Response of Child Poverty Action Group to the call for evidence produced by the Independent Review of Administrative Law Panel

October 2020

Introduction/Context

1. Child Poverty Action Group ('CPAG') is a medium-sized charity which works to end child poverty long term through policy and campaign work but also has a specific and highly regarded social security expertise. We have a small legal team (1 to 2 lawyers and an experienced welfare rights adviser) engaging in test case litigation on social security issues primarily affecting children and their parents, through both judicial review and statutory appeals. Our test cases seek to ensure that ordinary families who are going through difficult periods in their lives where they need to claim welfare benefits (e.g. because of bereavement or because, often despite working, they are unable to provide fully for their family) have their benefit entitlement determined by legislation which complies with basic public law requirements, including being in accordance with human rights law and not being irrational or *Wednesbury* unreasonable.

2. Judicial review test cases this year (2020) have included:

   - *R (Jackson and others) v SSWP* [2020] EWHC 183 Admin: a successful challenge on HRA non-discrimination grounds to the marriage requirement to be entitled to bereavement support payment even at the higher rate where children are involved. This followed from a similar successful challenge which had come up through the Northern Ireland courts to the precursor to higher rate bereavement support, namely widowed parent's allowance: *in the matter of an application for judicial review by Siobhan McLaughlin* [2018] UKSC 48. The SSWP attempted to argue that the two benefits were serving fundamentally different purposes and so *McLaughlin* could not be read across. We were successful in the High Court and the SSWP chose not to appeal further. A remedial order was announced in June in relation to both widowed parents' allowance and higher rate bereavement support payment but no proposed draft has yet been forthcoming. Up to 2,000 families per year are currently not entitled to bereavement benefit (a contribution based benefit rather than means-tested benefit) purely because they were not married to their long-term partner and parent of the couple's children.

   - *R (TD, AD and Reynolds) v SSWP* [2020] EWCA Civ 618: a successful challenge (on appeal) on HRA non-discrimination grounds to the situation in universal credit where certain claimants who only make a claim for universal credit because their original benefits were incorrectly stopped (as subsequently established on revision or on appeal) are worse off on universal credit but cannot, under existing legal provisions, return to their original benefits once the wrongful decision ending their entitlement to their original benefits is identified and do not receive any transitional element in universal credit to make up for the shortfall which was nothing of their own doing. (The SSWP is seeking permission to appeal from the Supreme Court).

   - *R (Johnson and others) v SSWP* [2020] EWCA Civ 778: a successful challenge (on SSWP's appeal) on irrationality grounds to the situation in universal credit where some claimants who are in regular monthly employment experience considerable oscillations in their monthly universal credit payments and the loss of the benefit of a work allowance (available to those with children) because, in months when they are paid a day or two early by their employer to avoid being paid on a non-working day, universal credit treats them as earning two lots of wages in one month and none in the following month. (The SSWP is not appealing this further but has yet to implement the judgment).

Once universal credit is fully rolled out, we estimate that up to 85,000 households could be affected by this issue.

- *R (Pantellerisco and others) v SSWP* [2020] EWHC 1944 (Admin): a successful challenge on irrationality grounds to the situation in universal credit where a claimant who works 16 hours per week at national living wage, which would be enough to exempt her and her children from the benefit cap if she were paid monthly, is subject to the benefit cap purely because she happens to be paid 4 weekly rather than monthly. (The SSWP is seeking permission to appeal from the Court of Appeal).

3. It is important to bear in mind that the number of test cases that CPAG has the capacity to engage in is necessarily small. For every **1** test case which we know will go to litigation because we are challenging policy and the legislation underpinning it, we engage in at least **10** matters at the pre-action stage which we know will not proceed further because the challenge concerns basic good decision making: making decisions on benefits within a reasonable time; applying the law correctly; applying departmental guidance correctly; considering the individual facts; exercising one's discretion rather than operating blanket policies.

