

The access to justice journey

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Access to Justice For Social Rights
Addressing The Accountability Gap

Briefing
May 2022



This briefing document has been prepared for the Nuffield Foundation project on ‘Access to Justice for Social Rights: Addressing the Accountability Gap’ led by Dr. Katie Boyle. The research undertaken as part of the Nuffield project worked closely with practitioners who support people experiencing violations of social rights (including the rights to housing, food, fuel and social security) across England, Wales, Scotland and Northern Ireland. The researchers asked the practitioners about the barriers faced in trying to access justice for violations of social rights. This briefing provides an insight into some of the key issues that emerged in the research.

Access to justice has often been understood in a narrow sense, relating to the most fundamental barriers people face in having a chance to access a legal process such as access to advice, access to legal representation and access to legal aid. Whilst overcoming these barriers are absolutely key to enabling people to access justice, the research also revealed that the access to justice journey requires us to take a step back and view a much broader perspective. There are significant gaps that require to be addressed across this journey to enable change.

The easiest way of explaining the gap between the narrow and broad understanding of access to justice is to think of the journey as crossing a large mountain range. In order to reach the first summit those at the start of the journey must contend with the immediate barriers they face. On the journey to access justice, the initial barriers may be the only ones that are visible. However, once the first peak is reached, there are more peaks that come into view. This briefing explains how to broaden our conception of access to justice beyond those initial barriers towards a conceptualisation of access to justice that results in an effective remedy for a violation.

We base this conceptualisation on the UK’s international legal obligations. Social rights form part of the international human rights framework, including the right to housing, the right to food and fuel and the right to social security. State parties who have signed up to the international framework are under an obligation to protect these rights in the domestic context, this includes the UK.¹ As part of its international obligations the UK is required to provide access to an effective remedy if there is a failure to meet these obligations.² This includes facilitating access to a legal remedy in court if necessary. Our reconceptualisation of access to justice begins with the violation of a right and ends in an effective remedy for that violation. This requires a renewed focus on what is meant both in terms of effective legal processes (international human rights law suggests that they require to be “accessible, affordable, timely and effective”)³ as well as effective and substantive outcomes of those processes.⁴



Summary infographic

1. Consciousness/ being in the dark about your rights and how to claim them

Even although a social rights violation occurs, people might not know and they might not know where to go. Social rights relating to areas such as housing, social security, poverty, health, employment, education etc are not treated as legal rights and often people do not have any awareness of them as “human rights”.

2. Resources to help traverse the journey

People need access to financial, legal and emotional resources to claim their rights. Without appropriate financial, legal and emotional resources there can be insurmountable hurdles to accessing justice.

The system is not currently operating to provide people with the help they need to navigate the system.

3. Fear of retribution for resolving issue

Once they get advice people may still be reluctant to fight a case, because they are worried there will be retribution. Unfortunately the research suggests that this fear is sometimes justified in practice. This is really problematic for people who are already marginalised by the system.

4. Getting stuck in ‘administrative mud’ when trying to use alternative routes to justice

People can try and resolve without relying on courts. For example, by going to Ministers directly, by trying complaints mechanisms and appeals processes, or by going to a tribunal or an ombudsman.

Sometimes, these can result in success for the individual.

However, often times they can result in the person getting stuck in ‘administrative mud’ where they can’t easily get to a resolution and they don’t have the help they need to make sure they know that they may have the right to challenge the decision.

5. Even if you manage to finally get to a legal forum, those legal processes can also be paved with difficulties

Access to a remedy in a court should vindicate people who have faced a human rights violation. The court should be able to look at their case and uphold their rights and provide a remedy. However, it is paved with difficulty.

First, the legal framework is not strong enough to ensure that social rights are properly recognised in law. This means that the UK’s international obligations are not upheld in domestic courts. And it means that even for those people who finally get to court, they might not actually be able to rely on the social right they are entitled to as a legal right.

Sometimes the rights might be protected but often it relies on lawyers trying to find passageways by using other ‘boats’ to cross the incorporation lake – for example they can use arguments based on European Convention of Human Rights (ECHR) or equality law, but they cannot rely on international treaties that have not been incorporated, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of the Child (UNCRC) or the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

6. Reaching an effective remedy is never guaranteed

Finally, for those who do get towards the end of the journey there is hope at the end of the tunnel that there could be a remedy and that the remedy is effective. To be effective in practice access to justice should be accessible, timely and affordable. Likewise, the remedies awarded, should be effective and appropriate in practice, ensure non-repetition and help change poor practice if the issue is systemic. There is therefore a distinction between individual remedies (fix the problem for one person) and collective remedies (fix the problem for everyone effected).

7. Feedback loop improved communication to stop violation in first place

If the case identifies an issue that is a problem or error in decision-making processes/ that applies to more than one person/ that causes widespread violations – is this issue or error communicated back into the decision-making process?

This means there should be improved communication to stop violations continuing to happen earlier on in the decision-making process. It is also an important way of ensuring that the system gets fixed for everyone and is not just a fire fighting exercise of dealing with one individual problem at a time without fixing the overall system. In this sense a feedback loop can help others avoid the arduous access to justice journey enabling fast routes to remedies once a lead case has identified a recurring violation.



Consciousness: awareness of rights and legal processes

The first barrier identified relates to what is referred to as ‘legal consciousness’ or an awareness of rights and legal processes. In other words, how can anyone claim their rights if they do not know that the rights exist?

