



Benefits for Renters in a Cost of Living Crisis

Recent legislation and policy

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GARDEN COURT CHAMBERS



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Topics covered

- Private sector rents and Local Housing Allowance (LHA) rates
- New exemptions to the shared accommodation rate of LHA
- Universal credit housing costs replacing housing benefit
- “No DSS” blanket bans
- The Debt Respite Scheme guidance



Problems meeting private sector rents - Local Housing Allowance (LHA) rates

What is LHA?

- the maximum rate at which Housing Benefit (HB) or the housing costs element of Universal Credit (UC) is paid to private sector renters.

How has the rate been set?

- at the 30th percentile on the list of rents in the broad market area
- LHA rates from 1 April 2022 are the same rates that came into force on 1 April 2020

(GOV.UK: LHA rates April 2022-March 2023)

The shortfall

- 1 in 4 private renters in England (1.2 million) depend on HB to help cover their rent (*Falling short: HB and the rising cost of renting in England, Crisis supported by Zoopla, August 2022*)
- DWP data showed 730,400 households in England, Scotland and Wales faced shortfalls between LHA and rents, with median monthly amounts of £65 - £112 (Aug. 2021 data, HC Written Question 26.1.22)



Problems meeting private sector rents

The wider problem is well-documented:

- *Renters on low incomes face a policy black hole: homes for social rent are the answer*, Elliot and Earwaker, JRF, Oct.2021 -
“624,000 are facing unaffordable rents which eat up more than 30% of their incomes even after HB is factored in”
- *Falling short: Housing benefit and the rising cost of renting in England*, Crisis supported by Zoopla, Aug. 2022: **“Since the start of the pandemic, rents in the UK have risen by 12% on average yet housing benefits have remained frozen at levels set according to rent data collected during 2018-19”**
- *Kerslake Commission on Homelessness and Rough Sleeping*: in view of the cost of living crisis **recommendations include bringing LHA into line with the bottom 30% of rental market**
- *More than a million private renters hit with a rent hike last month*, Shelter England, 23 Sept. 2022:
“the PM must at a minimum unfreeze housing benefit...or face an explosion of homelessness”



LHA: the good news - extension of exemptions from shared accommodation rate for victims of domestic violence and modern slavery

What is the shared accommodation rate?

- Applies to LHA claimants who are single, live on their own and are under 35
- Entitles the person to LHA at a rate for shared accommodation only - exclusive occupation of a bedroom and shared use of other rooms (Rent Officers Order, Sch 1)
- There are several exemptions (see HB Regs 2006, reg 2(1); UC Regs 2013, Sch 4)

The new additional exemptions

- are in the *Housing Benefit and Universal Credit (Victims of Domestic Abuse and Victims of Modern Slavery) (Amendment) Regulations 2022*

Exemption from shared accommodation rate for victims of domestic abuse and modern slavery

- Amendments to **HB Regs**: amendment to the definition of “*young individual*” in reg 2 HB Regs to exclude the relevant victims. As the definition of “young individual” will now exclude them, they will fall outside the scope of reg 13(5), which provides that in the case of a “young individual” the maximum rent will be the Single Room Rent unless one of the specified exceptions applies and outside reg 13D which provides that the shared accommodation rate applies to young individuals
- Amendments to **UC Regs**: amendment to Sch 4, para 29 UC Regs 2013 to include relevant victims in the list of renters excepted from the shared accommodation rate
- In force from 1 October 2022
- Wide definition of domestic violence: ...



