House of Lords Committee
Crime and Courts Bill
Committee starts 18 June 2012

After Clause 25: Immigration and nationality appeals from the Upper Tribunal

ILPA supports the following amendment:

After Clause 25

LORD LESTER OF HERNE HILL

Insert the following new Clause—

"Immigration and nationality appeals from the Upper Tribunal
Section 13(6) of the Tribunals, Courts and Enforcement Act 2007 (c. 15) (right of appeal to court of appeal etc.) does not apply in relation to immigration and nationality appeals from the Upper Tribunal."

Purpose

To remove the additional and highly restrictive requirement to show an important point of principle or practice or some other compelling reason in immigration and nationality appeals from the Upper Tribunal to the Court of Appeal. This additional requirement is referred to as "the second-tier appeals test".

Briefing

The second-tier appeals test was introduced by transfer of the jurisdiction of the Asylum and Immigration Tribunal into the unified tribunal structure (the First-tier and Upper Tribunals) in 2010. During the passage of the Borders, Citizenship and Immigration Bill in 2009, peers voted through amendments to prevent the second-tier appeals test taking effect in immigration and nationality appeals. This Amendment derives from the wording of the Amendment originally tabled by the Lord Lester of Herne Hill QC, the Lord Pannick QC and the Lord Lloyd of Berwick[1], and subsequently adopted by the Lord Thomas of Gresford and the late Lord Kingsland as part of a wider amendment concerning the Upper Tribunal. The Joint Committee on Human Rights concurred with the legal opinion of Sir Richard Buxton, a recently retired Lord Justice of Appeal in the Court of Appeal,[2] that introduction of such restrictions may not be compatible with the UK's international obligations – see the Committee's Ninth Report of Session 2008-09 *Legislative Scrutiny: Borders, Citizenship and Immigration Bill* HL Paper 62 HC 375, paragraphs 1.22 *et seq.*[3]

The assurances given in 2009 having proven misplaced it is appropriate for Parliament to revisit this matter. Moreover, the increased rotation of judges operated by the Crime & Courts Bill will result in more judges who are not immersed in these cases making asylum and immigration decisions without the supervision of the Court of Appeal. We continue to see the higher courts often engaged on these

[1] *Hansard*, HL 1 Apr 2009 : Columns 1122 and 1127
[2] Sir Richard Buxton's legal opinion was provided to the Joint Council for the Welfare of Immigrants (JCWI), and in turn to the Joint Committee on Human Rights – see the Committee's Ninth Report of Session 2008-09, HL Paper 62 HC 375 (*Legislative Scrutiny: Borders, Citizenship and Immigration Bill*), paragraph 1.30.
[3] http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/62/62.pdf

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issues. There are some poor tribunal decisions but, in addition, it is an incredibly complex, difficult and fast-moving area of the law. The tribunal judges sitting from time to time in the immigration and asylum chambers of the tribunal may be excellent tribunal judges. But the area of law is fiendishly complex and the effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, whether directly, in immigration or indirectly, in asylum, will be that more people are unrepresented.

Among concerns expressed was the impact of the second-tier appeals test in potentially excluding appeals to the Court of Appeal where individuals faced removal in breach of the Refugee Convention and human rights as a result of errors of law by the tribunals.

In 2009, Ministers gave assurances in both Houses that these sorts of cases would be the ones that could be expected to meet the test:

> "*...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).
>
> 'Of course, we accept—I would argue that we know better than most—that there may be some cases that raise the real prospect that the decision of the upper tribunal will be in breach of the UK's human rights obligations. Those are precisely the sort of cases that would meet the test that is set out in section 6 of the Act.'
> Phil Woolas MP, Minister of State for Borders and Immigration
> *Hansard*, HC Committee, Sixth Sitting 16 Jun 2009 : Column 182

In the House of Lords, the Lord West of Spithead said the power to restrict appeals to the Court of Appeal should be retained because of "*the burden on the Court of Appeal*"[4]. However, it is only possible to appeal to the Court of Appeal with permission, and the number of appeals to the Court of Appeal reflects the number of decisions of the Tribunal which are arguably wrong in law.

The current immigration minister, Damian Green MP, was among those urging caution:

> 'The widespread feeling is that Home Office failings must not be compensated for by a lessening of appeal rights in those complex cases that involve human rights issues or constitutional principles, and that the inadequate handling of judicial reviews by an untested tribunal risks increasing the work load of the supervising court, the Court of Appeal, and reducing supervision at the Home Office.'
> Damian Green MP, Shadow Immigration Minister *Hansard*, HC Report 14 Jul 2009: Column 212

Those assurances have proved to be misplaced following the judgment of the Court of Appeal in *PR (Sri Lanka) & Ors v Secretary of State for the Home Department* [2011] EWCA Civ 998. The Court of Appeal there considered the Ministerial assurances given in 2009, concluded that "*it would be wrong in principle*" to be constrained by these assurances and in applying the second-tier appeals test refused permission to appeal in each of the three asylum cases before the court. In one of those cases the appellant had been detained and tortured in Sri Lanka. Applying the test, the Court of Appeal concluded: "*The claimed risks are, unhappily, in no way exceptional in this jurisdiction, and not in themselves such as require the attention of the Court of Appeal.*" In another of the three cases, the judge had identified an error of law in the failure of the tribunals below to correctly apply country guidance in respect of Zimbabwe asylum claims, but concluded that the test nonetheless precluded any appeal to the court. In the last of the three cases, Pitchford LJ had found the reasoning of the tribunals below to be "*obscure and contradictory*" and such as to give rise to a real prospect of success on the appeal if permission had been granted.

[4] *Hansard*, HL 1 Apr 2009 : Column 1130

More information on the second-tier appeals test is available from the information sheet at: **http://tinyurl.com/bp7zc6v from which we take the following:**

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.

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 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 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.

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[5], and *JD (Congo) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 327[6], see 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 significantly to narrow 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)

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[5] http://www.bailii.org/ew/cases/EWCA/Civ/2011/988.html
[6] http://www.bailii.org/ew/cases/EWCA/Civ/2012/327.html

- 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)

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

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