“people don’t understand what their rights are. That they do have these fundamental social rights, you know, they’ve been undermined. Since, you know, between civil and political rights and social rights, you know. Social rights are definitely the poor cousin but I think it has just become, you know, a point where it’s desperate. Yet politicians, I don’t think, are being held to account for it, you know, you don’t see it on the news enough. Poverty is not reported on.”
Northern Ireland | Chloe⁵ | Volunteer

People need to know about their rights and the processes available to claim those rights before the access to justice journey can begin. Our research suggested that practitioners are concerned that

(1) people do not know that the rights to housing, food, fuel or social security exist:

“So, for example, when we went into Leith and we chatted to people about their right to housing and they were like ‘right to housing? What are you talking about?’ you know ‘what do you mean we’ve got a right to housing?!’ they didn’t know that that was there and they thought that it was all about lawyers taking human rights cases. So the narrative about human rights wasn’t built, you know, wasn’t very clear, that this could be in practice, for people.”
Scotland | Carole | Consultant & Activist, NGO for human rights

(2) or how to challenge a violation of their rights because they don’t know about the processes available to do so, or where to go for help:

*“the general feeling is that people don’t tend to challenge their rights because they don’t know how to and, you know, actually you need somebody there with a lawyer’s hat on or whatever to help you do that.”*Wales | Kim | Programme Manager, NGO to combat food poverty

This means that we do not know the full extent to which people remain ‘in the dark’ about their rights and how to claim them:

*“Well, you see again, it’s like, you know, we often talk about this in work when we have cases, you know, people coming to us with issues, we often think how many more people experience this issue but didn’t know where to go to.”*Northern Ireland | Josie | Chief Executive, NGO for housing

This can mean people who are facing social rights violations can be further stigmatised and marginalised, because the system is not designed to protect their social rights:

“I think a lot of people just don’t know where to turn ... I think services often struggle to be there when people need them because people typically get to a place of crisis, so they’re living in vulnerable circumstances and they’re dealing day to day with extreme, multiple extremely stressful life events that are pushing them to that point, you know, where they are at risk of destitution. And if they’re not engaged with agencies, and we’re seeing this a lot in the pandemic, these aren’t people who are problems, you know to society. So, they don’t have a social worker; they might not be working or engaged getting any help from mental health, you know, service providers and so on. You have to be quite ill to meet the threshold to be allowed to even kind of get support from those teams. So, lots of people just aren’t on the radar. And people, because of the stigma and the social kind of pressures of not admitting that you need help and, you know, poverty’s highly stigmatised in our society, and people don’t reach out for help. Well, they don’t even know where to turn”
Wales | Eva | Development Manager, NGO to combat child poverty



Emotional, legal and financial resources

People need legal and financial resources to support them on their journey to finding a remedy for a legal problem. This can sometimes be referred to as 'legal capability'. However the research also demonstrated the need for additional resources over and above purely legal ones, including emotional resilience, stamina, strength and overcoming fear.

Financial Resources

There are significant barriers in ensuring access to justice because of a lack of appropriate funding. Prohibitive costs for pursuing legal cases are a significant barrier in ensuring access to justice. Legal aid acts as an important pillar of the justice system and provides a form of protection so that people can pursue important cases to resolve social rights violations.

"any risk of having to pay the government's cost just totally, you know, outweighs anything that they would personally gain from the case. So, although, you know, we would do stuff pro bono, the real problem is the costs risk of them having to pay the Secretary of State's costs if they were unsuccessful. So, legal aid provide costs protection. It means that if a case is unsuccessful essentially it's the legal aid agency who steps into the client's shoes and one bit of government pays the other bit of government, you know. It's all a bit of an emperor's new clothes type thing. But legal aid provides clients cost protection, and that's what I want. I don't want to be saying, well you know, do you want to get involved in this case, you know, which will benefit you, but actually benefits [more] people, and actually, you know, there's x, y and z risk. And they'll just go, 'what?'" England | Claire | Solicitor

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) applies in England and Wales and has effectively ended legal aid provision for legal problems encountered in relation to debt, welfare benefits, employment, education, most housing disputes, private family law, non-asylum immigration, clinical negligence, consumer or contract disputes and criminal injury.⁶ Whilst exceptional case funding is available on the grounds of a breach of human rights, the definition of human rights is restricted to those falling within the ambit of the European Convention of Human Rights (ECHR) or retained EU law, excluding most economic and social rights by extension.⁷ The removal of legal aid for social welfare issues has had a chilling effect:

"the operation of the benefit tribunal is quite different, say, from the employment tribunal or the immigration tribunal. I think it's a far less formal context, it's a context in which legal aid isn't available for people to be represented by a solicitor. And so, I do think it's more informal. I think that errors in law can far easier go unnoticed. It's perhaps an issue that is silenced because people don't necessarily know that they've missed out on the basis of an unlawful decision." Scotland | Freya | Solicitor, NGO for Housing

Whilst there are different legal aid regimes in Scotland and Northern Ireland similar problems are faced in terms of access to appropriate and sustainable funding for advice services and legal representation. This can impact the type of advice and representation available to people. For example, legal aid funding does not cover all the costs of advice and representation meaning it becomes very difficult to support access in areas relating to social rights in a sustainable way. This has inadvertently created potential barriers through the increasingly likelihood of advice deserts both geographically and in the sufficiency of the numbers of solicitors providing a particular services within a specialist field of law.⁸ The reluctance of private providers to engage in these fields may be caused by the complexity and unsustainability of this work as a field of private practice.

