# Welfare Benefits and Judicial Review

Paper Presented by
Desmond Rutledge
Barrister at Garden Court Chambers

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Manchester, M1 6FQ

GARDEN COURT
CHAMBERS

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## 1. The Context

### The Cuts to Legal Aid

**1.** The Government has confirmed the proposal to take welfare benefits out of scope of civil legal aid, subject to appeals on a point of law to the Upper Tribunal and the superior courts. However, welfare benefits remain within scope where the appropriate remedy is by way of judicial review. As the application of public law points to welfare benefits issues has generally had a low profile in the world of judicial review, this represents an ideal time to take stock and consider what types of legal work can realistically be undertaken under the general heading 'Welfare Benefits and Judicial Review'.

**2.** In November 2010 the Coalition Government announced its proposal to remove Welfare Benefits entirely from the scope of civil legal aid.[1] This would produce a saving of 22 million. The reasons given by the Government at the time were that:

- these issues are of lower importance than fundamental ones concerning safety or liberty because they are essentially about financial or property matters;
- help and advice are available from a number of other sources;
- the accessible, inquisitorial and user-friendly nature of the tribunal means that appellants can generally present their case without assistance (4.216-219).

**3.** It seems that no one in the advice sector found these reasons convincing and few people outside of government circles felt the cuts made economic sense either. The consultation paper generated a staggering 5,000 submissions against the proposal but despite this overwhelming opposition it appeared in the Legal Aid, Sentencing and Punishment of Offenders Bill ('LASPO'). On 7 March 2012 the House of Lords debated an amendment that would keep welfare benefits in scope. Lady Doocey said –

> "Legal aid for welfare benefits costs about £25 million a year. Limiting advice to reviews and appeals, as proposed in the amendment, would save £8.5 million, which would reduce the total cost to £16.5 million a year, which is less than 1 per cent of the legal aid budget - but, crucially, it would help 100,000 people. If claimants are denied legal aid to appeal against wrong decisions, their situation will get worse, intervention at a later stage will cost much more and there will be a knock-on cost for other public services. We are also likely to see a much greater backlog of tribunal cases because panels will be faced with clients who are unable to put together a coherent case because of their lack of welfare benefit knowledge. …
> ... To make matters worse, the Bill is being proposed at a time when the Government are carrying out one of the most substantial reforms of the welfare system in a generation. This will almost certainly result in a huge number of mistakes and a similar increase in the need

1 Government Proposals for the Reform of Legal Aid in England and Wales', (Cm 7967) (paras. 4.216 – 4.224).

for appeals. Surely our overriding duty in this House is to protect those people who are unable to protect themselves ... This amendment would allow some of the most vulnerable people in our society to fight for the benefits to which they are entitled." (Hansard, 7 Mar 2012: Column 1783).

**4.** The Lords voted by 237 to 198 in favour of Lady Doocey's amendment. However, this was overturned in the House of Commons by 288 votes to 246 on 17 April 2012. During the debate, Kenneth Clarke (Lord Chancellor and Secretary of State for Justice) referred to MPs' experience of assisting constituents as evidence in support of the Bill:

> "Every Member sitting in the Chamber is used to giving advice on social security benefits, because we do it all the time, and there are other voluntary bodies that give advice, but we do not get legal aid. I suspect that in an ordinary case, where there is no issue of law and it is a matter of fact, because of the huge complexity of social security regulations, the advice given by MPs and some members of their staff can be superior to that which is available from a large number of general family solicitors, but those solicitors get legal aid. No one else gets legal aid. Legal aid should be for those cases where legal advice and expertise is required, and it should be financed by the taxpayer on legitimate grounds." (Hansard; 17 April 2012: Column 226).

**5.** The Government did, however, introduce its own amendment to the Bill which it described as a "concession":

> "... it would make legal aid and assistance available for welfare benefits appeals on a point of law in the upper tribunal, the Court of Appeal and the Supreme Court. It would also include funding for applications for permission made to the upper tribunal, and it would also make legal representation available for welfare benefits appeals to the Court of Appeal and to the Supreme Court." (Hansard, 17 Apr 2012: Column 226).

**6.** During the debate, Kenneth Clarke said that in the light of the above concession they *could* make provision for funding in the First-tier Tribunal where the case involved 'a point of law'. On this, Mr Clarke offered the following comments:

> "It would be reckless of me to try off the cuff to make a tight definition of a point of law. It is about a situation where a particular question arises out of the interpretation of a regulation and there is no clear and binding precedent for exactly what the law should be when it comes to applying it to the set of facts involved, and it is then up to the tribunal judge to decide. Following the concessions that I have introduced about upper tribunal and Court of Appeal cases, the judge will certify that a point of law is involved in a case because he thinks that it is one in which the guidance of the upper tribunal or the Court of Appeal is required on what exactly the law will say that it means. That is what is meant by a point of law." (Hansard; 17 April: 2011: Column 230).

**7.** In summary, from April 2013 welfare benefits are out of scope except for drafting appeals on a point of law to the Upper Tribunal (assistance only) and representation in the Court of Appeal and the Supreme Courts.[2]

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2 While funding for representation before the Upper Tribunal remains out of scope funding may still be available under the Exceptional Cases criteria in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 10(3), if funding is necessary as failure to do so would be a breach of the individual's ECHR rights or an enforceable EU right. The current guidance can be found in the LSC Funding Manual Vol 3, section 27.

## Funding for judicial review for welfare benefits remains in scope

**8.** The Green Paper stated that legal aid funding for judicial review for welfare benefits would remain in scope and even gave some examples (perhaps a tacit recognition that many people do not think of judicial review in the welfare benefit context):

> "As with other areas of law, funding for judicial review will continue to be available for benefits cases. Such cases are likely to occur where there are delays in making decisions on applications for benefits, or delays in making payments, or where there has been suspension of benefits by authorities pending investigation," (Green Paper 4.224).

**9.** Many however, take the view that judicial review has little or no place in social security law given the comprehensive appeals system for decisions on entitlement to welfare benefits. They point out that the court cannot order that a claimant is entitled to benefit as this is for the statutory authorities to decide. Does this explain the low profile welfare benefits have in public law circles? It seems to me that there are at least three possible explanations for the apparent lack of judicial review work in this area:

- Judicial review is not used because it is always possible to resolve benefit-related issue by other means, e.g. by lengthy correspondence, formal complaints or by waiting for the outcome of a statutory appeal.

- Judicial review is being used but in those aspects of the decision making process where it is possible to resolve the welfare benefit issue without the need to issue proceedings or the matter is compromised before coming on for a full hearing.

- Judicial review is underused as social security is a marginalised area of law where caseworkers find it difficult to gain access to lawyers experienced in judicial review compared to other areas of law, such as housing and immigration.

