Neutral Citation Number: [2020] EWHC 1411 (Admin)

Case No: CO/461/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 04/06/2020

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

THE QUEEN (on the application of HE by his litigation friend KE)	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**

Mr Christian Howells (instructed by **Watkins and Gunn Solicitors**) for the **claimant**
Mr Richard O'Brien (instructed by **the Government Legal Department**) for the **defendant**

Hearing dates: 28 May 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and for publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00 on the 4 June 2020.

HH JUDGE JARMAN QC :

1. The claimant is the infant son of his litigation friend. His father in 2016 received a lump sum payment under the Wales Infected Blood Support Scheme (WIBSS). He wishes to bring a claim for judicial review against the Welsh Ministers because payments under that scheme are significantly lower than those under the corresponding scheme in England (EIBSS). He applied for legal aid to do so, and at the time was in receipt of benefits which meant that he did not have to be income means tested. However, he was refused on the grounds that his capital as a result of such a payment takes him above the capital means test for legal aid. His son brings these proceedings for judicial review of that refusal, on the basis that he as a member of his father's family is affected financially by the refusal of legal aid for the intended proceedings.

2. The two grounds of the claim are that the refusal of legal aid in reliance upon capital payments from WIBSS discriminates against the claimant contrary to article 14 read with article 8 of the European Convention on Human Rights (ECHR) and/or article 1 of the First Protocol (A1P1) thereto and/or is irrational.

3. The claimant must surmount several hurdles to succeed. He must show that the refusal to grant his father legal aid is manifestly without reasonable foundation, that he is a victim of such refusal, and that he has standing to bring the claim. If he fails to show that he has an arguable case on any one of these points, then permission must be refused. Upper Tribunal Judge Grubb, sitting as a judge of the High Court upon consideration of the papers came to the conclusion that none of these points are arguable.

4. The claimant renewed his application for permission before me and was represented by counsel Mr Howells. The defendant was also represented by counsel Mr O'Brien. The hearing was conducted via video platform as it was necessary in the interests of justice to do so. I am grateful to both counsel for their clear and focussed submissions.

5. Section 6(1) of the Human Rights Act 1998 (the 1998 Act) makes it unlawful for a public authority to act in a way which is incompatible with the rights enshrined in the ECHR, which are set out in schedule 1.

6. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

7. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

8. A1P1 provides:

> "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

9. Mr Howells' overarching submission is that it is arguable that the claimant has standing to bring this claim as a victim of discrimination. Whilst he recognised that children have no A1P1 rights themselves and that they are not a protected class under Article 14, he submits that in considering the discriminatory effect on parents, the effects on their dependent children must also be taken into account.

10. He relies upon observations made in the Supreme Court in two cases where the legality of an annual cap on specified welfare benefits and the effect of the cap on dependent children was considered. In each case, the appellants included lone parents and their dependent children, and in each case, the appeals were dismissed by a majority of the Justices. Reference was made to article 3 of the United Nations Convention on the Rights of the Child 1989 (UNCRC), which provides:

> "1. In all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

11. In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 Lord Carnwath giving one of the majority judgments said at paragraph 100:

> "It is important also to understand how the interests of children affected by the scheme may be relevant to the legal analysis, either under the Convention itself, or indirectly by reference to article 3(1) of the UNCRC (best interests of children as "a primary consideration").

> As to the Convention, the children have no relevant possessions under A1P1 in their own right; nor are they a protected class under article 14. However, as Lady Hale has said (para 218), the disproportionate impact on women arises because they are responsible for the care of dependent children. Elias LJ said in the Divisional Court (para 62):
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> > "In this case there is no dispute that the rights of the adult claimants under A1P1 (the right to peaceful enjoyment of possessions) are affected by a reduction in the benefits paid to them. And although the child claimants have no A1P1 rights themselves, we agree with CPAG's submission that it would be artificial to treat them as strangers to the article 14/A1P1 arguments. The benefits in each case are paid to the mother to enable her both to feed and house herself and to feed and house her children."
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> I agree. Accordingly, in considering the nature of the admittedly discriminatory effect of the scheme on lone parents, and its alleged justification, the effects on their children must also be taken into account."

