *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2009] EWCA Civ 1058 – Whether the DWP have the power to recover overpayments under the common law;
- *R (Tilianu) v Social Fund Inspector and Secretary of State for Work and Pensions* [2010] EWHC 213 (Admin) - Whether EU citizens who had worked in the United Kingdom as self-employed workers but had ceased to be in work could retain their right of residence such that they were eligible for jobseeker's allowance and crisis loans.

5 Refusal of leave by a Social Security Commissioner

An area which has traditionally generated applications for judicial review is refusal of leave to appeal by a Social Security Commissioner. Reported cases include:

- *R(DLA) 5/04* – a decision of the Court of Session (Outer House);- Whether the Commissioner had failed to have proper regard to the statutory test on virtual inability to walk - the approach to be taken when ground only raised in the notice of appeal:
- *R (S) v Walsall MBC and the SSWP* [2009] EWHC 2221 Admin - Where a community care organisation provided care, support or supervision to a recipient of housing benefit by agreement with the local authority, whether that care was not provided "on behalf of" the recipient's social landlord of the accommodation such that it was "exempt accommodation" for the purposes of the Housing Benefit.

6 Test for review of a refusal of leave

(i) Pre-TCEA 2007

Applications to review a refusal of leave by a Commissioner have rarely resulted in a successful outcome for the claimant because a test of exceptional circumstances has been applied.¹⁷ The Court of Appeal in *Wiles v Social Security Commissioner & Anr* [2010] EWCA Civ 258, rejected this very restrictive approach in a case pre-TCEA 2007. The Court said that judicial review lay on conventional public law grounds, e.g. see approach taken in *Connolly v Secretary of State* [1986] 1 WLR 421, but this should be tempered by what was said by Hale LJ (as she then was) in *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 reported as *R(DLA) 6/01*), on the need for caution when reviewing decisions of a tribunal in a specialist area of law..

(ii) Post-TCEA 2007

In *R (Cart & Ors) v The Upper Tribunal & Ors* [2009] EWHC 3052 (Admin), the Divisional Court held that the Upper Tribunal (UT) created by the TCEA 2007 was not amenable to challenge by way of judicial review. While it could not claim to be immune from judicial review based solely on the terms of s.3(5) of the 2007 Act, the Court nevertheless concluded that the UT had a status so closely equivalent to the High Court that judicial review would be inappropriate. This did not rule out judicial review entirely but it was to be confined to those rare and exceptional cases where: "the judicial process itself has been frustrated or corrupted." The matter is on appeal to the Court of Appeal whose judgment is awaited.

17. *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 and *Sinclair Gardens Investments (Kensington) Ltd v Lands Tribunal* [2006] 3 All ER 650.

SECTION 3: EXAMPLES OF WELFARE BENEFIT DECISIONS WHICH ARE AMENABLE TO JUDICIAL REVIEW BUT ARE LIKELY TO BE RESOLVED WITHOUT THE NEED FOR A FULL HEARING

7 General delay and the power to make interim payments

(i) Delay in processing a claim

There is provision for both the Department of Work and Pensions (DWP)¹⁸ and HM Revenue and Customs ('HMRC')¹⁹ to make interim payments of benefits (or credits) if there is a delay in processing a claim and it appears that the claimant is, or may be, entitled to benefit.²⁰ If the DWP or HMRC refuse to make an interim payment then this can be challenged by way of judicial review with a request for an interim order requiring the DWP/HMRC to make interim payments pending a full hearing of the judicial review.

(ii) No power to make an interim payment while an appeal is pending

Once an unfavourable decision on entitlement has been made the power to make interim payment is lost. The claimant is expected to bring a statutory appeal against the disputed decision but no interim payments can be made whilst the decision is under appeal.²¹

8 Housing Benefit and 'payments on account'

The Housing Benefit rules²² make provision for a 'payment on account' to be made in the following circumstances:

18. Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1).
19. Child Benefit and Guardian's Allowance (Administration) Regulations 2003 SI 2003/492, reg 22.
20. Case law has emphasised that the test for making an interim payment is not whether it is "clear" that the person will qualify for benefit, but whether it appears that he or she "is or may be entitled" to that benefit: *R v Secretary of State for Social Security ex p Sarwar & ors* (1995) 7 Admin L.R. 781.
21. See *R v Secretary of State for Social Security ex parte Grant* [1997] EWHC Admin 754 (31st July, 1997). The case is based on the previous version of the regulation which states that the power to make a payment "shall not apply pending the determination of an appeal unless the Secretary of State is of the opinion that there is entitlement to benefit." In the current version, the last part of the sentence has been removed. See also *R (on the application of Hall) v Chichester District Council* [2007] EWHC 168 (Admin) where the claimant (who was unrepresented) was evicted whilst her housing benefit appeal was pending before a Commissioner.
22. HB Regs 2006, reg 93 – Payment on account of a rent allowance.