4. The importance of the pre-action process for judicial review in ensuring good governance and that decisions which affect some of the most vulnerable members of society (disabled people, children, those with limited financial resources) are made in compliance with basic standards of good administrative decision making[1] cannot be overstated and led CPAG in 2019 to establish a judicial review project. The JR project is specifically designed at enabling welfare rights advisers on behalf of their clients to engage in the pre-action process for issues which we know will be settled at the pre-action stage and not result in litigation and where there is no alternative, effective remedy. CPAG provides training, support and a bank of pre-action letter templates. The idea is that the welfare rights advisers engage themselves in the pre-action process without the need for any lawyers.[2] These are cases about straightforwardly getting the law wrong (e.g. requiring a woman to satisfy a residence test to qualify for universal credit despite regulations expressly exempting her from that test because she has been granted leave to remain under the destitution domestic violence concession); fettering discretion/operation of a blanket policy (e.g. automatic recovery of overpayments even where caused by official error); failure to follow own guidance (e.g. subjecting a terminally ill person to work search and work availability requirements as part of the conditions for receiving a benefit despite the provision of the relevant form evidencing his terminal illness and confirming that he is not expected to live more than 6 months); undue delay (especially around making a mandatory reconsideration decision in the absence of which a claimant cannot start the appeal process); and failure to provide sufficient reasons (e.g. where generic reasons are provided which fail to enable a claimant to know the actual basis on which she is said not to meet the relevant criteria for a disability benefit).

[1] This role of judicial review is recognised in the sub-title for the Government Legal Department's Judge Over Your Shoulder – a guide to good decision making https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf

[2] The JR project is headed up by an experience welfare rights advisers and the role of CPAG's legally qualified staff is limited to checking over pre-action letter templates.

5. Such pre-action matters usually result in a speedy and straightforward resolution of the situation for the individual concerned. This can often be against the backdrop of months spent by the individual claimant or welfare rights adviser trying to resolve the issue through other channels – correspondence with DWP, official complaints, involving the MP etc. as illustrated by this feedback to CPAG's JR project:

> *I just wanted to say thank you - I used one of your JR templates and have received an excellent result in just under a week. The one to get a paper assessment for PIP. The legal team emailed this morning to say they carried out the paper assessment, made an award, and will pay the backdate on 4th December. This is after weeks of nothing from the complaints team and no help from an MP who didn't seem interested. I was at a loss at what to do next so thank you so much!*

6. From a survey CPAG conducted at the end of September 2020 and to which 71 welfare rights advisers responded, we know that between them they had sent 74 pre-action letters in the preceding months using the templates available on CPAG's website and 66 of these had resulted in a positive result for their client ie 89%.[3] That is at least 66 individuals who have been able to secure a decision resulting in correct benefit entitlement which they would not have been able to secure, or would not have been able to secure within any reasonable timeframe, without the use of the pre-action protocol process for judicial review.

7. A sample of pre-action matters dealt with through CPAG's judicial review project is provided at Annex A. As the examples there demonstrate, judicial review is being used in those instances not as a means of hindering the executive from carrying out the business of government, as the overriding question in the call for evidence suggests, but rather as a means of ensuring that government departments carry out the business of government *lawfully* i.e. in the way proscribed by Parliament through the correct application of legislation and in line with basic principles of good decision making (e.g. without undue delay, following own guidance etc.).

8. CPAG is extremely concerned that any amendments in relation to the bringing of substantive judicial review claims could potentially have a negative impact on the effectiveness of the pre-action process. If amendments to judicial review mean that, however uncontroversial and meritorious the claim is, it is less likely that a claimant would proceed to issuing a claim (e.g. inability to comply with reduced time limits, increased costs risk, risk of satellite litigation stemming from codification of judicial review), there becomes no incentive for public bodies to settle claims at the pre-action stage or to ensure that administrative decisions are made in accordance with the law (both legislation and the common law). This would be completely contrary to the "role of the executive to govern effectively under the law".

[3] Of the remaining 8, it is unclear whether they were unsuccessful or whether a response is still awaited.