12. In *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21 [2019] 1 WLR 3289, the Supreme Court considered a revised cap. Lord Wilson, in giving the lead judgment of the majority in dismissing the appeal, said this at paragraphs 74 – 77:

> "74. In the present case the complaint of discrimination differs from the complaint in [*SG*]. The adult victims of the alleged discrimination are now cast not merely as women but as lone parents of children below school age. Moreover these children are now cast as further victims of it in their own right. And, although the lone parents repeat their complaint of discrimination in the enjoyment of their rights under A1P1 of the Convention, both they and their children now complain of it in relation to the enjoyment of their respective rights to respect for their family life under article 8."
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> 75. In explaining in [*SG*] that a breach, if any, of article 3.1 was irrelevant to the alleged discrimination, Lord Reed, Lord Carnwath and Lord Hughes each stressed in the paragraphs cited above that in their view the alleged discrimination could not be said to be directed against children. It is clear that the government cannot import their reasoning into the present proceedings. Equally it undertakes a mammoth task in maintaining the argument that, in setting the terms of the revised cap, it

> was not taking an action "concerning children" within the meaning of article 3.1. If valid in relation to the revised cap, the argument would have been valid in relation to the original cap. But it was rejected by Lord Carnwath, Lady Hale and Lord Kerr; and it was specifically upheld neither by Lord Reed nor by Lord Hughes. In para 107 Lord Carnwath referred further to General Comment No 14, namely to para 19 in which the committee explained that the duty under article 3.1 applies to all decisions on the part of public authorities which directly or indirectly affect children.
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> 76. Insofar as in the present appeals the children themselves claim a violation of rights of their own under article 14, taken with article 8, their rights should be construed in the light of the UNCRC as an international convention which identifies the level of consideration which should have been given to their interests before subjecting their households to the revised cap.
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> 77. But can the lone parents themselves also claim that their own rights under article 14, taken with article 8, must be construed in the light of the provision in the UNCRC for consideration of their children's interests? The interests of the lone parents in play in the present appeals are indistinguishable from the interests of their children below school age. Their claim is as parents: so, without their children, it would not exist. Indeed their claim is as lone parents: so responsibility for their children in effect rests solely upon them. And their claim is to defend furtherance of their family life from the effects of a cap on benefits specifically computed by reference to the needs of their children and themselves taken together. Never more apt than to the present appeals is the observation of Lady Hale in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] AC 115, in para 4 that:
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> "The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom the family life is enjoyed."

13. Lord Wilson's conclusion is set out in paragraph 88 as follows:

> "I am also driven to conclude that the government's decision to treat the appellant cohorts similarly to all others subjected to the revised cap was not manifestly without reasonable foundation… The appellants have not entered any substantial challenge to the government's belief that there are better long-term outcomes for

> children who live in households in which an adult works. The belief may not represent the surest foundation for the similarity of treatment in relation to the cap; but it is a reasonable foundation, in particular when accompanied by provision for DHPs which are intended on a bespoke basis to address, and which on the evidence are just about adequate in addressing, particular hardship which the similarity of treatment may cause"

14. Mr Howells further submits that the claimant does not need to show an interference with an A1P1 right and need only establish that the refusal of legal aid is more than tenuously connected to A1P1 and that he is indirectly affected. In *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618 the Court of Appeal considered a judicial review claim by a mother and her infant child alleging that changes to benefits brought in by the Universal Credit Regulations were discriminatory to them both. Singh LJ at paragraph 21said this:

> "21. It is well established that Article 14 is not freestanding, in other words it does not prohibit all discrimination by the state: it can be invoked only if the subject-matter falls within the ambit of another Convention right. It is also well established, and is common ground in this case, that, so far as material, social security benefits are a form of property (or "possessions") and therefore fall within the ambit of A1P1. It is accordingly common ground that, in principle, the Appellants are entitled to rely on Article 14, read with A1P1, in this case."

15. In *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, the Court of Appeal considered a challenge to a scheme under Part 3 Chapter 1 of the Immigration Act 2014 which prohibited landlords from letting properties to immigrants who do not have leave to enter or remain in the United Kingdom or have such leave but only upon condition that prevents them from occupying such premises. The challenge was put upon the basis that its provisions are incompatible with article 14 when read with article 8 of the ECHR.

