JUDICIAL REVIEW OF THE UPPER TRIBUNAL - RECENT CHANGES TO CPR

1. Judgement in **Cart [2012] 1 A.C. 663** was handed down on 22 June 2011. The Supreme Court unanimously approved the second appeals test for judicial review applications of the Upper Tribunal. The judges also recommended that CPR be amended to revert to the old 'statutory review' procedure for such applications.

Lord Philips

93 What would, however, be totally disproportionate, is that this judicial supervision should extend to the four-stage system of paper and oral applications first to the Administrative Court and then, by way of appeal, to the Court of Appeal, to which the ordinary judicial review procedure is subject. What are first required are readily identifiable criteria for the grant of permission to seek judicial review. That these exist should be capable of demonstration by paper applications, and my firm view is that applications for judicial review should be restricted to a single paper application, unless the court otherwise orders. This is, however, a matter for the Civil Procedure Rule Committee.

Lady Hale

58 If this approach is adopted, the Civil Procedure Rule Committee might also wish to consider the scope for stream-lining the procedure for considering applications for permission to apply for judicial review of these decisions. I agree with Lord Phillips of Worth Matravers PSC that it would be totally disproportionate to allow the four-stage system of paper and oral applications to both the High Court and the Court of Appeal in such cases. The previous procedures for statutory reviews in immigration and asylum cases showed that there is nothing inherently objectionable in a paper procedure, particularly if there has been an oral hearing of the first application for permission to appeal. But, in agreement with Lord Clarke of Stone-cum-Ebony JSC, it seems to me that this is a matter for the rule committee rather than for this court to determine.

Lord Clarke

106 The question which then arises is whether the application for permission to apply for judicial review should be dealt with wholly on paper or whether, if it was refused on paper, there should be a right to renew the application orally. There would then be a further question whether, if the application was refused at the first instance, it would be open to the applicant to apply to the Court of Appeal for permission to appeal and, if so, what the procedure should be. I agree with Lord Phillips PSC, at para 93, that it would be totally disproportionate to provide for the four-stage system of paper and oral applications to which the ordinary judicial review procedure is subject. Although there is much to be said for his view that the application should be determined on paper unless the court otherwise orders, I also agree with him that this is a matter for the Civil Procedure Rule Committee.

Lord Dyson

132 The second appeal criteria have been in force in the courts since October 2000. The exceptional nature of the test is well understood. A perusal of the commentary in Civil Procedure 2011 ("The White Book") on CPRr 52.13(2)(a)(b) suggests that the application of the second appeals test has not caused difficulty. That also accords with the experience of Lord Clarke of Stone-cum-Ebony JSC. It also accords with mine. I agree with others that rules should be made by the Civil Procedure Rule Committee ("CPRC") to govern the exercise of the judicial review jurisdiction of unappealable decisions of the UT. The mistakes of the past should not be repeated. A fair but streamlined system should be introduced with an emphasis on applications being made and dealt with on paper. Ultimately, however, it will be for the CPRC, taking account of the judgments of this court and after due consultation, to decide what is the appropriate procedure to adopt.

CHANGES TO CPR

2. Acting on the above the CPRC has made the following amendments to CPR. The amendments came into force on 1 October 2012 as follows:

CPR 54.7A

Judicial review of decisions of the Upper Tribunal

(1) This rule applies where an application is made, following refusal by the Upper Tribunal of permission to appeal against a decision of the First Tier Tribunal, for judicial review–

(a) of the decision of the Upper Tribunal refusing permission to appeal; or
(b) which relates to the decision of the First Tier Tribunal which was the subject of the application for permission to appeal.

(2) Where this rule applies –
(a) the application may not include any other claim, whether against the Upper Tribunal or not; and
(b) any such other claim must be the subject of a separate application.

(3) The claim form and the supporting documents required by paragraph (4) must be filed no later than 16 days after the date on which notice of the Upper Tribunal's decision was sent to the applicant.

(4) The supporting documents are–
(a) the decision of the Upper Tribunal to which the application relates, and any document giving reasons for the decision;

(b) the grounds of appeal to the Upper Tribunal and any documents which were sent with them;
(c) the decision of the First Tier Tribunal, the application to that Tribunal for permission to appeal and its reasons for refusing permission; and
(d) any other documents essential to the claim.

