

# Welfare Benefits and Judicial Review

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Training Notes  
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# Welfare Benefits and Judicial Review

## Training Notes

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### The proposal to remove welfare benefits from the scope of civil legal aid

1. In order to put this training session in its proper context, it must be borne in mind that the Coalition Government proposes to remove Welfare Benefits entirely from the scope of civil legal aid: 'Government Proposals for the Reform of Legal Aid in England and Wales', (Cm 7967) (paras. 4.216 – 4.224). The proposal is based on two principles (or as I prefer to call them crass assumptions) about Welfare Benefits:
  - that disputes concerning Welfare Benefits issues are objectively of low importance because they are "*essentially about financial entitlement*" (para. 4.217 ) as they do not involve threats to life, safety, liberty or homelessness; and
  - that Welfare Benefit disputes can be resolved without recourse to legal or specialist assistance. Claimants could get by with some basic help from volunteers and generalist advisers or staff employed by the relevant government department.

#### Legal aid removed for statutory appeals to the higher courts

2. It gets worse. The proposal to remove Welfare Benefit from the scope includes onward appeals in relation to the provision of welfare benefits to the Court of Appeal and the Supreme Court, and references to the European Court of Justice as representation in the higher courts for welfare benefits will no longer be in scope.<sup>1</sup>
3. The one area where funding will be retained for Welfare Benefits is judicial review – the subject matter of today's training. The Green Paper gives the following description of judicial review for benefit cases::

"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," (4.224).

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<sup>1</sup> IA: Scope – Annex 2: Summary of Current and Proposed Positions, page 37).

### What makes a decision unlawful in public law terms?

4. The text books say that a decision to be unlawful in terms of public law if it comes under one of the following headings:

- Illegality
- Unfairness
- Irrationality and proportionality

These grounds are overlapping and not exclusive.

Note: If alleging maladministration this comes within Ombudsman's jurisdiction

5. But what does this mean in practical terms? Broadly, to succeed in a claim for judicial review the claimant (the person or body bringing the case) will need to show that either:

- the defendant benefit authority is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so; or
- a decision or action that has been taken is 'beyond the powers' (in Latin, 'ultra vires') of the person or body responsible for it.

6. It is important to note that in judicial review the court is exercising a form of **supervision** of the decision-maker: i.e. examining the **process** by which the decision was made. It is not an appeal so the merits of the case will not usually be relevant.

### Some 'typical' public law errors in the administration of welfare benefits

7. In order to help translate the legal theory into terms that welfare rights advisors can understand I have set out some common scenarios where the actions or omissions of a benefit authority may be 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.<sup>2</sup>
- Fettering a discretion<sup>3</sup> - 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.

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<sup>2</sup> 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.

<sup>3</sup> R v North West Lancashire Health Authority ex parte A, D and G [2000] 1 WLR 977, CA.

- Unlawful sub-delegation<sup>4</sup> - 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 purpose<sup>5</sup> - 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.
8. The following examples from decided cases illustrate the range of situations in which judicial review has been used to challenge a welfare benefit decision or a policy of a benefit authority:
- *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;

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4. *R v Devon Country Council ex parte G* [1989] AC 573).

5. *Padfield v MAFF* [1968] AC 977, HL.

- *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 SSWP* [2011] 2 WLR 1, [2010] UKSC 54 – on whether the DWP has the power to recover an overpayment under the common law in addition to their powers under section 71 of the Social Security Administration Act 1992 – taken by an organisation rather than an individual – so not funded by legal aid.
  - *R (Payne & Cooper) v SSWP* [2010] EWCA 1431 – on whether deductions to recover a debt from an ongoing entitlement to welfare benefit during a Debt Relief Order is a 'remedy', and therefore unlawful. The Court (by a majority) dismissed the DWP's appeal. The Cooper case included a statement by the Citizens' Advice Specialist Support Money Advice team. The DWP's appeal is due to be heard by the Supreme Court in November 2011.
9. Before looking at the substantial area of judicial review in the welfare benefits context, there are a number of procedural rules and requirements that anyone interested in this area needs to know about and to bear in mind when considering whether to make a threat of judicial review against a benefit authority.

