

**ILPA BRIEFING
House of Commons - Report****October 2011****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
Bill 235****Onward Appeals**

Mr Elfyn Llwyd

124Page **118**, line **9** [*Schedule 1*], at end insert –*Onward appeals*

38A (1) Civil legal services relating to a review or appeal under sections 11 or 13 of the Tribunals, Courts and Enforcement Act 2007.

(2) Civil legal services relating to an appeal to the Supreme Court.

Exclusions

(3) Sub-paragraphs (1) and (2) are not subject to the exclusions in Part 2 of this Schedule, with the exceptions of paragraphs 9-11, 13 and 14 of that Part, and are not subject to the exclusions in Part 3 of this Schedule.

Purpose

To preserve Legal Aid for onward appeals to the Upper Tribunal and from the Upper Tribunal to the Court of Appeal, and for appeals to the Supreme Court. The exclusions would mean that Legal Aid was not available for appeals to the Supreme Court in relation to matters of conveyancing, the making of wills, trust law, company or partnership law, or specified matters relating to business. These matters are not, in any event, the subject matter of onward appeals before the Upper Tribunal.

Briefing Note

The amendment is not specific to immigration. However, as this is our area of expertise, our briefing in part focuses on immigration. Nonetheless, the points that are made here are generally applicable to other areas of law in which the Bill, as currently drafted, would remove or exclude Legal Aid, particularly matters that come before tribunals in the unified tribunal system. This system generally deals with appeals from government departments and other public bodies, such as decisions on welfare benefits and immigration. The system has two tiers. Most appeals in this system come before the First-tier Tribunal, which decides questions of fact and law. The Upper Tribunal also hears some first-instance appeals, but these are not within the scope of the amendment. A large part of the Upper Tribunal's work concerns appeals on points of law against the decisions of the First-tier Tribunal. However, not

all areas of the First-tier Tribunal's work can be appealed to the Upper Tribunal (e.g. there is no such appeal in asylum support or criminal injuries compensation matters).

The amendment only provides Legal Aid for 'onward appeals' – that is appeals beyond a decision of the judge at first instance. Legal Aid would not be extended to appeals before the First-tier Tribunal. Onward appeals can only be brought by permission of a judge, and can only be brought on points of law¹. Onward appeals beyond the Upper Tribunal (e.g. to the Court of Appeal) are subject to additional restriction in that they must raise "*some important point of principle or practice*" or "*some other compelling reason*"². Many onward appeals are brought by the State, seeking to overturn on legal grounds the success of an individual litigant before the first instance judge.

The need for Legal Aid for onward appeals was debated in Committee. At that time, the Parliamentary Under-Secretary of State, Jonathan Djanogly, said (of a different but related amendment):

"[The amendment] relates to access to legal aid in appeal cases in the higher courts and certain tribunals. The categories of law in question include welfare and immigration, where tribunals are used. Representation for welfare benefits is not available at the moment because such tribunals are designed to be user-friendly without the need for legal representation."
(Hansard HC, Public Bill Committee, 6 September 2011 : Column 268)

The Minister's answer misses the point. It is no answer to point to the arrangements in the First-tier Tribunal, whether one considers them to be user-friendly or not (and many do not find them to be so³). Onward appeals take place in the Upper Tribunal, the Court of Appeal and the Supreme Court. The Minister continued:

"We have to make tough choices about legal aid spending, so we have sought to focus resources on those who need them the most and on the most serious cases where legal advice or representation is justified..."

Onward appeals are among the most serious cases – particularly because these set precedent for decision-making and appeals in other cases. Indeed, it is remarkable that the Minister's response appears to suggest that appeals before the UK's highest courts are not among the most serious. The requirement that there is "*some important point of principle or practice*" or "*some other compelling reason*" why the appeal should be heard emphasises the seriousness of appeals from the Upper Tribunal to the Court of Appeal⁴. Given the nature of onward appeals, and that they are only concerned with points of law (not determinations of fact), there would be a clear inequality of arms (e.g. in immigration and welfare cases, as between the individual and the State) if Legal Aid was not to be available. This too was highlighted in the Committee debate, in response to which the Minister said:

"The concept of equality of arms is susceptible to misunderstanding. The amendment... seems to imply that justice can be done only where both

¹ 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 Consolidated Asylum and Immigration (Procedure) Rules 2005 and Tribunal Procedure (Upper Tribunal) Rules 2008 make provisions for seeking permission.

