

Submission by Mr Michael Petek on the occasion of the visit of the United Nations Special Rapporteur on extreme poverty and human rights to the United Kingdom of Great Britain and Northern Ireland from 5 to 16 November 2018

31 August 2018

Benefit Sanctions

1. I, Mr Michael Petek, of 18 Balfour Road, Brighton, BN1 6NA, make the following submission in a personal capacity to the Special Rapporteur. My terms of reference are limited to the matter of the administration of benefit sanctions within the Department for Work and Pensions.
2. I am a claimant of Income-Based Jobseeker's Allowance. I volunteer for one afternoon a week as a welfare rights adviser at Brighton Unemployed Centre Families Project, 6 Tilbury Place, Brighton.
3. A benefit sanction is a reduction or suspension of benefit payments because a claimant has not met conditions for receiving benefit. For example, Jobseeker's Allowance claimants are required to attend jobcentre appointments, and the Department for Work and Pensions may sanction people who fail to attend them. The Department uses sanctions for two reasons: to encourage more people to comply with conditions and to penalise claimants for not meeting their responsibilities. The amount of the reduction in all cases is 100 per cent of the benefit payment.

Sanctions for Jobseeker's Allowance

4. A typical sanction lasts four weeks and means a Jobseeker's Allowance claimant loses around £300. In 2015, the last year for which there is complete data, the Department imposed 400,000 sanctions on benefit claimants.¹
5. A claimant who loses a job voluntarily, loses a job because of misconduct, refuses or fails to apply for or accept a job, or neglects to avail himself of a job opportunity incurs a **High Level Sanction** by which JSA payment is reduced to nil for 13 weeks for a first sanctionable failure, escalating to 26 weeks for a second and 156 weeks for a third.
6. Conditions of entitlement to social security benefits linked to labour market activity differ as between Jobseeker's Allowance and Universal Credit. Entitlement to the former benefit is conditional on the claimant being available for work and actively seeking employment. Although the Claimant Commitment, an agreement setting out what the claimant will do to find work in each benefit week, might be relevant to the question whether a claimant is actively seeking employment, the criterion for determining it is the legislation, not the Claimant Commitment.
7. A claimant who is determined to have failed either condition of entitlement incurs a disallowance of JSA for each benefit week in which he is determined not to have met both conditions. He also incurs a **Medium Level Sanction** by which JSA payment is reduced to

¹ House of Commons Committee of Public Accounts - Benefit sanctions - Forty-second Report of Session 2016-17
<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/775/775.pdf>

nil for 4 weeks for a first sanctionable failure, escalating to 13 weeks for a second or subsequent failure, reduced in either case by the period of disallowance.

8. A **Low Level Sanction** is incurred for failing to participate in interviews, or to participate in a specified scheme for assisting people to obtain employment, or to carry out a jobseeker's direction.² JSA payment is reduced to nil for 4 weeks for a first sanctionable failure, escalating to 13 weeks for a second or subsequent failure.

Sanctions for Universal Credit

9. In contrast to Jobseeker's Allowance, the only labour market condition of entitlement to Universal Credit is that the claimant be in possession of a Claimant Commitment, an agreement setting out what the claimant will do during each assessment period (1 calendar month).
10. The condition of entitlement is the possession - but not the performance - of a Claimant Commitment. Thus, payment of Universal Credit is unconditional once the Claimant Commitment is in place. Work search requirements are enforced entirely by sanctions - there is no such thing as a disallowance.
11. In-work conditionality is a feature of Universal Credit. A person who is in work can claim UC if he meets the financial conditions of entitlement, and can be sanctioned for failure to find more work, or better paid work.

Benefit sanctions calculated to harm public health

12. Benefit sanctions are designed for the purpose of punishing claimants with degradation, starvation and destitution. The Department for Work and Pensions publishes a Decision Maker's Guide, an internal document which advises Decision Makers in the conduct of their functions. In relation to sanctions, the DMG states: "it would be usual for a normal healthy adult to suffer some deterioration in their health if they were without: 1. essential items, such as food, clothing, heating and accommodation or 2. sufficient money to buy essential items for a period of two weeks."..... (DMG 35142 et seq)"