16. Hickinbottom LJ at paragraph 104 said:

> "104.The Strasbourg authorities indicate that, where a positive measure of the state is being considered, it is sufficient that that measure has more than a tenuous connection with the core values protected by the substantive article (here, article 8). I appreciate that this is not a classic positive modality case; but it does involve a positive measure by the state in the form of the Scheme. Whilst perhaps generous to the Joint Council, I shall proceed on the basis that that "more than tenuous link" is the appropriate test. It certainly reflects the generous

> width of the concept of "ambit" consistently applied by the ECtHR "

17. Mr Howells submits that the schemes in the present case are positive measures by the state. The regulations which deal with means testing for legal aid, the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 as amended (the 2013 Regulations) recognise that a failure to provide legal aid may impact upon the family life of an applicant. Regulation 25 provides that a deduction may be made to reflect dependency of a child when means testing an applicant's income. By regulation 27 childcare costs may be deducted from employment income, and regulation 28 provides that the cost of accommodation to be deducted from disposable income.

18. Moreover, the explanatory memorandum to the Social Security (Infected Blood and Thalidomide) Regulations 2017, section 7, provides that payments made to individuals via various infected blood schemes amongst others are disregarded for the purpose of calculating income related benefits and are intended "to compensate 'infected persons' and their relatives in recognition that the physical, mental and other health impacts for those infected can lead to additional costs which cannot be met through the benefits system." The reference to relatives, submits Mr Howells, shows that family members such as the claimant were intended to benefit from the compensation. This is also recognised in the expert reports and evidence to the Infected Blood Inquiry.

19. As to whether there is an arguable case that the difference in treatment is manifestly without reasonable foundation, Mr Howells emphasises that it is the justification advanced by the defendant for the difference in treatment which must be considered, not the measure itself. He again cites Singh LJ in *TD* (ibid) at paragraphs 85 and 86, where he said:

> "85. Both at the hearing before us and in written submissions filed after the hearing, Mr Brown sought to stress that the justification for the Respondent's policy is not based only on administrative or cost grounds. He submits that it also includes other factors such as social fairness and a desire to move from inefficient spending on legacy benefits to UC. However, it seems to me that this is why it is so important not to lose sight of the point made by Lord Bingham in *A v Secretary of State for the Home Department*, at para. 68, that, in a discrimination case, what must be justified is the difference in treatment and not merely the underlying policy. The other factors to which Mr Brown draws attention may help to justify the underlying policy (moving from legacy benefits to UC) but do not justify the difference of treatment which is in issue. This is because, but for the acknowledged errors made by the state itself in relation to these Appellants, they would have remained on legacy benefits. It is the difference in the way that they were treated as compared with others who did remain on

> legacy benefits (because no error was made in their cases) that needs to be justified.
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> 86. As to cost, it is well established that cost alone does not justify a difference in treatment; if resources are finite then a non-discriminatory solution is required: see the summary of the relevant authorities in TP , at paras. 170-173 (in the judgment of Sir Terence Etherton MR and Singh LJ)."

20. Mr Howells submits that the defendant puts forward no reason for the difference in treatment but instead justifies the underlying policy. Furthermore, the defendant relies upon a review which he is currently undertaking when it is the court's view that matters, and relies also upon the cost of exempting WIBSS payments. The result of the review was expected in the autumn but in present circumstances this may be delayed.

21. Finally, in terms of irrationality, Mr Howells submits that no explanation has been put forward as to why persons in the position of the claimant's father qualify for benefits but not for legal aid, or why under regulation 40 of the 2013 Regulations payments under the Windrush Payments Scheme are disregarded and payments to the victims of the fire at Grenfell Tower may be disregarded in calculating the disposable capital of an applicant for legal aid, but payments under WIBSS are not.

22. In response, Mr O'Brien refers to section 7 of the 1998 Act, subsection (7) of which provides that a person is a victim of an alleged unlawful act only if he would qualify as a victim for the purposes of Article 34 of the ECHR if proceedings were brought in the European Court of Human Rights (ECtHR). The article does not define the word victim, but in *Tănase v Moldova (7/08)* 27.4.10, the ECtHR Grand Chamber held that " In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure."