Q1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

Firstly, it is unfortunate that the questions posed to government departments/public bodies take as their starting point that judicial review acts as a hindrance or impediment as opposed to it being a critical means for ensuring adherence to the rule of law. This is apparent from:

(i) the order of questions 1 (how JR impedes) and 2 (whether JR improves);

(ii) question 2 not seeking any information on how/why JR improves decision making (in contrast to question 1 which requests as much evidence as possible in support of why JR impedes decision making);

(iii) question 2, although framed initially as looking for positive aspects of JR, immediately goes on to ask a secondary question premised on JR not helping decision making; and

(iv) question 2 does not ask, if JR does not help decision making, why not. The reason for the lack of improved decision making may be for a range of reasons which have nothing to do with the judicial review e.g. pre-action challenges to delays by DWP in conducting mandatory reconsiderations may not result in quicker decisions in the future because there simply are not the available resources and dealing with a limited number of pre-action protocol letters on this issue is considered an acceptable pay-off to spending considerably more on putting in more human resources to processing mandatory reconsideration requests within shorter timescales.

Secondly, as set out in the introduction/context to CPAG's work, the pre-action judicial review process is critical to enabling ordinary individuals to secure the benefit to which they are entitled where there is no alternative remedy and to ensuring basic standards of good administrative decision making can be enforced in a quick and relatively accessible manner. The questions to Government Departments make no specific reference to the pre-action process and risk responses focussing on litigation only, which, of its nature, concerns more controversial issues and has greater costs implications.

Thirdly, in a recent FOI request to the Department for Work and Pensions, CPAG asked DWP how many letters had been received under the pre-action protocol for judicial review since January 2019 and, of those, how many had resulted in a favourable outcome for the claimant. The DWP were unable to provide a substantive response on the basis that such information, while held, was not held centrally but would involve individual DWP lawyers searching manually through their own records and so surpassed the cost limit. Given this experience and the lack of internal monitoring and evaluation, CPAG doubts that individual Departments maintain adequate records to enable them to respond in a fully evidenced, as opposed to selective, way to the questions posed.

Q2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

While the call for evidence is a publicly available document, it is unclear what steps the Panel are taking to engage pro-actively with judicial review claimants/potential claimants themselves and to hear from them what improvements they consider, based on their direct experience of judicial review as a non-professional, can be made.

Q3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

CPAG is not aware of any need for statutory intervention in the judicial review process or what the evidential basis for such a move would be.

It is highly unlikely that statute would add certainty or clarity to judicial review but rather the statutory provisions would themselves become a source of satellite litigation over what exactly they meant. This can already be seen from the provision in s84 Courts and Criminal Justice Act 2015 which amended s31 Senior Court Act 1981 to include a 'not substantially different' test into the permission and relief stage of judicial review and which has given rise to various litigation in its short history.[4]

Q4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

In CPAG's experience of engaging in judicial review claims, we have never had any issues about whether or not the decision or power we are challenging is subject to judicial review. This is within the context of the overwhelming majority of decisions that we encounter in the welfare benefits sector not being subject to judicial review but rather statutory appeal being the appropriate route of challenge and the one which is properly taken.

Q5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

Yes, at least to lawyers, though the 2nd to 4th resources below try to be accessible to the non-lawyer as well.

See: Civil Procedure Rules, particularly Part 54 (and Part 52 on appeals).

Administrative Court Judicial Review Guidance[5], particularly section 5 onwards which sets out in detail the process (issues of standing, time limits, how to actually file a claim form, where to file the claim form, the AOS, permission stage etc)

Judge Over Your Shoulder[6] section 3 (but also provides an accessible overview of the actual grounds of judicial review in earlier sections).

The court procedures section of the Supreme Court website.[7]

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[4] See James Maurici QC and Admas Habteslasie *When does the "no substantial difference" test make a difference in judicial review applications? Does the outcome differ depending on whether the case is based on EU or UK law?* Judicial Review 2019, vol 24, no 2 pp 127-156.