- HB is being paid in the form of a rent allowance, i.e. tenants with registered social landlords and those renting in the private sector;²³
- if the claimant has provided the evidence reasonably needed and requested;
- there are 8 weeks arrears.

Once these conditions are fulfilled then the local authority *must* consider making a payment on account: *R v Haringey LBC ex p. Ayub* [1990] 25 HLR 566, (QBD).²⁴ If the LA makes a payment on account it should issue a written decision notice to the claimant.²⁵

SECTION 4: EXAMPLES OF WELFARE BENEFIT PROBLEMS LINKED TO THE CLAIMANT'S IMMIGRATION STATUS THAT ARE AMENABLE TO JUDICIAL REVIEW

9 Delays being allocated a National Insurance Number

(i) Introduction

A claim for benefit cannot be processed unless the claimant has (or has applied for) a national insurance number – known as the NINO requirement.²⁶ If the claimant is a member of a couple then their partner will also be subject to the NINO requirement.²⁷ In the past, this rule resulted in many claims being interrupted when the eligible sponsor was joined by a spouse who was subject to a public funds condition.²⁸ Since April 2009, however, a partner will be exempt from the NINO requirement if they are 'a person subject to immigration control'.²⁹

(ii) Refusal to allocate a NINO results in the claim not being processed

If a claim for benefit is delayed because the Secretary of State refuses to allocate a NINO to the claimant then it may be appropriate to challenge this

23. Council tenants receive HB in the form of a rent rebate.

24. See HB Guidance Manual para 6.158.

25. HB/CTB Circular G24/2008 para 25.

26. Social Security Administration Act 1992, s1(1A) and 1(1B).

27. Secretary of State for Work and Pensions v Wilson [2006] EWCA Civ 882, [2007] 1 All ER 281 (reported as R(H) 7/06).

28. But see post-Wilson cases where the claimant did make an application for a NINO - CH/4085/2007 and CH/2366/2008 [2009] UKUT 74 (AAC).

29. Social Security (National Insurance Number Information: Exemption) Regulations 2009, SI 2009/471, in force from 6 April 2009: see also Circular HBCTB A4/2009.

refusal by way of judicial review, if it can be shown that the claimant has provided sufficient evidence of their identity at the NINO interview.³⁰ If the claimant is in urgent need then an application for interim payments of benefit should be made. Indeed, there is specific provision for the DWP to make interim payments where it is impracticable to satisfy the NINO requirement immediately.³¹ In addition, where the claim is for Child Benefit or Child Tax Credits, the HMRC also has a discretion to disapply the NINO requirement where it is considered that the claimant has a reasonable excuse for making a claim without satisfying it.³²

(iii) Refusal results in a negative decision on entitlement

If, on the other hand, the Secretary of State's refusal to allocate a NINO results in a decision that there is no entitlement to benefit, then the power to make interim payments is lost and the claimant would be expected to await the outcome of a statutory appeal against the decision on entitlement in the normal way (but see comment on delay at Section One, 2 above). However, where it is not clear whether the first-tier tribunal has jurisdiction to address the refusal to allocate a NINO itself and this is central to a successful outcome then judicial review proceedings may still be necessary to preserve the claimant's position.³³

10 Delays in processing claims for Child Benefit and Child Tax Credit

There is growing evidence that there are systemic delays in the HMRC processing claims. According to a recent report by the Citizens Advice '*Child benefit delays: The impact on CAB clients*', (January 2010), its bureaux have seen increasing numbers of clients experiencing long delays getting their claims processed.

“Three particular groups of claims are affected by delays:

- Claims changing from one claimant to another (whether or not the first claimant is contesting the switch)
- New claims from people from Eastern European countries - primarily Poland
- New claims from foreign nationals with new immigration status (page 2).

