# Judicial Communications Office

**3 August 2021**

## COURT ALLOWS APPEAL IN "TERMINALLY ILL" BENEFITS CASE

## Summary of Judgment

The Court of Appeal[1] today allowed an appeal by the Department for Communities in a challenge against the legislation which provides that certain persons with a terminal illness can receive payment of welfare benefits without undergoing a full assessment.

**Background**

Lorraine Cox ("the respondent") was formally diagnosed with Motor Neurone Disease ("MND") in 2018 and was given an estimated life expectancy of between two to five years. Having retired on medical grounds, she applied for Personal Independent Payments ("PIP"). The Special Rules on Terminal Illness ("SRTI") prescribe a mechanism for the payment of PIP and Universal Credit ("UC") benefits without undergoing a full assessment to those who satisfy the definition of "terminally ill". That definition requires that a person is suffering from a progressive illness where death as a consequence of that disease can be reasonably expected within six months. The purpose of the SRTI was to abolish the six month qualifying period for benefits which existed prior to 1989 in order to facilitate the terminally ill.

The respondent brought proceedings against the Department for Communities ("DfC") and the Secretary of State for Work and Pensions ("the DWP Minister") arguing that the rules breached her right to freedom from discrimination under Article 14 ECHR by treating her differently than others. In October 2020, the High Court found the difference in treatment between the respondent and individuals who had a terminal diagnosis who were reasonably expected to die within six months but who survived beyond that point was not justified and constituted a breach of Article 14. The judge concluded that the relevant legislation could not be read and given effect in a way which was compatible with the ECHR rights and awarded the respondent £5,000 by way of just satisfaction.

The DfC and DWP ("the appellants") appealed that decision contending that the trial judge erred in respect of his assessment that the respondent had status for the purpose of Article 14, that she was in an analogous group to others who have access to the SRTI mechanism and that the difference in her treatment was justified.

**Policy and Legislation**

In paragraphs [4] to [32] the court outlined the development of the policy and legislation which were the focus of the challenge in these proceedings. It said the effect of Article 87 of the Welfare Reform (NI) Order 2015 and regulation 2 and paragraph 1 of Schedule 9 to the Universal Credit Regulations (NI) 2016 is that a person applying for either UC or PIP on the ground of terminal illness must satisfy the criterion that death as a consequence of the illness can reasonably be expected within six months.

[1] The panel was the Lord Chief Justice, Lord Justice Treacy and Lord Justice McCloskey. The Lord Chief Justice delivered the judgment of the court.

The 2015 Order was subject to independent reviews in 2018 and 2019. These recognised the concerns expressed regarding the SRTI and the "six month rule" finding that the modern reality of many terminal conditions is that people can live and need ongoing support for several years. It was recommended that the clinical judgment of a medical professional, indicating that the claimant has a terminal illness, should be sufficient to allow the SRTI to apply and that the six months life expectancy criterion should be removed.

The clinical judgment approach was taken in Scotland where the Social Security (Scotland) Act 2018 provides for the Chief Medical Officer to develop guidance to medical practitioners when making determinations on terminal illness for the purpose of accessing benefits under SRTI. This guidance was published in July 2021. In order to qualify for the SRTI in Scotland a person must display the following indicators:

- an illness that is advanced and progressive, or with the risk of sudden death; and
- that is not amenable to curative treatment, or treatment is refused or declined by the patient for any reason; and
- that is leading to an increased need for additional care and support.

In October 2020, the Northern Ireland Assembly adopted the recommendation that the six month life expectancy criterion should be abolished and called on the Minister for Communities to "immediately" bring forward legislation abolishing the rule, providing guidance to health professionals and adopting a fairer definition of terminal illness. This was followed by a second independent review which again recommended the removal of the six month criterion and its replacement with a system similar to that adopted in Scotland. Subsequent to the hearing of this appeal, the DfC Minister announced on 30 June 2021 an intention to replace the six month time frame with a period of 12 months within which death can reasonably be expected. The Minister said it was her intention to implement this change before the expiry of the current mandate in May 2022. A similar announcement was made by the DWP Minister on 8 July 2021.

**Meaning of "terminal illness"**

The issue in this case is what was meant by the phrase "death in consequence of the disease can reasonably be expected within six months". It made the following comments:

- The use of the adverb "reasonably" introduces the concept of a range of values rather than a precise figure;
- The phrase is governed by the need to identify a progressive illness; and
- It is implicit in the provision that those facing the last six months of life with a progressive illness are highly likely to require the support which the benefits provide and that unless some fast-track to the benefits is provided they are likely to lose out on that support as a result of the bureaucratic process.

Turning to the practical application of the guides to interpretation, the court said it was clear that in any case where the prognosis can be fairly precisely determined as being expected within six months the legislation test would be met whereas a timeframe of 9-12 months lies outside the SRTI. Where, however, the prognosis is more uncertain the conclusion may be that death may reasonably be expected over the next 3-12 months. The court said that applying a grammatical construction of the qualifying condition it was clear that death can be reasonably expected within the statutory

timeframe and while not probably within the six month timeframe, entitlement to the benefit would be established. The legislative provision envisages a limited period of entitlement arising from a SRTI award which is subject to review after three years which the court said provides an obvious protection for the public purse but does not call into question the entitlement to avail of the SRTI.