Exemption from shared accommodation rate for victims of domestic abuse and modern slavery

“any incident, or pattern of incidents, of controlling behaviour, coercive behaviour, violence or abuse, including but not limited to

(a) psychological abuse

(b) physical abuse

(c) sexual abuse

(d) emotional abuse

(e) financial abuse

regardless of the sexuality or gender of the victim”

“coercive behaviour” means an act of assault, humiliation or intimidation or other abuse that is used to harm, punish or frighten the victim

“controlling behaviour” means an act designed to make a person subordinate or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance or escape or regulating their everyday life



Exemption from shared accommodation rates for victims of domestic abuse and modern slavery

- The criteria for the domestic abuse exemption are
 - (i) After attaining the age of 16 had **domestic violence inflicted** upon **or threatened** against them by their partner or former partner, or by a relative; and
 - (ii) Provides evidence to the relevant authority from **a person acting in an official capacity** which **demonstrates** that
 - (a) the victim's circumstances are consistent with their having had domestic violence inflicted or threatened against them and
 - (b) the victim contacted **a person acting in an official capacity** in relation to such an incident.
- “***person acting in an official capacity***” means a health care professional (as defined) a registered social worker, the victim's employer or any public, voluntary or charitable body which has had direct contact with the victim in connection with domestic violence



Exemption from shared accommodation rate for victims of domestic abuse and modern slavery

Guidance

HB Circular A6/2022; ADM Memo 19/22

- No time limit - in the sense that the abuse could have happened any time (after the age of 16) before the claim. Example: abuse happened when aged 20, claim can be made any time up to the age of 35.
- Modern slavery exemption applies when positive Conclusive Grounds decision is received from the relevant Home Office authority. Discretionary Housing Payments can be considered for those yet to receive a decision
- Entitlement to the one-bedroom LHA rate (instead of the shared accommodation rate) only applies if the person is living in self-contained accommodation.



Exemption from shared accommodation rate for victims of domestic abuse and modern slavery

Number of people who will benefit?

- Around 11,000 under domestic abuse exemption; around 1,000 under modern slavery exemption (reported to Social Security Advisory Committee, June 2022)

How will renters who could benefit from this change know about it?



UC housing costs replacing HB

- **UC is gradually replacing legacy benefits** including HB for people of working age, which is being replaced by the housing costs element of UC
- The government's plan has been to complete the move to UC **by the end of 2024** (DWP Press Release, 25.4.2022)
- The move to UC takes place by “**natural**” migration (change in circumstances necessitates a new claim), voluntary switch to UC, or “**managed**” migration whereby the DWP writes to the claimant and requires them to make a claim
- **Managed migration** as a process causes **concern** because difficulties in engaging in the process can result in benefits being cut off (*Leading Charities Unite to tell UK Government to halt managed migration*, 9 May 2022)
- There is a system for **alternative payment arrangements** (APAs) in relation to housing costs, designed to support vulnerable claimants. Payment of UC housing costs to the claimant (the default position) can be changed to **payment directly to the landlord**.



UC housing costs replacing HB

Take-up of APAs

- In 2019, 20% of UC claimants with housing costs had their rent paid directly to landlords. The second type of APA which provides for more frequent payments (than monthly) had a take-up of only 2% (Gov.uk Universal Credit: personal welfare Jan 2019)
- *“The guidance identifies mental health problems as a circumstances which might mean an APA is required, yet **very few people access them**, and when APAs are used, they’re typically **offered too late**, after financial harm has occurred.”*

(A fit-for-purpose managed migration process: safeguarding claimants with mental health problems in the move to Universal Credit, Nicola Bond, Money and Mental Health Policy Institute, Sept. 2022)



“No DSS” landlords

- National Audit Office reported Dec. 2021:
 - **52% of private sector landlords are unwilling to let to people claiming HB**
(*Regulation of private renting*, HC 893, 10.12.2021)
- **Successful legal challenges** to “No DSS” policies operated by letting agencies, resulting in the policies being declared unlawful under the **Equality Act 2010** as discriminatory against women and disabled people:
 - *A Tenant v A Letting Agency*, Legal Action, September 2020;
 - *Tyler v Paul Carr Estate Agents* [2020] EW Misc 30 (CC); Legal Action, November 2020, and
 - *Pearce v Michael Jones*, 29 March 2021 (Shelter blog, 16 April 2021)



“No DSS” landlords

- **Research shows:**

- women 1.5 times more likely to be in receipt of HB than men
- people who are disabled 3 times more likely to be in receipt of HB than those who are not

