ILPA BRIEFING
House of Commons - Committee

July 2011

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL – Bill 205

Amendment No. 81

Kate Green

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Clause **1**, page **2**, line **7**, at end add –

> (8) The Lord Chancellor must ensure that any individual bringing an appeal on a point of law or perversity to the Upper Tribunal, Employment Appeal Tribunal, the Social Security Commissioners, the Court of Appeal or the Supreme Court shall continue to be entitled to legal aid on the same basis as they would have been prior to the enactment of this Act. No individual shall be left without access to legal aid in appeal cases in such higher courts and Tribunals which would have been in scope prior to the enactment of this Act and on the same basis existing prior to the enactment of this Act.

Presumed Purpose
The amendment draws attention to the irrationality in the Government's approach to Legal Aid in this Bill in justifying the exclusion of whole areas from the scope of Legal Aid on the assertion that these do not raise matters of legal complexity, yet in doing so removing Legal Aid for onward appeals which can only be brought against the original decision on appeal on points of law (not fact) and only by permission of a court or tribunal on being satisfied that there is a real risk that the decision is wrong in law.

Briefing Note
In immigration cases, appeals against decisions of the UK Border Agency come before the First-tier Tribunal (Immigration and Asylum Chamber). These appeals are not limited to points of law, though immigration cases can, and many do, raise complex matters of law and fact[1]. The particular amendment is not concerned with appeals at this stage, but with the situation where an appeal may go further (onward appeals).

A decision of the First-tier Tribunal may be appealed to the Upper Tribunal (Immigration and Asylum Chamber) only on the ground that the decision is wrong in law, and permission to appeal must first be given either by the First-tier Tribunal or the Upper Tribunal[2]. A grant of permission will only be given if the judge is satisfied

[1] In addition to legal complexity, many immigration matters are complex by reason of their requirement for detailed evidence gathering and presentation.
[2] Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides that the right of appeal to the Upper Tribunal is "*on point of law*"; and section 11(3) provides that the right may only be exercised with permission of the First-tier Tribunal or the Upper Tribunal. The

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that there is a real risk that the decision is wrong in law and that correcting the error could result in a different result on the appeal. In some cases, further appeals may be brought to the Court of Appeal against a decision of the Upper Tribunal; and against a decision of the Court of Appeal to the Supreme Court. These further appeals are also restricted to points of law, and also can only be brought by permission[3]. Moreover, for permission to appeal to the Court of Appeal, the judge must additionally be satisfied that the appeal raises an important point of principal or practice or there is some other compelling reason for the appeal to be brought[4].

There are five reasons in particular why, at a minimum, the Bill should be amended to retain these onward appeals within Legal Aid scope.

Firstly, since these onward appeals only concern matters of law, specialist legal advice and representation to identify and articulate those matters is necessary.

Secondly, the current intention to remove Legal Aid from scope would create an extreme inequality of arms as between the State and many individuals in these appeals. Where an individual succeeded before the First-tier Tribunal, the UK Border Agency would be free to pursue an onward appeal, with the advantage of Treasury solicitors and counsel all the way to the Supreme Court, while individuals are left to cope without any legal advice or assistance. Litigants in person would also be especially vulnerable to the conduct of litigation by the State, including where the State does not respond in a timely manner to directions of the court, does not disclose relevant matters, does not adequately plead its case or seeks at the last minute to amend its case[5].

Thirdly, the prospect of increased litigants in person in these onward appeals raises a particular risk to the capacity of the Upper Tribunal and higher courts to manage the cases that come before them. The litigant in person is ill-placed to identify points of law that can properly be relied upon; or, even assuming he or she is directed to relevant points of law, to understand how properly to develop those points without straying into matters that are not legally relevant. Such a person may very well seek to advance additional points, which are not points of law; and judges may be forced to wade through copious evidence or letters by way of pleadings only to discover no arguable point of law is being advanced or to deal with extensive oral submissions which similarly raise no point of law.[6]

Consolidated Asylum and Immigration (Procedure) Rules 2005 and Tribunal Procedure (Upper Tribunal) Rules 2008 make provisions for seeking permission.