A covert penal system - my experience

13. On 01-05-2018 I reported to the Job Centre at Edward Street, Brighton, to sign on with my Work Coach. I presented evidence of my jobseeking activity for the preceding two benefit weeks. Ten steps were evidenced including two job applications for Week 1, and eight steps including two job applications for Week 2. The other steps were searches which disclosed no suitable vacancies to apply for.
14. I had previously incurred two successive disallowances following my attendances at the Job Centre on 06-03-2018 on 20-03-2018. Jobseeker's Allowance went unpaid at £146.20 on each occasion, a total sum of £292.40. For legal reasons, no sanction was applicable.
15. On 01-05-2018 the Work Coach raised a doubt as to whether I was actively seeking work (ASE) for the period 18-04-2018 to 01-03-2018 and directed me to complete a standard ASE Stencil, as it is called, to be forwarded to the Labour Market Decision Makers.
16. In the meantime, the Work Coach unlawfully suspended payment of Jobseeker's

² Child Poverty Action Group, *Welfare Benefits and Tax Credits Handbook, 2018/2019*, London 2018, Chapter 50

- Allowance, pursuant to the Social Security and Child Support (Decisions and Appeals) Regulations 1999, Regulation 16(2).
17. On Friday 04-05-2018 I telephoned the Department for Work and Pensions and asked for Mandatory Reconsideration of the decision. A decision maker telephoned me on the evening of 04-05-2018 to discuss it with me. He told me that I was found not to have been actively seeking employment and that I incurred a disallowance for the relevant weeks and a sanction of 13 weeks' benefit (less the disallowance period). The decision maker confirmed the decision and undertook to send a decision letter and a Notice of Mandatory Reconsideration.
 18. The decision maker is not an independent officer. He acts under the authority of the Secretary of State for Work and Pensions, who is the authority responsible for paying Jobseeker's Allowance, if awarded.
 19. On 09-05-2018 I received a Notice of Mandatory Reconsideration and on the same day sent my appeal to the First-Tier Tribunal.
 20. On 15-05-2018 I signed on and re-established entitlement to Jobseeker's Allowance. The Respondent applied Regulation 69B of the Jobseeker's Allowance Regulations 1996 unlawfully to execute the sanction upon it on 15/18-05-2018 and on 29-05-2018/01-06-2018 as payments failed to enter my account.
 21. On 21-05-2018 I issued an appeal in the First-Tier Tribunal (which had to be re-issued later after the appeal papers had been lost).

Procedural illegality

22. It is a rule of constitutional law that a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself, provided that it is not inconsistent with the intention of Parliament or with common law requirements of rationality and fairness. - **Carltona Ltd v Commissioner of Works [1943] 2 All ER 560; R(Bourgass) v Secretary of State for Justice [2015] UKSC 54** at 48 and 52.
23. The suspension of payment of JSA on 01-05-2018 relies on the Social Security and Child Support (Decisions and Appeals) Regulations 1999, Reg. 16. This enactment (Reg 16(2)) requires the Secretary of State to suspend payment of a jobseeker's allowance in the circumstances prescribed in paragraph (3)(a)(i) or (ii) where the issue or one of the issues is whether a person, who has claimed a jobseeker's allowance, is or was available for employment or whether he is or was actively seeking employment.
24. There is a case that the making of these Regulations contravenes the common law of fairness in decision making and has not been authorised by the primary legislation from which they purport to derive their authority.
25. The common law rule of fairness is that:
 - (1) a public authority is under a duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised. - **Bank Mellat v HM Treasury (No. 2) [2013] UKSC 39** at 29;
 - (2) no material can be put before the court in litigation, civil or criminal, without being disclosed to the parties. - **Belhaj & Anor v Director of Public Prosecutions & Anor [2018] UKSC 33** at 6;

- (3) the rule applies identically to administrative decision makers. - **Osborn v The Parole Board [2013] UKSC 61** at 68.
26. The consequence of the rule is that the decision of 01-05-2018 to suspend payment of Jobseeker's Allowance, the decision of 04-05-2018 to disallow my award of Jobseeker's Allowance, and the decision of 15-05-2018 to impose a sanction, are illegal and invalid by reason of unauthorised deviation from the rule of fairness and from the **Carltona** rule.
27. It is arguable that section 12 of the Social Security Act 1998 (which provides for the right of appeal to the First-Tier Tribunal) necessarily implies a duty of a public authority to refrain from any (present) conduct which tends to frustrate the enjoyment of the (future) right to a fair trial.
28. The report of my Work Coach to the Decision Maker was generated on 02-05-2018 for a decision on 04-05-2018, but was disclosed to me only in the Department's response to my appeal before the First Tier Tribunal dated 03-08-2018 and received by me on 07-08-2018.