(Time for change: Making renters fairer for private renters, Shelter, supported by Nationwide Building Society, November 2020)

- **White Paper, A Fairer Private Rented Sector, 16 June 2022:**

government states intention to make it **illegal** for landlords or agents to have **blanket bans on renting to families with children or those in receipt of benefits**



The Debt Respite Scheme

- ***Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regs 2020***, in force from 4 May 2021
- “***Moratorium***” : a period when a creditor may not, in relation to any moratorium debt, take any of the steps specified in **reg 7(6)** in respect of the debt. Reg 7(6) includes requiring payment of interest accruing during the moratorium period, or fees, penalties or charges that so accrue, or take “*any enforcement action in respect of the moratorium debt*”, defined widely in reg 7(7) to include
“*(a) take a step to collect a moratorium debt from a debtor*”
“*(j) serve a notice to take possession of a dwelling-house let to a debtor on grounds 8, 10 or 11 in Schedule 2 Housing Act 1988 or take possession of a dwelling-house let to a debtor having served such a notice*”
- Courts/tribunals can authorize a step otherwise prohibited in narrow circumstances: if not detrimental to the debtor and will not undermine the protections of the moratorium (**reg 7(5)**).



The Debt Respite Scheme

- Broad definition of “**qualifying debt**” (reg 5) (list of non-eligible debts includes a secured debt (although arrears in relation to a secured debt can be included) and budgeting loan or crisis loan from the social fund)
- 2 types of moratorium: **Breathing space moratorium** and **Mental health crisis moratorium**

Breathing space moratorium (a.k.a. standard breathing space)

- debtor must apply to a debt advice provider (defined in reg 3), and must first receive debt advice from them (reg 23)
- debt advisor must certify to the Secretary of State that the debtor meets the eligibility criteria to be in the scheme and is unable or unlikely to be able to pay some or all of their debts and the moratorium is appropriate (reg 25)
- Midway review
- Duration: 60 days (reg 26); and only one per year



Debt Respite Scheme

Mental health crisis moratorium (a.k.a. mental health crisis breathing space)

- applies to debtors who are receiving mental health crisis treatment, defined in reg 28 as
 - has been detained in a hospital under ss 2 or 4 MHA 1983
 - has been detained in a hospital for treatment under s 3 MHA 1983
 - has been removed to a place of safety by police under ss 135 or 126 MHA 1983
 - has been detained in hospital for assessment or treatment under ss 35, 36, 37, 38, 45A, 47 or 48 MHA 1983 or
 - *“(e) is receiving any other crisis, emergency or acute care or treatment in hospital or in the community from a specialist mental health service in relation to a mental disorder of a serious nature”*
 - *“specialist mental health service”* means a mental health service provided by a crisis home treatment team, liaison mental health team, community mental health team or any other specialist mental health crisis service (reg 28(3))



Debt Respite Scheme – Mental health crisis moratorium

- application to a debt advice provider by the debtor or another of the listed individuals on their behalf (reg 29)
- application must include evidence from an approved mental health professional (defined in reg 2) that the debtor is receiving mental health crisis treatment (reg 29)
- debt advisor must certify to the Secretary of State that the debtor meets the eligibility criteria and conditions including being unable or unlikely to be able to pay some or all of their debts, mental health crisis moratorium would be appropriate and an approved mental health professional has provided evidence the debtor is receiving mental health crisis treatment (reg 31)
- **duration of mental health crisis moratorium** (reg 32): the end of 30 days from the day when the debtor stops receiving mental health crisis treatment (or earlier under other provisions)



