House of Commons
House of Lords

Joint Committee on Human Rights

Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report

First Report of Session 2019–21

Report, together with formal minutes relating to the report

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

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Publication

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Summary

The Human Rights Act 1998 ("HRA") provides that where a court has found legislation to be incompatible with a Convention right, Ministers may correct that incompatibility through a Remedial Order, which may be used to amend primary legislation. On 5 September 2019, the Government laid the draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019. When a draft Remedial Order is laid by the Government, the Standing Orders of the Joint Committee on Human Rights ("JCHR") require us to report to each House our recommendation as to whether the draft Remedial Order should be approved.

This draft Remedial Order concerns the effect of the Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act"). The 2013 Act is retrospective legislation, which provides that the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ("the ESE Regulations"), the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 ("the MWA Regulations"), and the sanctions imposed under both of those Regulations, are to be treated as valid. This retrospective legislation was required as the courts had previously held that the ESE Regulations were invalid, as both the description of the schemes and the notices given to the claimants were insufficiently clear.[1] The imposition of sanctions on Job Seekers' Allowance ("JSA") claimants under the ESE Regulations was therefore invalid.

The Government therefore used the 2013 Act to remove a ground of appeal from JSA claimants who had lodged appeals against their sanctions before the 2013 Act entered into force on 26 March 2013. The MWA Regulations had not been held to be invalid by the courts like the ESE Regulations, however, the defective notice provisions contained in the MWA Regulations were the same as those contained within the ESE Regulations. The 2013 Act therefore sought, in primary legislation, to retrospectively validate the MWA Regulations as a pre-emptive manoeuvre.

Article 6(1) of the European Convention of Human Rights ("ECHR") requires that, in the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[2] The enactment of retrospective legislation which affects the results of pending proceedings may infringe Article 6(1), unless there are compelling grounds of general interest. It is, prima facie, contrary to the rule of law for the state to interfere in current legal proceedings in order to influence the outcome of those proceedings in a manner favourable to itself.

On 29 April 2016, the Court of Appeal declared, pursuant to section 4 of the Human Rights Act ("HRA"), that the 2013 Act was incompatible with Article 6(1) (right to a fair trial) of the ECHR, as it interfered with the pending legal proceedings of claimants who had lodged appeals against their sanctions before the 2013 Act came into force.[3]

In response to the declaration of incompatibility made by the Court of Appeal, the Government laid a proposal for a draft Remedial Order on 29 June 2018. The proposed

1 R (Reilly & Wilson) v SSWP [2013] EWCA Civ 95 (Reilly No. 1)
2 European Convention on Human Rights, Article 6
3 R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and others v Secretary of State for Work Pensions [2016] EWCA Civ 413 (Reilly No. 2)

draft Remedial Order sought to remedy the incompatibility of the 2013 Act with Article 6 by providing that the decision-maker (the Secretary of State or Tribunal) must ignore the provisions of the 2013 Act that retrospectively validate the ESE Regulations. In doing so, the proposed draft Remedial Order sought to restore to the claimants a ground of appeal against the sanctions.

The Joint Committee on Human Rights published its report on the proposed draft Remedial Order on 31 October 2018. The Committee welcomed the Government's action in proposing the draft Remedial Order to remedy the incompatibility in the 2013 Act with the Convention right to a fair trial. The Committee assessed the proposal in accordance with its Standing Order and the requirements under the HRA. It considered that the procedural requirements of the HRA had been met and the Government's reasons for proceeding by way of remedial order rather than by a Bill were sufficiently compelling for the purpose of section 10(2) of the HRA. Further, remedying the incompatibility by way of a non-urgent order struck a reasonable balance between avoiding any further undue delay on the one hand, and the need for proper parliamentary scrutiny on the other. The Committee did, however, regret the delay between the declaration of incompatibility and the laying of the proposed draft Remedial Order. The Committee concluded that the proposed draft Remedial Order adequately remedied the incompatibility of the 2013 Act with Article 6(1) as identified in the case of Reilly (No.2). The Committee therefore recommend that the proposed Remedial Order be laid in draft.

