House of Commons
House of Lords
Joint Committee on Human Rights

Proposal for a draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018

Thirteenth Report of Session 2017–19

Report, together with formal minutes relating to the report

Ordered by the House of Commons
to be printed 24 October 2018

Ordered by the House of Lords
to be printed 24 October 2018
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.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

House of Commons

Ms Harriet Harman QC MP (Labour, Camberwell and Peckham) (Chair)
Fiona Bruce MP (Conservative, Congleton)
Ms Karen Buck MP (Labour, Westminster North)
Alex Burghart MP (Conservative, Brentwood and Ongar)
Joanna Cherry QC MP (Scottish National Party, Edinburgh South West)
Jeremy Lefroy MP (Conservative, Stafford)

House of Lords

Baroness Hamwee (Liberal Democrat)
Baroness Lawrence of Clarendon (Labour)
Baroness Nicholson of Winterbourne (Conservative)
Baroness Prosser (Labour)
Lord Trimble (Conservative)
Lord Woof (Crossbench)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publication

Committee reports are published on the Committee’s website at www.parliament.uk/jchr by Order of the two Houses.

Committee staff

The current staff of the Committee are Eve Samson (Commons Clerk), Simon Cran-McGreehin (Lords Clerk), Eleanor Hourigan (Counsel), Samantha Godec (Deputy Counsel), Katherine Hill (Committee Specialist), Shabana Gulma (Specialist Assistant), Miguel Boo Fraga (Senior Committee Assistant) and Heather Fuller (Lords Committee Assistant).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 2467; the Committee’s email address is jchr@parliament.uk
Contents

Summary 3

1 Introduction 5
   The Declaration of Incompatibility 5
   Role of the JCHR 5
   Matters for consideration 6
   Legislative history 7
   The Government’s approach 8

2 Procedural requirements 10
   Compelling reasons and use of remedial power 10
   Use of non-urgent procedure 10
   Required information 11

3 Remediying the incompatibility 12
   Whose rights are affected? 12
   What is the proposed process for remedying the incompatibility? 12
   How will the retrospective effect of the 2011 Regulations be remedied? 13
   Does the Order remedy the incompatibility? 14

Conclusions and recommendations 15

Declaration of Lords’ Interests 16

Formal minutes 17

List of Reports from the Committee during the current Parliament 18
Summary

This proposed draft Remedial Order ("the 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 2011 Regulations"), and the sanctions imposed under them, are to be treated as valid. The courts had previously held that the 2011 Regulations were invalid, as the description of the schemes and the notices given to the claimants were both insufficiently clear.1 The imposition of sanctions on Job Seekers' Allowance ("JSA") claimants under the 2011 Regulations was therefore invalid. The effect 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.

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

This proposal for a draft Remedial Order is the Government's response to the declaration of incompatibility made by the Court of Appeal. The proposed 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 2011 Regulations. In doing so, the proposed draft Order restores to the claimants their right of appeal.

We welcome 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. We have assessed the Order in accordance with our Standing Order and the requirements under the Human Rights Act 1998 ("HRA"). 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,

---

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).
and the need for proper parliamentary scrutiny on the other. The Committee does, however, regret the delay between the declaration of incompatibility and the laying of the proposed draft Remedial Order.

In our view, the proposed draft Order adequately remedies the incompatibility of the 2013 Act with Article 6(1) as identified in the case of Reilly (No.2). We therefore recommend that the proposed draft Order be approved.
1 Introduction

The Declaration of Incompatibility

1. This proposed draft Remedial Order (“the Remedial Order”) concerns the effect of the Jobseekers (Back to Work Schemes) Act 2013 (“the 2013 Act”). The 2013 Act is retrospective legislation that provides that the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, and the sanctions imposed under them, are to be treated as valid. The courts had previously held that the 2011 Regulations were invalid, as the description of the schemes and the notices given to the claimants were both insufficiently clear. The imposition of sanctions on JSA claimants was therefore invalid. The effect of the 2013 Act was to remove a right 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 (“HRA”), that the 2013 Act is incompatible with the right to a fair trial as protected by Article 6(1) of the ECHR, as it interfered with pending legal proceedings.

3. The 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). The purpose of the 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 proposing the 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. There are special provisions to ensure that this power is not used inappropriately. Under the non-urgent procedure, a proposal for a draft must be laid before Parliament for 60 days, 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 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.

---

4 R (Reilly & Wilson) v SSWP [2013] EWCA Civ 95 (Reilly No. 1)
5 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).
6 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).
7 Human Rights Act 1998
8 For the definition of sixty days, see Human Rights Act 1998, Schedule 2, para 6
9 For the definition of sixty days, see Human Rights Act 1998, Schedule 2, para 6
6. The Remedial Order, together with the required information, was laid before both Houses on 28 June 2018. The Standing Orders of the Joint Committee on Human Rights (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.