Debt Respite Scheme

- **Guidance for money advisors**, updated 31 May 2022, GOV.UK
 - Intended to help debt advice providers understand the regulations
 - *“A breathing space is not a payment holiday. While creditors cannot enforce a **breathing space debt** during a breathing space or charge interest or fees on it, your client is still legally required to pay their debts and liabilities..” (7.3)*
 - *“Creditors must apply all the breathing space protections for your client after they have been notified of breathing space. If they do not, any action they take is not valid and they may be liable for your client’s costs” (7.15)*
 - *“The purpose of standard breathing space is to give your client time to get debt advice while their creditors cannot take enforcement action. It’s time for them to consider their options to deal with their debts, including considering or putting a debt solution in place” (7.1)*
- **Guidance for creditors**, updated 31 May 2022, GOV.UK



Debt Respite Scheme

- **Step Change** (debt charity) delivers a high proportion of the applications to the scheme - 46,050 out of 69,613 in the first 12 months of the scheme: *One Year of Breathing Space, Initial Findings from Step Change, July 2022*
- Step Change reports that some people are unable to reach agreement with creditors during the period of the breathing space and that it is “*important that Breathing Space is recognized as a sign of financial difficulty and those coming out of it granted ongoing forbearance where debts are not covered by debt solution*”
- **Lees v Kaye** [2022] EWHC 1151 (QB), HHJ Dight CBE: “*First Respondent has taken action in evicting the Applicant and in selling the Lease which, because they are breaches of regulation &, are null and void....the Applicant is entitled to an order which restores the position to what it was before the eviction and sale took place*”
- **Axnoller Events Ltd v Brake** [2021] EWHC 2308 (Ch), HHJ Paul Matthews—application to cancel a mental health crisis moratorium





Benefits for Renters in a Cost of Living Crisis

Desmond Rutledge, Garden Court Chambers

20 October 2022



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Universal Credit Payment Arrangements

The Default position is that Universal Credit (UC) is paid as a single payment into one account 7 days after the last date of the claimant's monthly assessment period. However, there is limited scope for payments of UC to be made in other ways under certain circumstances, viz:

- Alternative Payment Arrangements – if the claimant cannot manage a single monthly payment;
- Managed Payment – where housing costs are paid directly to the landlord;
- Third-party deductions – where deductions are taken and paid directly to a creditor/supplier.



How deductions are applied:

- An award of UC is formally made up of the standard allowance and additional elements (e.g. for children, disabilities and housing costs).
- However, as it is an integrated system, the claimant's income is assessed against the total award, rather than the various elements.
- As a result, none of the elements are ring-fenced (unless housing costs are being paid directly to the landlord).
- Consequently, whilst deductions for overpayments and other debts are calculated as a percentage of the standard allowance, the actual deduction is applied to the whole of the claimant's award, including elements for children.



The rate at which deductions are made

- When UC was introduced the maximum deduction rate could be up to an amount equivalent to 40 per cent of the UC standard allowance.
- From October 2019, this was restricted to 30 per cent.
- From April 2021 this was further restricted to 25 per cent (subject to limited exceptions).

Standard allowance rates

- Single person aged 25 or over - £334.91 pm
- Couple where either is 25 or over - £525.72 (for both)



Third Party Deductions

Third Party Deductions (“TPD”) is a way to pay certain priority bills straight from a person’s benefits, including UC. Arrears that can be recovered under the third party scheme include:

- housing rent arrears (NB private landlords can apply for direct rent payments instead of TPD)
- fuel costs
- Council Tax
- unpaid fines or compensation orders
- water and sewerage charges
- child maintenance

NB: The claimant cannot have more than three deductions for debts owed.



Work and Pensions Committee

- In July 2022, the Work and Pensions Committee produced 'The Cost of Living' report - which focused on how far the government's cost of living package protected those most in need.
- The Committee called for deductions from benefits to be paused and only be restored gradually as the rate of inflation reduced.
- The Government rejected this recommendation commenting: “...*pausing third-party deductions could result in an increase in enforcement action by third parties ...*”
- The Government Response added: ‘*DWP is committed to supporting claimants who contact us if they feel unable to afford the repayment of benefit overpayments. DWP Debt Management will work with claimants to review their financial circumstances and consider a temporary reduction in their rate of repayment.*’



R (Timson) v SSWP [2022] EWHC 2392 (Admin)

- The DWP acted unlawfully by failing to seek representations from claimants before applying a third-party deduction for utility debts.
- The claimant argued that the DWP’s policy approach to third-party deductions (TPDs) in respect of fuel and water debts was unlawful.
- The High Court considered the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968. Sch 9, para 6 provides that the Secretary of State can make a deduction for fuel or water if “it would be in the interests of the family” to do so.



