

COMMENT ON JUDICIAL REVIEW OF THE UPPER TRIBUNAL

In *AHC v Secretary of State for the Home Department* [2012] CSOH 147 Lord Stewart issued an interesting Opinion about the limits of the Court of Session's jurisdiction to review decisions of the Upper Tribunal in respect of which Parliament has excluded further appeals. The case concerned a judicial review of the Upper Tribunal (Immigration and Asylum Chamber) but impacts on other Chambers of the Upper Tribunal such as tax.

Lord Stewart held that the "important point of principle or practice" branch of the test espoused by the UK Supreme Court in *Eba v Advocate General of Scotland* 2012 SC (UKSC) 1 is satisfied if what is involved is a question about establishing the important point rather than a question about the correct application of an existing important point [*Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60 at § 18 *per* Dyson LJ giving the judgment of the Court; followed in *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 998 at § 7 *per* Carnwath LJ giving the judgment of the Court]. Since there was no existing guidance on the removal of genuine Christian converts, Lord Stewart took the present case to be about "establishing the point".

Lord Stewart held that deciding an application for permission to bring a second appeal and judicially reviewing a decision to refuse permission for a second appeal were perhaps rather different exercises from the exercise of judicially reviewing a decision to refuse permission for a first appeal. For one thing, in the former situations, assessing the prospects does not involve any question of trespassing on the jurisdiction confided to the tribunal judges.

Lord Stewart noted that the Court of Appeal in *PR (Sri Lanka)* suggested that: "A slightly less demanding standard may be appropriate where there has been only one level of judicial consideration." There might be "room for some flexibility" [at § 53]. In *PR (Sri Lanka)* itself the Court of Appeal said that the process "shows the two-tier system working as it was intended" [at § 55]:

"The appeal to the Upper Tribunal revealed an error in the First-tier's reasoning which needed to be corrected. The TCEA [*Tribunals Courts and Enforcement Act 2007*] enabled DIJ Wilson to reconsider the matter, and hear evidence for the purpose. He rightly had regard to the most up-to-date Country Guidance, but took account of the fact that it was by then almost a year old."

So, in *PR (Sri Lanka)* the applicant had had two opportunities to make out his claim, the second opportunity being a re-determination after permission was granted rather than an appeal proper. The other two cases heard with *PR (Sri Lanka)*, namely *TC (Zimbabwe)* and *SS (Bangladesh)* were "true" second appeals. In the present proceedings, there had only been one substantive hearing. The logic of the Court of Appeal's approach arguably leads to the conclusion at an even "less demanding standard" and more than "some flexibility" are called for when applying the second appeals rule to first appeals.

Lord Stewart also held that in reaching the view that there was a compelling reason in this case, His Lordship noted that the two-tier tribunal system was argued to be "adequate and proportionate protection" for the rights of those applicants who come within its jurisdictions [*Eba v Advocate General for Scotland* 2010 CSIH 78 at § 18; *cf. R (Cart) v Upper Tribunal* [2011] 3 WLR 107 at §§ 5, 86 *per* Lord Philips of Worth Matravers PSC; *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 998 at § 41 *per* Carnwath LJ giving the judgment of the Court]. However Lord Stewart noted that this presupposes that the system works; and in particular it presupposes that where there are points of law to be taken on appeal from the First-tier Tribunal to the Upper Tribunal such points will be entertained. Arguably it is of the greatest importance that the system functions properly where fundamental rights and extreme risks are at issue. In the present case, it was Lord Stewart's view that the system has broken down. Three specialist immigration judges - one immigration judge and two senior immigration judges - had apparently applied, or endorsed the application of an incorrect standard of proof in a situation where the correct test was clearly set out in the Immigration Rules; and they failed to take account of the up-to-date material which had been produced in implementation of an obligation under the Immigration Rules to obtain and make available to them as immigration decision makers "reliable and up-to-date information" about the "general situation prevailing in the countries of origin of applicants for asylum".

Lord Stewart acknowledged the argument that three failures in one case does not necessarily represent a "systematic" breakdown: but if the law has to wait until a number of applicants have potentially been denied the right to humanitarian protection, then it has to wait too long.

Lord Stewart also held that the argument for applying the second appeals rule to first appeals is an attractive one, but, it has to be remarked, one that did not attract Parliament. Had Parliament thought it proper to restrict rights of appeal within the tribunal system, it could as easily have enacted the "important point of principle or practice or some other compelling reason" rule for appeals from the First-tier to the Upper Tribunal. Parliament did not do so. The fact the Parliament has approved such a rule only for onward appeals to appeal court level is an indication for "flexibility" in the application of the rule at the lower level where, by virtue of the judicial decisions in *Cart* and *Eba*, the rule now also exists. In the present case Lord Stewart took the view that a "compelling reason" was constituted by the failure of the Upper Tribunal to exercise the jurisdiction confided to it by Parliament for the purpose of providing "fair, adequate and proportionate protection" of the Convention rights of an applicant in an extreme risk case.

Stephen Winter of Terra Firma Chambers appeared for the successful petitioner.