30. The Judge in CH/2366/2008 [2009] UKUT 74 (AAC) para 39 confirmed that the primary role of the NINO requirement is to prevent fraud, and it is the person's identify rather than the claimant's immigration status which is relevant to whether he or she should be allocated a NINO.

31. Social Security Administration Act 1992, s 1(a). The reference to the NINO requirement was inserted by regulation 10(1), 3(a)(ii) of the Social Security, Child Support and Tax Credits (Miscellaneous Amendments) Regulations 2005, SI 2005/337 from 18 March 2005.

32. Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014, reg 5(6).

33. CIS/0345/2003, para 23 said there was a statutory appeal against the refusal but this was doubted in CH/4085/2007 paras 19-21.

Bureaux are also seeing a disproportionate number of delays for people who have recently been granted indefinite leave to remain (ILR), which gives them a right to the same benefits as British citizens. Some CAB clients are wrongly refused the benefit, with their immigration status cited as the reason – others just seem to take longer as backlogs are more prevalent in the 'international' section of the CBO" (page 6).

These decisions may therefore be amenable to judicial review with an application for interim relief if the claimant is in urgent need.

11 Problems related to immigration documents

The general rule is that a claimant who is subject to immigration control (i.e. their leave to remain includes a 'no recourse to public funds' condition) cannot access most state benefits that are defined as public funds. Claimants are required to wait until the Home Office has made a favourable decision on their immigration application and issue them with the relevant 'status document' as there is no provision to make an award benefit retrospectively pending the granting of leave by the Home Office.³⁴ Benefit problems may arise where a favourable decision has been made but there has been a subsequent change of circumstances which appears to cast doubt on the claimant's eligibility to receive benefit having regard to their immigration status. Below are some scenarios where the benefit authorities should consider making interim payments of benefit pending the verification of the claimant's immigration status.

(i) Scenario one - misunderstanding of the claimant's immigration status

For example, benefit is withdrawn in error where the claimant had leave to remain without a public funds condition, and they have made an application to extend that leave before the current leave ran out; such that they are treated as having leave on the same terms until the application is decided by the Home Office.³⁵ Another common error is where the benefit authority treats someone as being subject to immigration control on the basis of having 'limited leave' when they have been granted leave without any restrictions save that it is for a fixed period of time. For example, someone who has been granted Humanitarian Protection will not have any public funds condition attached to their leave and should not be treated as a 'person from abroad' for benefit purposes.³⁶

34. R(IS) 6/08 para 6, and CIS/2635/2008 [2008] UKUT 5 (AAC), paras 12-20.

35. Section 3C of the Immigration Act 1971, which replaced the Immigration (Variation of Leave) Order 1976, (SI 1976/1572) (VOLO) as explained in CIS/2635/2008 [2008] UKUT 5 (AAC), para 15. For two examples under VOLO, see R(U) 1/85 and R(DLA) 1/01.

36. See Income Support (General) Regulations 1987, SI 1987/1967, reg 21AA(4hh); Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 85A(4hh), Housing Benefit Regulations 2006, SI 2006/213, reg 10(3Bhh),

(ii) Scenario two - immigration status conferred by legislation

This is where the benefit authorities insist on obtaining confirmation of a person immigration status by way of a Home Office status document when the claimant's immigration status is conferred directly by legislation, e.g. where the claimant has a right to reside based on EC legislation or they have a right of abode - such that they cannot be subject to immigration control.³⁷

(iii) Scenario three – obtaining replacement documents from the Home Office

If the benefit authority conducts a review of a claimant's existing entitlement to benefit this may involve them re-establishing the terms of the claimant's entry or stay in the UK. If the claimant has mislaid their original immigration status document (or the terms of their leave contained in the passport stamp or visa vignette are unclear) then payment of benefit is likely to be suspended by the benefit authority pending verification of their immigration status by the Home Office. If there is no reason to believe that the claimant's immigration status will have changed since they were awarded benefit, e.g. they were granted Humanitarian Protection or discretionary leave which is likely to be renewed, then it can be argued that having regard to the inquisitorial nature of benefit adjudication³⁸ the benefit authority is under a duty to verify the claimant's immigration status by using its own internal links with the Home Office.³⁹

In all of the scenarios described above, an application should be made to the benefit authorities that interim payments of benefit should be made pending verification of the claimant's immigration status by the Home Office, particularly where suspension or refusal of benefits is causing financial hardship to the claimant or their family.⁴⁰

37. See R(SB) 11/88 para 20 where limited leave was granted in error to a claimant who fulfilled the statutory conditions for a right of abode. See also R(PC) 2/07 which held that a British citizen with a right of abode cannot be subject to immigration control for benefit purposes. In R(Nahar) v Social Security Commissioners [2001] EWHC Admin 1049, a case in which contradictory decisions were made on whether there was a valid marriage for benefit and immigration purposes. The Court held that the Secretary of State for Work and Pensions was not bound by a decision made by an official acting on behalf of the Secretary of State for the Home Department.