**10.** Perhaps there is a 'grain of truth' in each of the above but it is my view and experience that public law is underused in this field. In answer to those who say social security has no place in the Administrative Court, it is worth bearing in mind that social security law contains a strong pubic law element and that the process of benefits adjudication is inquisitorial:

> "Appeal tribunals are part of the adjudication system which is designed to ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled (as opposed to the benefits to which the parties may be contending that they are entitled). There is a legitimate public interest in ensuring such a result.[3]

**11.** Lord Justice Dyson (as he then was) accepted a submission that social security appeals to a Commissioner on a point of law were more akin to immigration appeals rather than to other types of civil appeals:

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3 R(IB) 2/04, para 32.

> "I accept the submission of Mr Drabble that the nature and functions of the social security commissioners are closer to those of the IAT [Immigration Appeal Tribunal] than to either the county court or the Lands Tribunal. They are an administrative tribunal, frequently called upon to adjudicate on significant legal issues which have far-reaching consequences well beyond the individual case, including important issues of human rights and EU law. I accept that issues such as the right to life and the right not to be tortured are unlikely to arise in a social security case. But a social security case may well involve the right of a claimant to subsistence income and so directly affect their access to the most fundamental necessities of life.[4]

The central thesis of this paper is that the application of public law arguments to welfare benefit issues is entirely proper in the appropriate case and that such cases can make an important contribute to the development of the law.

## 2. Tactics and Procedure

**12.** One obstacle to the proper development of public law challenges in welfare benefit cases is that most welfare rights specialists do not get the opportunity to acquire 'hands on' experience of using judicial review procedure. This means there is a gap between the welfare rights specialist identifying a public law argument and translating that into litigation in the Administrative Court. This section concentrates on the mechanics of judicial review procedure and draws attention to some of the pitfalls that can befall those who are new to this area.

### The unlawful act

**13.** It is often said that when exercising its supervisory role of judicial review, the Administrative Court considers the legality of the decision under review i.e. the way in which it is made rather than an assessment of the merits of the case – for this is the role of the relevant public body. Accordingly, in order to bring judicial review proceedings against a benefit authority (be it the Department of Work and Pensions, Child Support Agency, Housing Benefit authorities or HM Revenue and Customs), it is necessary to identify that the benefit authority has failed to do something it is legally required to do, or it has done something it has no power to do or the decision maker for the benefit authority has acted irrationally in the sense that the decision maker has done something that no reasonable person could consider to be sensible.

### Indentifying the target for the claim

**14.** Where a potential claimant is considering judicial review proceedings then they must: -

- identify the action or decision that is unlawful which will form the 'target' of the claim. The Civil Procedure Rules refer to a claim to review the lawfulness of "an enactment" or "a decision', action or failure to act" (CPR 54.5(2));

4 Wiles v Social Security Commissioner & Anr [2010] EWCA Civ 258, para [46].

- warn the benefit authority in advance that judicial review will be sought unless the decision is amended or the benefit authority does the thing that the claimant says it is legally required to do (Pre-Action Protocol for Judicial Review).[5]

The Pre-action protocol letter

**15.** The purpose of the Pre-action protocol letter is to ensure that there is a fully argued letter before action to give the potential defendant an opportunity to deal with the complaint without the need for litigation The letter should: -

- explain in detail where it is alleged the public body has gone wrong, this means identifying the statutory duty or power and why the decision or action is wrong on public law grounds;
- ask for detailed reasons for the decision within a time limit;
- narrow down what is in dispute factually, i.e. set out the facts and invite the benefit authority to agree them;
- suggest a solution which avoids the need for litigation (i.e. a fresh reconsideration of its decision).

It is also important that the pre-action protocol letter is sent or copied to the relevant legal department, so that it is seen by a lawyer who will be alive to the importance of complying with the pre-action protocol, e.g. that they must produce a reply within 14 days of the letter before action.

When does the time-limit start to run?

**16.** CPR rule 54.5 provides that a claim for judicial review must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose. Hence, there is a duty to act promptly in addition to meeting the 3 months deadline.

**17.** Time starts to run from the unlawful event or decision upon which the claim is based. If an advice agency is engaged in lengthy correspondence with the benefit authority it may not always be apparent what event gives rise to the claim for judicial review. As a rule of thumb it can be said that:

- if the claim is based on a failure to exercise a power, and a request has been made to the benefit authority for it to exercise that power within a specified time then the time limit starts to run from the deadline set in the request letter;

- if the claim is based on a decision or action then the time limit starts to run from the date the decision was notified to the claimant.[6]

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5 See also the Administrative Court Guidance: Notes for guidance on applying for judicial review (April 2011) which is available online.

6 See Appendix to R(P) 1/04, CG/37/2008 and SD v Newcastle City Council [2010] UKUT 306 (AAC) on the need to notify a decision. If a notification letter has been sent then this will normally be sufficient to render the decision effective because the claimant will then be in a position to challenge the decision LS v London Borough of Lambeth (HB) [2010] UKUT 461

**18.** The time limit does not start again every time further correspondence is received from the benefit authority. It will only start to run again if the benefit authority has given a clear undertaking that it will make a 'fresh consideration' of the matter and it issues a 'further decision'. A letter which merely gives reasons for upholding the original decision will not normally be sufficient. If a fresh decision is made after a LSC certification has been issued in respect of the original decision then it may be necessary to amend the certificate to cover work being done in relation to the new decision.

**19.** Where the 3 months deadline is about to run out then a 'protective claim' can be lodged to protect the claimant's interests. The defendant will need to be notified that the claim is being lodged due to the time limit running out and the claim form should inform the Court that the usual time limits under the protocol have not been complied with for this reason.

Reasons for delay

**20.** If the 3 months' deadline has been missed then reasons for the delay in lodging the clam will need to be added to the application to persuade the Court to extend the deadline.[7] Difficulties in obtaining public funding or any difficulties the claimant may have in accessing specialist advice may justify an extension of time; but delay on the part of the claimant's lawyers will not.

Have all genuine alternative remedies been exhausted?

**21.** In order to comply with the pre-action protocol and the need to exhaust suitable alternative remedies before using judicial review, the pre-action letter should: -

- Include what attempts the client has made to resolve their benefit problems.
- Ensure there is nothing outstanding for the client to do e.g. is there is incontrovertible proof of delivery of information to the relevant benefit authority;
- Ensure that where a statutory appeal needs to be made, this has been lodged and the client has signed the necessary authority.
- If the case involves maladministration, ensure that the official complaint procedure has been activated.[8]
- Explain why the complaint has not resolved the issue or it is not an appropriate remedy.[9]

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(AAC), para 118 but it is arguable that the time limit does not start to run if the contents of the letter does not comply with the legislation.

7 See Andrew Finn-Kelcey v Milton Keynes Council [2008] EWCA Civ 1067, paras 20-29 for a summary of the law on delay.

8 See 'Dealing with DWP Delays and Administrative Issues by Kate Smith - Advisor 150 March/April, p 6.

- Explain why judicial review is considered to be an appropriate remedy despite the availability of a right of appeal.

