

## **Social security - when judicial review is the right remedy**



### **In brief**

This information briefing highlights instances in social security law where judicial review is the only or the most appropriate remedy in dealing with certain issues involving social security and the tax credits system.

The briefing identifies issues that advisers may wish to refer to the Law Centre.

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## **The tax credits system**

Where a household with children is entitled to means tested benefits, payments for the children will be made through Child Tax Credit by Her Majesty's Revenue and Customs (HMRC) while the Social Security Agency will be responsible for payment of means tested benefits to the adults in the household. HMRC will be responsible for claims for Working Tax Credit, where the household satisfies rules on being engaged in remunerative work.

## **Rejection of claims**

Entitlement to Child Tax Credit will depend on a valid claim being made. Section 5 of the Tax Credits (Claims and Notifications) Regulations 2002 requires that a claim must contain a national insurance number (NINO) for every person included in the claim. Where a claim is made by a person without a NINO, the claim will generate a NINO application. This provision has led to many instances of tax credit claims being 'rejected' as invalid or improperly made.

Such a decision does not carry a right of appeal and can only be challenged by judicial review. In particular, reg 5(6) provides that HMRC has discretion to waive the NINO requirement, where the party has a reasonable excuse for not having a NINO and reg 5(8) provides that the NINO requirement does not apply to any person who is a 'Person Subject to Immigration Control' under the Immigration and Asylum Act 1999.

Law Centre (NI) has come across many instances of claimants being told by HMRC to appeal such 'rejection' decisions to a tribunal only to find out twelve months later when the appeal reaches hearing that it does not carry a right of appeal.

## **Delays in decision making**

Once a claim has been accepted as validly made, HMRC has a statutory duty to decide the claim under section 14 of the Tax Credits Act 2002. At the end of a tax year, HMRC will then have a statutory duty under sections 17 and 18 of the Tax Credits Act 2002 to make a final decision on a claim. There is no statutory time limit for the processing of claims and there are currently extremely lengthy delays in the processing of some claims to tax credits. The main groups affected are:

- claims switching from one claimant to another, for example where a relationship breaks down;
- where a claimant's status changes from employed to self employed;
- new claims for people from Eastern Europe;
- new claims from foreign nationals with new immigration status, eg asylum seekers who are granted refugee status or leave to remain.

Law Centre (NI) has been contacted by individuals who have been waiting for many months for their claims to be adjudicated. This is totally unreasonable and is open to challenge by way of an application for judicial review for an Order of Mandamus to compel performance of a statutory duty.

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## **Notice of decision**

Section 23 of the Tax Credits Act 2002 provides a statutory duty to notify a decision in writing giving notice of appeal rights. This is a further issue that can be raised in an application for an Order of Mandamus.

## **Refusal to extend time limit for appealing**

There is a strict 30 day time limit for appealing tax credit decisions, which runs from the date the notice of a relevant decision is given.

There continues to be a widely held misconception that tax credits decisions cannot be appealed to a tribunal. Indeed, a decision on whether to recover a consequential overpayment cannot be appealed to a tribunal. However, decisions on entitlement can be.

This confusion about decisions and appeal rights can lead to the time limit for good appeals being missed. The good news is that this 30 day time limit can be extended by up to twelve months by HMRC upon application (reg 5 of The Tax Credits (Appeals)(No.2) Regulations 2002.)

Any refusal to extend the time limit can only be challenged by judicial review.

## **Overpayments**

Where HMRC has issued Notices of Overpayments to many claimants, at first instance, it is necessary to consider if the decision is correct or if there is an entitlement issue that needs to be appealed, eg where the claimant was single but HMRC alleges that he or she was a member of a couple.

However, if HMRC is correct that there is an overpayment, recovery can be disputed through the process set out in its Code of Practice 26.

If this policy is not correctly applied then there may be scope for judicial review of any Level 2 decision to continue to recover the overpayment.

## **Emergency payments**

HMRC currently adopts a very restrictive approach to when it will make emergency payments of tax credits. HMRC does not currently have a clear, published policy. Experience suggests that emergency payments will only be made where a claim has been pending for at least three weeks and failure to pay is due to a technical problem with the computer system.

In light of the unprecedented delays being experienced by many claimants, it may be appropriate to routinely request emergency payments and to seek to challenge any unreasonable refusal of emergency payments by judicial review. The policy of HMRC on when such payments will be made is extremely vulnerable to challenge by judicial review.

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## Social security benefits

Many of the issues raised above will also arise in claims for social security benefits. For example, there are significant delays in the processing of some Child Benefit claims which may be challenged by judicial review.

Also, where a person seeks to appeal a social security decision outside the one month time limit and the request for an extension of the time in which to appeal is refused, judicial review is the appropriate remedy.

## Setting aside of tribunal decisions

It is possible for a tribunal decision to be set aside by a legal member where the provisions of reg 57 of the Social Security and child Support (Decisions and Appeals) Regulations (NI) 1999 are complied with.

The application must be made by a party to the proceedings, be in the interests of justice and relate to either a relevant document not having been before the tribunal or a party to the proceedings, who wanted to be present, not having been present.

If the legal member refuses an application for setting aside, it will only be possible to challenge the decision by judicial review.

## Conclusion

The above highlights that judicial review can be an appropriate remedy in social security cases, especially where there is no statutory right of appeal to a tribunal. The situations outlined in this briefing are just some examples of where judicial review may be relevant.

**Law Centre (NI) offers an advice line to practitioners on all issues of social security law. We accept referrals of test cases and can alternatively work with members to provide any necessary support on social security issues that a practice may need to quality assure its social security work. Our advice line is open each day from 9.30am until 1pm.**

**We also offer training courses for practitioners and information through our publications and website. We hold regular legal practitioner meetings in social security, community care, mental health and immigration where practitioners can exchange expertise and receive important updates.**

**Social security advice:** Mon to Fri 9.30am to 1.00pm, 9024 4401 and 7126 2433

**For more information about the Law Centre:** [www.lawcentreni.org](http://www.lawcentreni.org)

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