

**Application of section 13(6) of the Tribunals Courts and Enforcement Act  
2007 to immigration appeals from the proposed Upper Tribunal**

**Opinion of Sir Richard Buxton**

*This opinion*

1. I retired from the English Court of Appeal in September 2008 after eleven years service on that court. During that time, and more particularly during the last five years, I was much concerned with appeals in immigration and asylum matters. I have been asked by the Joint Council for the Welfare of Immigrants to give my opinion on one issue relevant to the Borders, Citizenship and Immigration Bill. I am giving this opinion without remuneration.

*The issue*

2. Clause 52 of the Bill envisages the transfer to the Upper Tribunal of immigration or nationality judicial review applications. That proposal is controversial, but for the purposes of this Opinion I assume that it will pass into law. If such applications are transferred to the Upper Tribunal the Lord Chancellor will have power, under section 13(6) of the Tribunals Courts and Enforcement Act 2007, to limit appeals from the Upper Tribunal to the Court of Appeal to cases where the Court of Appeal considers

(a) that the proposed appeal would raise some important point of principle or practice; or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

I am asked to advise on the legal implications of that limitation being placed on the power of the Court of Appeal to entertain appeals.

*The effect of section 13(6)*

3. Section 13(6) adopts the language of section 55(1) of the Access to Justice Act 1999 and CPR 52.13(2), that is designed to limit “second appeals”. Such appeals are those sought to be brought from decisions of county court or High Court judges that were themselves made on appeal. It should be noted that the limitation in the Access to Justice Act applies only to appeals from the county or High Court. It does not apply, for instance, to appeals to the Court of Appeal from the Employment Appeal Tribunal; nor did it apply to appeals from the Asylum and Immigration Tribunal.

4. The formula has, and is intended to have, a very restrictive effect. Even if a proposed appeal has a real prospect of success (the normal test for permission to appeal to the Court of Appeal) the Court of Appeal cannot entertain it unless it passes one or other of the additional tests. The position has been clearly explained by the then Vice-President of the Court of Appeal, Brooke LJ, in *Tanfern Ltd v Cameron-MacDonald*:<sup>1</sup>

It will no longer be possible to pursue a second appeal to the Court of Appeal merely because the appeal is ‘properly arguable’ or ‘because it has a real prospect of success’.....The new statutory provision is even tougher-the relevant point of principle or practice must be an important one-and it has effect even if the would-be appellant won in the lower court before losing in the appeal court.

And not only does the rule apply even if the proposed appellant has won before one of the two lower tribunals, there is the further limitation that the possibility of appealing in relation to an important point of principle or practice arises only in relation to a point that is not yet established. If the principle is clear in law, but the lower court has applied it wrongly, no appeal will lie. That was made very clear by the Court of Appeal in *Uphill v BRB(Residuary) Ltd*, in a judgment delivered by Dyson LJ, the then Deputy Head of Civil Justice.<sup>2</sup>

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<sup>1</sup> [200] 1 WLR 1311[42].

<sup>2</sup> [2005] 3 All ER 264[18].

*The implications for immigration appeals*

5. Two points need to be borne clearly in mind. First, appeals from the Upper Tribunal to the Court of Appeal will in any event be on points of law only. Second, immigration cases in the domestic courts almost always engage the United Kingdom's obligations under international conventions: conspicuously the Refugee Convention, but increasingly also the European Convention on Human Rights and, particularly in respect of the Citizens' Directive, the Treaty on European Union. That means that in a case which under the normal rules would qualify to be heard by the Court of Appeal there will be a real prospect of persuading the Court of Appeal that the lower tribunal has erred in applying the law relating to the United Kingdom's obligations: that is, that the decision if implemented will place the United Kingdom in breach of those obligations. But if section 13(6) is applied to the case, the Court of Appeal can do nothing about that breach unless the case satisfies the restrictive conditions that section 13(6) requires.

6. It must be obvious that that cannot be right. While the United Kingdom's international obligations do not require it to provide endless opportunities for questioning the performance of those obligations in the domestic courts, good faith and practice (and, in the case of obligations under the ECHR, article 13 of the Convention) require that where a domestic appellate structure is provided that structure should not be deliberately withheld from cases that have a real prospect of demonstrating a breach of those obligations. And this is without reference to the position of the appellants themselves, who are faced with the prospect of being unable to challenge decisions that are arguably wrong, and which may result in their being returned to conditions of persecution, because the error has lain in applying an established principle rather than in the establishment of that principle in the first place.

7. Nor can it be said that the judges in the Court of Appeal can be relied on to apply the section 13(6) formula in a lenient manner, influenced by the human rights of immigrants that are at stake. Authority requires the judges to apply the wording in the terms already laid down by the court, as set out in paragraph 4 above. And there is no room for saying, for instance, under limb (b) of the formula that immigration implications will always be some other compelling reasons for hearing the appeal, because to take that view would nullify Parliament's intentions in passing section 13(6).

### *Conclusion*

8. I am very well aware, from personal experience, of the need to limit the work of the Court of Appeal to cases that merit its attention. As the court put it in *Clark (Inspector of Taxes) v Perks*:<sup>3</sup>

....the whole thrust of the new appellate reforms...is to use the time and resources of the judges of the Court of Appeal, and of the lawyers and staff who support them, on matters which really merit the attention of a court of this stature in the judicial hierarchy.

When dealing with domestic civil issues, which have been allocated to lower courts in the hierarchy and have already been heard by two of them, that principle is achieved without too much damage by a general rule such as that in section 55 of the Access to Justice Act. But the importation of that general rule into immigration cases breaches the principle just stated: because adjudication upon potential breaches of the United Kingdom's international obligations does really merit, indeed demands, the attention of a court of the stature of the Court of Appeal.

9. The way to ensure that immigration issues are properly handled would be to agree that section 13(6) will not be implemented in the case of immigration appeals from the Upper Tribunal. A less satisfactory approach would be to seek to limit section 13(6)'s application to categories of case that engaged

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<sup>3</sup> [2001] 1 WLR 17[17].

particular aspects of the United Kingdom's international obligations. But if neither of those steps is taken, section 13(6) is applied, and as an (intended) result the Court of Appeal is prevented from hearing appeals that have a real prospect of demonstrating an incorrect application of immigration and refugee law, then not only will serious injustice, and danger, to individuals be threatened, but also the United Kingdom will fail in its international obligations.

**Richard Buxton**