**22.** The Funding Code for Judicial Review[10] states that the issue for Commission is whether the reasonable private paying client would bring judicial review proceedings rather than pursue the alternatives:

> "When applying for a certificate under form CLS APP 1 or applying to amend the scope of a certificate under form CLS APP 8 it is important that the sections of the form headed Alternatives to Litigation are completed in detail. The issue for the Commission will be whether a reasonable private paying client would go to court rather than seek to pursue alternatives, taking into account the likely effectiveness of those alternatives (compared to what might be obtained on judicial review), the urgency of the case, the attitude of the opponent and all the other circumstances." (para 16.5.6).

## Is the 'costs benefit test' met?

**23.** Judicial review is a priority under the Funding Code and the primary concern is the public interest in holding public bodies to account. But the cost-benefit test still applies. The Guidance points out that in welfare benefits cases this can be met in certain cases where the monies at stake at first glance appear to be small:

> "When considering the relationship between the likely benefit to the client and the costs to be incurred, it is important to remember in the welfare benefit context that the lack of other remedies combined with the importance of the matter to the client and the long term financial effect of entitlement to a particular benefit may sometimes mean that this test is met even though the financial benefit to the client may well not be great in the short term (e.g. when expressed in terms of weekly income). However, there will be cases where the grant will be refused having regard to other non-judicial remedies (such as obtaining a grant or loan or item of furniture from another source) or where the issue or amount of benefit at stake is relatively trivial." (21.6.5 Welfare Benefits).

Note: The statutory charge does not apply as welfare benefits are not an assignable interest.[11]

## Urgent Consideration

**24.** Where the claimant is suffering severe hardship or they are at risk of being made homeless then it will normally be appropriate to ask for the claim to be considered urgently (i.e. within a time frame) and ask for interim relief in the form of an order requiring or preventing the public body from doing something pending the final hearing of the judicial review. Where the claimant requests urgent consideration or interim relief this is done on Form N463 which must be included in the Claim Form (Form N461) (see CPR 54.6).

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9 R v Sutton LBC ex parte Tucker (1998) 1 CCLR 251 - the social services statutory complaints procedure was not an adequate alternative remedy because the client would have had to argue points of law unrepresented before a lay panel.

10 The Legal Services Commission Manual: Funding Code, Volume 3 (October 2010 Issue 1).

11 The Community Legal Service (Financial) Regulations 2000 (2000/516) reg 44 (1)(h).

Note: The urgent consideration form (N463) must be served on the Defendant prior to the claim form (N461) being lodged at court. See *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 WLR 810. The test that needs to be satisfied when seeking interim relief compelling the mandatory performance of an obligation by a public authority is whether *a strong prima facie case can be made out*. This is a higher test than that for the grant of permission, where the claimant need only establish that a case is 'arguable'.

Claims where there is a threat to the home

**25.** It should be noted that where interim relief is sought based on there being an imminent threat to the claimant's home, the following factors will normally need to be present: -

- the claimant does not have a statutory defence to the possession proceedings;
- the landlord/authority has refused a request for an adjournment;
- the likelihood of the county court granting an adjournment to allow time for the HB issue to be resolved is poor.

The Administrative Court may be unwilling to order the county court to stay possession proceedings but it can order the local authority not to proceed with the possession claim until it has reconsidered its HB decision in the light of the legal arguments advanced by the claimant.

Costs issues where matter has been settled or withdrawn

**26.** If a defendant benefit authority incurred costs having to submit an acknowledgment of service, then it can claim the costs of that work from the claimant.[12] It is therefore important that the claimant has the costs protection provided by legal aid before proceedings are issued.

**27.** The Court is reluctant to consider costs applications by either party where the case has been settled or withdrawn.

- If the defendant benefit authority does concede the claim for judicial review and awards benefit, then the claimant should be entitled to have his or her legal costs paid by the defendant on an inter-party basis even though the claim is being withdrawn by consent.
- If the defendant benefit authority does *not* concede the claim and argues that the claim would not have succeeded if it had gone to a full hearing then provision can be made for written representations regarding the costs when drawing up the consent order for withdrawal of the claim.

To obtain costs in these circumstances the claimant, in essence, needs to show that the authority decision or action was made on a clear-cut error of law which can be

12 R (Mount Cook Land Limited) & anr v. Westminster City Council [2003] EWCA Civ 1346.

determined by a 'cursory glance' at the papers. For recent guidance on costs on permission stage applications see *Mendes & Anor v London Borough of Southwark* [2009] EWCA Civ and *M v London Borough of Croydon* [2012] EWCA Civ 595.

## 3. Benefit Decisions Susceptible to Judicial Review

**28.** When deciding what welfare benefit decisions are susceptible to judicial review the following questions are relevant: Does the benefit authority owe a duty to the claimant? Has the benefit authority misunderstood its powers or acted unfairly? Is the decision wrong on its face? If the decision letter is unclear why, then a preliminary step could be to ask the public body to provide reasons (and the legal basis) for its decision.

**29.** Broadly speaking, decisions or actions by benefit authorities susceptible to judicial review are those which do not carry any right of appeal. These include:

**(i) Decisions prescribed as not carrying any right of appeal.**[13]

**(ii) Interim or interlocutory decisions of a First-tier Tribunal.**

**(iii) Refusal of permission to appeal by the Upper Tribunal.**

**(iv) Decisions involving an exercise of a statutory power.**

**(v) Decisions based on a statutory duty.**

**30.** It is the decisions involving an exercise of discretion that represent the greatest potential for the use of public law arguments in social security law. These include:

- decisions to award Discretionary Housing Payments;
- decisions on whether to make interim payments of benefit;
- decisions to suspend payment of benefit;
- decisions on whether to waive recovery of an overpayment;
- decisions refusing to carry out a further revision.

13 Tribunals Courts and Enforcement Act 2007, s. 11(1), the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/ 991) reg 27, Schedule 2, and the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (2001/1002), reg, 16, the Schedule.

## 4. Established Public Law Challenges

### A DECISIONS THAT DO NOT CARRY ANY RIGHT OF APPEAL

**31.** Even though these are prescribed in the legislation there have been examples where it has nevertheless been held that such 'decisions' can be challenges as part of an appeal against entitlement. One example being a local authority's determination not to include a claimant's son as an occupier within the HB claim which was referred to a rent officer was held to be a matter that could be determined within an appeal to a statutory tribunal.[14]

Example 1

C's husband made a claim for HB/CTB. The authority did not make a decision on entitlement but instead made payments on account pending a decision on the claim. In the meantime C was advised to complete a claim for HB/CTB (for the same property) as she qualified for the disability premium which meant the amount used to calculate entitlement to HB/CTB would be greater. A request was made that C be the claimant when a decision was made on the claim. The authority refused. The public law issue was whether the authority's refusal was based on a misdirection as to the nature of the powers available to it under the legislation, such that it fettered its own discretion.