38. Kerr v Department for Social Development [2004] UKHL 23 (as reported as R 1/04 (SF)) para 62.

39. See Housing Benefit Guidance Manual, Part C, Persons from abroad, paras 4.353–4.359 and Appendix C – Requests for a person's immigration status from the Home Office. The guidance states that the Home Office expects to respond to written requests in respect of non-asylum seekers within 10 days.

40. Suspension and Termination Guide (December 2005) available on: <http://www.dwp.gov.uk>.

12 EEA Nationals and Home Office documents

The general rule for EEA nationals is that they are not under any legal obligation to obtain an immigration status documents from the Home Office as any residence document issued by the host Member State merely has a declaratory effect and EEA nationals are entitled to rely on their passports or ID documents to assert their rights under EC law.⁴¹ An important exception to this rule is whether someone is to be treated as an 'extended family member' of an EEA national.⁴² It has been held that this is a matter for the Home Department and not the benefit authorities to decide.⁴³ Accordingly, no benefit can be awarded until the Home Office has made a favourable decision on the family member issue.⁴⁴

It should be noted that an Upper Tribunal Judge has described the 'registration certificate' issued under paragraph 2(2) of Schedule 4 to the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) as having very little practical value in relation to welfare benefits, as the benefit authority will still need to establish whether the grounds upon which the registration certificate was issued still subsist at the date the claim for benefit is made.⁴⁵ On the other hand, if an EEA national has a Home Office document confirming that they have acquired permanent residence in the UK, this should be accepted at face value.

13 Housing Benefit decisions based on immigration status where the claimant is in receipt of Income Support or Income-based JSA

The Housing Benefit regulations⁴⁶ makes specific provision that a local authority is bound to hold that a claimant is not ineligible as 'a person from abroad' if they are '*in receipt of*' Income Support or income-based JSA.⁴⁷ The only exception is where the local authority can show that the award of IS

41. Case C-357/89 Raulin v Minister van Onderwijs en Wetenschappen [1992] ECR I-1027.

42. Directive 2004/38/EC, Art 3(2)(a). EEA Regulations 2006, reg 8.

43. CPC/3588/2006 para 53, which held that Article 3(2) 38/2004/EEC does not confer a right of residence; that right can only arise if the Host State gives it: KG (Sri Lanka) and AK (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 13 followed; [2008] WLR (D) 11. See also CIS/0612/2008 para 33 in followed AP and FP (Citizens Directive Article 3(2); discretion, dependence) India [2007] UKAIT 00048.

44. R(IS) 6/08 para 6, and CIS/2635/2008 [2008] UKUT 5 (AAC), paras 12-20.

45. CIS/2054/2008 & CIS/2946/2008 [2009] UKUT 44 (AAC), para 18.

46. Housing Benefit Regulations 2006, SI 2006/213, reg 10(3B)(k).

47. R v. Penwith DC ex parte Menear (1991) 24 HLR (QBD), see CH/3079/2007 London Borough of Hillingdon v MJ [2009] UKUT 151 (AAC) para 23. The rule also applies to those in receipt of Pension Credit: HB(Persons who have attained the qualifying age for state pension credits) Regs 2006 SI 2006/214, reg 10(4)(k).

or income-based JSA was obtained by fraud such that the local authority may be able to decide that there was no award from the outset.⁴⁸

On the other hand where, a claimant is not in receipt of IS or JSA(IB) the local authority is required to make its own decision on whether the claimant is a person from abroad based on the evidence available. Official Guidance⁴⁹ states that where the claimant has simultaneous claims for IS or JSA(IB) and Housing Benefit that:

"4.234 The claimant's separate rights of appeal on HB/CTB claims require you to adjudicate entitlement separately."