The court accepted that in cases of MND and other progressive illnesses defining even a span of time within which death can reasonably be expected is likely to be difficult but considered that the statutory test is appropriately satisfied by asking the question whether death as a consequence of the progressive illness within a six month period would be a surprise (as recommended by the DfC). It suggested that in order to address the concerns about the understanding of the test by clinicians dealing with it this question should be incorporated into the DS 1500 form as an aid to those providing an opinion.

**Article 14 ECHR**

The court cited the recent UK Supreme Court decision[2] which gives guidance to the approach to Article 14 in the context of welfare benefits. The UKSC held that:

- Only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14;
- In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations;
- Such a difference of treatment is discriminatory if it has no objective and reasonable justification ie it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised;
- The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of the margin will vary according to the circumstances, the subject matter and the background.

At first instance, the trial judge concluded that during the application process the respondent was a person suffering from a progressive illness as a consequence of which death was not unreasonably expected within a period of six months. The court said this was plainly an identifiable group and agreed that the requirement of status was satisfied. The court further accepted that the evidence establishes that those suffering from NMD have an unpredictable prognosis or trajectory about which it is impossible to be precise and that feeds into the outcome of the test for entitlement to benefit. Figures provided to the court demonstrative that one in four people suffering from MND receive the benefits in this jurisdiction claimed under SRTI:

> "The difference in treatment is not based on the nature of the illness but on the prognosis and there was no evidence in this case that death was reasonably expected as a consequence of the illness within a period of six months at the time of application. We agree with the learned trial judge that the status for which the respondent argued was not one on the basis of which the respondent suffered a difference in treatment."

The court then considered the issues of **analogous position** and **justification**. It noted that 14% of those who were awarded PIP and UC on the basis of the SRTI were still receiving those benefits three years later. The court said this is sufficient to establish that the group of persons suffering from

[2] *R(on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26

a progressive illness where there is a reasonable expectation of death as a result of the illness within a period of years is in an analogous position to the group who have a reasonable expectation of death as a result of the illness within six months. The real issue in this case was therefore one of justification for the difference in treatment between those groups.

Evidence from the DfC submitted that the SRTI rules provide a clear and specific definition of terminal illness which ensures that those closest to death are given immediate access to PIP and UC. It was also submitted that the definition safeguards public funds by avoiding an open ended definition which would apply to more people than currently qualify whilst also providing a clear threshold against which the medical practitioners can assessment claimants. It was contented that the rules have operated well in practice and have not, until recently, led to significant pressure for reform. The court accepted that there had been a measure of uncertainty about the definition of terminal illness but said that its grammatical construction of the qualifying condition (ie that death can be "reasonably expected" within the six month statutory timeframe could be said to be clear and specific. The court was also satisfied that the definition ensures that a group of people who are closest to death are given immediate access to benefits which is the legitimate aim and also safeguards public funds.

The next question for the court was justification. As this was a case involving welfare benefits the compatibility of the system overall has to be justified without giving undue weight to the circumstances of the individual. The court said that in this case the difference in treatment concerns the means of access to a set of benefits where those who suffer from a progressive illness as a consequence of which death can reasonably be expected within six months are fast tracked through to the benefit whereas those in respect of whom death cannot reasonably be expected within six months must go through the application process: "It is therefore a case about whether or where to draw the line within the welfare system".

The court reflected that there had been parliamentary consideration of this matter in 1990 and 2010 and that the DfC Minister has indicated an intention to extend the timeframe to 12 months which is what the MND Association argued for. It said there was no dispute about the fact that some special provision was necessary for those who might die as a result of a progressive illness in the course of going through the application process and that the line had been drawn at a point which seeks to identify the group of people where the need for benefits is highly likely to have arisen:

> "The extension of the SRTI to those who have a diagnosis of a progressive illness as a consequence of which death can reasonably be expected would change the basis for the award of the benefit. It would no longer be needs based. It would be determined by the diagnosis of a particular condition independently of need."

The court recognised that the determination of the prognosis by a medical professional is not hard edged, and there may be some element of inconsistency. It accepted, however that clinical judgement is an adequate and acceptable tool in order to achieve the aims of ensuring the availability of a fast-track for those who need it and safeguarding public funds. The court also accepted that one of the options available to policy makers is to provide that clinical judgement should make the determination of need in cases of progressive illness. That would involve consideration of the robustness of compliance with the needs based approach, the risk of diagnostic variability and any impact on budget. The respondent had contended that she should have been treated differently from other applicants for the benefits who did not qualify under the fast-track

approach as she has a diagnosis of a progressive illness. The court, however, said that the award of the benefit is dependent upon need and not upon the nature of the illness:

> "A change in the access arrangements of the SRTI to facilitate particular medical conditions would represent a departure from the needs basis of the present provisions. That is plainly a controversial political matter which it is not for the courts to determine."

**Conclusion**

The court accepted that a relatively strict approach had been taken in cases concerned with persons with disabilities in order to foster their full participation and integration in society. It said that objective was honoured in this case by the application process based on need and that this was not a case where the applicant has been excluded from the benefit. The court noted that the DfC Minister intends to submit a further proposed amendment to the benefits legislation to the Northern Ireland Assembly which will provide an opportunity for debate. It concluded that:

> "This is an area where considerable weight should be given to the views of the primary decision maker. These choices are for the political process and not for the courts."

The court allowed the appeal and dismissed the cross-appeal by the respondent.

**NOTES TO EDITORS**

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

**ENDS**

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