Example 2

C was a secure tenant of a council flat and in receipt of HB. The authority purported to recoup an overpayment of HB by a direct debit from C's rent account for the whole amount, thereby creating rent arrears and put C in breach of an existing possession order. A request was made that the authority uses its power to recover the overpayment by weekly deductions from C ongoing HB instead. The authority refused saying that this was not possible and that the threat to C's home was due to non-payment of rent not the overpayment. The public law issue was whether the authority's refusal is based on misdirection as to rules governing recovery of overpayments under such that its refusal was irrational. In the alternative, there was a failure to take relevant factors into account namely the need to avoid using a method of recovery that created rent arrears so as to put C at risk of eviction (*Housing Benefit/Council Tax Benefit Overpayments Guide* paras 4.150-153).

[14] SK v South Hams DC ; [2010] UKUT 129 (AAC); (J. Mesher), paragraphs [18]-[23].

## B DECISIONS BASED ON THE EXERCISE OF A STATUTORY POWER

### *(i) Discretionary Housing Payments*

**32.** Discretionary housing payments (DHPs) can be paid if *'it appears to"* an authority that the applicant is in need of additional help with their housing costs.[15] The authority has a wide discretion as to whether to make a DHP, the amount that is paid and the period it is paid.[16] The DHP Best Practice Guide[17] (March 2011) sets out various groups which local authorities should consider following the reductions in local housing allowance from April 2011. The public law principle at issue is whether the decision has been made by reference to and application of a rigidly applied set of rules or criteria such that it constitutes the fettering a discretion.[18] Possible scenarios include:

- the authority refuses to make a DHP award on the basis that applicant cannot point to some "special circumstance" such as health problems and that the lack of "any special circumstances" means that this automatically disqualifies" her for DHP;

  an applicant with a severe and permanent disability is awarded DHPs for fixed period of 12 weeks with an option to renew. But official guidance states that an indefinite award can be made in these circumstances: see *DHP Best Practice Guide", (*March 2011) para 401.

### *(ii) Interim Payments of Benefit*

**33.** There is provision for the DWP[19] and HMRC[20] to make interim payments of benefits if there is a delay in processing a claim and it appears that the claimant is, or may be, entitled to benefit.[21] The public law principle at issue is whether the failure to

15 Child Support, Pension and Social Security Act 2000, s69 and the Discretionary Housing Assistance Regulations 2001 (SI 2001/1167).

16 Discretionary Housing Assistance Regulations 2001, reg. 2(2).

17 Available on the DWP website: http://www.dwp.gov.uk/docs/dhpguide.pdf.

18 British Oxygen Co Ltd v Board of Trade [1971] AC 610, 625D-E and 'Making better use of Discretionary Housing Payments': Gareth Mitchell, Adviser 136 Nov/Dec 2009, page 9.

19. Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1).

20 Benefit and Guardian's Allowance (Administration) Regulations 2003 (SI 2003/492).

21. 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 of State for Social Security ex p Sarwar & ors (1995) 7 Admin L.R. 781. See Decision Makers Guide in Chapter 9 on the conditions that must be satisfied before a payment can be made at paras 09325-26.

use the power or the failure to take the claimant's circumstances into account amounts to a fettering of a discretion.[22] Common scenarios include:

- delays in processing Child Benefit and DWP claims due to being allocated a National Insurance number;
- delays processing DWP claims made by EU nationals;
- delays processing Child Benefit claims, particularly from foreign nationals who have recently been granted indefinite leave to remain.

**34.** Note: if the benefit authority does make a decision on the claim but decides the claimant has no entitlement to benefit, then there is an express prohibition on making interim payments pending an appeal.[23] Where the claimant is an EU citizen s/he may be able to argue that the domestic rule should be disapplied having regard to the principle of effective protection of EU law rights.[24] But see *Juscik (Tradeusz), Re Judicial Review* [2011] NIQB 7 where an A8 national's application to be paid interim payments of JSA pending the determination of his statutory appeal was dismissed by the High Court in Northern Ireland.

Example 1

C was issued with a permanent residence certificate by HO as a family member. C later separated from partner and claimed IS as a lone parent. The DWP refused to process her IS claim until they obtained details of her ex-partner's circumstances. The public law issue was whether the DWP's failure to make interim payments is unlawful because it was 'clear' that C had a permanent right to reside based on the HO document and did not need to rely on a derived right based on her ex-partner's status as a qualified person.

Example 2

C was awarded pension credit but then payment of benefit was suspended due to concerns about C's date of birth. Her previous claims for benefit had been based on a certificate registering her as a British Citizen dated July 1987. However, in 2002 C had, on the advice of her GP, obtained a birth certificate from her village in Bangladesh and submitted this to the DWP. As this gave a different date of birth to the Home Office document the DWP said it could not make any payments until the Home Office amended its documentation. The HO said it would not alter its registration document. As a result C was refused PC and had been living on widow's benefit of £23 per week for over two years. A new claim for PC was made. The public law issue was whether the failure to make interim payments on the new claim was irrational given that (i) according to both

22. R v North West Lancashire Health Authority ex parte A, D and G [2000] 1 WLR 977, CA.

23 Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg (1A). See also .R v Secretary of State for Social Security, ex parte Grant [1997] EWHC Admin 754.

24 R v Transport Sec, Ex p Factortame Ltd (No. 2) [1991] 1 AC 603.

documents she was over 60 years of age and (ii) the legal status of the naturalisation document issued by the HO was not affected by the birth certificate issued in 2002.

### *(iii) Suspending payment of benefit*

**35.** The benefit authorities have the power to suspend payment of benefit in a range of circumstances, including situations where the claimant's appeal to a first-tier tribunal has been allowed but the authority intends to appeal to the Upper Tribunal.[25] Broadly speaking, the question of whether the suspension should be lifted will depend on whether the claimant is suffering financial hardship. The public law principle at issue is whether the decision-maker has erred by taking irrelevant factors into account or by failing to take relevant factors into account. See factors contained in the DWP's internal guidance on the suspension and termination of payments.[26] Typical scenarios include:

- payment is suspended when claim is referred to fraud investigation unit but the suspension continues for many months despite the claimant cooperating fully with all requests for further information;

- payment is suspended based on the authority's mistaken view that the claimant is ineligible for the benefit as 'a person from abroad' e.g. where the claimant has made an 'in time application to extend or vary their leave which does not have a public fund condition attached';[27] or the leave is wrongly held to be "limited" because it has been granted for an initial period of three years with the possibility of renewal.

