ILPA BRIEFING
House of Lords – Committee

December 2011

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL – HL Bill 109

Onward Appeals (Immigration)

LORD THOMAS OF GRESFORD
LORD PHILLIPS OF SUDBURY
LORD CARLILE OF BERRIEW
BARONESS HAMWEE

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Page **133**, line **23**, at end insert—

"Immigration appeals

Civil legal services and advocacy in appeals from the Immigration and Asylum Chamber of the First-tier Tribunal to the Upper Tribunal, the Court of Appeal and the Supreme Court."

Purpose

To preserve legal aid for onward appeals from decisions of the First-tier Tribunal (Immigration and Asylum Chamber) to the Upper Tribunal and beyond to the Court of Appeal and Supreme Court.

Briefing Note

Immigration appeals are brought before the Immigration and Asylum Chamber of the First-tier Tribunal. Currently, the Bill (save in asylum cases) will generally exclude legal aid for immigration appeals to that tribunal, just as it will exclude legal aid for applications or representations to the UK Border Agency prior to any appeal. Additionally, it will exclude legal aid in these cases for any onward appeal against the decision of the First-tier Tribunal.

Onward appeals are brought by unsuccessful appellants before the First-tier Tribunal and by the UK Border Agency where appellants have succeeded before that tribunal. They are restricted to points of law only[1], and can only be brought with a judge's permission. Appeals to the Court of Appeal are additionally restricted by a requirement to show "*some important point of*

[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.

principle or practice" or "*some other compelling reason*"[2] why the appeal should be heard. These strictly legal tests applying on onward appeals demand far more than what the Minister for Legal Aid, Jonathan Djanogly MP, had said of tribunal appeals at Commons' Committee stage[3]:

> "*The appellant is required only to provide reasons for disagreeing with the decision in plain language.*"

The Minister had been referring to the First-tier Tribunal, but there is scant recognition by the Government in the debates to date or in the earlier consultation of the legal complexities of onward appeals. 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[4]:

> "*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 taking whole areas of law, such as non-asylum immigration, out of scope for legal aid will exclude legal aid in these onward appeals. Lord Hope, Deputy President of the Supreme Court has commented[5]:

> "*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[6]:

> "*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[7]. 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

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[2] Section 13(6), Tribunals, Courts and Enforcement Act 2007
[3] *Hansard* HC, Public Bill Committee, 19 July 2011 : Column 243
[4] *Reform of Legal Aid in England and Wales: the Government Response*, June 2011, Cm 8072
[5] Reported in *The Guardian* on 25 October 2011, see: http://www.guardian.co.uk/law/2011/oct/25/legal-aid-cuts-courts-logjam/print
[6] *Op cit*
[7] *Hansard* HL, 26 October 2011 : Column 837-838.

referred. The exclusion of legal aid for onward appeals will have several additional and damaging effects in relation to these appeals and their place in our legal system; and these in turn will undermine the aims stated by the Lord Chancellor.

Firstly, many onward appeals come before the Upper Tribunal and Court of Appeal as appeals brought by the UK Border Agency, against decisions by the First-tier tribunal to allow the appellant's appeal. Without legal aid for representation in any onward appeal, those individuals who win their appeals face the prospect that the legal system still defeats them (or appears to defeat them) because the UK Border Agency 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.

Secondly, whether it is the appellant or the UK Border Agency that brings an onward appeal, the latter may well have legal representation to deal with the points of laws that arise. 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 as to the capacity of the parties to understand and present the issues. Individuals will also be especially vulnerable to poor conduct of the UK Border Agency in the litigation such as failures to respond in a timely manner to directions of the court, to disclose relevant matters, to adequately plead its case or seeking to amend its case at the last minute. This is conduct 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 the UK Border Agency is legally represented. If so, the value of the precedents 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 both the immigration and legal system.

For further information please get in touch with:

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