On 5 September 2019, having taken into account the representations of the Committee and other stakeholders,[4] the Government laid the draft Remedial Order for affirmative resolution,[5] together with the Government's response. The draft Remedial Order laid on 5 September 2019 is largely the same as the proposal laid on 28 June 2018, however, the Secretary of State has widened the scope of the Remedial Order to apply to JSA claimants who were sanctioned under both the ESE and the MWA Regulations.

The Committee has considered the draft Remedial Order and concludes that the procedural requirements of the HRA have been met and that the draft Remedial Order remedies the incompatibility identified by the Courts. The Committee concludes that the special attention of each House is not required to be drawn to the draft Remedial Order on any of the relevant grounds, or on any other grounds, and recommends that the draft Remedial Order should be approved.

4 HC Deb, 5 September 2019, col 1819WS
5 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019

1 Introduction

The Declaration of Incompatibility

1. This draft Remedial Order concerns the effect of the Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act"). The 2013 Act is retrospective legislation, providing that the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011, and the sanctions imposed under both of those Regulations, are to be treated as valid. The courts had previously held that the ESE Regulations were invalid, as both the description of the schemes and the notices given to the claimants were insufficiently clear.[6] The imposition of sanctions on JSA claimants under the ESE Regulations was therefore invalid prior to the passing of the 2013 Act. One of the effects of the 2013 Act was to remove a ground of appeal from JSA claimants who had lodged appeals against their sanctions before the 2013 Act entered into force on 26 March 2013.

2. In respect of those claimants who had lodged their appeals before 26 March 2013, the Court of Appeal declared, pursuant to section 4 of the Human Rights Act 1998 ("HRA"), that the 2013 Act is incompatible with the right to a fair trial as protected by Article 6(1) of the European Convention on Human Rights, as it interfered with pending legal proceedings.[7]

3. The draft Remedial Order considered in this report is the Government's response to the declaration of incompatibility made by the Court of Appeal in the case of Reilly (No. 2).[8] The purpose of the draft Remedial Order is to remedy this incompatibility with Article 6(1) by:

a) setting out the process by which the penalty decisions may be revised;

b) requiring the decision-maker to disregard the incompatible provisions of the 2013 Act; and

c) allowing for the sanctions to be repaid in those pending cases affected by the Reilly (No 2) ruling.

4. We welcome the Government's action in laying the draft Remedial Order to remedy the incompatibility in the 2013 Act with the Convention right to a fair trial and to make the necessary consequential amendments that follow from those changes.

Role of the JCHR

5. The HRA provides that where a court has found legislation to be incompatible with a Convention right, Ministers may correct that incompatibility through a Remedial Order, which may be used to amend primary legislation.[9] There are special provisions to ensure that this power is not used inappropriately. Under the non-urgent procedure,

6 R (Reilly & Wilson) v SSWP [2013] EWCA Civ 95 (Reilly No. 1)

7 R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and others v Secretary of State for Work Pensions [2016] EWCA Civ 413 (Reilly No. 2)

8 R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and others v Secretary of State for Work Pensions [2016] EWCA Civ 413 (Reilly No. 2).

9 Human Rights Act 1998, section 10

a proposal for a draft must be laid before Parliament for 60 days,[10] during which time representations may be made to the Government. If the Government decides to proceed with their proposal, it will then lay a draft Remedial Order, accompanied by a statement responding to the representations and explaining what changes, if any, have been made to the draft as a result of the representations. A further 60 days must elapse after which, in order to be made, the draft Order must be approved by each House of Parliament.[11]

6. The proposal for a draft Remedial Order, together with the required information, was laid before both Houses on 28 June 2018. The Standing Orders of the JCHR require us to report to each House our recommendation as to whether a draft Order in the same terms as the proposal should be laid before Parliament, and any other matters arising from our consideration of the proposal. We may also report on the technical compliance of any remedial order with the HRA and note whether the special attention of each House should be drawn to the Order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (JCSI).

7. On 31 October 2018, the Committee reported to each House its recommendation that a draft Order in the same terms as the proposal should be laid before Parliament.[12] Having taken the Committee's representations into account, the Government laid the draft Remedial Order together with the Government's Response on 5 September 2019.[13]

8. The Committee's deadline for reporting to the House was 20 January 2020. However, due to the dissolution of Parliament on 6 November 2019 and the late formation of the new Committee on 3 March 2020, it was not possible to report to Parliament in accordance with this deadline. We are grateful that the Government did not seek an affirmative resolution on the Order before this Committee was able to report, despite the passing of the deadline.