Unconstitutional use of penal power

29. The Bill of Rights 1689 provides, so far as is material:

That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.

30. There is a case that an eleven-week sanction consisting in the total removal of a subsistence benefit, over and above the disallowance of the benefit for the period of doubt, and in consequence of a technical failure actively to seek employment, is on any view patently disproportionate to the transgression it retaliates against. It answers the description at least of an excessive fine. In so far as it foreseeably tends to harm human health and may even (at that duration) foreseeably tends to endanger life, it amounts to a cruel and unusual punishment.
31. The use of benefit sanctions is a use of the penal power of the State and, as such, is reserved to members of the judiciary, each of whom must exercise that power in person, in which case the Carltona rule does not apply. - **R(Bewry) v Norwich City Council [2001] EWHC Admin 657** at 21-29.
32. There is no express specific provision of primary legislation to place the penal power in the Secretary of State; if there were, then the Secretary of State for Justice is the lawful incumbent absent an express specific reference to a different portfolio. Thus, the use of a benefit sanction amounts to unauthorised extrajudicial punishment.

Violation of Article 6 (criminal limb) of the European Convention on Human Rights

33. Without statutory authorisation under domestic law, it is impossible to avoid a violation of Article 6 of the European Convention on Human Rights, for any relaxation of an individual element of the right to a fair trial must be authorised by law as well as pursue a legitimate aim and enjoy a reasonable relationship of proportionality and the aim sought to be achieved.
34. There is a case that the criminal limb of Article 6 is engaged - pursuant to **Engel & ors v The Netherlands - 5100/71 [1976] ECHR 3** either by reason of the punitive and deterrent purpose of the decision, or by reason of the severity of its consequences, or by reason of both taken cumulatively.

35. The right to a fair trial is then engaged pursuant to the decision in ***Deweere v Belgium* (1980) 2 EHRR 239**, where it was held at 46 that it commences at the moment of the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence [or a sanctionable failure] or his situation has been substantially affected.
36. This would engage my right to a fair trial from 01-05-2018, with consequences which include the right to early disclosure of evidence (Article 6(3)(a)), the right to adequate time and facilities to prepare my case (Article 6(3)(b)) and the right to a "presumption of innocence" (Article 6(2)).
37. They also include a determination that it is plainly incompatible with Article 6 for the Secretary of State to act as judge in her own cause - see ***International Transport Roth GmbH & ors v Secretary of State For the Home Department* [2002] EWCA Civ 158** at 157.
38. If it is the case that my Convention right to a fair trial commenced on 01-05-2018, then the Respondent is disqualified from making the decision, in that the Secretary of State acting as judge in her own cause did so on 04-05-2018 incompatibly with Article 6.
39. The system of redress within the domestic legal system is inadequate for the following reasons. Only the First-Tier Tribunal is available to receive appeals from sanction-related decisions; however, the process usually takes a matter of months before the Tribunal can deal with a case, and it has no jurisdiction to stay or reverse the execution of the administrative decision. Judicial review before the Administrative Court is not available, as it is a remedy of last resort only and is unavailable as long as other avenues of appeal are open. There is therefore, no practical and effective means of obtaining an authoritative statement of the law concerning benefit sanctions.

Punitive purpose of sanctions

40. Sections 19, 19A and 19B of the Jobseekers Act 1995 and sections 26 and 27 of the Welfare Reform Act 2012 provide for the making of arrangements for sanctions. Full statutory provision is made elsewhere for disallowance of Jobseeker's Allowance and for the recovery of overpayments in the interest of protecting public funds. There is therefore no purpose for sanctions to serve other than that of punishment and deterrence. It is for this purpose, and for this only, that Parliament authorises their imposition.

Severity of sanctions

41. There is a case that, as a matter of domestic law, the severity of sanctions is sufficient to engage the criminal limb of Article 6. Authorities pointing in this direction are ***DL v SSWP (JSA)* [2013] UKUT 0295 (AAC)** at 14, applied in ***MT v SSWP (JSA)* [2016] UKUT 0072 (AAC)** at 9 and considered in ***RR v SSWP (JSA)* [2017] UKUT 459** at 45; and ***CS v Secretary of State for Work and Pensions (JSA)* [2015] UKUT 61 (AAC)** at paragraph 19). These illustrate the proposition that the relevant legislation should be construed strictly or (equivalently) that the claimant should be given the benefit of any doubt that may reasonably arise.