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Sent via email to vijay.parkash@justice.gov.uk

Dear Mr Parkash,

Response to the proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal

We write in response to the Consultation on the proposed reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal. This document represents the collective views of members of our specialist team of immigration and public law barristers. We are a 42-strong team with extensive experience before the Immigration Tribunals and higher courts. Several senior members of our team having been practicing in the field of immigration law for in excess of 20 years. We are ranked as a leading Tier 3 set by the Legal 500 and several of our members are singled out for their expertise.

Our response to the questions posed in the Consultation are as follows:

Question One. **Do you agree that there should be a stricter and narrower test applied to applications to the Court of Appeal for permission to appeal in a second appeal from the Upper Tribunal to the Court of Appeal?**

1.1. No

Question 2: Do you agree with the proposal to amend element (b) of the current test so that it requires the application to demonstrate that it raises matters of exceptional public interest? Please give reasons.

2.1. No.

2.2. We consider that this proposed change must be seen in context and as only the latest step in the Government's attempt to limit access to the courts to users in the field of immigration and asylum law. There was a significant reduction in appeal rights as a result of the Immigration Act 2014 which meant that those whose cases did not raise human rights or protection issues no longer had a right of appeal at all.

2.3. Those who lost their right of appeal in 2014 were then only able to challenge a decision of the Secretary of State for the Home Department by way of judicial review. Despite the very different nature of a judicial review compared to an appeal, the Tribunal being far more limited in grounds, scope and its ability to consider new evidence, the number of judicial review claims being brought inevitably increased. In order to tackle the number of judicial review claims, fees for bringing judicial reviews were then substantially increased. Since 2014, the fee for an application for permission to bring a judicial review in the Upper Tribunal has increased from £60 to £154 (an increase of 157%) and the fee to proceed to a full hearing has increased from £215 to £770 (an increase of 258%). These fees now far exceed the cost of an appeal in the First-Tier Tribunal which is currently £140.

2.4. The 2014 Act also introduced the "deport first, appeal later" certification under section 94B of the Nationality, Immigration and Asylum Act 2002 and was the beginning of a marked increase in the use of certification generally by the Secretary of State to further limit appeal rights for immigrants and asylum seekers.

2.5. In this context, this latest proposal is viewed as yet another attempt to chip away at the ability of immigrants and asylum seekers to challenge decisions made by the Secretary of State which are of fundamental importance to their lives and which is a right that has already been significantly eroded.

2.6. It is notable that despite this being a change applicable to all Tribunals, it is figures concerning immigration and asylum claimants which are relied upon and it is clear that it is predominantly this field which is the target of these proposals.

2.7. It is our view that the current second appeals test is already sufficiently rigorous to ensure that only exceptional cases are considered.

2.8. It is noted that no equivalent amendment is being proposed for other non-Tribunal jurisdictions and it is considered that there can be no justification for applying a more stringent test for access to the Court of Appeal to asylum seekers and those claiming that decisions have breached their human rights. These are, indeed, the very decisions which require the most anxious scrutiny.

2.9. As to this, the importance of close examination of both protection and human rights claims (which are the only claims within the Immigration and Asylum Chamber of the tribunal system which could be affected by this aspect of the proposed regime change) was explained most recently by Fordham J in *JCWI v The President of the Upper Tribunal (IAC)* [2020] EWHC 3103 (Admin) at 6.6:

> "It is appropriate for a court (or tribunal) to adopt a "more rigorous examination, to ensure that [the decision] is in no way flawed, according to the gravity of the issue which the decision determines", so that "when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny" … This 'anxious scrutiny' principle is applicable in relation to protection claims … but also human rights claims … In the context of a substantive appeal, "the exercise of the right to be heard" for the individual affected "may literally be a matter of life and death" … It is applicable to appellate processes. As it was put in the context of judicial review, of putative 'fresh claims' made by failed protection claimants, and of the "overriding obligation" of non-refoulement of refugees to face

persecution: "The risk to an individual if a state acts in breach of this obligation is so obvious and so potentially serious that the courts have habitually treated asylum cases as calling for particular care at all stages of the administrative and appellate processes"….

2.10. The test proposed includes a new term of "exceptional public interest". No definition for this test is set out within the Consultation and it is therefore very difficult to assess or accurately predict what kind of case would fit within it.

