



HOUSE OF LORDS

Select Committee on the Constitution

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12th Report of Session 2012–13

# Jobseekers (Back to Work Schemes) Bill

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Ordered to be printed 20 March 2013 and published 21 March 2013

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Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£3.50

HL Paper 155

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The current staff of the committee are Nicolas Besly (clerk), Luke Wilcox (policy analyst) and Hadia Garwell (committee assistant). Professor Richard Rawlings and Professor Adam Tomkins are legal advisers to the committee.

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# Jobseekers (Back to Work Schemes) Bill

1. The Jobseekers (Back to Work Schemes) Bill was introduced into the House of Commons on 14 March 2013. It is being fast-tracked through both Houses of Parliament. All Commons stages took place on 19 March.<sup>1</sup> Second reading in the House of Lords is scheduled for 21 March, with all remaining Lords stages on 25 March.
2. In February 2013 the Court of Appeal ruled that certain of the Government's back-to-work schemes were unlawful as the relevant Regulations<sup>2</sup> were *ultra vires* the Jobseekers Act 1995.<sup>3</sup> Individuals had been refused benefits for not complying with the unlawful Regulations. The consequence of the Court of Appeal's ruling is that it is now unlawful for the benefits to be refused in these circumstances: it is axiomatic that no individual may lawfully be penalised for resisting an unlawful demand.
3. The Jobseekers (Back to Work Schemes) Bill would reverse the judgment of the Court of Appeal and would retrospectively make lawful the denial of benefits which, under the court's ruling, is unlawful. New Regulations have already amended the law prospectively.<sup>4</sup> Under the Court of Appeal's judgment the Government estimate that they would incur a liability of up to £130 million in repaying claimants who have been sanctioned under the Regulations and by not being able to impose sanctions for cases where decisions have been stockpiled.<sup>5</sup>
4. In this report we are concerned only with the constitutional questions arising from the Bill, not its merits.

## Fast-track legislation

5. The Constitution Committee published in 2009 a report on fast-track legislation in which we recommended, among other matters, that a Government introducing fast-track legislation into Parliament should be expected to comply with certain requirements.<sup>6</sup> In particular, we recommended that the Government should fully explain and justify why, in their opinion, it is necessary for legislation to be fast-tracked.<sup>7</sup> The then Government accepted our recommendations. In all subsequent cases of fast-track legislation the explanatory notes accompanying the bill have included

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<sup>1</sup> Two amendments were agreed by the House of Commons without division: see HC Deb, 19 March 2013, cols 877 and 892.

<sup>2</sup> The Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917).

<sup>3</sup> *R (Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66.

<sup>4</sup> The Jobseeker's Allowance (Scheme for Assisting Persons to Obtain Employment) Regulations 2013 (SI 2013/276), on which see the Secondary Legislation Scrutiny Committee, 28th report (2012–13), HL Paper 123.

<sup>5</sup> Explanatory notes on the Bill, para 3.

<sup>6</sup> Constitution Committee, 15th report (2008–09): *Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper 116).

<sup>7</sup> *ibid.*, para 186.

information as to why the Government consider that fast-tracking is necessary; the explanatory notes on this Bill include that information.<sup>8</sup>

6. The Jobseekers (Back to Work Schemes) Bill is the latest in what seems to us to have become an undesirably long line of recent fast-track legislation, following as it does the Loans to Ireland Act 2010, the Police (Detention and Bail) Act 2011, the Mental Health (Approval Functions) Act 2012 and the Police (Complaints and Conduct) Act 2012. In several of these instances we have reported concerns to the House<sup>9</sup> and, with regret, we are compelled to do so again now.
7. **The frequency of fast-track legislation is a matter of growing concern to us.**

### Is fast-tracking necessary here?

8. As explained above, the Jobseekers (Back to Work Schemes) Bill reverses the judgment of the Court of Appeal in *R (Reilly and Wilson) v Secretary of State for Work and Pensions*.<sup>10</sup> The Secretary of State has applied to the Supreme Court for permission to appeal against the Court of Appeal's judgment. The application is pending.
9. Thus, as with the Police (Detention and Bail) Act 2011, this Bill seeks retrospectively to overturn a judgment which is itself under appeal to a higher court. As we said of the Bill which became the Police (Detention and Bail) Act 2011, it is "highly unusual" to ask Parliament to legislate in these circumstances. Moreover, doing so raises what we described as "difficult issues of constitutional principle as regards both the separation of powers and the rule of law".<sup>11</sup> In their response the Government explained that they saw "no constitutional impropriety" in such legislation, citing the sovereignty of Parliament.<sup>12</sup> Replying, we said that the issue was not Parliament's competence to legislate (which is not in doubt) but the effect which legislation may have on constitutional principles.<sup>13</sup> In their further response, the Government emphasised that they "did not disagree".<sup>14</sup>
10. In the case of the Police (Detention and Bail) Act 2011 the Government made two observations justifying, in their view, the use of fast-track legislation to overturn a court judgment that was itself under appeal. The first was that, in that instance, the legislation in question merely restored the status quo ante and did not deprive anyone of a right on which they had

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<sup>8</sup> See paras 12–21. The Government's reasons for fast-tracking the Bill are also set out in a letter from the Minister for Welfare Reform, Lord Freud, to the opposition spokesman, Lord McKenzie of Luton, of 18 March 2013, which was copied to other members.