SECTION 5: WELFARE BENEFITS, OVERPAYMENTS AND JUDICIAL REVIEW

14 Recovery by Deductions from Benefit

The most common method of recovery of an overpayment or a Social Fund debt is by way of deductions from ongoing entitlement to one of those social security benefits from which recovery can be made under social security legislation⁵⁰. The standard maximum rate of recovery from continuing benefit is £9.90 a week (with effect from 1 April 2010). The maximum rate of recovery when the overpayment has arisen as a result of fraud is £13.20 a week (with effect from 1 April 2010). The rate of recovery is negotiable and can be reduced if it is causing the claimant financial hardship.

15 Discretion to Waive Recovery

(i) Benefits administered by the Local Authority

The local authority has a discretion as to whether to recover a recoverable overpayment. It must consider all relevant factors,⁵¹ such as the presence or absence of dishonesty, financial hardship, and personal circumstances.⁵² Guidance on "Discretionary write-offs" can be found in paragraphs 4.730 to 746 of the 'Recovery of Overpayments'; note in particular the official definition of hardship at paragraph 4.741:

48. R v. South Ribble DC HBRB ex parte Hamilton [2000] 33 HLR 1002), see CH/1987/2009, GB v London Borough of Hillingdon [2010] UKUT 11 (AAC), paras 36-37.

49. The Housing Benefit Guidance Manual Part C4 at para 4.234.

50. Income Support, Attendance Allowance, Jobseeker's Allowance, Disability Living Allowance, Incapacity Benefit, Industrial Injuries Disablement Benefit, Carer's Allowance, Maternity Allowance, State Pension/Retirement Pension, Pension Credit, Severe Disablement Allowance, Widows Benefit, War Pension, War Disablement Pension and Bereavement Benefit, SSAA 1992, s 75(4) and 76(2).

51. See R v South Hams DC ex p Ash (1999) 32 HLR 405.

52. HB/CTB Recovery of Overpayments Guide 4.735.

Hardship is proven when the income, minus priority debts, gives a figure more than £9.00 below the applicable amount. This figure is updated annually and is based on the maximum that the DWP recovers from IS or JSA(IB).

If the local authority does accept an application on the basis of financial hardship, this usually results in a reduced rate of recovery, rather than the overpayment being written off.⁵³ The HB authority should also consider arguments based on abatement (reduction) of the overpayment by a notional entitlement to another benefit or premium. There is no right of appeal against a refusal to write off an overpayment. The only remedy is by way of judicial review.⁵⁴

(ii) Benefits Administered by the DWP

The DWP's 'Policy on Waiving Recovery', (the Policy) was only made public following the ruling in *B v SSWP* [2005] EWCA Civ 929. These decisions are made by a centralised team within Debt Management. The guidance makes it clear that it is only in exceptional cases that recovery will be waived; those that are particularly distressing or where there is severe ill-health. Statistically, there have been very few cases where recovery of the overpayment has been waived.⁵⁵

The DWP policy states that cases are to be considered on their individual merits but the following factors are to be taken into account:

- The type of overpayment;
- Good/bad faith - the culpability of the claimant;
- The length of time since the overpayment was made;
- Whether recovery will have a detrimental effect, and the claimant's personal circumstances;
- Defences against recovery;
- Cost-effectiveness of recovery;
- Where a group of people have all been overpaid as a result of the same mistake, then each person should be treated equally as regards recovery.

In relation to hardship, the policy states that there needs to be reasonable evidence that recovery would be detrimental to the welfare of the claimant or the claimant's family.

- On medical grounds, supporting evidence is expected to show how recovery would be detrimental to the health of the claimant/ family. This does not necessarily have to be from a doctor, but conversely, a letter from a doctor will not necessarily lead to a waiver;

53. HB/CTB Recovery of Overpayments Guide 4.462.

54. See *R v South Hams DC ex p Ash* (1999) 32 HLR 405.

55. For the year 2000 it was 86; for 2001, 117; for 2002, 110; for 2003, 72; for 2004, 50 and for 2005, 32. Source - Welfare Rights Bulletin 190 February 2006.

- On financial grounds, details of income and expenditure are required.

Note the response may be to reduce the rate of recovery rather than to waive it altogether.