² Section 13(6), Tribunals, Courts and Enforcement Act 2007

³ See for example the short submission of Refugee Youth to the Public Bill Committee (LA 110): <http://www.publications.parliament.uk/pa/cm201011/cmpublic/legalaid/memo/la110.htm>

⁴ Section 13(6), Tribunals, Courts and Enforcement Act 2007

parties in proceedings have identical representation. That view is not supported by the law or by the experience of many litigants who currently appear before tribunals without the benefit of legally aided representation. "The important question is whether an imbalance in representation gives rise to an obvious unfairness in proceedings. In determining that question, it is necessary to consider all the circumstances of the case, including the nature of the rights at stake, the complexity of the law, the capacity of the individual to represent themselves and whether there are alternative means to securing justice. In many cases, for example before the tribunals, the procedure is relatively straightforward..."
(Hansard HC, Public Bill Committee, 6 September 2011 : Column 268)

The misunderstanding is all on the Minister's side. His response repeats his earlier confusion in suggesting that the relative accessibility of the First-tier Tribunal provides answer to the absence of Legal Aid before the Upper Tribunal, Court of Appeal and Supreme Court. Whatever one's view of the accessibility of the First-tier Tribunal, it is no answer to the need for legal representation before these higher courts, in which the only matters for discussion are points of law. Individuals who cannot afford legal representation and are left to conduct proceedings on their own will be in a significantly worse position than their opponent, often the State, who may have teams of lawyers to argue those points of law before the court. This is especially so where those individuals are further disadvantaged by factors including unfamiliarity with the legal system, poor education and poor language skills.

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 absence of Legal Aid would create an extreme inequality of arms as between the State and many individuals in these appeals. In immigration cases, 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 court directions, does not disclose relevant matters, does not adequately plead its case or seeks at the last minute to amend its case⁵.

Thirdly, the prospect of increased litigants in person in these onward appeals will put the capacity of the Upper Tribunal and higher courts to manage the cases that come before them at risk. The litigant in person is ill-placed to identify or articulate points of law that can properly be relied upon, even where a judge seeks to assist to identify what is relevant. 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

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, onward appeals are crucial in the development of the law. In an area, such as immigration, which changes rapidly⁷, 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 only the State is to be represented in many of these onward appeals, the development of the law may lack authority and require revisiting frequently because the issues that are put before the Upper Tribunal and higher courts 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 undermine confidence in the appeals system. 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.

Others concerned about the need for Legal Aid for onward appeals include Amnesty International (UK). Their submission to the Public Bill Committee (LA 66) states:

10. These cases also highlight a wider flaw in the Bill, which would exclude Legal Aid for onward appeals where Legal Aid was excluded for the original decision or first instance appeal. Onward appeals are generally only available on error of law grounds with permission of a judge. They necessarily proceed only when a judge rules a question of law is raised that has merit. In immigration cases, the State is the other party. As the individual appellant, the State is equally entitled to seek permission for onward appeal if it is unsuccessful at first instance. The State may be represented by teams of lawyers. There are many examples of the individual succeeding at first instance only for the State to appeal. Of course, there are equally examples where the individual has not succeeded at first instance and seeks to appeal. Currently (subject to the Legal Aid merits test, or the ability of the individual to pay privately), both the individual and the State have an equal opportunity, with permission of a judge, to challenge the understanding and application of law by the first instance judge. The Bill would remove that equality for individuals who cannot afford legal representation. The State may continue to seek to overturn an individual's success at first instance through successive stages – appeal to the Upper Tribunal, appeal to the Court of Appeal and appeal to the Supreme Court – despite the individual having no representation throughout.

For further information please get in touch with:

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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.