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- The High Court also considered official guidance in the Decision-Maker's Guide (DMG) which is available online and an Overview document described as "internal operational guidance".
 - The HC accepted the DWP's submission that the 1987 Regulations do not require the DM to ask the claimant whether they object to the imposition of a TPD.
 - But the HC did hold that the law requires that claimants have to be contacted before the TPD decision is made. Cavanagh J said:-



“Given the impact of a TPD upon a claimant, ... I am satisfied that the common law requires that claimants are given the opportunity to make representations and to provide information before the decision is taken. Even though, as I have said, a mere refusal to agree to a TPD is not relevant, there may be relevant things that the claimant can say, and may be relevant information that the claimant can provide, of which the decision-maker would not otherwise be aware. There is no way of being certain as to whether the utility company can provide the decision-maker with all of the relevant information. There is no way of being certain that the decision-maker is apprised of all relevant information, unless and until the claimant is given an opportunity to make representations and to provide information if they so wish” (para 214)

NB: No new TPD can be made for ongoing consumption from 26.04.22 to 06.04.23 due to SI 2022/428. But this does not prevent new TPDs from being imposed to make deductions for arrears of fuel costs.



R (Blundel & Ors) v SSWP [2021] EWHC 608 (Admin)

- The 4 claimants had incurred court fines for criminal offences.
- Where a fine is imposed by a magistrates' court, the court can ask the SSWP to deduct sums from the offender's UC.

[Fines (Deductions from Income Support) Regulations 1992, SI 1992/2182, reg 4, and Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013, SI 2013/380, Sch 6 para 4]



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- The SSWP had a policy of taking deductions at the maximum permitted level subject to a cap of 30 per cent of the standard allowance for UC.
 - The claimants had tried to get their deductions reduced due to financial hardship but they were refused.
 - The SSWP's guidance made no provision for reducing deductions on the ground of financial hardship. Instead, they were told they could apply to a fines officers and/or the magistrates' court to remove the deductions from the benefits order and enter into direct arrangements with the court to repay the fine.



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- The claimants sought judicial review of this deduction policy on the ground that the SSWP had unlawfully fettered the exercise of her statutory discretion to deduct (subject to parameters) ‘any sum’ from the UC standard allowance.
 - Kerr J agreed saying that the SSWP’s policy did not provide for any exceptions.
 - Kerr J rejected the SSWP’s argument that the claimants could apply to the magistrates’ court to change the method of payment.



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- This approach was inadequate because the court / fines officer would not necessarily know what the effect, if any, varying the payment rate would have on the deductions from UC in an individual case and therefore on alleviating financial hardship:-

‘In my judgment, it is – at any rate in this case - no answer to the charge of fettering a discretion to say that it does not matter because someone else can "un-fetter" it. The present case calls for individual consideration, where necessary, by the person responsible for exercising statutory power. It is not an answer, at least in this case, to a complaint that the Secretary of State is shutting her ears to a debtor seeking reduced deductions, to say that he can go elsewhere and get a less exacting payment rate instead.’ (para [86]).



Hardship Payments

- If a claimant's UC is cut because of a sanction (or a penalty for fraud), they might be able to get some emergency money to help cover household expenses like food and bills. This is called a 'hardship payment'.
- A hardship payment is a loan and has to be paid back when the sanction ends.
- The payment is recovered by deductions from UC.

[UC Regulations 2013, SI 376, regs. 115-119; CPAG Handbook, Chapter 52].