## Procedure

For detailed information on practice and procedure in judicial review applications see:

- **Civil Procedure Rules (CPR) Part 54** Judicial Review and statutory review – available online – [www.justice.gov.uk/civil/procrules](http://www.justice.gov.uk/civil/procrules);
- **Pre-Action Protocol for Judicial Review** – available online – [www.justice.gov.uk/civil/procrules](http://www.justice.gov.uk/civil/procrules);
- **Administrative Court Guidance**, Notes for guidance on applying for judicial review (October 2009) – available online – [www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk).

## The key points

10. Key points to bear in mind when bringing a judicial review challenge include:
- Is judicial review available (i.e. is it in time)?
  - Has there been compliance with the judicial review pre-action protocol?
  - Is the costs benefit test met?
  - Have all genuine alternative remedies been exhausted?

### Time limits

11. CPR 54.5 provides that a claim for judicial review must be made promptly and within three months (of the event which gives rise to grounds for JR). Time starts running from the date when the grounds for making the application first arose. It is therefore critical that the welfare benefit decision which is the target of the judicial review is clearly identified. Note: A second letter which explains the original decision will not constitute a fresh decision and cannot be used to restart the time limit.

### The Letter before Claim

12. The purpose of the Pre-action protocol letter before claim is for there to be a fully argued letter before action to give the Defendant an opportunity to deal with the complaint without the need for litigation. The Letter before Claim (LBC) should: -
- explain in detail where it is alleged the public body has gone wrong;
  - ask for detailed reasons for the decision within a time limit- e.g. 14 days;
  - narrow down what is in dispute factually and make the case on the facts as watertight as possible;
  - suggest a solution which avoids the need for litigation.

13. In judicial review there is a duty to give full disclosure of all material facts on the application for permission (known as the duty of candour). Failure to do so can result in the court refusing to consider the merits.

### Have all genuine alternative remedies been exhausted?

14. The Funding Code explains this principle in the following way:

*"It is an important principle of judicial review that a court will usually only interfere where the client has first exhausted all other remedies. Therefore if a public body makes a decision, but gives the client the right to appeal that decision administratively, the client must first make*

*that appeal and then consider a judicial review of the final appeal decision, rather than the original decision” (LSC Funding Code C para 16.5.1).*

*“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).*

#### Urgent Consideration

15. 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’.
16. A claim for interim relief (Form N463) must be included in the Claim Form (Form N461) (see CPR 54.6) and must be served on the Defendant prior to the claim being lodged at court. See *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 WLR 810.

#### Withdrawal of claim by consent - costs

17. Where proceedings are compromised because the proposed defendant has reversed its decision and conceded the claim, and the claimants costs were incurred “reasonably and timeously”, then the claimant should, as a general rule, be entitled to have their legal costs paid by the defendant. If the claim is withdrawn by consent but the defendant does *not* concede that the claim ought to have been brought then representations may need to be made on the subject of costs: see *R (Scott) v Hackney LBC* (2009) EWCA Civ 217, *R (Boxall) v Waltham Forest LBC* (2001) 4 CCL Rep QB (Admin) and *Mendes & Anor v London Borough of Southwark* [2009] EWCA Civ 594.

### Welfare Benefit decisions which may be susceptible to judicial review

18. Judicial review may be the appropriate remedy in the following cases: -
  - [1] Decisions which do not carry a right of appeal.
  - [2] Decisions specific to Housing Benefit.

- [3] Interim decisions of the First-tier Tribunal.
- [4] Refusal of permission by the Upper Tribunal
- [5] Unfavourable decisions on entitlement where a statutory appeal is not an effective remedy due to urgency.