9. In its consideration of draft remedial orders, the Committee must consider whether the special attention of the House should be drawn to the draft remedial order on any of the grounds specified in Standing Order No. 151 (Joint Committee on Statutory Instruments).[14] In particular, the Committee must report to the House its recommendation whether the draft Remedial Order should be approved, and any other matters arising from its consideration.

10. We issued a call for evidence on the Government's draft Remedial Order on 18 October 2019. We received no submissions.

10 For the definition of sixty days, see Human Rights Act 1998, Schedule 2, para 6

11 For the definition of sixty days, see Human Rights Act 1998, Schedule 2, para 6

12 Joint Committee on Human Rights, Thirteenth Report of Session 2017–19, Proposal for a Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018, HC 1451 / HL Paper 209

13 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019; Government Response to Representations (not publicly available at the time of publication).

14 Joint Committee on Statutory Instruments, Standing Order

Legislative history

11. Under the ESE Regulations, certain JSA claimants were required to participate in 'Back to Work' schemes to assist them in obtaining employment.[15] Sanctions were imposed on individuals for non-compliance with these schemes where the claimants did not have good cause for non-compliance. The sanction was non-payment of JSA for up to 26 weeks.[16]

12. The Jobseekers Act 1995 ("the 1995 Act"), which empowers the Secretary of State to make regulations, provides that the ESE Regulations must contain a "description" of the scheme beyond the name.[17] JSA claimants were also required to participate in the 'Back to Work' schemes only if they were given written notice setting out (a) details of what the claimant was required to do by way of participation in the scheme and (b) the consequences of failing to do so.[18]

13. In the case of Reilly (No. 1),[19] the lawfulness of the Government's 'Back to Work' schemes was challenged by a number of JSA claimants including a graduate who was required to undertake an unpaid work placement at Poundland and a HGV driver who was required to undertake unpaid work collecting and renovating furniture. They, among many others, were required to participate in the 'Back to Work' scheme in order to continue receiving benefits. They argued, amongst other things, that (a) the ESE Regulations were *ultra vires* because they did not contain a description of the scheme as required by the 1995 Act; and (b) the written notices did not comply with the requirements of the ESE Regulations.

14. The claimants won their case: the Court of Appeal held that the ESE Regulations were (a) *ultra vires* the enabling power in the 1995 Act as they failed to provide a description of the scheme, and (b) that the notices sent to claimants did not comply with the requirements set out in the ESE Regulations and were therefore unlawful.[20]

15. The decision of the Court of Appeal in Reilly (No.1) meant that the sanctioning of JSA claimants who had failed to participate in the 'Back to Work' schemes was not legally valid. Therefore, anyone sanctioned and stripped of their benefits under the ESE Regulations could potentially claim these back from the Government.

16. Following Reilly (No.1), in order to avoid having to repay the sanctions imposed under the ESE Regulations, the Government enacted emergency retrospective primary legislation–the Jobseekers (Back to Work Schemes) Act 2013, which came into force on 26 March 2013. The 2013 Act was intended to ensure that the ESE Regulations, and the notices served under those Regulations, were effective in respect of all claimants who had already had a sanction imposed on them under the quashed ESE Regulations. The Government also used the 2013 Act to validate the MWA Regulations. Although the MWA Regulations had not been quashed by the courts, they contained the same notice

15 The Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011
16 Jobseekers Act 1995, section 6
17 Jobseekers Act 1995, section 17(A)
18 The Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, Regulation 4, para 2
19 R (Reilly & Wilson) v SSWP [2013] EWCA Civ 95 (Reilly No. 1)
20 R (Reilly & Wilson) v SSWP [2013] EWCA Civ 95 (Reilly No. 1)

provisions as the ESE Regulations and may, therefore, have been subject to a successful challenge. The Government used the 2013 Act to pre-empt a successful challenge to the MWA Regulations.

17. The effect of the 2013 Act was that sanctions issued under the ESE and MWA Regulations were to be considered to be valid and any decision to sanction a claimant for failure to comply with the Regulations could not be successfully challenged on the grounds that the Regulations were invalid or the notices given under them inadequate, notwithstanding the Court of Appeal's judgment in Reilly (No.1). The 2013 Act therefore retrospectively denied the claimants a ground of appeal against administrative sanction.