"You don't have many, if any, legal aid high street firms, or legal aid firms, doing housing and only housing because it's not sustainable. So I think that in and of itself is a human rights issue." Scotland | Freya | Solicitor, NGO for Housing

For example, some providers of civil legal assistance must subsidise their work via other private practice or grants meaning not every hour worked on legal aid cases is paid. Respondents to a Scottish Government consultation on legal aid reform highlighted concerns that housing, debt, employment, domestic abuse, immigration and asylum were areas currently poorly served by private providers (meaning an overreliance on already stretched third sector organisations) and that gaps in funding exist across these areas, for example in relation to reasonable adjustments for people with disabilities, or in responding to mental health issues that can intersect with all of the above.⁹

Legal Advice and Representation

Advice services operate across different tiers (front-line, advice centres, lawyers, advocates and barristers). Sometimes advice will be required at only one of these tiers or it may be required across all of them. There are various barriers faced in accessing appropriate advice. First, there may be insufficient funding for one or more of the tiers (see above):

“the big problem at the moment is the lack of advice following [legal aid cuts] it couples, goes together with law centres being under enormous pressure and often having to close and similar pressures on the Citizens Advice Bureaux, which are a crucial part of the structure.” England | Roland | QC

“what used to happen before was you had a kind of ‘legal aid light’ at any stage in the social security system. So, if you were seeking a mandatory reconsideration you could get legal aid for help with that; if you were doing a tribunal you could get legal aid for help with that. And, the legal aid was not for representation, it wasn’t a forced certificate where you like pay your lawyer an hourly rate for turning up in court; it was just a fixed fee that organisations could get, but it meant also that organisations could pay for reports, using the state’s money. So it kind of enabled claimants who got advice to have some sort of equality of arms in terms of obtaining evidence, commissioning evidence... That went in 2012/2013 and the number of expert welfare rights advisors plummeted.” England | Miles | Welfare Rights Adviser, NGO to combat child poverty

There can be an overreliance on relying on one tier of advice. For example, sometimes specialist legal advice is required. The lack of appropriate funding in areas of social welfare law means that there are not enough lawyers specialising in these areas of expertise.

“So, if it’s about services that can provide advice and help people challenge and have their rights enforced, I’m worried. I say that I mean from the perspective, I obviously look at it through the lens of like legal advice. And that’s not to say all these cases most housing issues and homeless issues ... will be dealt with without a solicitor. But at the end of the day, in the context of homelessness, for example, it’s judicial review that’s the remedy, where you would need a solicitor and in many of these eviction cases it is court proceedings. We’re overly reliant not ‘overly reliant’, we are dependent on charities and you know, Citizens Advice Bureau and all of these organisations are doing everything that they possibly can. We have to ask ourselves why is there not a body of social security lawyers there to tease out what are really complex areas of law. Social security - like immigration law - changes all of the time.” Scotland | Freya | Solicitor, NGO for Housing

Second, even if one tier is engaged it may not be obvious or easy to access the next level. For example, there may be insufficient funding or legal aid to enable access to legal advice or it may not be clear to front-line advice services where to turn to next for legal advice.

People who access appropriate legal advice and representation do better than those who do not. Meaning, even for access to justice avenues where lawyers are not a requirement of the process (such as ombudsman or tribunal services) there is a disjoint between those who are able to access legal advice and representation and those who are not:

“evidence does suggest that, you know, statistics from the tribunal appeal service suggests that people that have advice and representation do better than those people that don’t... we know that because in the rest of the UK, but also here in Northern Ireland because of funding restrictions, I’m sure that the situation’s the same in Scotland, advice services are so stretched. You know, their capacity at the best of times is low.” Northern Ireland | Chloe | Volunteer

This can result in an un-level playing field, where those who do not receive legal advice and representation are ill-equipped to access justice and sometimes an unrepresented litigant on one side, will face a legal team on the other, meaning that it raises an 'equality of arms' issue:

"Now, of course it's not necessarily a level playing field, you'll know that, because inevitably the landlord will be represented by probably quite a professional highly-paid legal; whereas on many occasions the tenants may not even turn up and they may not be represented. It's unlikely they'll be represented in fact. Most of them don't even turn up because we find that they're encouraged by the landlord not to turn up, you know, because the landlord kind of indicates to them that it's not really worth their while because this is a fait accompli, you know." Northern Ireland | Josie | Chief Executive, NGO for housing

"we sometimes forget, or there's sometimes a perception that these are eviction cases that are just about non-payment of rent and all that is required is negotiation of repayment arrangements, when these are actually legal proceedings with lawyers acting for the landlords and rarely lawyers acting for the tenants. So the statistics on people who are accessing lawyers to represent them are stark. Yet when you have a lawyer in who is looking at the paperwork and who is identifying whether things are done properly, i.e. when equality of arms are there, it makes a stark difference to somebody, as I say, keeping their house or not, or at least how their case is dealt with" Scotland | Freya | Solicitor, NGO for Housing

Emotional Resources

The research demonstrates that in order for the very few cases that make it all the way to accessing a formal legal process (and even fewer that reach a remedy at the end of the journey) each depend on the individual person requiring to take on an immense emotional toll. It could also relate to the additional stress and burden of fighting an individual case on top of the reasons for bringing the complaint.

"And then when I'm going to the different agencies, like housing rights and they're saying, well, you have to do X, Y and Z, they potentially don't have the capacity to help you to do that. And I know that [the client] doesn't have the capacity, the

emotional, like really the capability, she doesn't have the legal capabilities to like go through the three stage complaint process that she has to go through." Northern Ireland | Chloe | Volunteer

For example, those in housing stress, facing financial difficulties, contending with mental or physical disabilities or other complex, intersectional problems may already have depleted physical and mental resilience before contending with a legal dispute. The legal justice system often siloes issues into stand-alone legal problems, whereas violations of social rights are more likely to be 'clustered':

"They're not able to reach all those people that are going through these tribunal appeal processes by themselves. And if they are, they then find that the individual that they're helping has a cluster of problems that may be stretching to housing, you know, so maybe they come with a social security issue, then they find out that they have a housing issue, then they maybe have a family issue, a family law issue, whatever it may be. It's so difficult to like unravel a health issue, mental health issue, to unravel all of those separate issues. Like I was talking to an adviser on Friday and she was saying that at the minute during Covid, [with] the demand they have 15-minute slots for people" Northern Ireland | Chloe | Volunteer

In addition, social rights violations often impact multiple people at the same time. In other words, they are systemic in nature and relate to a structural problem that is impacting many people. However, the legal system leans towards relying on individuals to challenge the system without the power of a collective challenge and this can place an unfair burden on an individual:

"there's definitely a role for individuals trying to get recourse as well. What there isn't is a strong enough structure in place to be able to do that easily without breaking them down mentally, physically, emotionally. You know, if you're already marginalised and then you've got to fight the system which is completely stacked against you - you know what? You really don't have a lot of hope for success unless you've got resilience coming out your pores." Scotland | Carole | Consultant & Activist, NGO for human rights



Fear of Retribution

In addition, there is the fear of potential retribution for challenging a case, something that in practice can manifest as subtle or explicit worsening of circumstances for the person complaining.