**[1]: Decisions or actions which do not carry a right of appeal to a First-tier Tribunal**

**1. Interim payments**

- 19. The legislation contains a power for both the Department of Work and Pensions<sup>6</sup> and HM Revenue and Customs (HMRC)<sup>7</sup> 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 benefits.
- 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.
- 21. Delays can occur in a number of scenarios, the most common being a delay in processing the claim due to a backlog or the claimant's immigration status documents need to be verified. Some typical examples are given below:

(a) A failure or refusal to make an interim payment of benefit (while a claim is being processed);

- Delays in receiving Child Benefit (and Child Tax Credits), particularly new claims from foreign nationals who have recently been granted indefinite leave to remain.
- Delays due to the National Insurance number requirement.

(b) A failure or refusal to restore benefit or make an interim payment pending verification of someone's immigration status

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<sup>6</sup> Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, (SI 1988/664), reg 2(1).

<sup>7</sup> Child Benefit and Guardian's Allowance (Administration) Regulations 2003 (SI 2003/492), reg 22.

- Payment suspended despite an 'in time application to extend or vary leave': see Immigration Act 1971, s. 3C and 3D. See also CIS/2635/2008 [2008] UKUT 5 (AAC), para 15.
- Payment suspended because leave is "limited" – but Humanitarian Protection for example is granted for an initial period of five years but this has no restrictions on that person's leave to remain.
- Payment suspended but immigration status has been conferred directly by legislation – e.g. where the claimant has a right of abode: see R(SB) 11/88, para. 20, and R(PC) 2/07
- Payment suspended until claimant obtains a replacement status document from the Home Office.

Note: If the benefit authority responds to a challenge to its decision to suspend payment by making a formal decision that the claimant is not entitled to benefit (generating a right of appeal) then this will end the power to make an interim payment.<sup>8</sup>

(c) A failure to make an interim payment pending the processing a claim by an EU national due to the right to reside requirement

22. In EU cases in addition to the argument based on the power to make an interim payment the question arises whether interim relief ought to be available even when a formal decision to refuse entitlement has been made, having regard to the principles in *R v Secretary Of State For Transport, Ex Parte Factortame Ltd & Ors (No.2)* (1990) (1991) 1 AC 603. Although this question has received some consideration in social security proceedings in earlier cases, the question of whether it may be applied on an application for judicial review, in the light of the current development of the case law.

**2 Refusal to carry out a revision**

23. If the benefit authority refuses the request to carry out a revision (e.g. official error) then the only remedy is by way of judicial review: *Beltekian v City of Westminster and Secretary of State for Work and Pensions* [2004] EWCA Civ 1784 (reported as R(H) 8/05).
24. The any time revision provision for 'official error' can represent the only route open to someone to obtain full arrears of benefit if the past decision was not appealed at the time and more than 13 months have elapsed. However, the threshold for official error is a high one: *R(H) 2/04* para 13.

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<sup>8</sup> R v Secretary of State for Social Security, ex parte Grant [1997] EWHC Admin 754 and R (on the application of Hall) v Chichester District Council [2007] EWHC 168 (Admin).

### **3 Failure to notify a decision**

25. It is a well-established principle that an official decision which is not properly communicated to the party concerned is, at the very least, for the time being ineffective: Appendix to *R(P) 1/04*.

Note: There is, however, authority to the effect that the failure to notify a social security decision does not necessarily render that decision void, invalid or unenforceable for all purposes. The key consideration, so far as notification is concerned, is whether the failure to comply means the claimant is in a position to challenge through the legal process a decision that would affect his or her rights: see *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC), para 118.

#### **[2]: Decisions specific to Housing Benefit**

26. There are at least three situations where judicial review proceedings might be an appropriate remedy where the claimant is facing possession proceedings due to non-payment of Housing Benefit (HB):
- on the ground that there has been a failure to make a 'payment on account' where the claim relates to a housing association tenant and all the necessary evidence and information has been provided;
  - on the ground that discretionary housing payments have been refused;
  - on the ground that the HB authority's decision not to award HB is unlawful on public law grounds and the immediate threat to the claimant's home renders any statutory appeal against that decision an ineffective remedy.