2.11. Within the Impact Assessment, reference is made to cases of "exceptional public importance". It is not clear whether this and "exceptional public interest" are intended to be equivalent or different tests. It is noted that cases of "exceptional public importance" are referenced within the Impact Assessment as including those "with high media profiles and permissions to appeal which raise a significant point of law". It is further unclear whether a "significant point of law" is equivalent to the "important point of principle or practice" contained within the existing second appeals test.

2.12. Without there being a settled definition of "exceptional public interest" it is inevitable in our view that this will simply lead to further litigation to define the parameters of the test, which will undermine a currently effective system at further cost to the public purse.

2.13. It is also our view that a "high media profile" is no indicator at all of the importance of a case. Media attention is vulnerable to the political and public mood of the time which is something the Courts should be independent of and resist taking into account. More complex legal cases are also unlikely to attract a high media profile. The Courts should be mindful that "public interest" cannot be defined by what the public find interesting.

2.14. In terms of how "importance" is defined, given that all cases within the immigration and asylum field that will be affected by the proposed regime change will be human rights claims and/or protection claims, it is also highlighted that for such a change to be procedurally fair, the new test must be capable of embracing the interests of and importance to the affected individual as well as any wider public importance.

2.15. What is clear is that the proposal involves the removing of the safeguarding provision for compelling circumstances outside of an important or significant point of law which is currently provided for within the second appeals test. It is our view that this represents a real risk to refugees and those in need of human rights protection.

2.16. We have significant concerns that the figures within the Consultation relating to both second appeals and judicial reviews are incomplete and may be misleading. The assertion that "few cases actually succeed at hearing" in the Court of Appeal fails to have regard to the cases that do not require a substantive hearing because, both before and after permission is granted by the Court of Appeal, a large proportion of cases are settled with the Secretary of State and the appeal is then either allowed by consent or the original decision under challenge is withdrawn. These are cases that should properly be factored in as "successful appeals" but are not featured within the Consultation at all. In cases that have settled or been allowed by consent, it is clear from experience that the Secretary of State would have had no reason to engage in settlement if access to the Court of Appeal had been unavailable.

2.17. There is a real risk that cases which have previously proceeded to the Court of Appeal and have either succeeded or been settled with the Secretary of State, would not do so under a more stringent test.

2.18. Within our team, we have identified many cases from our own practices where the proposed test would have resulted in a very different outcome for the clients involved. Some examples of these are as follows:

1. SD (Sri Lanka) – A protection claim where permission to appeal was granted on the papers by the Court of Appeal from an Upper Tribunal decision in 2020. Following the grant of permission to appeal, the Secretary of State consented to the case being remitted back to the First-Tier Tribunal for a full rehearing of the appeal both on asylum and Article 8 grounds. This case contained no point of public importance but it was considered that there were strong prospects of success. Counsel's view is that in this case permission would have been unlikely to have been granted under the proposed regime and as this was a protection and human rights claim, the consequences would have been severe.

2. RS (Sri Lanka) – Permission to appeal was granted in this protection claim following oral hearing in the Court of Appeal. No point of exceptional public interest arose but it was considered that the grounds were strongly arguable. Following substantive appeal, the Court of Appeal allowed the appeal outright granting the Appellant refugee status. The judgment of the Court of Appeal was in 2019. Counsel's view is that in this case permission would have been unlikely to have been granted under the proposed regime.

3. AA (Turkey) [2020] EWCA: Permission granted by the Court of Appeal and the substantive appeal is currently listed for hearing in March 2021. The client came to the UK as a refugee, committed a money laundering offence and was sentenced to 5 years imprisonment 15 years ago. No action was taken by the Secretary of State and the client was granted further leave to remain despite his conviction. 15 years after the offence a decision was made to deport him. His appeal was allowed in the First-Tier but dismissed in the Upper Tribunal. Permission to appeal to the Court of Appeal was refused by the Upper Tribunal but the Court of Appeal granted permission. Although there is a point of principle for the Court of Appeal to consider (namely, the effect of delay in deportation appeals), it is neither certain nor clear whether permission would have been granted in such a case had the test been one of "exceptional public interest".

4. RK (Sri Lanka) – Permission to appeal was granted in this case following oral hearing in the CA. Before substantive hearing, the SSHD agreed that the appeal should be remitted back to the First-Tier Tribunal for a full rehearing, it being accepted that the Upper Tribunal had erred in law in finding no error. There was no point of wider public importance but the grounds were viewed to be strongly arguable and it would not therefore have proceeded under the proposed regime.