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf

[7] https://www.supremecourt.uk/procedures/index.html

Q6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

In CPAG's experience the 3 month time limit is already extremely short. The clients that we work with often have no awareness of judicial review; will often 'put up' with an unlawful situation for lack of understanding of the highly complex and constantly amended field of social security law; are vulnerable in the sense that they often reluctant to challenge those who ultimately control how much income they receive, as well as having complex lifestyles which make finding the emotional and thinking space to engage in an alien litigation process demanding. As a result, they often come to us or, having seen a welfare rights adviser, are referred to us already several weeks, if not longer, since the relevant decision was made. If the matter is not resolved at the pre-action stage, this initial delay is then compounded with difficulties in securing legal aid in a speedy fashion and by the front-loaded nature of a judicial review claim compared to other civil proceedings, with supporting evidence all required at the time of issue.

We consider that the discretion available to judges to extend time where reasonable rather than the operation of a rigid 3 month time limit has the potential to ensure that the right balance is struck between the general public interest of certainty and the specific circumstances of individual claimants. We would though urge that difficulties in obtaining legal aid is a factor that goes into the exercise of that discretion: a claimant who is financially eligible for legal aid is simply not in a position to issue proceedings, even protectively, without legal aid being in place. They should not be prevented from bringing a valid claim because they have been unable to comply with the 3 month time limit in circumstances where the Legal Aid Agency has itself delayed in granting legal aid or where an initial refusal by it has necessitated the claimant challenging that refusal.

Rather than focussing on the time limits for bringing a judicial review claim, we consider attention would be better focussed on the time taken for a claim for judicial review to process post-issue. In our experience, it can take anywhere from 3 to 9 months for a decision for permission on the papers to be made. Once permission is granted, there can then be a further significant delay in finding available dates for a hearing, particularly to accommodate the respondent's chosen counsel despite the existence of panel counsel. For example, in one judicial review claim, a rolled up hearing was, on 26 November 2019, directed to be listed for the first available date after 1 February 2020. Ultimately, due to limits on the availability of the respondent's chosen counsel, the hearing was not listed until 24 June 2020 and, at the time of writing, judgment is still awaited over 3 months since that hearing. Such a protracted litigation process is at complete odds with the initial 3 month time limit for starting proceedings and the reason underpinning that extremely short time limit compared to other civil proceedings.

It should be emphasised that the nature of the litigation cases that CPAG is involved in are such that there is absolutely nothing to be gained by our clients trying use the judicial review process as a delaying tactic. Quite the opposite, our clients want the judicial review process to be resolved as soon as possible so that they can receive a benefit or a higher amount of benefit to that which they are actually receiving. In our experience, it is DWP that has nothing to lose by the judicial review process (and any onward appeal) being as protracted as possible. By way of concrete example, in *R (Johnson and others v SSWP),* concerning oscillating universal credit amounts due to the non-banking day pay shift, the claim was successful before the Divisional Court with judgment being given in January 2019. The SSWP sought permission to appeal which was refused by the Divisional Court and

she applied direct to the Court of Appeal. However, her lawyers failed to provide the Court with bundles which were compliant with the civil procedure rules until August 2019 and, in the absence of which, the permission to appeal application was not forwarded to a judge. There was absolutely no sanction given for this failure and, in the meantime, in reliance on a piece of social security legislation which allows the SSWP to decide other claims which are affected by an issue which is under appeal as though she had already been successful in that appeal (even where she hasn't even yet been given permission to appeal), the SSWP continued to make decisions on other benefit awards in a way which the Divisional Court had held to be unlawful (and which ultimately the Court of Appeal also found to be unlawful).

Q7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

In our experience, the long standing common law rule is applied i.e. that costs follow the event.

We note though that in recent cases, government lawyers have tried to push for only a percentage of a successful claimant's costs being awarded e.g. in *R (Johnson and others) v SSWP* the costs order could not be agreed between the parties because, despite the claimants winning at both first instance and on the SSWP's appeal, counsel for the SSWP sought to argue that we should only get a percentage of our costs because, essentially, not all our arguments had been accepted by the court. Such argument was given short shrift at both Divisional and Court of Appeal level.

