**Do benefit sanctions breach Article 3 ECHR?**

*One of PLP’s five strategic focus areas is benefit sanctioning. We are particularly concerned with the lawfulness of sanctioning and the effect this has on marginalised people. In this article PLP solicitor Sarah Clarke considers whether benefit sanctioning, particularly for people who are not well enough to work, could constitute inhuman and degrading treatment in breach of Article 3 ECHR. This is an extended version of the article which appears in the LAG Bulletin for May 2019.*

In his recent book, *“Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK”[[1]](#footnote-1)*,[[2]](#footnote-2) Michael Adler critiques the benefit sanctions regime in the UK. He concludes that the evidence shows that sanctions are “inefficient, cause great suffering and are unjust[[3]](#footnote-3).”

In Chapter 8, which looks at the role of the law in protecting the right to a social minimum, Michael Adler considers the decision of the House of Lords in *R(Adam and Limbuela) v Secretary of State for the Home Department* [2015] UKHL 66 (considered in more detail below) and points out the court held “the failure to provide them [two asylum seekers] with support exposed them to a real risk of destitution and that this constituted a violation of Article 3 of the ECHR.” He goes on to say “In light of this, one might have expected that the courts would likewise have found benefit sanctions to constitute a violation of Article 3 but this has not been tested in the courts.”[[4]](#footnote-4)

**Universal Credit and hardship**

The Universal Credit (‘UC’) system, including sanctioning, has been blamed for claimants suffering severe hardship and even destitution and homelessness. In his recent report on the UK, the UN Special Rapporteur on Extreme Poverty and Human Rights refers to “Endless anecdotal evidence…to illustrate the harsh and arbitrary nature of some of the sanctions, as well as the devastating effects that resulted from being completely shut out of the benefits system for weeks or months at a time”.[[5]](#footnote-5) The Work and Pensions Select Committee published a highly critical report on benefit sanctions on 6.11.18[[6]](#footnote-6); the government response was published on 6.2.19[[7]](#footnote-7).

*How sanctioning can result in destitution and homelessness*

The Welfare Reform Act 2012, which provides the statutory framework for benefit sanctions in Universal Credit, refers to a “Reduction of benefit”[[8]](#footnote-8). However, claimants subject to higher, medium and low level sanctions are sanctioned at a rate usually equivalent to 100% of their standard allowance [[9]](#footnote-9). There is no minimum amount that claimants must be left with from their standard allowance after sanction. Claimants are left having to choose between eating and paying the rent. High level and medium level sanctions are for fixed periods, low level sanctions are applied indefinitely until the claimant complies.

*Deductions*

UC is subject to the benefit cap which limits overall income from benefits to set levels, unless the claimant is exempt. No allowance is made in the rate at which the sanction is applied for the benefit cap or for other deductions already being made from the standard allowance for rent arrears and other debts.

The problem is compounded by the fact that more deductions can be made from Universal Credit at higher rates than was the case for the benefits it replaces[[10]](#footnote-10). For instance the five week wait for universal credit means that claimants have to rely on advance payments to survive this period; these must be repaid by deductions from ongoing universal credit payments; universal credit hardship payments are also recoverable. Deductions can also be made for rent arrears, utilities debts, benefits overpayments, fines amongst others.

Recent statistics showed that 47% percent of claimants had a deduction of 20% or more from their UC, 28% had deductions of 30% or more, and 12% had deductions at 40%[[11]](#footnote-11).

If a claimant who already has deductions is then sanctioned, it seems the sanction can eat into other elements of UC including for housing. This leaves claimants unable to meet essential living costs for themselves and their children, including housing costs,[[12]](#footnote-12) and places them at even greater risk of destitution and homelessness[[13]](#footnote-13).

*Hardship payments for UC*

Hardship payments are in principle available for those who are sanctioned under UC, at an amount based on 60% of the reduction applied[[14]](#footnote-14). There is no automatic entitlement to hardship payments for members of “vulnerable groups” as was the case with legacy benefits, and they are not available to claimants whose benefit is reduced by 40%. In order to obtain a hardship payment, a sanctioned claimant must show that s/he has no other source of support, for instance from friends or charities, and has made every effort not to spend money on anything which does not relate to basic and essential needs[[15]](#footnote-15).

As set out above, hardship payments are effectively a loan, and must be repaid after the sanction period. This effectively more than doubles the length of time for which the claimant’s benefit is reduced. Claimants must make a fresh application for hardship payments in each assessment period (every month).