R (Larusai) v Secretary of State for Work and Pensions [2003] EWHC 371 (Admin) is the lead case on the SSWP's exercise of discretion on waiving recovery of an overpayment. In *Larusai* the claimant had been overpaid Income Support when she failed to disclose that she had started full-time work. The claimant argued that the amount of the overpayment could be reduced by the notional Working Family Tax Credit which she would have been entitled to if she had applied for it. The SSWP declined to exercise his discretion to reduce the overpayment on this basis. He also refused to waive recovery, as it would not cause undue hardship. Newman J was satisfied that the SSWP had given proper consideration to the issue of hardship and he emphasised that it was not for the courts to form a view with regard to the SSWP's exercise of this discretion:

"It is inevitably a sensitive area for the operation of discretion. In this particular instance the Secretary of State has been provided with details of the precise financial position of the claimant. They have been weighed. That is what this legislation and this particular part of the legislation requires of the Secretary of State and his department. It is not for this court, unless it is satisfied that there has been an unlawful exercise of discretion, to form a view about the financial margins with which this case, or any case, might give rise to," (para 32).

16 Tax Credit Overpayments

The most common cause of Tax Credit overpayments is where the claimant fails to tell the HMRC about a change of circumstances reducing their entitlement or gives them incorrect information. However, experience suggests that a large number of overpayments arise due to the rigidity of the adjudication system. For example:

- *Situations where a person's partner joins or leaves him or her.* Changing status from single to couple or vice versa has the effect of automatically terminating entitlement.⁵⁶ In 2004-2005, changes in single/couple status accounted for £320 million of overpaid tax credits.⁵⁷
- *Failure to meet the required hours requirement:* Where a claimant's hours fluctuate so as to give rise to uncertainty as to whether they are working for the required number of hours,⁵⁸ it may turn out that they are not entitled to working tax credit when the final entitlement is ascertained but it will be too late to claim Income Support or (IB) JSA for the same period.

56. Tax Credit Act 2002, s.3(4).

57. Child and Working Tax Credits: Error and Fraud Statistics 2004-2005 (cited in note 95 above) table 3.

58. TCA, s.10(1). These rules are complex: Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 SI No 2005 reg 4. For most families it is 16 hrs, for childless couples it is 30 hrs.

(i) HMRC's discretion not to enforce Recovery

There is no right of appeal to a First-tier Tribunal against a decision to recover an overpayment⁵⁹ but HMRC has a discretion not to enforce recovery.⁶⁰ Whether or not it should be exercised is left to guidance. The principle guidance is to be found in HMRC Code of Practice 26 - COP26, *What Happens If We Have Paid You Too Much Tax Credit?*⁶¹ The basic policy is that it will waive recovery where the overpayment is caused by official error or where recovery would cause hardship.⁶²

Details of how the HMRC deal with overpayments can be found in both the Tax Credit Manual⁶³ and the Tax Credit Claimant Compliance Manual.⁶⁴ The latter is designed for use by Compliance Officers who carry out examinations of cases in order to ensure that the correct amount of tax credit is being paid. According to this guidance⁶⁵ an offset can be applied where the claimant has made a "genuine error" when they made their claim. But an offset would not be considered where a claimant was late in telling the HMRC about a change in their circumstances. In January 2010, the guidance was amended so that where there has been a delay in the claimant telling the Tax Credit Office of a partner leaving, or a new partner moving in, the Tax Credit Office will work out how much the claimant would have been paid if they had told them about the change on time and then deduct that amount from the overpayment.⁶⁶

(ii) Disputing a Tax Credit Overpayment

If the claimant wishes to dispute the overpayment decision it is best practice to use the Revenue's official dispute form (TC846).⁶⁷ The HMRC will suspend recovery when it receives this form, pending its decision whether to write off any of the overpayment. If a complaint to internal HMRC management does not bring results, a complaint may be made to the Adjudicator.⁶⁸ The Adjudicator's Office handles complaints about mistakes, delays, poor or misleading advice, and HMRC's use of discretion.⁶⁹ If this is unsuccessful a subsequent complaint to the Parliamentary Ombudsman may bring results.