Q8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

For our clients, who by definition are usually of very limited means given that the judicial review challenges concern welfare benefits entitlement, the costs of engaging in judicial review, if they were required to pay direct, would be completely disproportionate to the value of the claim to them as individuals. For example, *R (Johnson and others) v SSWP* [2020] EWCA Civ 778 (where our clients were successful before both the Divisional Court and the Court of Appeal) only concerned a financial loss of a few hundred pounds. However, there was a wider issue of fluctuating universal credit awards despite our clients being in stable employment which had disastrous knock on effects (use of foodbanks, threats of court action for rent arrears, accumulating credit card debt etc. and the accompanying emotional stress which had led one client to attempt suicide on two occasions). Had our clients had to bear the possibility of costs risk, it is extremely unlikely that the litigation, which stands to benefit up to 85,000 other households by the time universal credit is fully rolled out, would ever have been brought.

While legal aid is presumably outside the scope of this review, one particular concern worth raising is that universal credit currently acts as a passporting benefit for legal aid purposes i.e. an individual in receipt of universal credit is automatically assessed as coming within the income limits of the means test and only needs to satisfy the capital limit of the means test, as well as the merits test. The Ministry of Justice has previously consulted on this but currently has taken no further action. If universal credit were to cease to act as a passporting benefit, the current income limits for legal aid would need to be reviewed as they put access to justice completely outside the reach of many hard working families with limited financial means. Given the uncertainty of the outcomes of judicial review, the often limited financial amount at stake in the claim and damages not usually being an

available remedy, it is extremely difficult to fund judicial review claims through alternative funding arrangements.

Q9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

The main difficulty that CPAG has experienced in relation to remedies is where challenges to secondary legislation result in declarations of unlawfulness but it is left to the government department to bring forward amending legislation to remedy the unlawfulness with no specific timetable being set. Invariably this can take several months and, in the meantime, legislation which has been declared to be unlawful stands and continues to be applied to other claimants. This is clearly an unsatisfactory state of affairs and ultimately undermines the rule of law.

This has happened, for example, in relation to:

(i) *R (SC and others) v SSWP* [2018] EWHC 864: the ordering requirement in the exception to the two child rule for children taken in by a family under an informal kinship care arrangement. The legislative provisions which were challenged provided that the exception to the two child limit for the child element of means tested benefits would only apply if the kinship care child was the third child in the family.[8] The High Court found[9] that given the rationale for the exception, namely to encourage families to take in the children of family or friends who would otherwise fall to be cared for by the local authority at much greater financial and emotional cost, limiting its application only to those situations where a family took in a child after having their own two children was irrational. A declaration to this effect was given as the relevant provisions were not unlawful in their entirety such that a quashing order was inappropriate. It took the HMRC and DWP seven months to bring forward amending legislation.[10]

(ii) *R (Johnson and others) v SSWP* [2020] EWCA Civ 778: the non-banking day shift whereby regular, monthly paid employers who happen to claim universal credit on or around their normal pay date, are treated as receiving two lots of monthly wages (and therefore entitled to less universal credit) when they are paid early in some months so as to avoid being paid on a non-banking day. The Court of Appeal found that the failure of the SSWP to provide an exception to the usual position that a person's earned income for the purposes of calculating their monthly universal credit entitlement is that income received in an assessment period to cover this situation was irrational. However, because the calculation method and underlying regulations were lawful in respect of those not affected by the 'non-banking day shift' issue, a quashing order was inappropriate. We are currently still waiting for amending regulations to be brought forward[11] and, in the meantime, the DWP continues to calculate universal credit awards on a basis that has been found to be unlawful.

[8] Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) Amendment Regulations 2017 and the Child Tax Credit (Amendment) Regulations 2017

[9] [215]-[217]

[10] Child Tax Credit (Amendment) Regulations 2018 and Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations 2018.

[11] The SSWP confirmed shortly after the judgment of the Court of Appeal that she would not be appealing it.

It will be apparent from such examples, that the courts already use remedies sparingly, leaving it to the relevant government department to consider how best to address the unlawfulness. If anything, we would be looking for courts to use remedies more robustly e.g. to prohibit the application of legislation in those cases where to do so would be unlawful even if the legislation in its totality cannot be struck down. This would (a) ensure proper respect for the rule of law in that subsequent decisions were not being taken on the basis of legislation which had been found to be unlawful and (b) incentivise government departments to bring forward amending legislation as soon as possible to fill in what might otherwise be gaps in the law. (As things stand, there is simply no incentive on government departments to bring forward amending legislation at any particular speed).