18. Ms. Reilly and Mr. Hewstone (both sanctioned under the ESE Regulations) challenged the 2013 Act by way of judicial review proceedings on the basis that the 2013 Act denied them what would have been a conclusive victory in their appeals following Reilly (No.1).[21] They sought a declaration that the 2013 Act was incompatible with their rights under Article 6 (right to a fair trial) and Article 1 Protocol 1 (right to property) of the ECHR.

19. The High Court held that the 2013 Act was incompatible with the Article 6(1) rights of claimants who had a pending appeal against a sanction imposed under the ESE Regulations at the time the 2013 Act came into force (i.e. 26 March 2013). Were it not for the 2013 Act, the claimants would have won their appeal when the ESE Regulations were declared *ultra vires*. A declaration of incompatibility was made under section 4 HRA.[22]

20. The Government appealed the decision of the High Court. The Court of Appeal upheld the decision of the High Court, concluding that the 2013 Act was incompatible with Article 6(1) of the ECHR, in that it had interfered with ongoing legal proceedings challenging benefits sanctions by retrospectively validating those sanctions.[23] The Court held that the 2013 Act had "remove[d] from […] appellants what would otherwise have been a conclusive ground of appeal", which had not been justified by sufficiently compelling reasons in the public interest.[24] Underhill LJ emphasised "the importance to be attached to observance of the rule of law".[25]

21. The declaration of incompatibility is limited to JSA claimants who had appealed against a sanction decision when the 2013 Act came into force on 26 March 2013, as long as their appeal had not already been finally determined, abandoned or withdrawn. The draft Remedial Order is therefore limited in its application to people with cases pending before the courts when the 2013 Act entered into force.

The Government's approach

22. The Government's initial proposals for a draft Remedial Order were limited to JSA claimants who had appealed against a sanction decision under the ESE Regulations when the 2013 Act came into force on 26 March 2013, if that appeal had not already been finally determined, abandoned or withdrawn. This was because the claimants in the Reilly case were all sanctioned under the ESE Regulations.

21 Joined by other claimants on appeal from the Upper Tribunal.
22 R (Reilly & Wilson) v SSWP [2013] EWCA Civ 95 (Reilly No. 1)
23 R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and others v Secretary of State for Work Pensions [2016] EWCA Civ 413 (Reilly No. 2).
24 Reilly No. 2, para 83
25 Reilly No. 2, para 99

23. To restore the claimants' right to a fair hearing, the proposed draft Remedial Order inserted section 1A into the 2013 Act. Section 1A had the following effect:

a) It required the Secretary of State for Work and Pensions, a Tribunal or a Court to ignore the effect of the 2013 Act for claimants who had filed an appeal against a sanction decision under the ESE Regulations by 26 March 2013 (if that appeal had not been finally determined, abandoned or withdrawn by 26 March 2013).

b) It required the Secretary of State for Work and Pensions, a Tribunal or a Court to find that the ESE Regulations were invalid and that the notices sent to claimants advising them that they were required to take part in a programme within the Employment, Skills and Enterprise Scheme were inadequate. This would allow the appeal to be decided in the claimants' favour.

c) It gave the Secretary of State for Work and Pensions the power to revise or supersede the sanction decision in these cases. This will allow the Department for Work and Pensions to pay the sanctioned benefit amount, without the claimants having to progress their appeals through the tribunal system.[26]

24. However, following the publication of the Government's proposals in June 2018, the Government received representations from an Upper Tribunal Judge who questioned whether a claimant who appealed a sanction decision under the MWA Regulations and had a defective notification would also benefit from the Remedial Order.[27]

25. As noted above, the 2013 Act retrospectively validated defective notifications made under the MWA Regulations. Although the MWA Regulations had not been quashed, they contained the same notice provisions as the ESE Regulations and could therefore have been subject to a successful challenge on the same grounds.

26. Although in the Reilly case the claimants had all been sanctioned under the ESE Regulations, certain JSA claimants who were sanctioned under the MWA Regulations could be in an analogous position to the JSA claimants sanctioned under the ESE Regulations, as the outcome of their appeals (brought before the 2013 Act came into force) is potentially impacted by the retrospective provisions of the 2013 Act.