59. TCA, s.38(1), which does not permit an appeal against a decision under s28(1). See CTC/2662/2005.

60. TCA, s.28(1) states that HMRC "may decide" that excess should be repaid.

61. The current version was published in March 2008: <http://www.hmrc.gov.uk/leaflets/cop26.pdf>.

62. Hardship is not defined and is simply described as not being able to meet your "essential living expenses".

63. Available online at: <http://www.hmrc.gov.uk/manuals/ntcmanual/Index.htm>.

64. Available online at: <http://www.hmrc.gov.uk/manuals/ccmmanual/index.htm>.

65. Tax Credits Claimant Compliance Manual: CCM15605 - Undisclosed Partners: Recovery of Overpayments from 17 May 2007 – General, see also para 15630, available on line

66. <http://www.hmrc.gov.uk/taxcredits/keep-up-to-date/changes-affect/family-change/partner-change.htm>

67. Available on line at: <http://www.hmrc.gov.uk/forms/tc846.pdf>.

68. See the leaflet for details: <http://www.hmrc.gov.uk/leaflets/ao1.pdf>.

69. Tax Credit Complaints by Helen McAlpine – Adviser 108, March & April 2005.

The Ombudsman has been severely critical of the lack of coherence of HMRC policy in relation to overpayments.⁷⁰

(iii) Judicial Review

Given the availability of alternative remedies, judicial review is not likely to be available as an option except in extreme cases. According to CPAG, a number of claims for judicial review relating to overpayment disputes have been threatened or commenced against the Commissioners for Revenue and Customs but these have been settled at the pre-permission stage.⁷¹ Arguments which could be used include the following:

- HMRC is fettering its discretion on whether an overpayment should be recovered by imposing a rigid requirement on its policy.⁷²
- Recovery of the full amount of tax credits where notional entitlement existed is a disproportionate penalty.

17 The power to make deductions from benefits and Insolvency

(i) Deductions from benefit during bankruptcy order

There is case law to the effect that insolvency legislation does not affect the DWP's (or a local authority's) right to recover a debt by deductions from benefit. This is because the right to benefit is a right to receive the net amount, after deductions are made.⁷³ Subsequent cases considered the question of whether the right to recover a debt by deductions continues after discharge from bankruptcy.

(ii) After bankruptcy order is discharged

Secretary of State for Work and Pensions v Balding [2007] EWCA Civ 1327 decided that the Secretary of State had no power to continue to recover an overpayment debt by deductions after a claimant had been discharged from bankruptcy, unless the overpayments were decided after the date of bankruptcy (see *Steel* below) or they were due to fraud.⁷⁴ The Court of Appeal agreed with the reasoning in the High Court [2007] EWHC 759

70. Tax Credits: Getting It Wrong? (2007) chapter 3, containing numerous case studies and suggestions for reform. See also Ombudsman Report - Mistakes happen - failure to put them right quickly and properly can make them considerably worse (19 Nov 2009).HC 6. <http://www.ombudsman.org.uk>.

71. See Factsheet Tax credits and judicial review (updated April 2010) available on line http://www.cpag.org.uk/cro/tax_credits.htm

72. *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 625D-E.

73. *R v Secretary of State for Social Security ex p Taylor and Chapman* [1997] BPIR 505.

74. In order to recover an overpayment after discharge based on 'fraud' the claimant must have (i) been found guilty of an offence whether under statute or otherwise; (ii) made an admission after caution of deception or fraud for the purpose of obtaining relevant benefit, or (iii) agreed to pay a penalty under section 115A of the Administration Act and the agreement has not been withdrawn.

(Admin) that if a decision to recover an overpayment has been made *prior* to the date of bankruptcy, the liability that arose under the social security legislation to repay the overpayment was a “bankruptcy debt” within the meaning of s.382 of the Insolvency Act 1986 and could not be recovered by the Secretary of State when the bankrupt was discharged. This interpretation was said to be in line with the general purpose underpinning section 281 of the 1986 Act ‘wiped the slate clean’ so as to enable the bankrupt to make a fresh start. Accordingly, once Mr Balding was discharged he was released from any liability for recovery of the overpayment.

This should be contrasted with the situation in *Steel v Birmingham City Council* [2006] EWCA Civ 1824, where the decision to recover the overpayment had been made *after* the date of bankruptcy.⁷⁵

The position following *Balding* can be summarised as follows:

- If a decision is made that a claimant was overpaid *prior* to a bankruptcy order, on discharge from bankruptcy, the Secretary of State’s right to recover the overpayment ceases.
- In addition to the right to recover by deductions, the Secretary of State is precluded from recovery by any other means, e.g. as a civil debt in the courts.
- There can be no distinction between DWP benefits and housing benefit for this purpose as the legislation is the same.⁷⁶

According to official guidance⁷⁷ the DWP and the local authority should not attempt to continue recovery in a *Balding*-type case. If this does happen then the claimant may apply for judicial review to prevent such a course of action (or sue in debt for any monies unlawfully withheld).