Q10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

As set out in the introduction, in broad terms, CPAG engages in two types of judicial review:

> (i) those cases which we know will fold at pre-action stage and essentially concern poor decision making e.g. a challenge to a basic failure to correctly apply the law or a delay in making a decision. In other words, cases where it is clear that the decision maker is in error and the issue has no wider strategic importance.
>
> (ii) test cases which are not a challenge to the wrongful/non-application of the legislation but to the legislation itself or how it is being interpreted which we know are highly unlikely to settle.

In relation to the first type, we currently have 90 pre-action template letters which are freely available on our website to be used by welfare rights advisers or indeed individuals. All but a handful of these relate to matters which we know concern issues of poor decision making, rather than an argument about what the law requires, which will result in a settlement. The simplest way to minimise the need for judicial review in such instances would be for DWP to ensure its decision makers were adequately trained and resourced to make decisions efficiently and in line with the law.

As a second best, the need to engage in the pre-action judicial review process, could be minimised by DWP ensuring that after settling an individual case, systems are put in place to prevent the same issue arising in relation to other benefit claimants. Essentially, our template pre-action letters should become otiose after they have been used once or twice as the misunderstanding of the law, the failure to follow guidance or the blanket policy limiting the exercise of discretion that they are concerned with is addressed within DWP by better training, reissued guidance and amendment to the policy. However, as the sample of cases provided in the annex shows, there are some issues which are recurring e.g. failure to include the carer's element in universal credit where the person being cared for has died despite the 8 week run-on off carer's allowance and the refusal to accept advance claims within 1 month of the 18th birthday of a care leaver.

We are unclear how the handling of pre-action claims by DWP Legal is integrated into the wider operation of DWP or what monitoring/evaluation/learning from the issues raised by them takes place. The response to our recent FOI request, referred to under Q1 above, on the number of pre-action letters received since January 2019 and how many resulted in a positive outcome for the claimant without recourse to litigation, provides little confidence that robust systems for monitoring, evaluation and avoiding the same issue arising again are in place.

Q11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

During the past 4 years, CPAG has only had one case where settlement has been reached post-issue but before the substantive hearing. This was a case concerning people moving from incapacity benefit to employment support allowance who were paid less employment and support allowance than they were legally entitled to due to basic errors/oversight by DWP. However, even when DWP recognised its errors it still sought to argue that the period for which it had to make back dated payments was limited due to something known as the anti-test case rule. We challenged the application of the anti-test case rule in this situation and, just before having to comply with directions on filing its defence after several previous extensions of time, the DWP conceded the case. A short write up is available at https://cpag.org.uk/news-blogs/news-listings/CPAG-legal-action-leads-to-full-arrears-for-disabled-claimants with links to the National Audit Office report and the Public Accounts Committee report into the affair at the bottom of that page.

This is in the wider context of a total of 11 judicial review claims which have been issued in the last 4 years. Besides the case referred to above, the claimants have been successful in 5 claims following substantive hearing. (Of the other 5, we were unsuccessful in full in 2 (though 1 is still going through the appeal process); unsuccessful in part in 1 (and the unsuccessful part is still going through the appeal process); we are awaiting judgment in 1; and we are appealing the refusal of permission to apply for judicial review in the Court of Appeal in 1).

Q12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

Not for the type of judicial reviews that CPAG is involved in. Where the challenge is to basic poor decision making, the matter settles at the pre-action stage. For challenges to actual legislation, and therefore the underlying policy, ADR is simply not appropriate.

Q13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

The cases that CPAG are involved in are generally brought in the name of the individual clients and standing is not usually an issue.

The one exception to this is that in the successful challenge to the marriage condition for entitlement to higher rate bereavement support payment (BSP) *R (Jackson and others) v SSWP*, the SSWP sought to argue that the children in the two claimant households had no standing as they were not directly affected by the law governing BSP and their rights and interests were not affected despite the higher rate of BSP only being paid where there were children involved. The High Court held that the children did have victim status for HRA purposes and so had standing. This had nothing to do with public interest standing but was simply an attempt by the SSWP to underline her (unsuccessful) argument that higher rate bereavement support payment only paid where there are children involved had nothing to do with the interests or needs of the children.