27. The scope of the draft Remedial Order, as revised, therefore covers (a) claimants who had lodged an appeal against a sanction decision for failing to comply with ESE Regulations, and (b) claimants who had lodged an appeal against a sanction decision for failing to comply with the MWA Regulations where the claimant received a notification validated by the 2013 Act. For both sets of claimants, the provisions of the draft Remedial Order will only apply if their appeals had not been finally determined, abandoned or withdrawn by 26 March 2013.

26 Department of Work and Pensions, Proposed Draft Remedial Order to resolve an incompatibility under the European Convention on Human Rights (article 6(1)): The Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018, June 2018, Required Information, para 3

27 Government response to representations (not publicly available at the time of publication)

Is the revised scope intra vires?

28. Whilst the Committee commends the Government's intention to widen the scope of the draft Remedial Order to ensure a remedy is available for all JSA claimants who were affected by the retrospective provisions of the 2013 Act, the question for the Committee is whether the revised scope is *intra vires* the scope of the Government's remedial order powers in section 10 of the HRA.

29. We note that the Court of Appeal refers to the incompatibility at paragraphs 83 and 180 of the judgment. The former reference is more restrictive than the latter. At paragraph 83, the Court of Appeal stated: "It is convenient to say at the outset that we believe that the [High Court] judge was right to hold that the enactment of the 2013 Act gave rise to a breach of article 6.1, in the form embodied in the Zielinski principle,[28] in the case of Mr Hewstone; and also that we believe that it did so in the cases of all other JSA claimants who had filed appeals against sanctions imposed under the 2011 [ESE] Regulations prior to its coming into force."[29] However, the Court adopted a broad articulation of its approach in the concluding paragraph of its judgment, stating that, "in the cases of those claimants who had already appealed against their sanctions the [2013] Act was incompatible with their rights under the European Convention of Human Rights".[30]

30. The Order granted by the Court of Appeal states: "It is declared that the Jobseekers (Back to Work Schemes) Act 2013 is incompatible with Article 6(1) of the European Convention on Human Rights, as given effect by section 1 of the Human Rights Act 1998, to the extent set out in the judgment".[31]

31. We note that the vast majority of declarations of incompatibility made refer to a specific provision of an Act. However, although the case of Reilly concerned ESE claimants only, the concluding declaration of incompatibility issued by the Court of Appeal could be construed to apply to the entire 2013 Act. This would, therefore, cover the provisions of the 2013 Act that relate to both the MWA[32] and the ESE Regulations.[33] Whilst the declaration is articulated in respect of the 2013 Act as a whole, the judgment is clear that it is limited to the extent that it applies only to claimants whose claims were pending before the courts when the 2013 Act entered into force.

32. In our view, the principle underlying the declaration is that the effect of the 2013 Act was to interfere with the Article 6 rights of all claimants who had appealed against their sanction before the enactment of the 2013 Act. This principle applies irrespective of which Regulations applied.

33. If there are claimants who have been deprived of a fair determination of their civil rights under Article 6 as a result of the 2013 Act, those claimants should not be denied a ground of appeal because they were sanctioned under a different set of Regulations to the ones considered in Reilly. Under section 10(2) of the HRA, a Minister has the power to make "such amendments to the legislation as he considers are necessary to remove

28 This principle states that the rule of law and Article 6 preclude any interference by the legislature, other than on compelling grounds of general interest, with the administration of justice designed to influence the judicial determination of a dispute.

29 Reilly No.2, para 83

30 Reilly No.2, para 180

31 Court of Appeal Order, in correspondence between JCHR and DWP officials.

32 Jobseekers (Back to Work Schemes) Act 2013, section 1(7)–(9)

33 Jobseekers (Back to Work Schemes) Act 2013, section 1(10)–(12)

the incompatibility".[34] It is, therefore, within the Government's powers to remedy the incompatibility as the Minister considers necessary. In our view, the Government's decision to widen the scope of the draft Remedial Order to include all claimants affected by the 2013 Act is to be welcomed.