[3] Section 13(1) of the Tribunals, Courts and Enforcement Act 2007 provides that the right of appeal to the Court of Appeal is "*on point of law*"; and section 13(3) provides that the right may only be exercised by permission of the Upper Tribunal or the Court of Appeal. The Tribunal Procedure (Upper Tribunal) Rules 2008 and the Civil Procedure Rules Part 52 (the Practice Direction 82) make provisions for seeking permission to appeal to the Court of Appeal. Section 40(6) of the Constitutional Reform Act 2005 requires that in civil proceedings, permission of the Court of Appeal or the Supreme Court is necessary to appeal to the Supreme Court.

[4] The Appeals from the Upper Tribunal to the Court of Appeal Order 2008, SI 2008/2834

[5] These failings are ones with which ILPA is familiar in immigration proceedings. The conduct of the UK Border Agency as a litigant is a matter that ILPA has raised with the UK Border Agency on several occasions; and is a matter ILPA raised in response to the Government's Legal Aid consultation.

[6] During the consultation, the Government conducted a review of the literature on litigants in person. The short publication produced (Research Summary 2/11, Ministry of Justice, June 2011) records: "*...most research suggested that litigants in person may experience a number of problems, which in turn impact on the court. For instance, the research pointed to problems with understanding evidential requirements, difficulties with forms, and identifying facts relevant to the case... A number of sources also pointed out that litigants in person may have*

Fourthly, it is a feature of our legal system (and other common law systems) that onward appeals are crucial in the development of the law. In an area, such as immigration, which changes rapidly[7], the need for rulings by the Upper Tribunal and higher courts is ongoing and profound if there is to be a real prospect of consistency in decisions on appeal and in the wider understanding of the law. However, if in many of the appeals coming before the Upper Tribunal and higher courts, only the State is to be represented, the risk will be that development of the law lacks authority and requires revisiting frequently because the issues that are put before the Upper Tribunal and higher courts in appeals where only the State is represented are incomplete.

Fifthly, if the appeals system leaves individuals without understanding or confidence in what has been decided and why, having been unable to adequately participate, this will significantly increase the likelihood that the ultimate decision reached is inadequate (whether because it is not adequately informed by the party that has not had legal advice or assistance; or because that party has no confidence in it) and is followed by renewed applications and judicial review proceedings by the dissatisfied party. Indeed, lack of confidence in such a system is unlikely to be restricted to the individual participants in particular appeals, but rather may quickly become the general feeling of others, particularly those with a particular interest such as those who may anticipate the possibility of having themselves to rely upon such a system.

In considering these matters, Committee members need to have regard to the particular circumstance of immigration advice and assistance being regulated under sanction of criminal law[8]. Thus, charities and other advice agencies, unable or unwilling to enter that regulatory scheme – e.g. because they are insufficiently specialist or cannot afford to provide training and support to would-be advisers – cannot lawfully fill the gap left by the withdrawal of Legal Aid.

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difficulty explaining the details of their case... many unrepresented tribunal appellants and applicants felt ill-equipped to present their case effectively at their hearing. They felt intimidated, confused at the language and often surprised by the formality of proceedings... The ethical challenges litigants in person present for court staff and the judiciary were also noted in the research... Some studies indicated that litigants in person presented a challenge to the judiciary in maintaining impartiality, who were concerned about the perception of bias where one party was represented and the other was not." These findings of the Government's literature review appear to focus largely on litigants in person in first-instance tribunal or court hearings (hence the focus on evidence and facts); but the problems are likely to be very much greater in onward appeals on points of law.

[7] For example, in each of 2009 and 2010 the Government made ten changes to the Immigration Rules and since 1993 there have been ten immigration Acts of Parliament; there have been vastly more regulations made by Statutory Instrument over this period.

[8] Part V, Immigration and Asylum Act 1999 provides for this regulation and establishes the Immigration Services Commissioner.

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