23. Mr O'Brien cited several decisions of the ECtHR which show that the circumstances in which a relative of a victim may bring a claim are very restricted. He submits that the refusal to grant the claimant's father legal aid does not directly affect the claimant's rights, as it is his father who would receive the legal aid and any increase in the WIBSS payment.

24. He refers to *R (Z) v Hackney* [2019] EWCA Civ 1099, where the Court of Appeal held that it is necessary to show that the impugned activity falls within the ambit of one or more of the protected Convention rights. While it is not necessary to show an actual violation of a Convention right, it is necessary to show that a personal interest close to the core of such a right is infringed. A tenuous link is not enough. The position of the claimant is not analogous to the facts of *DA* , where the claimants in that case were reliant on housing benefit to meet basic needs. In the present case it is not claimed on behalf of the claimant that the refusal to grant his father legal aid, nor the difference between the amounts paid under schemes in question jeopardises the ability of the family to meet basic needs.

25. He further submits that it is not arguable that the claimant comes within the ambit of A1P1. The refusal of legal aid does not amount to a deprivation of an existing possession.

26. Moreover, he submits that the inclusion of infected blood payments when considering eligibility for legal aid is clearly not "manifestly without reasonable foundation." This is consistent with the purpose of legal aid, which is to provide access to legal help for those who cannot afford the short to medium term legal costs arising from a claim, and those with substantial compensation payments do not generally fall into that category. Payments under the Windrush Scheme and to victims of the fire at Grenfell Tower are exceptions, and it is not arguable that the only reasonable position is to make an exception for similar types of payments, such as those under WIBSS.

27. He also submits that the current review is intended to ascertain the financial impact of disregarding infected blood payments, which may go beyond such payments. Until those implications are understood it is not arguably manifestly without reasonable foundation to take these into account.

28. As for irrationality, Mr O'Brien firstly submits that the claimant does not have a sufficient interest in the matter to which the claim relates, which is a prerequisite under section 31 Senior Courts Act 1981 for permission to be granted. He refers to *Jones v Commissioner of the Metropolis* [2019] EWHC 2957 (Admin) (DC); [2020] 1 WLR 519, where at paragraph 38, it was noted by Dingemans LJ that one factor to be taken into account in considering sufficiency of interest is the existence of better placed challengers. At paragraph 62 reference was made to the need to ensure that those who bring claims for judicial review are limited to those best placed to bring the claim. The claimant's claim in the present proceedings is derivative and is not one of right.

29. Furthermore, he submits for the reasons advanced under the first ground it is not arguably irrational for WIBSS payments not to be disregarded when payments to Windrush and Grenfell victims are. Separate schemes driven by separate purposes and budgets can rationally be structured in different ways.

30. Finally, he submits that it is premature for the court to consider the question of whether WIBSS should be disregarded for the capital means test when the same issue will be addressed in the review which the defendant is currently undertaking. That gives the claimant an alternative remedy. There is no pressing need to challenge the difference between the schemes in question at the present time, and that adds force to the point that the claim is premature and/or that the claimant has an alternative remedy.

31. I take Mr O'Brien's point that the court in *SG* and *DA* was considering the effect of the cap on the basic needs of the infant children, and that there is no such effect put in evidence in the present case. Nevertheless, in my judgment it is arguable that the observations in those cases cited above should lead to the conclusion that it is sufficient for the claimant to show that the refusal of legal aid has an indirect financial impact upon him in order to show that he is a victim of discrimination and has standing to bring the claim. This is so notwithstanding that there are observations to the contrary in one decision of the ECtHR.

32. It is also arguable in my judgment that the refusal is manifestly without reasonable foundation and/or irrational for the reasons advanced by Mr Howells. Finally, it does not seem to me that the current review is bound to provide the claimant with an adequate remedy for a decision which has already been taken and which arguably is already impacting upon him financially.

33. Accordingly, I give permission for both grounds to be advanced and will give directions for the hearing of the substantive claim in an accompanying order.