34 Human Rights Act 1998, section 10(2)

2 Procedural requirements

Compelling reasons and use of remedial power

34. Since remedial orders are a type of delegated legislation which can be used to amend statutes, there are controls on their use. A Minister may only use the remedial power under the HRA if that Minister considers that there are "compelling reasons" to do so. The Government's reasons for using a remedial order are set out in the statement of required information which accompanies the draft Remedial Order.[35]

35. Firstly, the Government is of the view that breaches of the Convention should be remedied as soon as possible, noting that some claimants have been waiting since 2012 to have their appeals decided.[36] Secondly, the Government notes that there are no appropriate Bills planned to accommodate this specific legal objective.[37]

36. We are grateful for the information provided by the Department as part of the "required information" and consider that these are compelling reasons.

Use of non-urgent procedure

37. Remedial orders can be made by urgent or non-urgent procedure. The Government's reasons for proceeding by way of the non-urgent procedure are set out in the required information accompanying the draft Remedial Order. The Government notes that the use of the non-urgent procedure allows time for proper parliamentary scrutiny.

38. We are satisfied that that this is an appropriate use of the non-urgent procedure.

Required information

39. Pursuant to Schedule 2, paragraph 3(2) of the HRA, if representations have been made during the sixty day period (which began on the day the proposal for a draft remedial order was laid and expired sixty days thereafter),[38] the draft Remedial Order must be accompanied by a statement of representations and, if as a result of the representations the proposed order has been changed, details of the changes.

40. On 5 September 2019, when the draft Remedial Order was laid, the Government provided an Explanatory Memorandum along with a statement in response to representations made on the proposed draft Remedial Order.[39]

41. **We consider that the procedural requirements of the HRA have been met and the Government's reasons for proceeding by way of remedial order rather than by a Bill are sufficiently compelling for the purpose of section 10(2) of the HRA. Further, remedying the incompatibility by way of a non-urgent order strikes a reasonable balance between avoiding any further undue delay on the one hand, and the need for proper parliamentary scrutiny on the other.**

35 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019, Explanatory Memorandum (EM)
36 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019, Explanatory Memorandum, para 6.5
37 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019, Explanatory Memorandum, para 6.5
38 The sixty period excludes any time during which Parliament is dissolved or prorogued or if both Houses are adjourned for more than four days. Human Rights Act 1998, Schedule 2, para 6.
39 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019

3 Remedying the incompatibility

42. Having assessed whether the draft Remedial Order complies with the procedural requirements, we must also assess whether the Order will remedy the incompatibility of the legislation with Convention rights.

What is the proposed process for remedying the incompatibility?

43. As with the proposed Remedial Order, section 1A(2) of the draft Remedial Order provides the Secretary of State with a power (not a duty) to revise the penalty decisions (i.e. decisions to impose upon a JSA claimant a penalty for failing to comply with the ESE Regulations).[40] Section 1A(4) provides that in cases where a tribunal has not stayed a case and has instead made a final decision before the draft Remedial Order enters into force, the Secretary of State must make a superseding decision (a duty not a power). The effect of section 1A would therefore be as follows:

a) Claimants who lodged an appeal against their penalty decision before 26 March 2013 and whose cases have been stayed by the courts may have their penalty decision revised by the Secretary of State (pursuant to s.1A(2)). The tribunal also has the power to consider these appeals (pursuant to s.1A(8) and (9)).

b) Claimants who lodged an appeal before 26 March 2013 whose cases have been determined after 26 March 2013, but before the coming into force of the Remedial Order, where the tribunal upheld the penalty decision must have their tribunal decision superseded by a decision of the Secretary of State (pursuant to s.1A(4)).

44. When revising a penalty decision, the decision-maker (either the Secretary of State (pursuant to s.1A(2)) or the tribunal (pursuant to s.1A(9)) must disregard the provisions of the 2013 Act that (i) validate the ESE Regulations and (ii) provide retrospectively for the adequacy of the notices.[41] The effect of this is to put the claimants back in the position they would have been in had the Government not breached their Article 6(1) rights by retrospectively validating the ESE Regulations whilst their cases were under appeal.

45. When revising a penalty decision, if the decision-maker finds that, disregarding the incompatible provisions of the 2013 Act, the claimant should not have been sanctioned, such a decision is treated as having retrospective effect.[42] This allows the entire sanction to be repaid to the claimants.