For Jobseekers’ Allowance (JSA), a predecessor to UC, provisions for hardship payments were less harsh, and these were awarded in 40% of sanction cases [[16]](#footnote-16). David Webster commented; “If you get a hardship payment, it means that you have been completely cleaned out of resources, and exhausted all possibility of help from family and friends. The figures therefore show that the Duncan Smith regime is creating destitution on a horrifying scale[[17]](#footnote-17).”

In response to a recent FOI request from PLP, the DWP said that it did not have information to show in what percentage of UC sanction cases hardship payments are awarded. Although hardship payments are all that stands between a sanctioned claimant and destitution, the DWP does not seem to know whether anyone is getting them.

*Inhuman and degrading treatment?*

The threshold for establishing a breach of Article 3 in the context of state welfare support is high. However, in *Budina v Russia* 45603/05 the ECtHR (European Court of Human Rights) said; “the court could not exclude that State responsibility could arise for “treatment” where an applicant wholly dependent on State support found herself facing official indifference when in a situation of serious deprivation or want incompatible with human dignity.”

The claimant was a disabled pensioner who had enough to pay for her flat, food and hygiene and access to free medical services, but not enough for clothing and cultural and other services. Despite acknowledging that the state could have some responsibility, the court held the claim was inadmissible since she could not show her “lack of funds translated itself into concrete suffering.” She had enough “to protect her from damage to her mental and physical health or from a situation of degradation incompatible with human dignity” and her case did not meet the very high threshold for breach of Article 3.

In *R (Adam and* *Limbuela and Tesema) v SSHD [2005] UKHL 66*, the Home Secretary refused to provide asylum support to the claimants pursuant to s 55(1) Nationality, Immigration and Asylum Act 2002. Section 55 prohibited the provision of asylum support for those who had not claimed asylum at the port of entry or as soon as possible thereafter, subject to a savings provision to avoid breaching human rights. Since asylum seekers were prohibited from working to support themselves, refusal of asylum support had the necessary consequence that some would be driven to destitution and street homelessness.

In the earlier Court of Appeal case of *R(Q) v SSHD*,[[18]](#footnote-18) it was held that a regime in which the state prevents asylum seekers from working and then prohibits the grant of support, amounted to positive action directed at asylum seekers and not mere inaction, and was therefore “treatment” for the purposes of Article 3.[[19]](#footnote-19)

In *Limbuela*, the House of Lords held there was inhuman and degrading treatment in breach of Article 3. In his judgement at paragraph 7, Lord Bingham said that treatment would be “inhuman or degrading” “if, to a seriously detrimental effect it denies the most basic needs of any human being.” As a result, the Home Office was obliged to provide support to asylum seekers who would otherwise face destitution and/or homelessness, in order to avoid a breach of Article 3.

Subsequently, in *MSS v Belgium and Greece[[20]](#footnote-20)* the Grand Chamber of the ECtHR held that extremely poor living conditions faced by asylum seekers in Greece breached Article 3. In considering whether the threshold for breach of Article 3 had been reached, the court had regard to MSS’s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time frame.

The court held that treatment was inhuman where (para 220) it was “premeditated, was applied for hours at a stretch which caused either actual bodily injury or intense physical or mental suffering.”

Treatment was “degrading” where (para 220 citing *Pretty v UK* 2346/02) “it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.”[[21]](#footnote-21)

*Sanctions where claimants are capable of work*

By contrast to the situation of the asylum seekers considered in *Limbuela* and in *MSS*, in the case of UC sanctioning**,** the state is not preventing claimants from working. In a case where a claimant is sanctioned and left destitute and/or homeless, but is capable of work, it could be said that s/he could find a job to support him/herself and escape destitution.

The ECtHR held there was no breach of Article 3[[22]](#footnote-22) in a case where the claimant became street homeless “to the detriment of his health” after eviction from a hostel following complaints about his behaviour, and then refused two offers of accommodation.

*Sanctions for claimants unable to work*

But what about claimants who are unable to work and have no other means of support? *Budina*, *Limbuela* and *MSS* cited above support a view that in cases where the claimant is wholly dependent on state support, serious deprivation or want incompatible with human dignity could breach Article 3, particularly where there are health consequences.

The state recognises that those in receipt of ESA are unable to work. Limited capability for work (LCW) is a condition of entitlement to Employment and Support Allowance (ESA). LCW is defined in s 1 (4) WRA 2007 as follows; (a) his capability for work is limited by his physical or mental condition and (b) **the limitation is such that it is not reasonable to require him to work** s 1 Welfare Reform Act 2007.