Child Poverty Action Group
19 October 2020

Annex A: Sample of cases from Child Poverty Action's Judicial Review Project

1. Failure to follow the law

The client had been caring for his wife who was severely disabled and who was in receipt personal independence payment. The client, in turn, received carer's allowance. His wife died and the client claimed universal credit as a lone parent of 4 children. His carer's allowance ran on for eight weeks following his wife's death. His welfare rights adviser in a local authority welfare rights team asked DWP to include the additional carer element in his universal credit award, but this was refused as the client was held to be no longer providing 'regular and substantial care'. A mandatory reconsideration of that decision was sought, but the client was in urgent financial need.

'Regular and substantial caring' is defined as including where a claimant '*satisf[ies] the conditions for entitlement to a carer's allowance'* (reg 30 Universal Credit Regulations 2013*).* The client did satisfy the conditions for entitlement to carer's allowance and was still receiving carer's allowance for the 8 week run-on after his wife's death. (Indeed, his carer's allowance was being deducted from his maximum universal credit allowance as unearned income).

A pre-action letter was sent challenging the failure to award the carer element despite the client being in receipt of carer's allowance. The carer element was awarded within 14 days of the pre-action letter being sent.

In September 2020, the same adviser confirmed two further cases of refusal to award the carer element in line with a run-on of carer's allowance. This failure to correctly follow the law is therefore an ongoing issue.

2. Failure to follow the law and procedural irregularity

The client was severely disabled and had wrongly had his contribution-based employment support allowance (cbESA) claim terminated after 52 weeks; he had never undergone a work capability assessment (WCA) to establish if he had limited capability for work and work related activity (LCWRA) such that his ESA could have continued beyond 52 weeks; and his entitlement to income related ESA (irESA) had not been assessed. Following the termination of his cbESA award, the client had no choice but to claim universal credit but was unable to manage his claim due to his disability.

Under the Welfare Reform Act 2007 the duration of an award of cbESA is 365 days unless the claimant has or is treated as having LCWRA. In *MC and JH v SSWP* (ESA) [2014] UKUT 125 (AAC) the Upper Tribunal stated that termination of cbESA for those not in the support group can be contested on the basis that the claimant at the point of termination, although not regarded by the SSWP as being in the support group, ought to have been because the claimant at that point in fact has LCWRA (or was to be treated as such), and that the tribunal can make this determination where the SSWP has not considered the question. Further following *R (DS) v SSWP* JR/1249/18 it is clear that a claim to ESA includes a claim to irESA and the client's cbESA should not have been terminated without assessing entitlement to irESA.

The client's welfare rights adviser from a local Citizen's Advice sent a pre-action letter contending: (i) error of law / failure to consider entitlement to irESA; (ii) failure to assess whether the client had LCRWA at the end of the time-limited period of cbESA; and (iii) the procedural irregularity of not sending for a WCA. The client had a right of appeal against the decision, however this was ineffective given the clear failure by the DWP to follow the law and its own guidance, the incorrect advice given to the client by the DWP that he needed to claim universal credit, and the profound financial hardship caused to the client who was already homeless. Judicial review was considered the only effective remedy available to provide a speedy resolution to the clear unlawfulness.

In response to the pre-action letter, the client's cbESA and legacy benefits were reinstated. The adviser reported "it has been a long haul, but the client's benefits are now as we believe they should be and he can look ahead with much more confidence, both in himself and in the system."

3. Failure to follow the law

The client was a care leaver just past her 18th birthday. She had been prevented from making an advance claim for universal credit in anticipation of turning 18 so that she would immediately be able to access benefits when local authority provision for her came to an end at that date. The client's welfare rights adviser from her local NHS Trust sent a judicial review pre-action letter challenging the unlawful refusal of DWP to accept the client's universal credit claim when made in the month prior to her 18th birthday in direct breach of the provisions in reg. 32 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (UC etc (C & P) Regs).