(5) The claim form and supporting documents must be served on the Upper Tribunal and any other interested party no later than 7 days after the date of issue.

(6) The Upper Tribunal and any person served with the claim form who wishes to take part in the proceedings for judicial review must, no later than 21 days after service of the claim form, file and serve on the applicant and any other party an acknowledgment of service in the relevant practice form.

(7) The court will give permission to proceed only if it considers –
(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and
(b) that either –
(i) the claim raises an important point of principle or practice; or
(ii) there is some other compelling reason to hear it.

(8) If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.

(9) If permission to apply for judicial review is granted –
(a) if the Upper Tribunal or any interested party wishes there to be a hearing of the substantive application, it must make its request for such a hearing no later than 14 days after service of the order granting permission; and
(b) if no request for a hearing is made within that period, the court will make a final order quashing the refusal of permission without a further hearing.

(10) The power to make a final order under paragraph (9)(b) may be exercised by the Master of the Crown Office or a Master of the Administrative Court.

3. **Previous guidance**

In addition to reflecting the view of the Supreme Court, the changes may reflect the ruling of Ouseley J in **R (on the application of Khan and others) v SSHD [2011] EWHC 2763 (Admin).** (6 October 2011) This case concerned the approach of the Court to oral renewal applications.

4. Ouseley J gave the following guidance:

(1) All applications must expressly address the second appeals test. Pre existing applications will be refused straight away if not amended promptly.

(2) Failure to issue promptly will be penalised

When applications for permission are made, claimants should be aware that there is no justification for supposing that the requirement for promptness will be ignored. The courts are well aware of the potential for the abuse of its procedures by late applications for judicial review, even if made within the three-month period. The courts hearing applications will be aware of the time limits that used to apply in relation to statutory review and reconsiderations. I do not accept what Miss Appiah said about the amount of time that is required for a proper application for permission to be made following an adverse decision by the Upper Tier. If more time is required than the seven days granted for renewal of an application to the Upper Tier following a refusal by the FTT, it is difficult, in my view, to imagine a case in which a period exceeding one month could be justified, absent very special reasons. That is not to say that any period up to one month would be regarded as prompt.

(3) Grounds should address issues to which Cart and PR (Sri Lanka) give rise in a succinct and focused manner.

(4) The application should be supported by the minimal documentation required to make it good – essentially the two decisions of the Tribunal, two sets of grounds of appeal and two refusal decisions. "further documentation may be required, but real thought has to be given as to whether the court has to be burdened with it in order for the point raised properly to be understood"

(5) Oral hearings will be short and claimants must carefully consider whether there is a case for renewal.

(6) Those who do renew unmeritorious applications are to be reminded of costs powers under CPR 44.14 and that costs may be awarded in respect of hopeless, persistent or abusive renewals.

5. **7 points arising from CPR changes**

At paragraph 2 - This application cannot be combined with any other related claim.

Paragraph 3 – 16 days to lodge.

Paragraph 4 – Prescribed supporting documents

Paragraph 5 – serve within 7 days.

Paragraph 6 – 21 days for Acknowledgment of service

Paragraph 7 – Ordinary test for JR and second appeals test.

Paragraph 8 – No oral hearing

Paragraph 9 – UT or interested party (SSHD) to request oral hearing within 14 days of grant or permission, otherwise court (including a Master) will make an order to quash determination of UT.

What was the old statutory review system and how did it work?

6. Section 101(2) of the Nationality, Immigration and Asylum Act 20022 Act (in force from 1 April 2003 to 4 April 2005) introduced the concept of a statutory review, where a refusal of permission from the Immigration Appeal Tribunal could be reviewed on the papers by a High Court Judge. This provision was replaced by the very similar section 103A of the 2002 Act (inserted by the Asylum and Immigration (Treatment of Claimants etc Act 2004).

7. There was no right to an oral hearing of the application in the event of refusal on the papers and no appeal from an unsuccessful application for statutory review. In R (on the application of G) v IAT [2005] 1 W.L.R. 1445 the Court of Appeal held that statutory review was adequate because judges of the Administrative Court were experienced and understood the importance of the decisions they were making. They were unlikely to overlook an error of law.

