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Steve Symonds ILPA Legal Officer 020-7490 1553 steve.symonds@ilpa.org.uk

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Appeals – 'the second-tier appeals test'

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What is called 'the second-tier appeals test' was introduced by section 13(6) of the Tribunals, Courts and Enforcement Act 2007 for certain appeals from the Upper Tribunal to the Court of Appeal. This information sheet provides more information about this test, particularly in relation to immigration appeals.

The appeals to which the test applies

The test applies when the Upper Tribunal is hearing an appeal against a decision of the First-tier Tribunal. Where a person appeals against an immigration decision of the UK Border Agency, his or her appeal is heard by the First-tier Tribunal. If the appeal is dismissed, the person may apply to appeal to the Upper Tribunal. If the appeal is allowed, the UK Border Agency may apply to appeal to the Upper Tribunal. An appeal coming before the Upper Tribunal in either of these ways will be a 'second-tier' appeal. If a person (or the UK Border Agency) wishes to appeal against the Upper Tribunal's decision on such an appeal, the second-tier appeals test must be met.

The test does not apply when the matter before the Upper Tribunal comes to it directly as the first court or tribunal to decide the matter. Certain judicial review applications are now considered by the Upper Tribunal rather than by the High Court – e.g. judicial review applications against a refusal by the UK Border Agency to accept that a person has made a fresh asylum claim. An application may be made to appeal to the Court of Appeal against the decision of the Upper Tribunal on such a judicial review application. If a person (or the UK Border Agency) wishes to appeal against the Tribunal in these circumstances, the second-tier appeals test will not apply.

The second-tier appeals test

The test requires that for permission to be granted for a person to appeal to the Court of Appeal against a decision of the Upper Tribunal one of the following two criteria must be met:

- that the proposed appeal would raise some important point of principle or practice, or
- that there is some other compelling reason for the [Court of Appeal] to hear the appeal

It is important to note that it is not enough to meet one of these criteria. The application for permission to appeal must also raise a point of law. Thus, if there is no arguable case that the Upper Tribunal has erred in law in its decision, permission to appeal to the Court of Appeal will be refused. However, if there is an arguable case that the Upper Tribunal has erred in law, permission to appeal to the Court of Appeal will be granted only if the second-tier appeals test is met (assuming the test applies – see above).

There have been two key judgments in the Court of Appeal concerning the second-tier appeals test:

- *PR (Sri Lanka) & Ors v Secretary of State for the Home Department* [2011] EWCA Civ 998, see http://www.bailii.org/ew/cases/EWCA/Civ/2011/988.html
- *JD (Congo) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 327, see http://www.bailii.org/ew/cases/EWCA/Civ/2012/327.html

Taken together, these two judgments indicate the following about the second-tier appeals test:

- asylum and other human rights cases are neither exempt from the test, nor grounds in themselves to meet the test – e.g. that an error could lead to a person being returned to a country where he or she may be tortured will not necessarily mean the test is met (*PR (Sri Lanka)*, paragraph 41)
- the test is intended to narrow significantly the circumstances in which a person may appeal against a decision of the Upper Tribunal (*PR (Sri Lanka)*, paragraphs 33 & 37; *JD (Congo)*, paragraph 27)
- where a procedural failure by the Upper Tribunal has resulted in a person not getting a fair hearing, this may be considered a 'compelling reason' and the test may be met (*PR (Sri Lanka)*, paragraph 35)
- where it is strongly arguable that the Upper Tribunal has erred in law and the consequences for an individual could be severe (such as in an asylum case), these factors combined may constitute a 'compelling reason' and the test may be met (*JD (Congo)*, paragraph 22)
- other factors that may be relevant (though perhaps not decisive) may include the impact of the decision upon a child, or that two courts have reached conflicting decisions on the same point (*JD (Congo)*, paragraph 14)
- a person applying to appeal against the decision of the Upper Tribunal, which had overturned his or her success before the First-tier Tribunal, will still have to meet the test; but such circumstances will be a relevant factor in deciding whether the test is met (*JD (Congo)*, paragraph 23)
- where the Upper Tribunal finds the First-tier Tribunal has made an error of law and decides to remake the decision itself (even where it decides to make the same decision as the First-tier Tribunal, though for different reasons), the test must still be met; but such circumstances will be a relevant factor in deciding whether the test is met (*JD (Congo)*, paragraph 23)

Ministers' statements to Parliament about the test

In passing legislation (the Borders, Citizenship and Immigration Act 2009) to make changes to the immigration appeals system, which introduced the second-tier appeals test for immigration appeals, Ministers had said that "*...the test would not stop cases that raise important issues concerning human rights or asylum being granted permission to appeal to the Court of Appeal*" (Phil Woolas MP, *Hansard* HC, 14 July 2009 : Column 210). The Court of Appeal in *PR (Sri Lanka)* considered this and similar statements by Ministers. However, it concluded that it was for the courts to decide upon the meaning of the second-tier appeals test, the test did not have the effect that Ministers told Parliament it would have and the test did prevent appeals to the Court of Appeal in some human rights or asylum cases.

Judicial review

The Supreme Court has decided that the second-tier appeals test has another important application in relation to immigration appeals. The test applies when a person applies for judicial review of a decision of the Upper Tribunal to refuse permission to appeal to itself against a decision of the First-tier Tribunal. It decided this in the cases of *Cart v The Upper Tribunal* [2011] UKSC 28 and *Eba v The Advocate General for Scotland* [2011] UKSC 29.