**36.** If the benefit authority replaces the decision to suspend with a decision terminating entitlement it will not normally be willing to pay benefit pending the appeal as such payments cannot be recouped if the claimant's appeal is subsequently dismissed.[28]

**37.** Where the claimant is an EU citizen s/he may be able to challenge a suspension of benefit following a successful appeal based on the principle of effective protection of an individual's rights under EU law.[29] But see *R (Sanneh) v SSWP* [2012] EWHC 1840 (permission decision) where a claimant was refused relief by the Administrative Court despite a first-tier tribunal ruling that she had a right to reside based on the ruling in *Zambrano v Office national de l'emploi (ONEM)* (Case C-34/09).

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25 Social Security Act 1998, s 21, the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), reg 16, The Housing Benefit and Council Tax (Decisions and Appeals) Regulations 2001 (SI. 2001/1002), Part III, and Tax Credits (Payments by the Board) Regulations 2002 (2002/2173) reg 11 where payments can be postponed.

26 'Suspension and Termination Guide' (April 2010) – see Factors which may make suspension inappropriate (para 2050-52).

27 Immigration Act 1971, ss. 3C, 3D and CIS/2635/2008 [2008] UKUT 5 (AAC), para 15.

28 R (on the application of Hall) v Chichester District Council [2007] EWHC 168 (Admin).

29 R v Transport Sec, Ex p Factortame Ltd (No. 2) [1991] 1 AC 603.

### *(iv) Waiving recovery of an overpayment*

**38.** The benefit authorities have a discretion to waive recovery of a recoverable overpayment (where the claimant does not dispute liability or their rights of appeal have been exhausted or lost due to more than 13 months having passed since the overpayment decision). The benefit authorities are required to consider all relevant factors, such as the presence or absence of dishonesty, financial hardship, and personal circumstances. The public law issue is whether there has been a lawful exercise of discretion.

- For Housing Benefit see Guidance on "Discretionary write-offs" in paragraphs 4.730 to 746 of the 'Recovery of Overpayments'. [30]
- For benefits administered by the DWP see 'Policy on Waiving Recovery'.[31]
- For HMRC see Code of Practice COP26, *What Happens If We Have Paid You Too Much Tax Credit?*[32] - which provides that recovery may be waived where the overpayment is caused by official error and recovery would cause hardship.[33]

### *(v) Refusal to carry out a revision*

**39.** An any time revision for 'official error'[34] can represent the only route open to obtaining full arrears of benefit if the past decision was not appealed at the time and more than 13 months have elapsed. If a benefit authority refuses a request to carry out a revision of its own decision then the only remedy is by way of judicial review:[35] Common scenarios include:

- Cases where the claimant is blind and has been awarded the care component of DLA at the lower rate instead of at the middle rate based on a failure to apply the ruling in *Mallinson v Secretary of State for Social Security* [1994] 1 WLR 630, (also reported as R(A) 3/94).[36]

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

31 See also R (Larusai) v Secretary of State for Work and Pensions [2003] EWHC 371 (Admin).

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

33. For guidance on recovery of overpayments when there has been a delay in a claimant telling the Tax Credit Office of a partner leaving, or a new partner moving in see Tax Credit Claimant Compliance Manual CCM15000 - Undisclosed Partners.

34 Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/ 991), reg 1(3), 3(5) and Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/ 1002), reg 1, 2(a).

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

36 Note if the Secretary of State does carry out a revision for official error but refuses to revise the decision, there is no right of appeal to a tribunal against such a refusal and the only remedy is by way of judicial review. If, however, such a request is still outstanding, and the claim comes before a tribunal on appeal, then the application for a revision can be considered by the appeal tribunal: see R(IS) 15/04, para 78.

- Cases where the local authority automatically impose the maximum deduction for HB/CTB where the non-dependant's income is likely to be low having regard to the ruling in CH/48/2006 and the revised guidance in HB/CTB Circular A8/2007.

## C FAILURE TO CARRY OUT A STATUTORY DUTY

**40.** The Housing Benefit rules[37] make provision for a 'payment on account' but only where benefit paid in the form of rent allowance, i.e. tenants renting from housing associations and in the private sector.[38] Such a payment will be made if (i) the claimant has provided the evidence reasonably needed and requested and (ii) there are 8 weeks rent 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).[39] The public law principle at issue is the failure to carry out a mandatory duty.

## D DECISION OF AN UPPER TRIBUNAL JUDGE REFUSING PERMISSION TO APPEAL

**41.** Historically, the test for applications to judicially review a refusal of leave of a Social Security Commissioner has been a high one – namely that there is an error "that is sufficiently grave to justify the case being treated as exceptional": *R (Sinclair Gardens) v The Lands Tribunal [*2005] EWCA Civ 1305; [2006] 3 All ER 650.[40] In 2010 the Court of Appeal reversed this to hold that conventional public law principles apply: *R (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258 [2010] AACR 30. But the issue then had to be considered afresh following the transfer of jurisdiction to the Upper Tribunal (Administrative Appeals Chamber) under the Tribunals, Courts and Enforcement Act 2007.

CASE STUDY - CART

*R (Cart) v The Upper Tribunal and ors* [2011] UKSC 28, 3 WLR 107:

In this case, the Supreme Court provided authoritative guidance as to both the susceptibility to judicial review of decisions of the Upper Tribunal, and the standard to be applied. Two alternative approaches advanced in argument were considered but not adopted. It had been argued on behalf of the Government that a refusal of permission by the Upper Tribunal was only reviewable in 'exceptional circumstances' ((*R (Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650). The claimants, on the other hand, argued that normal public law principles should apply (*R (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258). Instead the court, referring with approval to the judgment of Dyson

37. HB Regs 2006, reg 93 – Payment on account of a rent allowance.

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

39. See HB Guidance Manual para 6.158 - 160.

40 See R (Hook) v Secretary of State for Work and Pensions [2007] EWHC 1705 (Admin) (R(IS) 7/07).

LJ in *Wiles*, adopted "the second-tier appeals criteria", as offering "a rational and proportionate" restriction on the availability of judicial review, and one which would: "... recognise that the new and in many ways enhanced tribunal structure deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected". Under the second-tier appeals criteria permission to appeal is not to be granted unless the relevant court considers that: "(a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the [Court of Appeal] to hear the appeal". Lord Dyson's speech at paragraphs [130]-[131] contains some useful guidance on the second appeal criteria where he says that (i) it is not enough to point to a litigant's private interest in the correction of error in order to obtain permission for a second appeal; (ii) if the law is clear and well established but arguably has not been properly applied in the particular case, it will be difficult to show that an important point of principle or practice would be raised by an appeal; the second limb of the test ("some other compelling reason") would enable the court to examine an arguable error of law in a decision of the FTT which may not raise an important point of principle or practice, but which cries out for consideration by the court if the UT refuses to do so; this might include a case where it is strongly arguable that the individual has suffered what Laws LJ referred to at para 99 as "a wholly exceptional collapse of fair procedure" or (ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences."

