**Employment and Support Allowance: Mandatory Reconsideration and Appeals Come Full Circle**

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Nearly seven years after the introduction of Mandatory Reconsideration (MR) before appeal, the lawfulness of the scheme has finally been considered by the courts in *R (On the Application of Connor) v The Secretary of State for Work And Pensions* [2020] EWHC 1999 (Admin). Following an outline of the facts and the judgment of the court, this note focuses on the four-stage approach to the assessment of proportionality adopted in the judgment and the Secretary of State for Work & Pension’s (SSWP) response to the appeal.

The case was brought by an individual claimant Mr Connor, representing himself. The claim challenged the legality of the regulation 3ZA of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the Decisions and Appeals Regulations) on the grounds that it is an abrogation of the right to appeal and contrary to the Human Rights Act 1998 and Article 6, ECHR because:

1) Regulation 3ZA of the Decisions and Appeals Regulations results in an open-ended deferral of the right of appeal;

2) Operating together with section 30(3) of the Employment and Support Allowance Regulations, the regulations prevent payment of Employment and Support Allowance (ESA) during this open-ended process; and

3) Regulation 3ZA places a condition on the right of access to the First-tier Tribunal that is disproportionate (para 13).

Mr Justice Swift’s judgment sets out the complex legislative provisions in detail (paras. 3-9). In summary, decisions on a claim for ESA are made under sections 8 or 10 of the Social Security Act 1998 (the 1998 Act). Those decisions take immediate effect by virtue of section 17 of the 1998 Act, bringing payments to an end where a claimant is found not to have limited capability for work. Prior to MR, a claimant had a right of appeal against those decisions under section 12 of the 1998 Act. Regulation 30(3) of the Employment and Support Allowance Regulations 2008 (the ESA Regulations) would then bite, providing in sum, for a payment of ESA to be made pending an appeal. The imposition of regulation 3ZA now requires that a MR must first be sought before an appeal can be made.

The effect is to prevent the immediate operation of the provisions above in two distinct areas: (i) preventing the immediate exercise of the right to appeal, making it at best a conditional right; and (ii) preventing the operation of regulation 30(3) in providing for payment of ESA pending an appeal until the Secretary of State has considered an application made via regulation 3ZA on whether to revise the decision.

In addressing the grounds set out, the court rejected quickly the contention that regulation 3ZA led to an abrogation of the ECHR article 6 right of access to a court, as recognised in the case of *Golder v United Kingdom* (1979) 1 EHRR 524. However, the court accepted the condition placed on claimants to first seek a revision under section 3ZA acted as an impediment or hinderance to Article 6, raising the issue of the proportionality of the interference (paras. 18-19).

The court adopted the four-stage approach to ECHR proportionality set out in *Bank Mellat v HM Treasury (No.2)*[2014] AC 700 (paras. 20-28). In addressing the first two elements (whether the measure’s objective is sufficiently important to justify the limitation of a fundamental right; and whether the measure is rationally connected to this objective), the judge considered the Explanatory notes to section 102 of the Welfare Reform Act 2012, which amended the section 12 right of appeal in the 1998 Act and introduced regulation 3ZA. The court accepted the stated purpose was “…improving the effectiveness of the administrative decision-making by the Secretary of State, so as to make more efficient use of the resources of the First-tier Tribunal” (para.20). Regulation 3ZA operates as the vehicle through which this legitimate purpose or objective is pursued. The measure was therefore rationally connected to the objective and the objective was considered, in principle, to be sufficiently important to justify the interference of the right.

This conclusion is questionable. In evidence in front of the Work & Pensions Select Committee, HH Judge Robert Martin states this was a “false premise” since a power already existed to review appealed decisions via section 9, subject to regulation 3(4)(a) of the Decisions and Appeals Regulations (HC Work and Pensions Committee, 2014). Additionally, evidence from its several years in operation demonstrates that section 3ZA has failed to improve the effectiveness of administrative decision-making. There is a consistently low number of revisions and an increasing percentage of appeals being overturned: from October 2013 to June 2019, an average of 17% and 64% respectively (DWP, 2020(a); MOJ, 2020). Further, far from 3ZA being the vehicle through which the legitimate objective is pursued, it may actively work against that objective in creating a perverse incentive for claimants not to meaningfully engage in the MR process in order to bring about appeal rights and the subsequent payment that 3ZA prevents (Citizen’s Advice, 2014).

The third and fourth elements of the four-stage approach (whether a less intrusive measure could have been used; and whether a fair balance has been struck between the rights of the individual and the interests of the public) are problematic for the Secretary of State. On the first, several options were available, including making the previous discretionary power to consider a revision on appeal a requirement, or amending regulation 30(3) of the ESA Regulations to allow for payment pending a reconsideration or appeal. Either would have protected the payment of ESA pending any decision on revision or an appeal without compromising the stated objectives. As a result, although the court did not consider this in detail, there were clearly less intrusive measures by which the objective could have been pursued.

In assessing the final element of whether, having regard to the severity of the impact, a fair balance had been struck between the interests of those affected and the general public interest, evidence was submitted showing the majority of MR decisions were usually made within 10 working days. While no provision exists to pay ESA during that period, a claimant could claim other benefits, such as Jobseeker’s Allowance (paras. 23, 33) – the implication being that the severity of the consequences of 3ZA for claimants were minimal.

Reassuringly, the court did not accept that position, recognising that even “…a hand full of weeks”(para.23) would likely have a significant impact, and requiring an additional benefit claim placed an additional burden on the claimant (para. 33). The court found that the combination of the delay in accessing appeal rights and the absence of any payment during this time was disproportionate (para. 28).

The court considered the absence of payment pending the MR process, and the absence of any reasons as to why, to be “telling” (para. 34). The court concluded that that regulation 3ZA represented a re-balancing of interests, benefiting the Secretary of State at the cost of claimants. As no evidence was provided to demonstrate a payment of ESA would prevent or undermine the objective pursued, it was found a fair balance had not been struck and the measure was a disproportionate interference with the Article 6, ECHR rights of the claimants (para. 34).

While no doubt reaching the right conclusion, the judgment falls short of reflecting the severity of the impact for some claimants. These include changing between ESA and JSA leading to foodbank reliance, spiralling debt and worsening of health conditions (SSAC, 2016). Further, the court’s assessment that the SSWP may not have foreseen the “practical issue” at the heart of the appeal does not reflect the reality: this was not only completely foreseeable, but has been raised both in the initial consultation and many times since (see, for instance, SSAC 2016).

It will come as little comfort to those who have suffered those hardships that since this decision, the Department for Work and Pensions has issued new guidance (DWP 2020(b)) detaching the required MR from section 8 or 10 decisions relating to ESA where –if an appeal were to be made – a claimant would be entitled to a payment pending that appeal. This effectively defaults back to the position as it was seven years ago, where an immediate appeal is now available with a tied payment pending that appeal. After seven years, the position has returned full-circle. The judgment in *Connor* demonstrates the importance of both the SSWP listening and acting on responses to their consultations and the value of judicial review in ensuring the rights of claimants are upheld when they fail to do so.

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