ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA BRIEFING
House of Commons - Report

October 2011

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL – Bill 235

Proceedings brought by permission
Amendment Nos. 146 & 147

Simon Hughes
Tom Brake
Mike Crockart

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Page **5**, line **40** [*Clause 8*], after 'determination', insert ', or

(c) if they are services excluded by Part 1 and Part 2 of Schedule 1 and –

(i) they relate to proceedings before a court of tribunal for which a court or tribunal has granted leave or permission to appeal, including where the person to whom services may be provided is a party to the proceedings other than the party to whom permission has been granted.

(ii) the Director has determined that the individual's financial resources are such that the individual would be eligible for civil legal services in accordance with section 20 [Financial resources].

(2) Subsection 1(c) does not permit the availability of services for those matters excluded by paragraphs 9 to 11, 14 or 14 of Part 2 of Schedule 1.

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

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38A (1) Civil legal services relating to proceedings before a court or tribunal for which a court or tribunal has granted leave or permission to appeal, including where the person to whom services may be provided is a party to the proceedings other than the party to whom permission has been granted.

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Exclusions

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

Purpose

These are alternative amendments, with the same effect: To allow for Legal Aid, to those satisfying the means test, where a court or tribunal is dealing with an appeal for which permission (or leave) is required and has been obtained. This would provide for both the person who has obtained permission to appeal and the person who has received a favourable decision against which another person (or the State) has obtained permission to appeal. The amendments would not extend Legal Aid in any matter relating to conveyancing, the making of wills, trust law, company or partnership law, or specified matters relating to business.

Briefing Note

The amendments are not specific to immigration.

In Committee, the Parliamentary Under-Secretary of State, Jonathan Djanogly, said this in response to a question as to how claimants were expected to prepare for their tribunal applications:

> "*In most cases, individuals will be able to appeal to the first-tier social security and child support tribunal without formal legal assistance. The appellant is required only to provide reasons for disagreeing with the decision in plain language.*"
> (*Hansard* HC, Public Bill Committee, 19 July 2011 : Column 243)

This is in keeping with the Government's general approach to whole areas of law, which the Bill is to remove from Legal Aid scope, including immigration. The correctness of that general approach, and the accessibility and straightforwardness of tribunals claimed by the Government, is hotly disputed, but even if this was to be accepted it provides no answer to the exclusion from scope of onward appeals beyond, for example, the First-tier Tribunal, to which the Minister referred.

Onward appeals are made to courts and tribunals including the Upper Tribunal, Court of Appeal and Supreme Court against decisions of a court or tribunal at first instance. They are in nature very different to first-instance appeals in key ways. Generally, they are not concerned with questions of fact, which are the province of the first-instance court or tribunal. In contrast, they are restricted to points of law. Unlike the appeal to the first-instance court or tribunal, where the appeal may generally be brought as of right (subject to complying with procedural requirements such as time limits), onward appeals need permission from a judge in order to be brought. Accordingly, these onward appeals are only brought if and when a judge has decided that the appeal has merit and has granted permission.

In his foreword to the Government's response to the Legal Aid consultation, the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, said[1]:

[1] *Reform of Legal Aid in England and Wales: the Government Response*, June 2011, Cm 8072

"*The aims of justice are relatively easy to state: sound results, delivered fairly, with proportionate costs and procedures, and cases dealt with at reasonable speed.*"

Judges of the Supreme Court have recently added their voice to concerns about proposals that by taking whole areas of law out of Legal Aid scope would exclude Legal Aid in these onward appeals. Lord Hope, Deputy President of the Supreme Court has commented[2]:

"*The court of appeal now is being deluged with litigants in person which is a product of the absence of legal aid and that creates a logjam in itself.*"

Lord Dyson has expressed himself as "*very worried*" about access to justice for those seeking to bring judicial reviews or challenge the decisions of tribunals. This would include onward appeals against tribunals at first instance. He has said[3]:

"*There are some very good litigants in person but there are an awful lot who, understandably, don't know what they are doing. They feel frustrated, angry. They are not lawyers. They take masses of bad points. They waste a lot of the court's time. And it's a growing trend.*"

Lord Scott of Foscote, a Lord of Appeal in Ordinary between 2000 and 2010, made similar points regarding litigants in person in the debate in the House of Lords on the Community Legal Services (Funding) (Amendment No. 2) Order 2011, last Wednesday[4]. The concerns of very experienced members of the senior judiciary cast doubt upon the aims of 'sound results', 'delivered fairly', 'proportionate costs and procedures' and 'reasonable speed' to which the Lord Chancellor referred. By selecting whole areas of law to be taken out of Legal Aid scope, and removing Legal Aid scope for every stage of the appeal system a case could possibly reach, the Bill will add considerably to these problems. In doing so, it will have several additional and damaging effects in relation to onward appeals and their place in our legal system; and these in turn will undermine the aims stated by the Lord Chancellor.