R (B) v SSWP CO/116/2020

- The Public Law Project brought a judicial review challenge arguing that the DWP could use its discretion to waive the recovery of hardship payments.
- In a consent order (available on the PLP website), the Secretary of State agreed that “*she has discretion to decide whether to recover recoverable hardship payments made to a universal credit claimant following the imposition of a sanction, including where such sanctions are subsequently overturned*” (sealed 20 August 2021).
- For more information, see guide on PLP website: ***‘DWP sets out policy for waiving and repaying Universal Credit hardship payments’***.



The Guidance **Benefit overpayment recovery guide** has been amended to reflect this concession:

8.1 The Secretary of State has a discretion over whether to recover overpayments and associated penalties and how to do so. This discretion can also be applied to recoverable hardship payments. ... The discretion can also be exercised by cancelling part of, or the entire overpayment, through the process of waiver and write-off.

- NB: How to request a waiver and the factors that will be taken into account are described at paras. 8.10 – 8.14 of the Guidance.



Managed Payment to Landlord (APA)

- If a tenant experiences difficulty in managing their single monthly payment or gets into difficulty paying their rent, the claimant, their work coach, Case Manager or their landlord can apply for a Managed Payment to Landlord (which is an APA).
- The decision to award an APA is discretionary and made on behalf of the Secretary of State.
- There is no right of appeal against the decision, however the decision can be reviewed by the same or another Universal Credit agent if further information is provided.
- The APA will be reviewed to take account of a claimant's changing circumstances and characteristics. Guidance suggests reviews will be set for a 3, 6, 9, 12, 15, 18 and 24 months period.



For some claimants who are particularly vulnerable, such as those who have a long-term mental health condition with no one to support them, it may be more appropriate to have a longer review period.

Further details can be found in DWP Guidance available online:

- **Universal Credit and rented housing: guide for landlords** (Updated 13 May 2020).
- **Alternative Payment Arrangements** (Updated 13 May 2020). NB, this includes a list of factors to be taken into account when considering a APA: see Section 5. Annex A.



Case-law in brief

- ***R (Caine) v SSWP [2020] EWHC 2482 (Admin)*** – holds that the formulae for converting weekly rents to a monthly value for the purpose of calculating UC entitlement are neither irrational nor unlawful. (NB. The claimants attacked the conversion ratio of 52/12 as it is based on a year having 52 weeks, when a non-leap year has 52 weeks plus one day, and a leap year has 52 weeks plus two days).
- ***Pantellerisco and Ors v SSWP [2021] EWCA Civ 1454*** – holds that UC benefit cap earnings assessment is not irrational and unlawful in the case of a four-weekly paid claimant. The claimant was subject to the benefit cap in 11 out of 12 assessment periods each year.

As one minister explained: “[by assessing income against the total award, rather than elements] we avoid the need for setting out complex rules and setting a priority order for rendering reductions in net entitlement with regard to earnings and income. This is a fundamental building block in the design ...” (Malthouse, 2018).



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- ***R (Salvato) v SSWP [2021] EWCA Civ 1482*** – holds that ‘Proof of Payment Rule’ requiring UC claimants to pay for childcare upfront is not unlawful.
 - NB: In each of the 3 -cases above, the SSWP argued that the UC system relies on automation, and that any amendment to its core design would compromise this and that manual interventions were too staff-intensive and costly.



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- ***AM v SSWP (UC): [2022] UKUT 242 (AAC)*** – holds that UC claimants have the right to seek backdating of their claim after the decision to award benefit has been made. The claimant is able to raise the backdating issue in an MR or on appeal after a decision on the claim has been made.
 - ***R (Bui) v SSWP; R (Onakoya) v SSWP: [2022] UKUT 189 (AAC)*** – holds DWP entitled to withhold payment of UC from an individual who does not have a National Insurance number (NINo) until such time as a NINo is allocated to that person.



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- ***Taylor v The Department for Communities and The Department for Work and Pensions [2022] NICA 21*** - Court of Appeal in Northern Ireland upholds High Court decision that 13-week housing benefit temporary absence rules that apply to serving prisoners do not breach human rights law.
 - NB: The High Court had made two interim relief orders in 2020 to restore housing benefit payments pending a full hearing of the case in ***Taylor, Re Application for Judicial Review [2020] NIQB 46*** (1 May 2020) and [2020] NIQB 52 (22 June 2020).