7. 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).

8. We issued a call for evidence on the Government’s proposal on 13 July 2018. We have been in contact with officials from the Department for Work and Pensions (“the Department”) who have been helpful throughout.

**Matters for consideration**

9. In our consideration of remedial orders, we generally consider the following questions:

- Have the conditions for using the remedial order process (section 10 and Schedule 2 HRA) been met?

- Are there “compelling” reasons for the Government to remedy the incompatibility by remedial order?

- Is the procedure adopted (non-urgent or urgent) appropriate?

- Has the Government produced the required information and effectively responded to other requests for information from the Committee?

- Does the proposed order remedy the incompatibility with Convention rights and is it appropriate?

- Are the criteria of technical propriety applied by the Joint Committee on Statutory Instruments (JCSI) satisfied?

10. The relevant grounds on which the JCSI can draw a statutory instrument to the special attention of each House are:

- that it imposes a charge on the public revenues or requires payments to be made to a public authority;

- that there appears to have been unjustifiable delay in the publication or laying of the Order before Parliament;

- that there appears to be a doubt whether it is intra vires or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

- that for any special reason its form or purport calls for elucidation;

- that its drafting appears to be defective; or

- on any other ground which does not impinge on its merits or the policy behind it.\(^{10}\)

---

\(^{10}\) Joint Committee on Statutory Instruments, *Standing Order*
Legislative history

11. Under the 2011 Regulations, certain JSA claimants were required to participate in ‘Back to Work’ schemes to assist them in obtaining employment.\(^\text{11}\) Sanctions were imposed on individuals for non-compliance with these schemes where the claimants did not have ‘good cause’. The sanction was non-payment of JSA for up to 26 weeks.\(^\text{12}\)

12. The Jobseekers Act 1995 (‘the 1995 Act’), which empowers the Secretary of State to make regulations, provides that the 2011 Regulations must contain a “description” of the scheme beyond the name.\(^\text{13}\) 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.\(^\text{14}\)

13. In the case of Reilly (No. 1),\(^\text{15}\) the lawfulness of the Government’s ‘Back to Work’ schemes was challenged by a number of JSA claimants including a graduate who was required 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 2011 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 Regulations.

14. The claimants won their case: the Court of Appeal held that the 2011 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 2011 Regulations and were therefore unlawful.\(^\text{16}\)

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 2011 Regulations could potentially claim these back from the Government.

16. In order to avoid having to repay the sanctions imposed under the 2011 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 2011 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 2011 Regulations.

17. The effect of the 2013 Act was that any decision to sanction a claimant for failure to comply with the 2011 Regulations could not be 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 right of appeal.
18. Ms. Reilly and Mr. Hewstone 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.\(^{17}\) 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 European Convention of Human Rights (“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 2011 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 2011 Regulations were declared ultra vires. A declaration of incompatibility was made under section 4 HRA.\(^{18}\)

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.\(^ {19}\) 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.\(^ {20}\) Underhill LJ emphasised “the importance to be attached to observance of the rule of law”.\(^ {21}\)

21. The terms of the declaration of incompatibility are limited to JSA claimants who had appealed against a sanction decision under the 2011 Regulations 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 Remedial Order is therefore limited in its application to people with cases pending before the Courts when that 2013 Act entered into force.

**The Government’s approach**

22. To restore the claimants’ right to a fair hearing, the Remedial Order inserts section 1A into the 2013 Act. In summary, section 1A has the following effect:

a) It requires 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 2011 Regulations by 26 March 2013 (if that appeal had not been finally determined, abandoned or withdrawn by 26 March 2013).

b) It requires the Secretary of State for Work and Pensions, a Tribunal or a Court to find that the 2011 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 allows the appeal to be decided in the claimants’ favour.

---

17 Joined by other claimants on appeal from the Upper Tribunal.
18 R (Reilly & Wilson) v SSWP [2013] EWCA Civ 95 (Reilly No. 1)
19 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).
20 At para 83
21 At para 99
c) It gives 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.22

---

2 Procedural requirements

Compelling reasons and use of remedial power

23. 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 Remedial Order.23

24. The Government initially considered whether it would be possible to remedy the breach by implementing an ex-gratia system of payments, but determined this would have been contrary to the 2013 Act.24 The Government believes that there are compelling reasons for using a remedial order. Firstly, it is important that the Government acts promptly to ensure that the claimants receive the payments to which they are legally entitled.25 Secondly, the Government notes that there are no appropriate Bills planned to accommodate this specific legal objective and that there is very limited space available in the Parliamentary timetable for a bespoke Bill.26

25. We are grateful for the information provided by the Department as part of the “required information” and consider that these are compelling reasons. We strongly agree that it is important that claimants receive their payments promptly. However, we note that the judgment was handed down by the Court of Appeal on 29 April 2016 and that many of those affected have been waiting to have their appeal decided since 2012.27 Those sanctioned under the 2011 Regulations were, by definition, people who would be adversely affected by the loss of the benefits on which they depended. The Department estimates that there are approximately 3789 - 4305 claimants affected by the declaration of incompatibility.28 Whilst we agree that the use of a remedial order will achieve a change in the law more quickly than primary legislation, it is regrettable that it has taken the Department this long to lay a proposed draft order.