“I have definitely found that since we have been advocating on [her] behalf, that she has definitely been gaining even more maltreatment from the housing executive.” Northern Ireland | Chloe | Volunteer

In some cases this fear may be placed on the potential backlash of raising a complaint or drawing attention to a vulnerable situation:

“[They] might never approach the authority because they’re worried that they’re going to be deported or detained because they think they’re illegal.” Scotland | Freya | Solicitor, NGO for Housing

This fear can become a reality – creating a significant and often invisible barrier for access to justice. A practitioner emphasised that fear of consequences when defending yourself in the face of rights violations was not entirely misplaced. They expressed dismay that they could not:

“give people assurances that nothing bad will happen if they complain because sometimes things do happen when people complain and they’re the ones that deal with it, I don’t deal with it. I dealt with one example that I always think about, of a woman during the evictions, like after Serco had made the evictions and we were working with a lot of lawyers to get people represented in court. Anyway, I had this woman... the court had placed an interim interdict...the interim

interdict says that they can’t move you until the Ali case had been decided...she called us saying ‘Serco have said that they’re going to come and evict me today’ so I called Serco and was like ‘are you aware that there’s an interim interdict on this property and you will be breaking the law if you move her?!’ and they didn’t know! And they were like ‘oh thank you for telling us!’ like ‘she won’t be moved’. But then there’s this kind of system in place where if somebody doesn’t move, either when they come to evict you or they come to move you to a different property, it’s called a ‘Failure to Travel’. So if you refuse to get in the van and go, they issue a Failure to Travel message to the Home Office and then your asylum support stops. So even though they would have been breaking the law if they had moved her, they still issued the Failure to Travel notice, so then her asylum support stopped.” Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers



Complexity of the journey – getting “stuck in administrative mud”

The complexity of the access to justice system is not easy to navigate. Often people may prefer or be required to resolve a dispute through an informal route to justice. This could be for example, through a complaints process, appeal mechanism or alternative resolution process. Sometimes these processes result in positive results that deal with the social rights issue:

“I did a a Survey Monkey thing where I asked people have you downloaded a letter, what happened? Really high percentage, something like 86% or something of people who said that they’d used the letters, in one way or another it had resolved the issue for their

client. So usually what that'll be if they send a pre-action letter, actually send it as a pre-action letter to the DWP, the DWP will say 'we do not accept your argument, you're completely wrong and judicial review is a remedy of last resort. However, in this instance a mandatory reconsideration decision has been made which actually has resolved the issue for the client. So it's sort of an indirect success ... when I'm training advisers and say 'never expect them to accept your arguments, never expect them to agree with you because they will always disagree, but what you're looking for is to see whether there is a consequential change.' If they say, you know, 'we trust that no further proceedings will ensue, because we've issued a mandatory reconsideration decision in your client's favour' that's a success." England | Jane | Welfare Rights Adviser, NGO to combat child poverty

This could be via a complaints mechanism, or an internal appeal process like mandatory reconsideration, or it could be via broader institutional avenues like directly appealing to parliament or government:

"We convened a group of young people to meet with our first minister just before Christmas, at his request. I mean, it came out quite late in the day but we managed to get a good group of young people together and they raised a number of issues around mental health, schools returning. And he did refer to that and his education minister referred to engagement he'd had with young people fairly recently, in terms of informing his decisions around Covid. Young people also then raised, at that meeting, that they weren't getting sufficient information around Covid in a child-friendly manner. Within a week, we had a meeting of senior comms leads across Welsh government officials" Wales | Sam | Policy Developer, NGO for children and youth

However, these paths can be mired with difficulties. Whilst they may sometimes result in positive outcomes, this is by no means guaranteed, and can prolong the violation and delay the remedy:

"But, as I say, they informed me that we would have to go through the whole of the housing executive's internal complaints procedure which is going to take, you know, another, I don't know how long it's going to take. I don't even want to look, because, as I say, it's so time-consuming." Northern Ireland | Chloe | Volunteer

These routes do not necessarily guarantee human rights compliant outcomes, nor do they ensure accountability for violations of rights when they occur:

"It's easy to get those public appearances and public declarations of support. It's extremely difficult to see actual change and movement. So, how do you translate that kind of public expressions or, like informal expressions, like unanimously pass motions and to bring about any actual change, you know." Northern Ireland | Esther | Housing Activist, NGO for Human Rights

Formal legal processes also exist via tribunals, ombudsmen and courts. Whilst there are many positives to encouraging resolution through alternative routes, there are also potential setbacks to the complexity of the pathways available and the danger that people can get mired 'in administrative mud'. Ultimately, many practitioners argued that courts must be available, at least as a means of last resort, to ensure a remedy:

"the Courts are the best remedy because if you try and introduce some kind of ombudsman or commissioner or something... something that might not work really, I don't know... I think the Courts are the best safeguard, the best safety net but the problem is access to funding and access to lawyers who know what they're doing because there aren't that many, again in Wales, there's literally two or three lawyers like me ... I think access to justice both in funding and knowing and lawyers is the problem, but I think ultimately it should be the Courts who decide these things because they're so important and I think if you try and add, you know, another type of ombudsman or something like that, it'll just get mired in the administrative mud, actually." Wales | Matthew | Solicitor, Private Law Firm

The system is so complex that even those who work in it day to day may not know the best route forward. It is not always clear what route to justice should be prioritised for an individual in the particular circumstances, and how they can reach a satisfactory and timely remedy:

"It's not clear to people. You can never know, I think, as an individual citizen or resident rather, you know, of Wales, what steps you're supposed to take... and who's supposed to help you, and for even for sort of

fairly well-informed and experienced advisors this can be difficult” Wales | Eva | Development Manager, NGO to combat child poverty.