#### **(a) Payments on account**

27. The HB rules<sup>9</sup> make provision for a 'payment on account' to be made in the following circumstances:
- 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;<sup>10</sup>

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

- if the claimant has provided the evidence reasonably needed and requested;
- there are 8 weeks arrears.

Once these conditions are fulfilled, the HB authority *must* consider making a payment on account: *R v Haringey LBC ex p. Ayub* [1990] 25 HLR 566, (QBD).<sup>11</sup>

### **(b) Discretionary Housing Payments**

28. 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.<sup>12</sup> The help can be given to cover rent arrears. There is no statutory right to DHPs. The authority has been given a wide discretion as to whether to make a DHP in a particular case; as to the amount that is paid and as to the period it is paid.<sup>13</sup> However, it may be possible to challenge a refusal on public law grounds e.g. fettering a discretion: (see *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.
29. In March 2011 the DWP issued a new discretionary housing payment (DHP) best practice guide<sup>14</sup> that takes into account the reductions in local housing allowance (LHA) from April 2011. The Guide sets out the following groups that local authorities should consider assisting.

### **(c) Challenge to a housing benefit decision where a possession hearing is imminent**

30. In possession claims for rent arrears by social landlords made under discretionary grounds the county court will be under a duty to adjourn proceedings if there is an outstanding HB issue (which could make a material difference to the exercise of the discretion): *Haringey v Powell* (1995) 28 HLR 798, CA. This means judicial review of the HB authority is only likely to be a live option where:

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

11 See also HB Guidance Manual paras. 6.158-160.

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

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

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

- the claimant does not have a statutory defence to the possession proceedings e.g. the licence to occupy temporary accommodation has been determined by a notice to quit;
  - 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 are poor or uncertain (e.g. due to the level of the arrears);
  - that a 'gateway b' public law defence<sup>15</sup> is unlikely to succeed;
  - a proportionality defence under Article 8 of the ECHR<sup>16</sup> is unlikely to succeed.
31. If a decision is made to apply for judicial review, each of the points above will need to be addressed, both in the pre-action protocol letter and in the claim itself.<sup>17</sup> As will the question of whether a statutory appeal would be an effective alternative remedy, bearing in mind that it is common for claimants to have to wait for between 6 and 12 months before their case is heard by a first-tier tribunal.
32. The High Court may be unwilling to order the county court to stay the 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 or on behalf of the HB claimant. In cases where the merits are not clear, it may be prudent to obtaining an opinion from counsel under '**investigative help**' – e.g. to draft a complex pre-action protocol letter (Part C Funding Code 16.3.2).

Note: For the legal background to an authority's delay in dealing with a Housing Benefit appeal and referring it to the Tribunal Service see CH/3497/2005, paras 26 and *R(H)1/07* paras 27-34.

### **[3]: interim decisions of the First-tier Tribunal**

33. Following the coming into force of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal has the power to conduct a judicial review of interim decisions or actions made by First-tier Tribunals where there is no right of appeal to the Upper Tribunal against the decision in question. The most common decision which is likely to give rise to judicial review proceedings is a refusal to admit a late appeal.

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<sup>15</sup> Doherty v Birmingham City Council (2008) UKHL 57, [2009] 1 AC 367

<sup>16</sup> Pinnock v Manchester City Council [2010] UKSC 45, 3 WLR 1441

<sup>17</sup> See also LSC Manual Vol 3 Part C Chapter 16 at 16.5.