<sup>9</sup> Constitution Committee, 16th report (2010–12): *Police (Detention and Bail) Bill* (HL Paper 178); 8th report (2012–13): *Police (Complaints and Conduct) Bill* (HL Paper 80).

<sup>10</sup> *op. cit.*

<sup>11</sup> Constitution Committee, 16th report (2010–12): *Police (Detention and Bail) Bill* (HL Paper 178), para 7.

<sup>12</sup> Letter from the Minister for Crime Prevention, Baroness Browning, to the chairman of the Constitution Committee, 11 July 2011.

<sup>13</sup> Letter from the chairman of the Constitution Committee to the Minister for Crime Prevention, Baroness Browning, 14 July 2011. See further the exchanges between Lord Pannick (a member of this committee) and the Minister: HL Deb, 12 July 2011, cols 614–31.

<sup>14</sup> Further letter from the Minister for Crime Prevention, Baroness Browning, to the chairman of the Constitution Committee, 27 July 2011.

relied.<sup>15</sup> The second was that the legislation was necessary because of “a compelling operational requirement to act as quickly as possible to restore the law”, meaning that it was “not possible” to await the outcome of the appeal.<sup>16</sup> Neither of these reasons applies to the Jobseekers (Back to Work Schemes) Bill. Unlike the 2011 Act, the present Bill does deprive individuals of a right: namely, the right not to have unlawful financial sanctions imposed upon them. And, again unlike the 2011 Act, there is in this instance no compelling operational requirement for Parliament retrospectively to amend the law. New Regulations have already amended the law prospectively,<sup>17</sup> and any retrospective effect of the Court of Appeal’s judgment in the *Reilly and Wilson* case is suspended pending the Government’s application for permission to appeal to the Supreme Court.<sup>18</sup>

11. **For these reasons, we are unable to agree with the Government’s assessment that it was necessary for the Bill to be fast-tracked.** We note that the judgment of the Court of Appeal was handed down on 12 February 2013. The new Regulations referred to in the previous paragraph were laid by the Government at 6.15 pm that day and came into force at 6.45 pm that day. Yet it then took the Government four weeks to introduce the Jobseekers (Back to Work Schemes) Bill into Parliament. It is not clear why the Bill should be timetabled to complete its parliamentary passage in three sitting days when the Government allowed themselves four weeks to introduce it.
12. In a written statement made on 12 February the Minister stated that “we are considering a range of options to ensure that we do not have to repay” the sanctions which, in the judgment of the Court of Appeal, had been unlawfully imposed.<sup>19</sup> Given that a range of options was under consideration, it is incumbent upon the Government to explain to Parliament why they have chosen to proceed by means of fast-track legislation and to reject the alternative options.

### Retrospective legislation

13. We also draw to the attention of the House the retrospective nature of this Bill. As the explanatory notes make clear, the Bill will affect individuals in cases where, on the basis of unlawful regulations and notices (as held by the Court of Appeal), sanctions have been applied. By changing the law to reverse the decision of the Court of Appeal, “benefit sanctions already imposed ... will stand.”<sup>20</sup>
14. Such provision engages the cardinal rule of law principle that individuals may be punished or penalised only for contravening what was at the time a valid legal requirement. According to the doctrine of the sovereignty of Parliament, retrospective legislation is lawful. Nonetheless, from a

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<sup>15</sup> Letter from the Minister for Crime Prevention, Baroness Browning, to the chairman of the Constitution Committee, 11 July 2011.

<sup>16</sup> Further letter from the Minister for Crime Prevention, Baroness Browning, to the chairman of the Constitution Committee, 27 July 2011.

<sup>17</sup> *op. cit.*, note 4.

<sup>18</sup> The power to suspend payment of a benefit while an appeal is pending is in regulation 16 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991).

<sup>19</sup> HL Deb, 12 February 2013, col WS 42 (Lord Freud).

<sup>20</sup> Explanatory notes, para 6.

constitutional point of view it should wherever possible be avoided, since the law should so far as possible be clear, accessible and predictable. This applies to civil penalties as well as criminal offences. In the words of the late Lord Bingham of Cornhill.<sup>21</sup>

“If anyone—you or I—is to be penalised it must not be for breaking some rule dreamt up by an ingenious minister or official ... It must be for a proven breach of the established law of the land.”

15. **In scrutinising this Bill, the House will wish to consider whether retrospectively confirming penalties on individuals who, according to judicial decision, have not transgressed any lawful rule is constitutionally appropriate in terms of the rule of law.**

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<sup>21</sup> Tom Bingham, *The Rule of Law* (Allen Lane, 2010), pp 3–4.