Firstly, it must be recalled that onward appeals may be brought by either party; including the State where it is a party to the proceedings. Thus, many onward appeals come before the Upper Tribunal and Court of Appeal as appeals brought by Government departments or bodies, such as the Department for Work and Pensions and the UK Border Agency, against decisions by first-instance tribunals that have allowed an individual's appeal against, for example, a refusal of benefit or a decision to remove the person from the UK. Even individuals who win their appeals in the first-instance tribunals, which the Government describes as "*user-friendly*", face the prospect that the legal system still defeats them (or appears to defeat them) because the Government elects to pursue the matter into a forum where the only points for discussion are points of law, which the individual cannot or cannot reasonably be expected to understand, but for which the Bill would exclude Legal Aid (as will have been the case for the person's original application and first-instance appeal). Ironically, the risk to the individual that without legal advice and representation he or she is deprived of the right (such as to his or her benefits) or protection (such as against unlawful removal) supposedly guaranteed to him or her by law (often law enacted by Parliament), will be compounded by the difficulty he or she may already have faced in presenting the case (including gathering the evidence) to begin with. A

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[2] Reported in *The Guardian* on 25 October 2011, see: http://www.guardian.co.uk/law/2011/oct/25/legal-aid-cuts-courts-logjam/print

[3] *Op cit*

[4] *Hansard* HL, 26 October 2011 : Column 837-838.

reason why the first-instance judge may have made an error of law, susceptible to onward appeal, may be that there was nobody for the individual appellant to direct that judge as to the law, despite that had the judge accurately understood the legal point he or she may nonetheless have decided in the individual's favour.

Secondly, whether or not an onward appeal is brought by the individual or the other party (including the State), the other party may well have legal representation to deal with the points of law that will be the subject of the onward appeal. In immigration cases, the UK Border Agency will likely be represented by lawyers, possibly teams of lawyers, particularly in the Court of Appeal and Supreme Court. The individual, who cannot afford legal representation, will have nobody. This will produce extremes of inequality of arms. Individuals will be especially vulnerable to legally represented parties, including the State, who do not respond in a timely manner to directions of the court, do not disclose relevant matters, do not adequately plead their case or seek to amend their case at the last minute. This is conduct, for example, of the UK Border Agency with which the Immigration Law Practitioners' Association has become all too familiar.

Thirdly, as the judges have highlighted, it will be very difficult for the court to manage without lawyers for both sides, particularly when these matters are purely concerned with points of law. In addition to their case management, however, the absence of legal representation on both sides is likely to do damage to the authority of their decisions. Decisions in onward appeals set precedent in our legal system. Thus, decisions of the Upper Tribunal, Court of Appeal and Supreme Court have an especial role in not only deciding the particular cases before them, but in laying down the law for the deciding of other cases. There is a serious risk that decisions of these higher courts will need to be revisited more frequently. This is because their full implications are far less likely to have been understood or considered in cases where only one side, often the State, was legally represented. If so, the value of the precedents they set will be reduced, certainty in the law will be reduced while inconsistency in decision-making is increased, and the volume of appeals and onward appeals may in turn need to increase.

Finally, each of these factors can only reduce confidence in the legal system itself.

Amendment No. **124**, tabled in the name of Mr Elfyn Llwyd, addresses similar concerns[5], though it is largely restricted to areas of law within the unified tribunal system. Amendments Nos. **146** & **147**, in one respect, go wider in that they are not limited to onward appeals in that system, though would include these. In another respect, however, these two amendments are more narrow in that they would only provide for Legal Aid where a judge has already decided the permission to appeal question, and decided that there is merit for the appeal to proceed. While this would leave individuals without Legal Aid for making applications for permission to appeal, it would to a degree address concerns expressed by the judges in that, if permission to appeal were to be granted, they could be satisfied that legal representation would not be unavailable simply because an individual was of insufficient means.

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[5] An ILPA briefing on this amendment sets out more detail of the legal tests that apply for a person to be granted permission to appeal. That briefing is available at: http://www.ilpa.org.uk/data/resources/13835/11.10.25-Report-Briefing-on-Onward-Appeals-Amendment-124.pdf