**42.** In *R (Nicholas) v Upper Tribunal* (CO/12305/2010) permission was granted in an incapacity appeal on the basis that it was at least arguable that the high threshold in *Cart* has been met. The case concerns an incapacity appeal where previous favourable personal capability assessments (PCAs) where not included in the papers by the DWP. At the start of the hearing the tribunal asked the appellant whether she wanted an adjournment to obtain the PCAs. The hearing went ahead and the appellant was awarded 6 for physical health and 3 points under the mental health test. Applications to set aside the tribunal's decision and permission to appeal to the Upper Tribunal were refused. On granting permission to judicially review the Upper Tribunal's refusal Forskett J commented that he was troubled that "an unrepresented party was effectively presented with the decision whether to seek an adjournment of the First-Tier Tribunal's hearing when she either did not or may not have appreciated the importance of doing so." The claim is listed for a final hearing on 26 July 2012.

## E INTERIM / INTERLOCUTORY DECISIONS OF THE FIRST-TIER TRIBUNAL

**43.** The Tribunals, Courts and Enforcement Act 2007 created a judicial review jurisdiction for 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, e.g. a refusal to admit a late appeal.[41] A Panel of Three Judges has held that most interlocutory decisions are in

41 Case-law has established that the First-tier tribunal's power to extend time is unqualified as it is no longer limited by reference to "special reasons' see R (CD) v First-tier Tribunal (CIC) [2010] UKUT 181 (AAC) [2011] AACR 1 and R(Hutton) v First-tier Tribunal (Criminal Injuries Compensation Authority) [2012] EWCA Civ 806.

principle appealable and that in those circumstances the remedy of judicial review would not be appropriate.[42] Where it is unclear which route should be followed, judicial review or a statutory appeal - then parallel applications to appeal and review the decision may need to be made to the Upper Tribunal, in order to protect the claimant's position.

**44.** For further details on procedure and funding see: Tribunals, Courts and Enforcement Act 2007, s.15-19, the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) Part 4; the HMCTS website for judicial review claim form 'Form JR1' and associated leaflets and the LSC Funding Manual Volume 3 Part C General Guidance 22 on 'Tribunal Representation'.

## F DECISIONS ON WHETHER TO EXPEDITE AN APPEAL

Delay in authority referring housing benefit appeal to HMCTS

**45.** If the benefit authority fails to refer an appeal to the HM Courts and Tribunals Service (HMCTS) within a reasonable period of time[43] then the following steps can be taken to resolve the issue:

- a formal complaint can be lodged with the local authority which makes reference to the need to forward housing benefit appeals to the HMCTS within a period of four weeks in accordance with the recommendation of the Local Government Ombudsmen;[44]

- an application can be made direct to HMCTS for a District Judge to use the tribunal's case management powers[45] to list the hearing straightaway with a direction that if no submissions are provided by the local authority within, say, 14 days, then the case will be listed for a hearing based solely on the papers already provided (by the appellant).[46]

Delay in appeal being listed for a hearing by HMCTS

**46.** The First-tier Tribunal has extensive case-management powers[47] which enable it to arrange the hearing of the appeal with expedition if that is what is required to do justice between the parties.[48] Note: The Administrative Court will expect the claimant to make a request for the expedition of the hearing of the appeal if there is a concern

42 LS v London Borough of Lambeth (HB) [2010] UKUT 461 (AAC), para 97.

43 On delays in preparing housing benefit appeals see FH v Manchester CC [2010] UKUT 43 (AAC).

44 In the Local Government Ombudsmen Special Report H01029 (Feb 2004) 'Advice and guidance on arrangements for forwarding housing benefit appeals'.

45 The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (2008/2685) rules 5-7.

46 See R(H)1/07 which held that the tribunal has jurisdiction even before the response is submitted to it. In appropriate cases it should accept this and direct expedition.

47 The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (2008/2685) rules 5-7.

48 Rule 5 of Tribunal Procedure Rules.

that the claimant will become destitute or homeless whist awaiting the outcome of their statutory appeal.

## 5. Test Cases

**47.** A test case can be described as a case which seeks to establish a new point of law, (by changing or by clarifying the law). Examples of test cases in the social security context include: -

- *R v Secretary Of State For Social Services and anor, ex Parte Child Poverty Action Group and others* [1990] 2 QB 540 – where the Court of Appeal dismissed an application that the Secretary of State was under a duty to have a set number of adjudication officers available so that a claim could be dealt with within the stipulated period of 14 days.

- *R (National Association of Colliery Overmen, Deputies and Shot Firers) v Secretary of State for Work and Pensions* [2003] EWHC 607 (Admin) – on 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).

- *R (Child Poverty Action Group) v SSWP* [2011] EWHC 2616 (Admin) – where the High Court dismissed a challenge to the regulations amending the housing benefit rules so that the local housing allowance rates in the private rented sector in any area are capped for each size category.

CASE STUDY 1 - CPAG

*R (Child Poverty Action Group) v SSWP* [2011] 2 WLR 1, [2010] UKSC 54.

This concerned the question whether the DWP has the power to recover an overpayment under the common law. The challenge arose from the DWP's practice of sending standard letters to claimants who were considered to have been overpaid benefit, but who had not misrepresented or failed to disclose any relevant fact. Those letters claimed that the DWP had a right to recover an overpayment under common law. Between March 2006 and February 2007 some 65,000 common law recovery letters were sent out.

When the case came to court the issue turned on a point of statutory construction, namely, whether section 71 of the Social Security Administration Act 1992 constituted the only avenue to recovery such that there was no scope for recovery under the common law. In the end the Supreme Court took particular note of the fact that at the time the 1992 Act was enacted, there was a division of functions between the adjudication of awards and their payment, and under that scheme simple error on the part of the adjudicating authorities was excluded. In 1998, the Secretary of State was made responsible for both the decision on the claim for benefit and payment of the amount of the award under the Social Security Act 1998; but this had not been accompanied by any change in the statutory criteria for recovery of overpayments under the 1992 Act. Accordingly, there was no basis for the Secretary of State's claim that this amounted to an intention to open the door any wider to recovery than it previously had been at the time of the 1992 Act. The judgment only covered overpayment

made in the course of an award of benefits, not accidental payments – e.g. duplicates, which remain recoverable.

Note: the Welfare Reform Act 2012 allows all overpayments of universal credit, jobseeker's allowance and employment and support allowance to be recoverable (there will be some exceptions in the case of housing credit for pensioners).

## CASE STUDY 2 – PAYNE

*Secretary of State for Work and Pensions v Payne & Anor* [2011] UKSC 60, [2012] 2 WLR 1

Debt Relief Orders (DRO)s were introduced in April 2009 as an alternative to bankruptcy for those debtors with under £15,000 of debt and little or no assets to realise with which to pay their debts. If a DRO is made there is a moratorium period of one year during which the debts specified in the order are frozen and the creditor "has no remedy in respect of the debt" (s.215G of the Insolvency Act 1986). The claimants wrote letters to the DWP stating that it had no power to recover overpayments or a social fund budget loan in these circumstances and issued proceedings when the DWP continued recovery.