Use of non-urgent procedure

26. 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 information accompanying the Remedial Order.

27. The Government notes that the urgent procedure is used only for the most pressing cases. In the present case, the number of claimants whose rights are affected is finite and cannot increase beyond those who had an outstanding appeal on 26 March 2013. The non-urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay in remedying the incompatibility with human rights standards and the need to afford a proper opportunity for parliamentary scrutiny of...
changes to primary legislation.\textsuperscript{29} Since the Government has chosen to prioritise scrutiny we are content that the non-urgent procedure has been used, but trust there will be as little delay as possible between conclusion of proceedings on the proposal for an order and laying the draft order itself and implementing its provisions.

28. We are satisfied that that this is a valid use of the remedial power.

\textbf{Required information}

29. Pursuant to Schedule 2, paragraph 3(1) of the HRA, the Government must lay before Parliament ‘required information’ alongside the proposed draft order. ‘Required information’ is (a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and (b) a statement of reasons for proceedings under section 10 and for making the order in those terms.\textsuperscript{30}

30. We consider that the Government has provided the required information in accordance with the provisions of Schedule 2.\textsuperscript{31} We are also grateful to the Department’s officials for providing timely and helpful responses to requests for further information.

31. 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. The Committee does, however, regret the delay between the declaration of incompatibility in April 2016 and the laying of the proposed draft order in June 2018.

\textsuperscript{29} EM, para 4.4
\textsuperscript{30} Human Rights Act 1998, Schedule 2, para 5
\textsuperscript{31} Human Rights Act 1988, Schedule 2
3 Remedying the incompatibility

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

Whose rights are affected?

33. In the case of Reilly (No.2), there were different categories of claimant affected by the retrospective validation of sanctions under the 2013 Act; some of the claimants had already lodged an appeal against their sanctions by 26 March 2013 (the date the 2013 Act came into force) and some of whom had not appealed by this date.

34. The Court found a breach of Article 6(1) only in respect of those claimants who had lodged an appeal before 26 March 2013, where the appeal had not yet been determined, abandoned or withdrawn. There are, therefore, other individuals who received a penalty decision under the 2011 regulations who did not lodge an appeal before 26 March 2013 but who, nevertheless, have been adversely affected by the penalties. Although the position of these claimants was considered by the Court of Appeal in Reilly (No.2), the Court found no interference with their Convention rights. This category of claimants is not therefore within the scope of the declaration of incompatibility. The Remedial Order is designed only to remedy the Article 6(1) breach of those claimants who had lodged an appeal before the 2013 Act came into force.

35. We understand that approximately 3789–4305 individuals are affected by the incompatibility: the majority of these cases are currently stayed and have not yet been heard by a tribunal; the remainder have been determined by a tribunal, of which approximately 23–32% were found in the Department’s favour.\(^32\)

What is the proposed process for remedying the incompatibility?

36. Section 1A(2) of the 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 2011 Regulations).\(^33\) 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 the Secretary of State (pursuant to s.1A(4)).

\(^32\) Correspondence with Department officials. [Not published]

\(^33\) The Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018, June 2018, Annex A, section 1A(2)
37. We sought clarification from the Department’s officials as to (a) why the provision in section 1A(2) confers a power rather than a duty upon the Secretary of State to revise penalty decisions; and (b) in light of the discretion given to the Secretary of State to exercise her power, in what circumstances would she decide not to do so.\(^{34}\)

38. The Department officials clarified that the Department intends, as soon as the Remedial Order comes into force, to commence the process of revising decisions in accordance with s.1A(2). In doing so, the Department expects to be in a position to make repayments to claimants without the need to progress their appeals through the tribunal process. However, the Department is concerned that, for administrative reasons, a situation may arise where it cannot revise a penalty decision within a reasonable timeframe once the Order is made. For example, there may be difficulties with tracing and/or paying certain individuals, such as those who no longer claim benefits.\(^{35}\)

39. We have been assured that, in these circumstances, the Department will undertake an administrative exercise to meet the principles and guidance set out in the Legislative Entitlement and Administrative Practices Report 1979 to trace the affected individuals and correctly identify the amount to which they are legally entitled wherever possible.\(^{36}\) In circumstances where the Department is unable to trace the affected individual and therefore unable to revise the penalty decision of its own initiative, then the tribunal has the power under section 1A(9) to hear the appeal and find in favour of the claimant should the claimant wish to pursue the appeal.\(^{37}\)