8. However, notwithstanding the statutory scheme, the Administrative Court was prepared to step in where necessary where decisions of the Asylum and Immigration tribunal were perverse. In R(S) v AIT [2007] EWHC 426 (Admin) Sullivan J (as he then was) allowed a judicial review against an order for reconsideration where SSHD alleged that the documents upon which an Immigration Judge had allowed an appeal against refusal of asylum were obtained by fraud because the Claimant was Russian and in other (wholly unrelated cases) cases involving Russians fraudulent documents had been submitted.

9. There may be cases in the future where the Administrative Court can be persuaded to intervene under inherent powers where the actions of the Upper Tribunal can be seen to be manifestly perverse or wholly procedurally unfair, but this will form an exceptional category of cases.
10. The Tribunals, Courts and Enforcement Act 2007 contained no provision for any such statutory review, hence the litigation in Cart.

THE SECOND APPEALS TEST

11. This is contained at within section 55 of the Access to Justice Act 1999

55 Second appeals.

(1)Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—

(a)the appeal would raise an important point of principle or practice, or

(b)there is some other compelling reason for the Court of Appeal to hear it.

(2)This section does not apply in relation to an appeal in a criminal cause or matter.

The second appeals test threshold – PR (Sri Lanka) & others v SSHD [2012] 1 W.L.R. 73 [2011] EWCA Civ 988

12. On 11 August 2011 Lord Neuberger MR; Sir Anthony May , President of the Queen's Bench Division and Lord Justice Carnwath (Senior president of Tribunals) handed down judgment in an application for permission to appeal to the Court of Appeal in three test cases on the application of the second appeals test to immigration and asylum cases in light of what was said by the Supreme Court in Cart.

13. Lord Justice Carnwath (as he then was) , giving the judgment of the Court held as follows:

(1) The point of principle or practice should not be merely important, but one which calls for the attention of the higher courts, specifically the Court of Appeal, rather than left to be determined within the specialist tribunal system (paragraph 37). This has not been followed in the context of judicial review of the Upper Tribunals - see paragraph 9 of rule changes.

(2) Following Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60 it is unlikely that a court will find that there is a compelling reason to give permission for a second appeal unless it forms the view that the prospects of success are very high / very good;

(3) This condition will be satisfied where the judges on the first appeal made a decision which is perverse or plainly wrong

(4) A decision will be plainly wrong where it is inconsistent with authority of a higher court.

(5) Notwithstanding the above if an applicant failed to refer the Tribunal to the higher authority in question, justice may not require the court to give him a second appeal.

(6) If the decision of the higher authority post dated the first appeal, there may well be a compelling reason to grant a second appeal.

(7) Procedural irregularity may amount to a compelling reason to grant a second appeal even where the prospects of success are not very high.

(8) The Court noted that in Re B (A child) (Residence: Second Appeal) [2009] 2 FLR 632 the mere fact that the decision of the High Court was "arguably plainly wrong" did not give rise to a compelling reason to hear the appeal, in the absence of an important point of principle or practice.

(9) The Court noted at paragraph 33 that the introduction of the second appeals test in 1999 was a matter of judicial policy and designed to ensure the best use of limited judicial resources. The emphasis was to be on important points of law or principle. The compelling reasons alternative was to be an 'exceptional remedy' of 'safety valve'.

(10) It is ultimately for the Court of Appeal to decide whether a matter is sufficiently compelling to justify its attention. The views expressed on this issue by the Supreme Court are highly persuasive, but not determinative.

(11) Notwithstanding the acknowledgment by Lady Hale and Lord Dyson in Cart of the possible relevance of the extreme consequences for the individual; such matters are not a free-standing test. Compelling means 'legally' compelling rather than from a political or emotional point of view, although, such considerations may exceptionally add weight to the legal arguments (paragraph 36).

(12) No added weight is to be given to grounds which identify breaches of international obligations. International law recognises no right to a second appeal.

(13) The question is not whether the nature of the asserted claim would, if its factual basis were established, risk dramatic consequences, but whether there is a

compelling reason why a claimant who has failed twice should be subjected to a third judicial process.

JD (Congo) & others v SSHD [2012] EWCA Civ 327 - Revisiting PR

16 March 2012.

14. These cases were heard on 22 February 2012 before Lord Neuberger MR; Maurice Kay LJ, president of the Court of Appeal, Civil Division and Sullivan LJ. They were listed together to determine the question of how the second appeals test was to be applied in cases where an individual had not failed twice in the Tribunal as contemplated at paragraph 41 of the judgment in PR.