Adequate and effective access to justice

For those cases that manage to proceed to a formal legal forum there are a number of significant barriers to ensuring that a social rights violation is addressed.

First, the UK’s domestic legal system does not include statutory or constitutional social rights meaning that when cases are adjudicated they are not with reference to substantive social rights standards.

“That’s probably our most typical kind of case in terms of disrepair and fitness would be this lack of heating, and then condensation, damp throughout the house, and then all the kind of potential health ramifications that come with that, particularly if you have young children. Now, you see, there’s very, very, very little in law that we can do about that, because it’s not actually breaking any you know, that is complying with the standards, so it’s very hard to do anything. I mean, that’s never getting into any court because there’s no challenge for it. And in those sort of cases you just have to work with environmental health officers who try to, you know, they will kind of serve notices on landlords to try to get them to take action, not install heating or not upgrade heating, but just to maybe take action on ... the symptoms rather than the cause, but it’s not really a satisfactory solution”
Northern Ireland | Josie | Chief Executive, NGO for housing

In addition, courts are reluctant to get involved in economic and social policy matters that are deemed to fall within the sole remit of the legislature and executive:

“There’s a very strong feeling of reluctance in the English higher courts actually deciding on social and economic policy, to be honest. I’ve just been arguing, I mean, this is at the top of my mind in a way, because, you know, back in late October I was arguing a case about the two-child rule, which says that for child tax credits, which is one of the major means tested benefits, you can’t get benefit for the third and subsequent children born after April 2016. But that

feels to me like a pretty draconian rule, given that the benefit is a subsistence benefit, it’s a benefit to provide for basic needs. And so you’re just not providing for the basic needs of the third and subsequent children. But the court is terribly reluctant to get into it at all. They just say that sort of judgement is essentially a political judgement.” England | Roland | QC

This is a frustration for practitioners because it means they are often trying to make arguments by using less appropriate legal structures to protect social rights, or trying to fit a ‘square peg in a round hole’. One route to challenging social rights violations has been to make arguments that the decisions, policies or statutory framework falls short of a reasonable standard so much so that they can be deemed irrational, and therefore unlawful. The reasonableness test in UK law relies on the *Wednesbury* reasonableness test.¹⁰ The threshold for a finding of unreasonableness under this test is a very high one: an action (or omission) must be ‘so outrageous and in defiance of logic... that no sensible person who had applied his mind to the question ... could have arrived at it.’¹¹ In recent cases involving challenges to social security measures the court has further raised the threshold for those cases involving economic and social policy, meaning such cases are not open to challenge on the grounds of irrationality ‘short of the extremes of bad faith, improper motive or manifest absurdity.’¹²

Compliance with economic and social rights law requires a broader reasonableness test.¹³ The types of questions asked in a broader reasonableness assessment includes the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of social rights; whether discretion was exercised in a non-discriminatory and non-arbitrary manner; whether resource allocation is in accordance with international human rights standards; whether the option adopted is the one that least restricts rights; whether the steps were taken in a reasonable timeframe; whether the precarious situation of disadvantaged and marginalised individuals or groups has been addressed; whether policies have prioritised grave situations or situations of risk and whether decision-making is transparent and participatory.¹⁴

One practitioner noted that the court, at the very least, may be willing to engage when it is clear

that a decision has been made by the legislature or executive and there has been insufficient weight given to the potential impact of a policy:

“What things boil down to is a political decision about two imperfect situations that have both been fully scoped out ... but I often get the sensation ... the decision-makers in government have just not confronted the true complexity of the decision that they were making. It’s not that they weighed up x and y and come to a solution that might kind of work ... it is by no means a rare situation, it’s extremely common for people to behave in that pattern, and as universal credit rolls out, it will affect hundreds of thousands of people at least ... a test case, social security litigation, and no doubt there are parallels in other areas of law that I’m less familiar with, they should do much more of it. It’s right that people spend time thinking about the implication of laws that affect hundreds of thousands if not millions of people in quite some detail. And I sometimes find it astonishing that so much law is made without that sort of analysis. ... I sort of thought, how is it as a society we make provision for lots of clever people to spend lots of time thinking about the colour and shape of sweet wrappers, but when it comes to how we provide the basics of systems income for millions of households with children, it’s just like, oh wow, this will probably do. ... there’s a bit of a disconnect there ... the litigation that I do with [name of organisation] is fundamentally an accusation that the state just hasn’t thought about a problem perhaps. And, you know, when we, er, when we succeed the court is very frequently accepting that the problem hasn’t really been confronted. And when we fail, they tend to be saying, and quite rightly, it’s not the courts’ job to say but they’re often saying, well, they’ve done it, you know, they’ve grappled with this enough and so we’re not going to intervene.” England | Tobias Barrister

Other avenues for seeking to protect social rights include under the European Convention of Human Rights (ECHR). The ECHR is incorporated into UK domestic law via the Human Rights Act 1998 and the devolved statutes, however the ECHR does not extend to economic or social rights. The UK has agreed to be bound by international treaties that protect economic and social rights, but has not incorporated (embedded) them into domestic law. This creates an accountability gap for the UK and makes it difficult for practitioners to use a treaty that is essentially unfit for

purpose in making economic and social rights claims (because it is not designed to do so).