The claimants' argument before the High Court was that a DRO moratorium prevented the DWP from reclaiming overpaid benefits and repayment of a budgeting loan, by deducting them from future entitlement to benefits given the difference in wording for DRO in s.215G of IA 1996, compared to the phrase used for bankruptcy – 'any remedy against the property or person of the bankrupt in respect of that debt'

The DWP's argument was that the DWP could rely on a previous case-law on the relationship between social security and insolvency. In *R v Secretary of State for Social Security, ex parte Taylor and Chapman* [1997] BPIR 505 the court had decided that recovery of debts by future deductions from benefit could not be affected by a bankruptcy order and that the DWP were right to continue to recover their debt in this way and the same reasoning applied to DROs.

Cranston J ([2010] EWHC 2162 (Admin)) decided that the DWP were unable to reclaim the debts listed on a DRO as the DRO deprives a creditor of "any remedy" for the duration of the DRO. This prohibition was a more wide ranging definition than that for bankruptcy. The Court of Appeal ([2010] EWCA Civ 1431) by a majority, dismissed the DWP's appeal against Cranston J's judgment (Mummery LJ dissenting) and accepted the claimants' submission that the different wording used in section 251G(2)(a) (in respect of DROs) compared to section 285 (in respect of bankruptcy) was significant, and that the statutory context indicated that a different outcome in respect of DROs was intended. The Court held that the effect of a DRO is to give immediate debt relief, as there is no realistic possibility of creditors ever being paid, whereas in bankruptcy there was some possibility of payment at least in part and, for that reason, there was no debt relief until the end of the process.

Before the Supreme Court the Secretary of State argued that the statutory power of deduction is not a "remedy" within the terms of the insolvency legislation but is rather an adjustment to the level of benefit which the claimant is entitled to receive and that Mrs Payne and Ms Cooper were only ever entitled to the net sum (after the deduction was made); and both the loan and the overpayment were to be regarded as payments in advance of future benefit and

that in so far as *R (Balding) v SSWP* [2007] EWCA Civ 1327, [2008] 1 WLR 564 (CA) suggested otherwise it was wrongly decided.

Lady Hale (with whom the Court agreed) rejected this analysis saying that: (i) the claimant to social security benefit has a statutory entitlement to the amount of benefit which is awarded by the Secretary of State or a tribunal; (ii) such awards cannot be regarded as an advance payment of future benefit as the claimant's circumstances may change; and (iii) the liability to repay Social Fund loans or overpayments arises independently of the claimant's entitlement to any benefit from which the Secretary of State may later decide to recoup it. The Court went on to say that, in order to bring coherence to this area of the law, the same principle applied to the bankruptcy scheme. Consequently, the Secretary of State had no power to recoup social security debts on the making of a bankruptcy order, which meant *R v Secretary of State for Social Security, Ex p Taylor and Chapman* [1997] BPIR 505 (HC) was wrongly decided (para [23]). Finally, the Supreme Court said that *R (Balding) v SSWP* was rightly decided when it held that a social security debt was wiped out when the bankrupt was discharged. The Court said *Balding* applied equally to the discharge of a DRO.

## Declarations

**48.** One of the remedies available in judicial review is a declaration. This is an authoritative ruling on the rights of the parties, or the state of the law (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 the future.

**49.** One of the difficulties in obtaining a declaration is that the courts will deal only with live issues; relief will not be granted if the matter is hypothetical or academic (*R v SSHD ex parte Wynne* [1993] 1 WLR 115). This means that when an individual's case has arisen due to a 'structural problem' (e.g. systemic delays processing child benefit claims in family reunion cases, tax credits overpayments) and the claimant's case is then resolved, the claim cannot proceed to a hearing because the claimant no longer needs a remedy. There is some scope for the court to hear a case even when the claimant no longer actually needs a remedy but only in cases where: (i) it is in the public interest to do so; (ii) the claim raises a discrete point of law not dependent on the facts of the case; and (iii) where a large number of similar claims are likely to need to be resolved in the near future (*R v SSHD ex p Salem* [1999] Ac 450). An example where this happened is *R (Clue) v Birmingham CC* [2010] EWCA Civ 1169, [2011] 1 WLR 99 where the claimant had been granted ILR but the case was heard to clarify the law. However such cases are rare.

Note: In 29 June 2012 the Guardian contained a report of an application for judicial review of the Work Capability Assessment brought on the basis that the current system discriminates against people with mental health problem as the DWP has failed to make reasonable adjustments to the assessment system, for the benefit of people with mental health problems, in breach of the Equality Act 2010 – see Guardian website story dated 29 June 2012 'Judge considers judicial review of Work Capability Assessment' http://www.guardian.co.uk.

Interveners

**50.** According to CPR 54.17 there are two main methods of intervention in judicial review proceedings:

- Provision of a witness statement in support of a party to the proceedings. Here the intervener acts as a sort of expert witness for one of the parties.

- Intervening as an independent third party to the proceedings.

**51.** The court is more likely to allow an intervention if an organisation can claim a special remit, for example by: (i) representing the interests of a particular group who may be affected by a case; (ii)having access to information or expertise that will assist the court's understanding of the wider public impact of the case. Examples of interveners (in statutory appeals from the Upper Tribunal) include: -

- *Patmalniece v SSWP* (interveners:AIRE Centre) [2011] UKSC 11, [2011] 1 WLR 783, [2011] AACR 34;
- *R (Cart) v The Upper Tribunal and anor* [2011] UKSC 28 [2011] AACR 38 (interveners: Public Law Project and JUSTICE);
- *Burnip v Birmingham City Council & Anor* [2012] EWCA Civ 629 (interveners: Equality and Human Rights Commission).

**52.** An alternative to becoming a formal intervener is for the case to be referred by a special organisation and a member of that group will provide witness statement. For example in *R (Payne & Cooper) v SSWP* [2010] EWHC 2162 (Admin) (on the power to recover social security debts when someone is subject to a debt relief order) one of the cases (Cooper) was referred by the Citizens Advice Specialist Money Advice Unit to the Public Law Project. The judgement makes reference to "the evidence of Peter Madge, a Citizens Advice specialist" at paragraph 2 of the judgment.

**53.** The Human Rights Act 1998 provides further scope for challenging welfare benefit decisions by way of judicial review. Examples include:

- *R (Carson and Reynolds) v SSWP* [2005] UKHL 37, [2006] 1 AC 173 on whether a pensioner resident in a country which did not have a reciprocal agreement with the UK for cost of living increases in pension benefits suffered unlawful discrimination under Art 14 ECHR and whether paying a lower rate of jobseeker's allowance and income support to persons under 25 was contrary to Art.14.