In response to the pre-action letter, the missing days of universal credit were awarded within 14 days. However, the adviser reported "*I am still getting young people turned down for advanced claim."* This failure to follow the law is therefore an ongoing issue.

4. Unreasonable Delay / frustration of appeal rights

The client was a disabled woman with multiple conditions who was an EEA national. She claimed universal credit but her claim was purportedly 'closed' as she was found to have failed the residence test. The client sought a mandatory reconsideration of this decision and several months later, having still not received a response to her mandatory reconsideration request, reclaimed universal credit as she had no income. Universal credit was awarded on her second claim without any issue as she was accepted as having a right to reside.

It had been over 12 months since she requested a mandatory reconsideration of the decision on her first claim and no mandatory reconsideration notice had been received. The client was therefore prevented from appealing the initial refusal of universal credit as it is a pre-requisite to exercising appeal rights in social security claims that the SSWP has considered whether or not to revise the decision being challenged.

The client's adviser sent a pre-action letter challenging the delay. A mandatory reconsideration notice was received in response and the decision to 'close' her claim was revised (i.e. it was accepted that she had met the residence test all along) with universal credit being awarded from the date of her first claim.

5. Unreasonable delay / frustration of appeal rights

The client claimed universal credit and was refused as she was found not to satisfy the habitual residence test in May 2019. The client sought a mandatory reconsideration but no mandatory reconsideration notice was received and in March 2020, her welfare rights adviser sent a pre action letter challenging the unreasonable delay in making a mandatory reconsideration decision and the frustration of the client's appeal rights.

In response, the decision refusing the client universal credit was revised and the client was found to be entitled to universal credit as from 24 May 2019. £8,541.90 was paid into her bank account in back payments over the next two days which enabled her to clear her rent arrears and other debts in full.

6. Failure to exercise discretion and failure to follow the law

A welfare rights adviser in a Citizens Advice centre sent a pre-action letter on behalf of a disabled client whose personal independence payment had been refused when he was unable to attend a medical assessment due to his disability. The pre-action letter challenged: (i) DWP's failure to exercise discretion and/or take account of relevant information in not deciding the client's claim on the paperwork available when all the evidence needed to make an award was available; (ii) the failure to offer a home visit; (iii) the failure to make reasonable adjustments/disability discrimination; and (iv) failure to follow the law and own guidance in not accepting the client's 'good reason' for not attending the assessment.

In response to the pre-action letter, personal independence payment was awarded at the enhanced rate in just under a week on the basis of the client's paperwork already held by DWP. This was, in the adviser's words "after weeks of nothing from the complaints team and no help from an MP who didn't seem interested. I was at a loss at what to do next".

7. Failure to have regard to relevant information, failure to follow guidance and procedural irregularity

The client was a severely disabled woman, suffering multiple mental and physical health conditions including cancer. She had been in receipt of personal independence payment (PIP) at the standard rate and was called for a reassessment at which point it was held that she was no longer entitled to PIP and her award terminated.

The client's welfare rights adviser from Macmillan Cancer Support sent a pre action letter challenging: (i) the failure on the part of the DWP to take relevant facts and evidence into account; (ii) the failure to follow DWP's own guidance; (iii) procedural irregularity; and (iv) disability discrimination.

In response to the pre-action letter, PIP was awarded at the enhanced rate for 3 years including backdating of over £3200. The adviser reported "As she is homeless, hopefully that will help her secure accommodation and start her life again … DWP also said they were using it as a 'learning exercise' as clearly a lot had gone wrong with the case."

8. Failure to exercise discretion to accept a late tax credit mandatory reconsideration request

The client had requested a mandatory reconsideration of her tax credit award but had sent in the request outside the one month time limit. A pre-action letter was sent on behalf of their client challenging the refusal to accept the reasons given for the lateness of the mandatory reconsideration equest. HMRC quickly responded and within six weeks the client received a response that they agreed that there had been an official error and they would be revising the client's award from the start of the claim. The client was entitled to an underpayment of nearly £12,500 in tax credits.