“Yeah, well, obviously they don’t really stand on their own in the ECHR, they’re not incorporated, so they’re not part of domestic law. They can obviously illuminate the arguments that you might have about nationality or discrimination in domestic law or even buttress the argument with references to international obligations. My own experience, that’s just been where I’m coming from recently, it’s quite difficult to really gain much added value as an advocate for the international conventions to social and economic rights and you can’t litigate them by themselves because [they’re] not incorporated.” England | Roland | QC

The incorporation of economic and social rights is explored in greater depth in our briefings on the rights to housing, food and social security.¹⁵ In brief, incorporation of international law into domestic law means embedding legal standards as set out in international law and making them enforceable at the domestic level.¹⁶ A broad definition of incorporation includes a domestication of treaty provisions in a way that is completely contextualised within the specific constitutional setting it springs from. Compliance with international human rights treaties can occur through domestic internalisation of international norms by way of a variety of means.¹⁷ Ultimately, the most robust form of incorporation is to grant a direct or indirect form of domestic recognition to international human rights law that is enforceable and coupled with effective remedies.¹⁸ There are now advanced processes of incorporation in Scotland¹⁹ and proposals for similar in Wales.²⁰

The United Nations human rights monitoring bodies have advised that the fulfilment of human rights requires states to take action at the domestic level in order to create the necessary legal structures, processes and substantive outcomes for human rights protection. Several UN Committees have recommended that the UK both incorporates international human rights law and ensures effective justiciable remedies are made available for non-compliance.²¹ For example, the Committee on the Rights of the Child suggests that fulfilment of international obligations should be secured through incorporation of international obligations²² and by ensuring effective remedies, including justiciable

remedies are made available domestically.²³ The UN Committee on Economic, Social and Cultural Rights has called for justiciable remedies for violations of economic and social rights.²⁴ The Committee also indicates that a blanket refusal to recognise the justiciable nature of social rights is considered arbitrary and that, ideally, social rights, as well as economic and cultural rights should be protected in the same way as civil and political rights within the domestic legal order.²⁵



The lack of legal incorporation of social rights whether that be explicit, implicit, direct, indirect, holistic or sectoral means that practitioners are left without the appropriate legal routes to litigate social rights on their own merits:

“The limitation is that because we haven’t incorporated international covenant and economic social culture rights we are having to run cases about unfairness in the benefits system, the main way of challenging them is through Article 14 discrimination claims under ECHR. So, Article 14 in conjunction with A1P1, and then Article 8 potentially. And, you know, it’s putting a round peg into a square hole for example. So, you know, in relation to the main challenges of the benefit cap well, you know, 70 per cent of those being affected pre-Covid were lone parents. You’ve got a work incentivisation measure which is singling out lone parents. So, you have to justify what it is about lone parents that singles them out for such punitive treatment. But that’s because of a variety of issues as to how we got up to the Supreme Court and the lack of full substantive arguments down below it was treated as a discrimination case, whether an exception should be made for lone parents. And well to me that wasn’t the issue. We were challenging the benefit cap, you know, square on because if you take lone parents out as

opposed to lone parents of under-fives and lone parents of under two, you know, you’ve scuppered the whole benefit cap. But it was a contorted argument having to fit it into an Article 14 claim, as opposed to well actually you have, you know, provided in the benefit cap something that is inadequate in terms of level of subsistence benefit. It was recognised that it pushed families well below the poverty line. So, you know, inadequacy and lack of accessibility to meaningful benefits. And if you look in terms of general comment language about accessibility, adequacy et cetera, and then if you look at the various letters that were sent out from, you know, the head of the Committee on Economic, Social and Cultural rights in response to the 2008/2009 financial crisis and austerity and so, you know, regressive measures, austerity measures were all going to be temporary, works weren’t going to be discriminatory, they’re meant to be participative, you know, all of those criteria that’s irrelevant in the UK courts. And that’s really frustrating because the benefit cap, you know, yeah potentially could just be litigated on its own terms without the discrimination argument.” England | Claire | Solicitor

Reaching an effective remedy is not guaranteed

As a result of the lack of substantive standards for social rights the outcomes of cases can often fall short in terms of adequacy and effectiveness. In other words, remedies are not sufficiently “accessible, affordable, timely and effective”.²⁶ For



example, they can take a long time, such as in the case of a terminally ill applicant who ultimately lost her case, despite an earlier judgment in her favour:

“For two years, like she’s wasted two years of her life on the benefits system and it just doesn’t make sense, it doesn’t make sense that a young woman and with three children who she’s bringing up on her own, [she] should have been using those two years productively with her children, has been focused on the system. And nobody can ever give her or those two children those two years back. They’re gone.”

Northern Ireland | Kamilla | Welfare Rights Adviser, NGO Local Community

People are so worn down by the system that they will often accept less than effective remedies as an outcome

“You, know, ‘cause I think people just get weary. Like I know [name of client] just wants a new house now. So the housing executive in the next week offer her a new flat that meets what she wants in a home, and she can be safe there, she will take it. That will be her remedy. So she won’t seek to get the eight weeks rent that she has missed or, for example, have her arrears waived because of what she has gone through... I don’t think she’ll seek any other redress because she’s so worn down by the whole thing.”

Northern Ireland | Esther | Housing Activist, NGO for Human Rights

People’s desperation for a result can mean their resilience for taking a longer route to a more satisfactory remedy is outweighed by mere survival instincts.