(iii) Deductions from benefit during a Debt Relief Order

The Tribunals, Courts and Enforcement Act 2007 introduced changes to the procedures available for debt relief; including the creation of Debt Relief Orders.⁷⁸ The policy aim behind Debt Relief Orders is to provide better assistance to people with multiple debts who have no disposable income or assets and little prospect of getting any in the foreseeable future and who otherwise are unable to access insolvency under the bankruptcy rules due to their lack of means. These provisions potentially affect overpayments of benefit, since they would appear to be “qualifying debts” for the purposes of the definition⁷⁹ and would accordingly make the DWP or local authority a

75 See HB/CTB General Information Bulletin G5/2007 for guidance to HB departments on recovering overpayments following discharge from bankruptcy.

76 See Overpayments Guide (DWP) paras 7.302-7.303.

77 Housing Benefit and Council Tax Benefit Circular ‘HB/CTB A3/2008’ (Feb 2008).

78 TCEA s108 and Sch 17.

79 TCEA s132.

“qualifying creditor”.⁸⁰ A claim for judicial review is currently before the Administrative Court⁸¹ which raises the following issues:

- Is the Secretary of State's action in continuing to make deductions from the Claimant's benefits to recover a qualifying debt under a Debt Relief Order unlawful given the prohibition against such action in Section 251G of the Insolvency Act 1986?
- Can the Secretary of State rely on established case law that deductions from benefit can continue to be made during a Bankruptcy Order as the legal basis for making such deductions during a Debt Relief Order?

SECTION 6: SHARED RESIDENCE AND DISPUTES OVER WHO SHOULD BE PAID BENEFIT IN RESPECT OF THE CHILD

18 Child Benefit and Child Tax Credits - shared residence cases

Child Benefit and Child Tax Credit is payable to only one person at any one time and cannot be split if more than one person is responsible for the child.⁸² There are rules for determining which person is entitled to CHB or CTC in such a case. Where the responsibility is shared but the parties cannot agree; in those circumstances HMRC has been given a discretionary power to determine to whom CHB or CTC should be paid.⁸³

In *R (Graham Ford) v Board of Inland Revenue* [2005] EWHC 1109 (Admin), Mr Ford challenged the decision of the Inland Revenue to pay CHB to his former wife for one of their two children. Mr Ford submitted that there was a failure to consider the greater impact on him of not receiving CHB because he was on state benefits; whereas Mrs Ford was in employment. The judgment sets out at length the internal guidance given to officers about the way they should take decisions about conflicting claims for CHB. Richard J concluded that the fact that Mr Ford was on Income Support had been taken into account by the Inland Revenue. He referred to a decision letter which stated: "The fact that you receive Income Support is not justification for changing the decision." This showed that the factor had been considered but was not regarded as providing a justification for making the payment to Mr Ford rather than to Mrs Ford. Having concluded that the relevant factors had been taken into account, Richards J held:

80 TCEA s131(1).

81 *R (Payne) v SSWP* (CO/3793/2010) and *R(Cooper) v SSWP* (CO/4048/2010). Permission has been granted and the cases are ready to be listed..

82 Social Security Contributions and Benefits Act 1992 (SSCBA 1992), s. 143. Tax Credit Act 2002. s. 8(1).

83 SSCBA 1992, para 5 of Sch 10 and Child Tax Credit Regulations 2002 (SI 2002/2007) reg 3.

"This means that the claimant's case has to come down to whether the decision reached in balancing those factors was an irrational one. In my judgment, it was plainly not irrational. It was well within the responses of a reasonable decision-maker to conclude that in circumstances where the parents had nearly equal responsibility for the two children, it was fair and reasonable for each parent to receive Child Benefit in respect of one child, notwithstanding the fact that one of the parents was on Income Support whereas the other parent was in employment. I would not go so far as to say that any other result would have been irrational, but I do take the view that no complaint can properly be made of the actual decision on grounds of Wednesbury unreasonableness," (at[31]).

For a Commissioner's decision on a shared residence case involving Child Tax Credit see *CTC/4390/2004*.

The Court of Appeal has recently held that the payment of Child Tax Credit to a principal carer only, where residence of the child is shared is justified under Article 14 and Article 1 of Protocol 1 ECHR: *Humphreys v HM Revenue and Customs* [2010] EWCA Civ 56. It is understood that the claimant is seeking permission to appeal to the Supreme Court.

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