The state also recognises that those in the limited capability for work group for Universal Credit are not able to work but the test is structured differently[[23]](#footnote-23). LCW is defined in the same way in s 37 WRA 2012 as in s 1 WRA 2007, but it is not a condition of entitlement to UC. If a claimant is recognised as having limited capability for work, s/he cannot be required to look for work, only to undertake work preparation and work focussed interviews.

Income related ESA and universal credit are both means tested benefits; to be entitled, claimants must have little or no other income and only a limited amount of savings. These benefits are paid at rates intended only for subsistence. This means that in most cases claimants have no other resources they can use to support themselves besides their benefits.

A claimant with limited capability for work for ESA or for UC can have a sanction applied if without good cause, s/he fails to take part in a work focused interview, or in work related activity. This is usually a low level sanction, at 100% of their standard allowance, which lasts indefinitely until compliance, plus a fixed period of 7, 14 or 28 days. This means that a claimant the state recognises cannot reasonably be required to work, can have a subsistence benefit reduced sometimes to nil, until they comply. In these circumstances, the state recognises that the claimant cannot find a job to support her/himself and escape destitution.

It is important to note that claimants facing indefinite sanctions can bring them to an end by complying. 86% of sanctions are due to failure to attend a work focussed interview[[24]](#footnote-24); in these cases the claimant can contact the DWP to arrange an interview and ensure they attend. Arguably, this should bring the sanction to an end from the point when they arrange the interview.

In practice, claimants may find compliance difficult. It seems many are not aware they have been sanctioned or why; if they are notified at all it seems this is often via their online journal and they may miss this[[25]](#footnote-25). Claimants with mental health problems, those who cannot access phones or the internet and those who cannot access advice may not understand what they have to do, and/or may not be able to do it.

*Conclusion*

The application of a sanction at 100% of the standard allowance of a subsistence benefit means claimants cannot feed themselves and meet other essential living needs. There is no evidence that hardship payments are effective in preventing this. This in itself could meet the test for inhuman and degrading treatment.

If claimants are already having deductions made from their benefits for debts, and the sanctions eat into amounts intended for housing and/or children, they may be left with insufficient money to meet their housing costs, and/or feed their children.

Claimants who are made homeless will be at risk of harm to their health and, if they are street homeless, to ill treatment and vulnerability to crime. Whilst not exactly on all fours with *Limbuela*, the analogy is clear. As Lord Bingham observed in *Limbuela* (para 7):

“I have no doubt that the threshold may be crossed if a late applicant[[26]](#footnote-26) with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.”

*Postscript: a possible change of direction?*

In its October 2018 report on Benefit Sanctions, the Work and Pensions Select Committee recommended that “the Government immediately stop imposing conditionality and sanctions on anyone found to have limited capability for work or who presents a valid doctor’s note”[[27]](#footnote-27).

In its response[[28]](#footnote-28), the Government has agree to conduct a small pilot (“proof of concept”) to be run in 2-4 Jobcentres over Summer 2019 for claimants presenting with medical evidence of a health condition or disability before the work capability assessment is carried out, and those found to have LCW. Claimants will start with no mandatory requirements and will have tailored conditionality applied depending on their circumstances. The scheme will be evaluated in Autumn 2019.

On 9.5.19 the Secretary of State Amber Rudd made the very welcome announcement that three- year sanctions are to be removed by the end of the year, and the maximum length of a fixed length sanction will be reduced to six months[[29]](#footnote-29). The minister commented:

It is important that sanctions remain proportionate to ensure they promote the best outcomes. For this reason, the Department is currently carrying out a further evaluation into the effectiveness of UC sanctions at supporting claimants to search for work. I will consider what other improvements can be made following this and inform the House in due course.

1. Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK Michael Adler; Palgrave Socio-Legal Studies 2018; Series editor Dave Cowan [↑](#footnote-ref-1)
2. The wording for the title comes from the *UN Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment*. **Article 3 of the European Convention on Human Rights,** directly enforceable in UK courts under s 6 Human Rights Act 1998, is slightly differently worded; it prohibits torture and "inhuman or degrading treatment or punishment". [↑](#footnote-ref-2)
3. Ibid p 150 [↑](#footnote-ref-3)
4. Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK Michael Adler; Palgrave Socio-Legal Studies 2018; Series editor Dave Cowan [↑](#footnote-ref-4)
5. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881&LangID=E [↑](#footnote-ref-5)
6. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/955/955.pdf [↑](#footnote-ref-6)
7. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1949/194902.htm [↑](#footnote-ref-7)
8. Heading to s 26 WRA 2012 [↑](#footnote-ref-8)
9. Or at 40% if the claimant is in the Work Focused Interview only group and for certain other groups, see Regulation 111 Universal Credit Regulations 2013. For more detail about which sanctions apply in which circumstances, see CPAG’s Welfare Benefits and Tax Credits Handbook 2019/20 Chapter 47 UC System Sanctions.