46. The draft Remedial Order now inserts section 1B into the 2013 Act. This section operates in the same way as section 1A, by removing the effects of the 2013 Act from appeals against a penalty imposed on a JSA claimant for failure to comply with the MWA Regulations, where appeals were pending on 26 March 2013.[43]

40 Department of Work and Pensions, Draft Remedial Order to resolve an incompatibility under the European Convention on Human Rights (article 6(1)): The Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019, 5 September 2019, section 1A(2)

41 Subsections (1) to (6) of section 1 of the 2013 Act and sub-section (12) of section 1 so far as it applies.

42 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019, section 1A(10)

43 Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019, section 1B

Does the Order remedy the incompatibility?

47. Article 6(1) requires that, in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[44] This applies to fair hearings in relation to social security benefits.[45] The enactment of retrospective legislation which affects the results of pending proceedings may infringe Article 6(1), unless there are compelling grounds of general interest.[46] The core principle is that it is, prima facie, contrary to the rule of law for the state to interfere in current legal proceedings in order to influence the outcome in a manner favourable to itself.[47]

48. **By enacting retrospective legislation to validate the 2013 Act and remove a ground of appeal from claimants whose appeals were pending, the Government breached the Article 6 ECHR rights of these claimants. The draft Remedial Order seeks to remedy the incompatibility of the 2013 Act with Article 6 by providing that the decision-maker (the Secretary of State or Tribunal) must ignore the provisions of the 2013 Act that retrospectively validate the ESE and MWA Regulations for those whose cases were pending before a Court when the 2013 Act entered into force. In doing so, the draft Remedial Order restores to the claimants a ground of appeal against their sanctions. In our view, the draft Remedial Order adequately remedies the incompatibility of the 2013 Act with Article 6(1) as identified in the case of Reilly (No.2). We recommend that the draft Remedial Order be approved.**

44 European Convention on Human Rights, Article 6(1)
45 Feldbrugge v Netherlands (1986) 8 EHRR 425; Salesi v Italy (1998) 26 EHRR 187
46 Zielinski v France (2001) 31 EHRR 19, para 57
47 Reilly No.2, at para 44

Conclusions

1. We consider that the procedural requirements of the HRA have been met and the Government's reasons for proceeding by way of remedial order rather than by a Bill are sufficiently compelling for the purpose of section 10(2) of the HRA. Further, remedying the incompatibility by way of a non-urgent order strikes a reasonable balance between avoiding any further undue delay on the one hand, and the need for proper parliamentary scrutiny on the other.

2. By enacting retrospective legislation to validate the 2013 Act and remove a ground of appeal from claimants whose appeals were pending, the Government breached the Article 6 ECHR rights of these claimants. The draft Remedial Order seeks to remedy the incompatibility of the 2013 Act with Article 6 by providing that the decision-maker (the Secretary of State or Tribunal) must ignore the provisions of the 2013 Act that retrospectively validate the ESE and MWA Regulations for those whose cases were pending before a Court when the 2013 Act entered into force. In doing so, the draft Remedial Order restores to the claimants a ground of appeal against their sanctions. In our view, the draft Remedial Order adequately remedies the incompatibility of the 2013 Act with Article 6(1) as identified in the case of Reilly (No.2). We recommend that the draft Remedial Order be approved.

Lords Declaration of Interests[48]

Lord Brabazon of Tara

- No relevant interests to declare

Lord Dubs

- No relevant interests to declare

Baroness Ludford

- No relevant interests declared

Baroness Massey of Darwen

- No relevant interests declared

Lord Singh of Wimbledon

- No interests declared

Lord Trimble

- No relevant interests to declare

48 A full list of Members' interests can be found in the Register of Lords' Interests: http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/

Formal minutes

Joint Committee on Human Rights

Wednesday 11 March 2020

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Lord Brabazon of Tara
Ms Karen Buck MP	Lord Dubs
Joanna Cherry MP	Baroness Ludford
Dean Russell MP	Baroness Massey of Darwen
	Lord Singh of Wimbledon
	Lord Trimble

Draft Report (*Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 48 read and agreed to.

Summary agreed to.

Resolved, That the Report be the First Report of the Committee.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till Wednesday 18 March at 3.00pm.