- *SM (as guardian of the child JM) v Advocate General for Scotland* [2010] CSOH 15 on whether applying a lower age limit of three as an absolute bar to claiming the mobility component of DLA was discriminatory under Art 14 ECHR as it had a disproportionate effect on disabled children of two years of age who have no realistic prospects of walking in the foreseeable future.

- *McGrath v SSWP* [2012] EWHC 1042 (Admin) on whether the recovery of an overpayment through deductions from benefit after a period of more than six years breached a claimant's human rights.

**54.** A human rights challenge currently before the courts, but still at an early stage, is *R (Knowles) v The Valuation Office Agency and ors* [2012] EWHC 1161 (Admin). This raises the issue of whether the way in which the Housing Benefit scheme operates is discriminatory under Art 14 ECHR in respect of members of the gypsy community occupying private caravan sites because it fails to make any provision for the extra costs of managing those sites whereas HB is paid in full if the site is owned by the local authority or run by the county council. Permission was initially refused following an oral hearing by the Administrative Court, but it has subsequently been granted by the Court of Appeal on the papers. The matter is due to be returned to the Administrative Court for a substantive hearing of the claim in the light of the ruling in *Burnip v Birmingham CC & anor.*

## 6. Potential Public Law Challenges

**55.** Where a decision has been made refusing someone entitlement to benefit and thereby generating a right of appeal to a tribunal, the Administrative Court will require the statutory right of appeal to be used as an alternative to judicial review unless there are exceptional circumstances: see *R v IRC ex part Preston* [1985] AC 835. A public law challenge by way of judicial review may nevertheless be appropriate in cases where:

- it can *clearly be shown* that the decision on entitlement is based on a mistaken view as to the law and the benefit authority has failed to engage with the legal arguments put forward in the letter before action; *and*

- the benefit authority has been asked to use its power to revise the decision under appeal so that any appeal will thereby lapse but has refused to do so or failed to give any reply, *and*

- there are good reasons why the statutory appeal route is not an effective or suitable remedy in this particular case.

**56.** Below are some examples (from actual cases) of the kind of scenarios where judicial review might be a suitable remedy despite the availability of a right of appeal to a first-tier tribunal where the remedy being sought from the Court is an order requiring the benefit authority to consider the decision again applying the proper legal test:

- C, a Czech national arrived in the UK in 2000 on a visa allowing her to work as an au pair. She was later continuously employed for a period of over five years and was able to produce P60s for each tax year from 2004-2010 in respect of three different companies. In January 2011 she claimed IS as a lone parent but it was refused based on her not having a right to reside. C appealed. On 15 May 2011 the Home Office issued C with a certificate that she had permanent residence in the UK (an earlier card has been mislaid). The decision maker refused to change the decision under appeal - that she did not have a right to reside in January 2011. The public law challenge was to the DWP's refusal, without good reason, to revise the decision under appeal

given the evidence that (i) C is exempt from the worker registration scheme, (ii) has completed a period of continuous employment of more than five years; and (iii) the recent HO certificate confirming PR.

- C was in receipt of Invalidity Benefit. In 1997 when he failed the all work test (AWT) when he scored no points under the physical descriptors and the mental health test was not applied. In May 1998 an appeal tribunal adjourned his appeal and issued a Direction that the DWP conduct the mental health assessment section of the AWT. No further action however was taken on the appeal for some six years. The public law issue was whether the failure to carry out the direction is unlawful and the delay of six years is a breach of Art 6 ECHR. A claim for judicial review was issued and permission granted. The statutory appeal was listed soon afterwards. Interest was paid on the arrears of benefit when C won his appeal.

- C was refused HB on the basis that she was ineligible as an A8 national not in registered employment, despite being a self-employed person and the spouse of a self-employed person. Moreover, HMRC had decided that C and her spouse were entitled to WTC as persons who have a right to reside as self-employed persons. As a result of the refusal of HB there were rent arrears of over £15,000; an outright possession order had been granted against C and the landlady had issued an ultimatum. The public law issue was the authority's failure to have proper regard to the EU concept of a worker and its failure to explain why it took a different view of the law from HMRC based on the same facts.

- C's contributory ESA was cut after 12 months and his partner's earnings means he is not entitled to income-based ESA. C is too unwell to return to the work in the near future. Public law issue is whether the complete removal of contributory ESA a breach of the C's rights under Art 1 of Protocol No. 1 because it places an excessive burden on C as particular claimant when set off against the interests of the community as a whole (per *Kjartan Ásmundsson v. Iceland*, no. 60669/00, March 15, 2005 and *Moskal v Poland* (2010) EHRR 22, para. [76]).

Investigative help

**57.** In cases where it is unclear whether it would be appropriate to use judicial review it may be possible to obtain funding under 'investigative help' – Part C of the Funding Code 16.3.2 states (emphasis added):

> "Investigative Help is important in judicial review cases because, at the time the client first hears of the act or decision complained of, it will often be very difficult to estimate the prospects of successfully bringing a challenge. Investigative Help may therefore cover the work necessary in writing a letter before action to the body potentially under challenge in accordance with the Pre-Action Protocol … In straightforward cases the application for Investigative Help may be refused if it is reasonable for the letter before claim to be issued under Legal Help.

> Under Criterion 5.6.4 Investigative Help may only be granted if there are reasonable grounds for believing that, when the investigative work has been carried out, the claim will be strong enough, in terms of prospects of success and cost benefit, to satisfy the relevant Criteria for Full Representation. This Criterion ensures that public funds cannot be used to investigate claims unless there is good reason to believe that, once those investigations have been carried out, the case will be able to proceed."

**58.** It will be apparent from the above that it is not really possible to define in advance the circumstances where public law points of law will provide a suitable and effective remedy in a welfare benefit case. Perhaps the most that could be said is that it will usually involve a case that stands out from the norm either due to the urgency of the matter and the serious consequences for the claimant or where the claimant has reached an impasse trying to resolve the issue by the usual channels.

## 6 Conclusion

**59.** Despite some of the additional hurdles facing the social security specialist there is scope for the application of public law arguments to welfare benefits cases in some clearly defined areas and to the occasional 'exceptional case' where the normal means of resolving the issue do not appear to be working. This type of challenge cannot, of course replace the mainstream welfare advice work before the statutory adjudication authorities. Nevertheless, judicial review can prove to be a valuable remedy when the statutory appeals system proves unresponsive or the issue arises at a stage in the decision-making process that does not carry a right of appeal. The use of judicial review as a means of resolving welfare benefit issues outside of the statutory appeal route are likely to increase in this period of high unemployment cuts to public services and wholesale changes to rules governing welfare benefits.


Garden Court Chambers
Friday, 6 July 2012