“Yeah and they would never, you know, even if they get the asylum support back, there would never be any recognition of that fact, that it was not their fault that that happened. You know, there would never be an apology. I wouldn’t even think to ask for an apology! Even though that’s what they should get. But also because you’re just dealing with the kind of like survival aspects of it, just that they need the asylum support back in order to be able to pay for food”

Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers

Examples of appropriate remedies for violations of international human rights law include: restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition, public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate

account of the violation, reviewing or disapplying incompatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and supervising compliance post-judgment.²⁷ These types of remedies are not typically deployed by UK courts where there is a focus on financial redress. Many practitioners highlighted the need for remedies to move beyond financial compensation. For example, they referenced the importance of an apology and other forms of restitution:

“You could get compensation, but another part of [an] effective remedy is like restitution ... to the extent possible, you should be restored to the position that you were in had that rights violation not happened to you, but compensation won’t necessarily do that, so you might need educational, counselling, health measures - like various other things to be put in place...to some people, a finding of liability is important - so like a finding of fault and then comes with that the apology. And then obviously ... human rights law has got stuff to say about what an apology should be as well. So like, I think that the important thing would be, and to a lot of people as well, like that public aspect of it ... of having that sort of ‘day in court’ is important for access to justice”

Scotland | Erica | Solicitor, Human Rights Public Body

Often cases involving social rights violations can become systemic in nature. This means that the violation of a social right is often felt by many and ideally a case should stop the violation happening to anyone else. One of the key issues arising in the interviews demonstrated how difficult it is to navigate a legal avenue that enables access to justice beyond the individual to enable access to justice on a collective basis (for everyone impacted):

“Whereas there’s many cases where you would really love to have the opportunity to get it into court to have the issues heard and aired because then it could be more helpful beyond the individual, that’s not a decision that you can make on behalf of the person, you know, you just can’t ... if you’re in that situation and somebody said to you, no okay, we will accept you’re homeless, obviously you’re going to say that’s great, thanks very much, and that’s what people do. They’re not going to say, well hold on, I want to make an important legal point here”

Northern Ireland | Josie | Chief Executive, NGO for housing

There are various ways to seek collective justice, such as for example, through strategic public interest litigation (a lead case that help many), or through group-proceedings or class actions (where multiple people collectively challenge a violation). International human rights and comparative law has seen the growth of remedies which are structural or collective in nature, in other words, they seek to address both individual relief as well as collective relief through guarantees of non-repetition. Structural remedies are well suited to the UK system as they often involve a strong degree of dialogue, where the court facilitates a remedy with the participation of the rights holders and decision makers.²⁸ The power of collective challenges can help counter-act the burden placed on an individual taking a case:

"I think in some individual cases there, you know, there are great advocacy organisations in Scotland that are supporting that work. You know, look at Clan Childlaw as well, who are doing strategic litigation work in terms of rights around children and education and trying to shift the system from that perspective so individuals might get a bit of support and recourse there but that's not a strategic thing... It's just a nightmare to go through in terms of supporting people, to do that. There are organisations that will help people to do that to try and get their rights addressed but the issue is if you've been broken down by a system and completely marginalised, where are you going to go when they stop listening? You know, the people in Leith for example, the Council said 'we've not had complaints about this issue' so the issue was around pigeon waste and rats. You know, vermin. 'We've not had complaints'... like if I was the tenant living in Leith and I'd complained about the same issue for five years - and in some cases for 20 years - and nothing had been done, why, why would I even take that on? But it also can be hopeful when you can get people together to realise that actually you still have the power. And it's the power of the collective which can be really helpful in engaging some of that.... and to realise that they're not alone because that solidarity and power of the collective is actually really, really strong." Scotland | Carole Consultant & Activist, NGO for human rights

However these routes are, for various reasons, under explored in some parts of the UK compared to others. For example, in Scotland there is a realisation that more work is required to develop a public interest litigation culture:

"The Scottish legal system and legal community has never been good at using the law strategically... We've not been good in Scotland at knowing how to use litigation strategically. So will we be able to use [group proceedings] strategically? Well I hope so." Scotland | Kelly | Solicitor specialising in women/ children/ immigration, NGO for Legal Service

"That's my impression - is that we are moving towards that. And I think that would also develop more of a sort of public interest litigation culture, generally, which we don't really have in Scotland just now. Like down South there's much more of a kind of culture of just even like NGOs or somebody taking a case, on behalf of, you know, a group of people. But you don't necessarily need to, like the idea of not having to identify that lead applicant or something. We don't really have that sort of culture yet in Scotland. And I think it is developing and I think people like Just Right, like Shelter, like all these people are, yeah, greatly contributing to development of that public interest litigation culture. But I think group proceedings and things would be a sort of way, would be a positive development in that area." Scotland | Erica | Solicitor, Human Rights Public Body

The Feedback Loop

"I think the tribunals arrive at the right answer, most of the time. And the quality of their decision making is pretty good. But I don't think that there's any real mechanism for feeding back to decision makers what was wrong with their decision. Certainly there's no mechanism at the individual decision maker level. Like the individual decision maker who made a decision in [Name] Benefits Service Centre will never know that that decision was overturned ultimately. Like unless they stumble across the case some time later" England | Miles | Welfare Rights Adviser, NGO to combat child poverty

Access to justice needs to be an iterative process whereby the end of the access to justice journey feeds back into law, policy and decision-making processes as a matter of course. This is particularly important where it becomes clear that there is a flaw in the system that requires to be addressed. In other words, ideally there requires to be feedback mechanisms that help enable longer term change for systemic issues. For example, at tribunal level if there is a repeated pattern of poor decision making, or a repeated flaw in the decision-making process

case outcomes should be fed back into the decision-making process.



This means there should be improved communication to stop violations continuing to happen earlier on in the decision-making process. It is also an important way of ensuring that the system gets fixed for everyone and is not just a fire fighting exercise of dealing with one individual problem at a time without fixing the overall systemic issue. In this sense a feedback loop can help others avoid the arduous access to justice journey enabling fast routes to remedies once a lead case has identified a recurring violation.