Sanctions imposed whilst the claimant was subject to conditions continue to run when claimants move into the no conditionality group. If the sanction is an indefinite one, the rate should be reduced to nil, and see Alok Sharma’s response to Frank Field <https://www.parliament.uk/documents/commons-committees/work-and-pensions/Correspondence/180823%20MfE%20-%20Rt%20Hon%20Frank%20Field%20MP%20-%20Sanctions%20Data_Redacted.pdf>

Problems can arise, however, where the claimant has been sanctioned for a prolonged (but not indefinite) period whilst in the all work related group, and has then moved into the LCW or LCWRA group. The Work and Pensions Select Committee recommended sanctions be cancelled in these circumstances, the government has rejected this. See: [https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1949/194902.htm paras 49 & 50](https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1949/194902.htm%20paras%2049%20%26%2050) [↑](#footnote-ref-9)
10. See for instance Tony Rice, Universal Credit and Third Party Deductions” Mary Rachel McCabe and Simon Mullings, LAC July/August 2018. See also CPAG’s Welfare Rights and Tax Credits Handbook 2019/20 Chapter 52, Getting Paid. [↑](#footnote-ref-10)
11. Alok Sharma in answer to a Parliamentary Question asked on 21.11.18 https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-11-21/194148 [↑](#footnote-ref-11)
12. See Work and Pensions Select Committee report on Benefit Sanctions at pp 41 and 42. The Committee recommends deductions be suspended whilst the sanction is in place. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/955/955.pdf [↑](#footnote-ref-12)
13. In its response to the Select Committee, at https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1949/194902.htm the government has said it will “explore options for capping overall deductions in relation to sanctions where claimants have last resort deductions” - the DWP is to write to the Select Committee by the end of this year once this has been done. [↑](#footnote-ref-13)
14. The government announced in November 2018 that the recovery rate would be reduced to 30%, see response to the Select Committee paragraph 91 ibid. [↑](#footnote-ref-14)
15. This should not include expenses connected with looking for work or maintaining a child’s access to education. [↑](#footnote-ref-15)
16. #  DWP Ad Hoc Statistical Release, 18 November 2015; JSA and ESA hardship applications and awards: Apr 2012 to Jun 2015; EARLY BRIEFING, David Webster, Honorary Senior Research Fellow, Urban Studies, University of Glasgow, 18 November 2015 – these seem to be the most recent figures available.

 [↑](#footnote-ref-16)
17. Ibid [↑](#footnote-ref-17)
18. [2003] EWCA Civ 364 [↑](#footnote-ref-18)
19. Paragraph 57 [↑](#footnote-ref-19)
20. 30696/09 [↑](#footnote-ref-20)
21. See also *Sufi and Elmi v UK* where deportation to Somalia was held to violate Article 3 where the applicants would have no means of support and would be left destitute and living in a refugee camp where conditions were extremely poor. [↑](#footnote-ref-21)
22. O’Rourke v The UK 39022/97 [↑](#footnote-ref-22)
23. Limited capability for work related activity (LCWRA) is a condition of entitlement to the LCWRA element; those with LCWRA are in the support group and are not required to undertake any work related activity. These claimants cannot be sanctioned. [↑](#footnote-ref-23)
24. https://www.gov.uk/government/statistics/benefit-sanctions-statistics-to-january-2019 [↑](#footnote-ref-24)
25. By regulation 51 UC (D&A) Regs 2013 a decision which carries a right of appeal, which includes a decision to sanction, must be notified to the claimant in writing including notification of the right of appeal. [↑](#footnote-ref-25)
26. “Late applicant” here means an asylum seeker who did not claim asylum at the port of entry [↑](#footnote-ref-26)
27. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/955/955.pdf [↑](#footnote-ref-27)
28. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1949/194902.htm Published on 11 February 2019 [↑](#footnote-ref-28)
29. This will presumably not affect low level sanctions which are indefinite, however. [↑](#footnote-ref-29)