34. In *R (CD) v First-tier Tribunal (CIC)* [2010] UKUT 181 (AAC) [2011] AACR 1, Judge Turnbull held that the First-tier tribunal's power to extend time are unqualified as under the Procedure Rules it is no longer limited by reference to "special reasons" (at [27]).
35. Note: The Upper Tribunal has held that for some interim decisions the appropriate remedy is not judicial review:
- where a case management decision is being challenge an application for permission to appeal can be treated as an application for a new direction if it is satisfied that the challenged direction is not appropriate: *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at para 19;
  - challenge to a decision by a FtT Judge who set aside a decision of a FtT judge accepting an appeal as late: *LS v LB Lambeth* [2010] UKUT 461 (AAC) at para 97.
36. Where it is unclear which route should be followed, 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.

Procedure for judicial review of an interim decision

37. See Tribunals, Courts and Enforcement Act 2007, s.15-19 and the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) Part 4 for details.
38. A person seeking permission to bring judicial review proceedings before the Upper Tribunal must make a written application which must be made promptly and no later than 3 months after the date of the decision to which the application relates (rule 28(2)). The application may be made later if it is made within 1 month after the date on which the First-tier Tribunal sent written reasons for the decision or notification of an unsuccessful set aside (rule 28(3)) although the Upper Tribunal has the power to extend the time limit (rule 28(7)). The procedure then mirrors that in the High Court, namely the respondent can serve an acknowledgement of service (rule 29) and a decision on permission is made on the papers (rule 31(1)) with a right to renewal at an oral hearing (rule 31(4)).
39. The judicial review claim forms for reviews of First-tier Tribunals' interim decisions in social security can be downloaded from HMCTS website: 'Form JR1'.<sup>18</sup>
40. Public Funding for this type of judicial review to the Upper Tribunal is on the same basis as judicial review in the High Court: see LSC

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<sup>18</sup> <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/aa/form/index.htm>

Funding Manual Volume 3 Part C General Guidance 22 on 'Tribunal Representation'.

**[4]: Refusal to grant permission by the Upper Tribunal**

41. *R (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258 [2010] AACR 30, held that judicial review in principle does lie against a Commissioner's refusal of leave to appeal and should be exercised by applying conventional public law principles (para 49).
42. However, the scope for bringing judicial proceedings against a refusal of permission by an Upper Tribunal Judge has been held to be extremely restricted (just like the old day) following the enactment of the Tribunals, Courts and Enforcement Act 2007 and the decisions of the Court of Appeal in *R (Cart & Ors) v The Upper Tribunal and Ors* [2010] EWCA 3052 Civ 859 and the Court of Session in *Eba (AP) v The Advocate General for Scotland* [2010] ScotCS CSIH 78. The issue was considered by Supreme Court this March; judgment is awaited.

**[5]: Unfavourable decisions on entitlement where a statutory appeal is not an effective remedy due to urgency**

43. The issue that has to be considered once a formal decision has been made is the impact of the existence of an alternative remedy. The case-law indicates that
  - (a) When a statutory system of appeal exists, the court will require it to be used unless there are exceptional circumstances: see *R v IRC ex part Preston* [1985] AC 835.
  - (b) Whether the alternative provides an effective remedy is a relevant factor: *Leech v Deputy Governor of Parkhurst Prison* [1995] AC 533.
44. If the social security decision that is the proposed target of a judicial review carries a right of appeal, both the Pre-action Protocol letter and the Claim Form will need to explain why judicial review is considered to be an appropriate remedy.
45. Judicial review of an unfavourable decision *may* be appropriate in cases where:
  - It can *clearly be shown* that the decision is based on a mistaken view as to the law and that the benefit authority has failed to engage with the legal arguments put forward in the LBC; *and*

- the statutory appeal route is not an effective remedy e.g. the claimant (and their family) are experiencing financial hardship or there is a risk to the claimant's home and the time it will take for the statutory appeal to be heard means it is not a suitable or effective remedy.