15. The question before the Court was : *"How should the test be applied in cases where the appellant has succeeded before the FTT but failed in the UT following a successful appeal by the Secretary of State? How should the test be applied in cases where the appellant has "failed twice in the tribunals system", but the FTT's adverse decision was set aside because it contained a material error of law, and the UT has re-made the decision and dismissed the appeal? The issue is not whether the second-tier appeals test applies to such cases (all of the parties accept that the test does apply), but how the test should be applied in such cases".* (paragraph 3 of the judgment of Sullivan LJ).

16. The Court of Appeal held that there must be an inherent flexibility in the second limb of the second tier appeals test and noted at paragraph 22 Lord Dyson's warning in Cart that "care should always be exercised in giving examples of what might be 'some other compelling reason' because it will depend on the particular circumstances of the case'. The Court further noted Lady Hale's observation that very adverse consequences for an applicant are capable, in combination with strong argument that there has been an error of law, of amounting to "some other compelling reason".

22 We accept Mr. Beloff's submission on behalf of PLP that it is important not to lose sight of Lord Dyson's warning that "Care should be exercised in giving examples of what might be

'some other compelling reason' because it will depend on the particular circumstances of the case". Undue emphasis should not be laid on the need for the consequences to be "truly drastic". Lord Dyson was expressly giving two, non exhaustive, examples. However, the second of his examples makes it clear that very adverse consequences for an applicant (or per Baroness Hale, the "extremity of consequences for the individual") are capable, in combination with a strong argument that there has been an error of law, of amounting to "some other compelling reason."

17. At paragraph 23 of the judgment Sullivan LJ stated that while the test is a stringent one it must be sufficiently flexible to take account of the particular circumstances of the case. Those circumstances should include the fact that an appellant has succeeded before the FTT and failed before the UT, or the fact that the FTT's adverse decision has been set aside and the decision has been re-made by the UT.

18. Sullivan LJ noted that Dyson LJ (as he then was) had said in Uphill that "anything less than very good prospects of success will rarely suffice", but that he went on to state that there may be circumstances in which there is a compelling reason to grant permission even where the prospects for success are not very high. Sullivan LJ noted that Dyson LJ had not given any examples as the defendant in Uphill had failed twice.

19. Sullivan LJ considered the 'legally compelling' finding at paragraph 36 of PR in this context and held that paragraph 36 was consistent with Cart and that the Supreme Court had stated that "absent a sufficiently serious basis for challenging the UT's decision, extreme consequences would not suffice.

20. At paragraph 27 Sullivan J accepted that just as there is no case for applying a different test to applications for permission to appeal from the Immigration and Asylum Chamber of the UT, so also there is no reason to minimise the significance of the consequences of a decision in the immigration and asylum field merely because legal errors in that field are often capable of having dire consequences for appellants.

21. The Court of Appeal concluded that it is likely to be much more difficult to persuade the Court that the second appeals is made out where a Claimant has "failed twice" in the tribunal system" because the UT has either agreed with the FTT on appeal, or has refused permission to appeal against the FTT's decision on the basis that it contains no arguable error of law.

Conclusions

(1) As anticipated in Cart there is no longer any right to an oral hearing of a judicial review of the Upper Tribunal, where permission is refused on the papers. The courts have reverted to the old statutory review system.

(2) All applications must be issued within 16 days of the date that the refusal of permission is sent out.

(3) Documents in support of the application must only comprise decisions, grounds and 'essential documents'. No excess documentation should be included with the claim.

(3) Grounds must clearly address the second appeals test

(4) The focus should be the first limb of the test - any point of principle or practice raised by the appeal, which should be considered by the Court of Appeal as opposed to the Tribunal i.e. an issue upon which guidance is needed.

(5) Any inconsistency with decisions of the Administrative Court, Court of Appeal or Supreme Court must be raised.

(6) Any previous 'success' in the Tribunal system must be brought to the attention of the Court

(7) Any exceptional compassionate circumstances (article 8) or asylum / Article 3 points must be clearly set out.

(8) Where permission is granted. The determination of the UT will be quashed by the court without an oral hearing, unless the Defendant or interested party requests an oral hearing. The issue of public importance will then be fully argued before the Upper Tribunal.

CHRISTOPHER JACOBS

LANDMARK CHAMBERS

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