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- ***FN v SSWP (UC): [2022] UKUT 77 (AAC)*** – UT gives guidance to representatives, tribunals and the DWP on the approach to obtaining information from an abusive partner to support a claim from the person fleeing abuse when a non-molestation injunction is in place. In any application for directions, representatives should say what steps have been taken, unsuccessfully, to date.
 - ***CA v Hastings Borough Council: [2022] UKUT 57 (AAC)*** - holds that the First-tier Tribunal should have considered HB provisions that enable the capital value of shares in the business to be disregarded where the claimant is in a position analogous to that of a partner in the business (HB Regs, reg 49(5)).



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- ***Waltham Forest LBC v PO (HB): [2022] UKUT 58 (AAC)*** - considers the application of HB rules in relation to the bedroom tax and non-dependant deductions where a foster parent is accepting intermittent placements.
 - ***ZD v London Borough of Hillingdon (HB): [2021] UKUT 305 (AAC)*** – holds that a claimant who moved into property as a ‘caretaker’ for her boyfriend’s council tenancy after he went to prison could not be treated as liable to make payments for HB purposes – the decision refers to the use of the phrase “is to continue to live” in reg 8(1)(c). NB The local authority landlord refused to set up a use and occupation account for the property.



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- ***Hillingdon London Borough Council v EB (HB): [2021] UKUT 208 (AAC)*** – holds fostering allowances paid to carers approved by independent agencies, in common with allowances paid to carers approved by local authorities, are not to be counted as part of their earnings.
 - ***MP v Sutton London Borough Council (HB): [2021] UKUT 193 (AAC)*** – holds that a claimant did not create a rent liability to take advantage of HB scheme where entitlement to HB was the same as it was before the liability was created. [On the facts found the new liability (2 HB claim) was the same as the original liability (1 HB claim)].



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- ***LG v SSWP (UC): [2021] UKUT 121 (AAC)*** – holds the First-tier Tribunal was correct to take two lots of four-weekly paid wages into account in one universal credit assessment period / *Johnson and Pantellerisco* did not apply.
 - ***DP v East Dorset District Council (HB): [2020] UKUT 270 (AAC)*** - holds 82-year-old claimant who was ‘*drowned in paperwork*’ could not reasonably have been expected to realise that the local authority error in treatment of Teachers’ Pension meant he was being overpaid.



Benefits for Renters in a Cost of Living Crisis

Adrian Berry, Garden Court Chambers

20 October 2022



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EU Issues

Pre-Settled Status: After *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53:

- The Court of Justice of the European Union (CJEU) delivered its judgment in *CG* on 15 July 2021 (Case C-709/20) [2021] WLR 5919.
- It observed that every EU citizen may rely on the prohibition of discrimination on grounds of nationality laid down in article 18 of the Treaty on the Functioning of the European Union ('TFEU').
- However, the first paragraph of article 18 TFEU is intended to apply independently only to situations governed by EU law with respect to which the TFEU does not lay down specific rules on non-discrimination



EU Issues

Pre-Settled Status: After *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53:

- Thus, the principle of non-discrimination is given specific expression in article 24 of Directive 2004/38/EC (“the Directive”)
- Accordingly, the question whether that EU national faces discrimination on grounds of nationality falls to be assessed by reference to article 24 of the Directive and not by the independent application of article 18 TFEU.
- The CJEU in Case C-709/20 *CG* concluded that an EU citizen can claim equal treatment in respect of social assistance only if his or her residence in the territory of that member state complies with the conditions of the Directive (para 75, citing *Dano v Jobcenter Leipzig* (Case C-333/13))



EU Issues

What about Fundamental Rights/Human Rights in Case C - 709/20 CG case?