#### Delays in appeals being heard by a First-tier Tribunal

46. Any application for judicial review under this heading needs to be made against a background of delays in social security appeals being heard by tribunals.
47. Claimants are currently experiencing delays of between six and twelve months before their social security appeal is listed before a First-tier Tribunal. A recent report by the Administrative Justice and Tribunals Council (AJTC): *'Time for Action - A report on the absence of a time limit for decision makers to respond to social security appeals'* (February 2011) described the situation facing social security appellants in the following terms:

*"As the case studies and statistics in this report demonstrate, in practice the time taken by agencies to process appeals can span many months, added to which, the time it takes a case to get to a tribunal hearing, can take the best part of a year. The worst case we encountered in a random case sampling exercise took 423 days, or 15 months from the lodgement of the appeal with the DWP to the date of hearing by the tribunal. The overall average time from lodgement to date of hearing for the cases we sampled was 202 days or 29 weeks."*

48. Whether the delay in an appeal being heard by a statutory appeal tribunal will be enough to justify issuing judicial review will depend on the particular circumstances of the case.
49. In cases where the merits are not clear or it is unclear whether it would be appropriate to issue judicial proceedings at all it may be possible to obtain an opinion from counsel under '**investigative help**' – e.g. to draft a complex pre-action protocol letter (Part C Funding Code 16.3.2).

### **Judicial review and the guidance on public funding**

50. For details of the funding code for Judicial Review see the **Legal Services Commission Manual: Funding Code, Volume 3 (October 2010 Issue 1)**:

#### Part A The Funding Code: Criteria

#### Section 7 Judicial Review

Part C The Funding Code: Decision Making Guidance

16. Judicial Review which includes:

16.3 Investigative Help:

16.5 Administrative Procedures;

16.7 Full Representation.

51. Judicial review is a priority under the funding code and a funding certificate should be available even if the monies at stake are small as long as the following **cost benefit test** is satisfied:

*“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).*

52. The statutory charge does not apply to welfare benefits (as they are not an assignable interest): The Community Legal Service (Financial) Regulations 2000 (2000/516) reg 44 (1)(h).

53. In cases where the merits are not clear, the adviser may need to consider obtaining an opinion from counsel under ‘**investigative help**’ – e.g. to draft a complex pre-action protocol letter:

*“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 necessarily in writing a letter before action to the body potentially under challenge in accordance with the Pre-Action Protocol – see paragraph 7 below. 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 – see section 10.3 of this guidance” (Part C Funding Code 16.3.2).*

Tactics

54. A problem for many advisers is the lack of any response from the relevant benefit authority. But if you are considering judicial review

proceedings then you need to be pro-active and show that you have been reasonable throughout.

- The purpose of the pre-action protocol in judicial proceedings is to clearly lay out the claimant's case and to give the other side the opportunity of remedying the defect without litigation.
- Identify the statutory duty to act and ask the authority to exercise that power - demand that it takes place within 14 days (or 7 day if very urgent)
- Ensure ball is in the court of the relevant benefit authority i.e. that it has all the necessary information and has no excuse not to act.
- Make your case as water-tight as possible. Set out the facts in correspondent and invite the authority to agree them. If there is a major dispute over a factual issue it needs to be flushed out at this stage - before any claim is lodged as the Administrative Court needs a 'clean point of law', it cannot carry out its legal analysis if there are several possible scenarios depending on which version of the facts is correct.
- Set out what attempts the client has made to resolve their benefit problems.
- Ensure there is nothing outstanding for the client to do e.g. if there is no incontrovertible proof of delivery of information to the relevant benefit authority, resubmit it immediately (without prejudice to previous claim already sent).
- If a statutory appeal needs to be made, ensure the client signs any appeal letter.
- Is the relevant benefit authority following a lawful procedure? If so - monitor the situation. If not, threaten judicial review. Give the authority an ultimatum; stipulate the time limit within which the local authority must act.
- If the authority fails to comply with a deadline then this will be grounds to issue proceedings.

Note: It is 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.

Desmond Rutledge ©  
Barrister at Garden Court Chambers  
3 June 2011