“there never is any apology, and as I say, more worrying than that is, there isn’t [any] feedback. So because they’re not getting feedback, they’re not getting the tribunal coming back to them and saying, look, we have overturned this decision because you failed to take account of this piece of evidence. Or, you misinterpreted this piece of evidence or you misinterpreted this bit of the law or there’s never any of that feedback. And that’s, to me, that’s a real issue ... I’m not naive enough to think that that would turn everything around, but I think it could have some, in a small way, it could, you know, there might be some decision makers who could actually, I think if it was drawn to their attention, that they’re always making a certain type of mistake, or they’re always ignoring a certain piece of evidence, or underestimating a certain aspect of a case, or something like that. I just think, well, possibly, you know. And also, it could expose that there might be because we don’t always, we don’t get to know the names of the individuals who have made the decisions. But, you know, I see lots of bad decisions – are they being made by a whole variety of people across the board, or is there actually a handful of people making bad decisions, and there are lots of them making good decisions. I don’t know, because that’s what I’m not privy to. So, that would be very interesting, if I could have confidence that the Government department concerned was actually taking that side of things seriously. If they were prepared to be a bit more self-critical and analyse decisions, and analyse results. And think, well actually, are we not training our staff well enough, are we not, you know. But, there you go ((laughs)). I can but dream ((laughs))” Wales | Rose | Welfare Rights Adviser, Local Authority

Endnotes

- 1 The UK ratified the International Covenant on Economic, Social and Cultural Rights in 1976.
- 2 CESCR General comment 9, 3 December 1998, E/C.12/1998/24; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691, para.23.
- 3 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para. 9.
- 4 Remedies are the processes by which arguable claims are heard and decided, whether by courts, administrative agencies, or other competent bodies as well as the outcome of the proceedings and the relief afforded the successful claimant, Dina Shelton, *Remedies in International Human Rights Law* (OUP 1999) at 7
- 5 In order to ensure the protection of our participants' identities, all individual names used are pseudonyms.
- 6 For a full list of scope changes, see schedule 1 of LAPSO and the practical 'bible on legal aid', *The Legal Aid Handbook 20/21*. V Ling et al [2021] *Legal Aid Handbook* Legal Action Group
- 7 Section 10(3)(a) LASPO 2012
- 8 Scottish Government Consultation, *Legal Aid Reform Consultation Analysis*, (Scottish Government 2020), available at <https://www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/pages/4/>
- 9 *ibid*
- 10 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223
- 11 *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374
- 12 *R (Pantellerisco and others) v SSWP* [2021] EWCA Civ 1454 para.58 referring to Lord Reed in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 who cites Lord Bridge in *R v Secretary of State for the Environment, ex p Hamer-smith and Fulham London Borough Council* [1991] 1 AC 521
- 13 For a discussion on the 'proportionality-inflected' broader reasonableness review adopted by the UN Committee on Economic, Social and Cultural Rights see Sandra Liebenberg, *Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol*, *Human Rights Quarterly*, Volume 42, Number 1, February 2020, pp. 48-84, p.72
- 14 *Ibid*. See also Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) pp.32-35
- 15 Katie Boyle and Aidan Flegg, *Briefings One-Four: "Economic, Social and Cultural Rights, International Legal Obligations: An Explainer"; "The Right to Social Security: An Explainer"; "The Right to Food: An Explainer"; and "The Right to Housing: An Explainer"*, Access to Justice for Social Rights Project (February 2022)
- 16 Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (2020) p.181.
- 17 Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002). Faculty Scholarship Series. (1961) Paper 839.
- 18 Katie Boyle, *Models of Incorporation and Justiciability of Economic, Social and Cultural Rights*, (Scottish Human Rights Commission 2018) at 14. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.77-80; UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147
- 19 See First Minister's Advisory Group on Human Rights Leadership (Edinburgh, 2018) available here: <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> and the National Taskforce for Human Rights Leadership Report (Edinburgh 2021) available at <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/documents/>
- 20 Simon Hoffman, Sarah Nason, Rosie Beacock, & Ele Hicks (with contribution from Rhian Croke) 'Strengthening and advancing equality and human rights in Wales' (2021) Welsh Government Social Research Number 54/2021
- 21 Treaty bodies recommending incorporation: CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture; CRC/C/GBR/CO/4 (CRC, 2008) Committee on the Rights of the Child. Treaty bodies recommending justiciable enforcement and effective remedies: CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights; E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights
- 22 UN General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the child, (2003), CRC/GC/2003/5, para 20; Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom (2002), CRC/C/15/Add.188, paras 8 and 9 and Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom (2008), CRC/C/GBR/CO/4 , para 7; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture, para.7; CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights para.13
- 23 E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights, para.5; CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child para.7
- 24 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para.10; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights para.13
- 25 *General Comment No. 9, ibid.*
- 26 *ibid* para.9.
- 27 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147
- 28 For a full discussion on this see Gaurav Mukherjee, 'Briefing: Effective Remedies & Structural Orders For Social Rights Violations', Nuffield Access to Justice for Social Rights, *Addressing the Accountability Gap* (2022).

The Access to Justice for Social Rights: Addressing the Accountability Gap project explores the barriers faced by rights holders in accessing justice for violations of social rights across the UK. The project seeks to better understand the existing gaps between social rights in international human rights law, and the practice, policy and legal frameworks across the UK at the domestic level. It aims to propose substantive legal solutions – embedding good practice early on in decision making as well as proposing new legal structures and developing our understanding of effective remedies (proposing substantive change to the conception of 'justice' as well as the means of accessing it).

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<https://www.stir.ac.uk/about/faculties/arts-humanities/law-and-philosophy/law-research/human-rights/access-to-justice-for-social-rights/>

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2. Briefing - ESC Rights Part One : International Legal Obligations - An Explainer
3. Briefing - ESC Rights Part Two: The Right to Social Security in the UK - An Explainer
4. Briefing - ESC Rights Part Three: The Right to Adequate Housing in the UK - An Explainer
5. Briefing - ESC Rights Part Four: The Right to Food in the UK - An Explainer
6. Briefing: Thematic Analysis on Access to Justice for Social Rights: An Explainer
7. Briefing: A Comparative Study of Legal Aid and the Social Rights Gap
8. Briefing: Effective Remedies & Structural Orders for Social Rights Violations
9. Briefing: Legal and Discursive Interdisciplinary Approach to Social Rights in the UK
10. Briefing: The Access to Justice Journey