- Where an EU citizen resides legally, on the basis of national law, in the territory of a Member State other than that of which he or she is a national, the national authorities empowered to grant social assistance are required to check that a refusal to grant such benefits based on that legislation *does not expose that citizen, and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights*, as enshrined in Articles 1, 7 and 24 of the Charter. (dignity, family life/private life, best interests of the child).



EU Issues

What about Fundamental Rights/Human Rights in Case C-709/20 CG case?

- Where that EU citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the event of a refusal to grant social assistance, that EU citizen may nevertheless live with his or her children in dignified conditions.
- In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and her children are actually entitled to benefit.



EU Issues

What about Fundamental Rights/Human Rights in Case C-709/20 *CG* case?

- ADM Memo 1/22 makes no mention of the duty on the Secretary of State to consider a risk of violating an EEA national's rights under the EU Charter of Fundamental Rights before refusing an application for Universal Credit, as required by the binding judgment of the CJEU in *CG*.
- Is this lawful?



What about Fundamental Rights/Human Rights in Case C-709/20 *CG* case?

- DWP Minister David Rutley on 15 July 2002:

'The Department has no current plans to update the guidance.... The Department does not accept that *CG* has any application to situations which are governed by the rules in place after the end of the transition period, because EU law no longer applies. For periods before the end of the transition period, the Department considers that, to the extent that the Charter applies on the specific facts of any case, the state's obligations are satisfied by the availability of alternative sources of support.'



EU Issues

EU Rights and Brexit Hub: Template skeleton for Pre-settled status and access to benefits

- <https://www.eurightshub.york.ac.uk/project-news/pre-settled-status-and-access-to-benefits-template>
- Remember a person with Pre-settled Status seeking benefits for the period before the end of the Brexit transition period (11 pm on 31 December 2020) may have EU rights they can rely on.
- Remember too that for the period after the end of the Brexit transition period, they may have Withdrawal Agreement rights.



EU Issues

Can a person seeking to show self-sufficiency in EU law (to establish a right to reside) rely on NHS health care to show they have Comprehensive Sickness Insurance? – Yes

See *VI v HMRC* Case C-247/20:

- 68. In the present case, it is apparent from the documents before the Court that VI and her son were affiliated during the period in question, namely from 1 May 2006 to 20 August 2006, to the United Kingdom's public sickness insurance system offered free of charge by the National Health Service.



EU Issues

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See *VI v HMRC* Case C-247/20:

- 69 In that regard, it must be recalled that, although the host Member State may, subject to compliance with the principle of proportionality, make affiliation to its public sickness insurance system of an economically inactive Union citizen, residing in its territory on the basis of Article 7(1)(b) of Directive 2004/38, subject to conditions intended to ensure that that citizen does not become an unreasonable burden on the public finances of that Member State, such as the conclusion or maintaining, by that citizen, of comprehensive private sickness insurance enabling the reimbursement to that Member State of the health expenses it has incurred for that citizen's benefit, or the payment, by that citizen, of a contribution to that Member State's public sickness insurance system (judgment of 15 July 2021, A (Public health care), C-535/19, EU:C:2021:595, paragraph 59), the fact remains that, once a Union citizen is affiliated to such a public sickness insurance system in the host Member State, he or she has comprehensive sickness insurance within the meaning of Article 7(1)(b).



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- Further, the anti-test case rule does not prevent housing benefit claimant from relying on CJEU ruling that affiliation to NHS satisfies comprehensive sickness insurance requirement for right to reside as a self-sufficient person
- See [2022] UKUT 203 (AAC) | CH/1602/2019 *WH v Powys County Council and SSWP*



EU Issues

A Person may have both a qualifying and a non-qualifying EU Right of Residence: They still qualify

- A claimant's right to reside as a jobseeker did not preclude her from relying on derivative right to reside as primary carer of a child of EEA national to establish entitlement to housing benefit
- See [2022] UKUT 123 (AAC) *Sandwell MBC v KK and SSWP*
- Citing *Jobcenter Krefeld-Widerspruchsstelle v JD* Case C-181/19



Thank you

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