40. The power to revise a penalty decision is governed by section 9 of the Social Security Act 1998. Under section 9, the Secretary of State may revise a decision either in response to an application or on her own initiative. We sought clarification as to whether claimants would be expected to make an application in order to have their penalty decision revised. We have been assured that the Secretary of State intends to revise decisions on her own initiative and that the Department plans to take steps to contact affected individuals so that they will not be required to proactively apply in order to obtain a remedy, although they would, of course, be free to contact the Department on their own initiative.\(^{38}\)

**How will the retrospective effect of the 2011 Regulations be remedied?**

41. 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 2011 Regulations and (ii) provide retrospectively for the adequacy of the notices.\(^{39}\) 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 2011 Regulations whilst their cases were under appeal.

---

\(^{34}\) Correspondence between Committee officials and Department officials. [Not published]
\(^{35}\) Correspondence between Committee officials and Department officials. [Not published]
\(^{36}\) Civil Service Department, Legal Entitlements and Administrative Practices: a report by officials, 1979
\(^{37}\) Correspondence between Committee officials and Department officials. [Not published]
\(^{38}\) Correspondence between Committee officials and Department officials. [Not published]
\(^{39}\) Subsections (1) to (6) of section 1 of the 2013 Act and sub-section (12) of section 1 so far as it applies.
42. 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. This allows the entire sanction to be repaid to the claimants.

**Does the Order remedy the incompatibility?**

43. 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. This applies to fair hearings in relation to social security benefits. 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. 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.

44. By enacting retrospective legislation to validate the 2013 Act and remove a right of appeal from claimants whose appeals were pending, the Government breached the Article 6 rights of these claimants. The proposed 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 2011 Regulations for those whose cases were pending before a Court when the 2013 Act entered into force. In doing so, the proposed draft Order restores to the claimants their right of appeal. In our view, the proposed 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 proposed Remedial Order be approved.

---

40 The Proposed draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018, section 1A(10)
41 Human Rights Act 1998, Art 6(1)
42 Feldbrugge v Netherlands (1986) 8 EHRR 425; Salesi v Italy (1998) 26 EHRR 187
43 Zielinski v France (2001) 31 EHRR 19, para 57
44 Reilly and Hewstone, at para 44
Conclusions and recommendations

1. In our view, the proposed draft Order adequately remedies the incompatibility of the 2013 Act with Article 6(1) as identified in the case of Reilly (No.2). We therefore recommend that the proposed draft Order be approved.

2. 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. The Committee does, however, regret the delay between the declaration of incompatibility in April 2016 and the laying of the proposed draft order in June 2018. (Paragraph 31)

3. By enacting retrospective legislation to validate the 2013 Act and remove a right of appeal from claimants whose appeals were pending, the Government breached the Article 6 rights of these claimants. The proposed 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 2011 Regulations for those whose cases were pending before a Court when the 2013 Act entered into force. In doing so, the proposed draft Order restores to the claimants their right of appeal. In our view, the proposed 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 proposed Remedial Order be approved. (Paragraph 44)
Declaration of Lords’ Interests

Baroness Hamwee

- No relevant interests to declare

Baroness Lawrence of Clarendon

- No relevant interests to declare

Baroness Nicholson of Winterbourne

- No relevant interests to declare

Lord Trimble

- No relevant interests to declare

Baroness Prosser

- No relevant interests to declare

Lord Woolf

- No relevant interests to declare

---

Formal minutes

Wednesday 24 October 2018

Members present:

Baroness Hamwee, in the Chair
Ms Karen Buck MP
Joanna Cherry MP
Baroness Lawrence of Clarendon
Baroness Nicholson of Winterbourne
Baroness Prosser
Lord Trimble
Lord Woolf

Draft Report (Proposal for a draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018), 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 44 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Wednesday 31 October 2018 at 3.00pm.]
List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee’s website. The reference number of the Government’s response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis HC 774 (HC 774)


Third Report Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill HC 568 (HL 87)

Fourth Report Freedom of Speech in Universities HC 589 (HL 111)

Fifth Report Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018 HC 926 (HL 146)

Sixth Report Windrush generation detention HC 1034 (HL 160)

Seventh Report The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards HC 890 (HL 161)

Eighth Report Freedom of Speech in Universities: Responses HC 1279 (HL 162)

Ninth Report Legislative Scrutiny: Counter-Terrorism and Border Security Bill HC 1208 (HL 167)

Tenth Report Enforcing Human Rights HC 669 (HL 171)


Twelfth Report Legislative Scrutiny: Mental Capacity (Amendment) Bill HC 1662 (HL 208)


Fourth Special Report Windrush generation detention: Government Response to the Committee’s Sixth Report of Session 2017–19 HC 1633