5. KV (Sri Lanka) [2018] EWCA Civ 2483 – This case concerned deprivation of citizenship. Permission was granted by the Court of Appeal on the basis of there being compelling reasons and a point of principle but Counsel in this case does not believe

that permission would have been granted if the new regime had been in place and the case certainly had no media profile. This case did proceed to a full hearing and was successful.

6. TL (Sri Lanka) – This case concerned a question of long residence under Article 8 and permission was granted by the Court of Appeal on the basis of there being a compelling reason and a point of principle. Counsel in this case does not believe that permission would have been granted if the new regime had been in place and the case had no media profile. The case did not proceed to a full hearing as the Secretary of State withdrew her decision.

Question 3: For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal do you agree that the right to apply to the Court of Appeal for permission to appeal be removed?

3.1. No.

3.2. To provide some further context, we would also ask that the Ministry note that it was only in 2013 that a Claimant whose claim was certified as totally without merit lost the right to request that the refusal of permission be reconsidered at an oral hearing. Furthermore, the timescales for lodging an application for permission to appeal a refusal of permission to apply for judicial review which has been certified as totally without merit are already very onerous as an application must be made within 7 days of service of the Upper Tribunal's order. Together with the high level of fees involved, such procedures have already ensured that access to the Court of Appeal is limited for such claims.

3.3. The impact assessment highlights that "In 2019, there were 118 cases deemed to be totally without merit, of these 67 were determined by the Court of Appeal and only 4% were granted".

3.4. It is firstly concerning that figures for such a short period of time are all that are being taken into account within the Impact Assessment. Relying upon a single year of evidence would indicate that this is a short-term problem for which a permanent solution has been proposed.

3.5. The figures relied upon also do not present a complete picture. In relation to cases deemed to be totally without merit specifically, it is acknowledged within the Consultation when it is said that "relatively few cases were successful in their application for judicial review" that there are therefore some which must have succeeded. Where issues in such cases are highly likely to include risk of persecution or other breaches of human rights, the fact that some cases *do* succeed is sufficient reason, in our view, to ensure that access to the Court of Appeal continues without additional restrictions being put in place.

3.6. As already stated above, the figures relied upon only consider those which "succeeded at the substantive appeal stage". No figures are provided for the proportion of cases which were withdrawn or otherwise settled by the Secretary of State and which did not therefore need to proceed to a substantive appeal stage.

3.7. Within our team, there is experience of cases having been determined to be totally without merit which have subsequently succeeded. An example of such a case is as follows:

1. SH (Pakistan) – this was a case where the UT had refused permission to apply for JR on the papers and declared the claim to be "totally without merit". Thus, the only option was to appeal to the Court of Appeal. Permission to appeal was refused by the UT and following consideration on the papers Underhill LJ granted permission to appeal. He encouraged the parties to agree for the case to be remitted back to the UT. In fact, the SSHD consented to withdraw her decision and make a new decision. SSHD issued a new decision, which was not certified, the appellant appealed and he won his appeal.

Question 4: For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal, do you agree that there should be a right of review before a second Upper Tribunal judge?

4.1. Yes, but not as an alternative to oversight by the Court of Appeal. Upper Tribunal judges are specialist lawyers. There are cases that require wider experience so as to ensure that a holistic approach can be taken. The Court of Appeal offers such wider experience and this is one reason why such a safeguard should be maintained.

Question 5: Do you agree that the "second appeals" test should be applied by the Upper Tribunal when considering an application for permission to appeal to the Court of Session?

6.1. The majority of our team practice in the jurisdiction of England and Wales.

Question 6: Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please provide any empirical evidence relating to the proposals in this paper.

7.1. Issues taken with the figures and with the definitions relied upon have been set out above in response to Questions 2 and 3. These are not repeated here.

7.2. We are however also additionally concerned to see reference to an assumption that "legal professionals will find alternative work of a similar level of profitability". We are not sure why this is relevant to this particular assessment and would welcome elaboration. It is our view that the income of lawyers should be irrelevant to this consideration.

Question 7: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

8.1. In terms of the changes to the second appeals test, the only people affected within the Immigration and Asylum Chamber of the tribunal system will be those who have made protection and/or human rights claims. It is reiterated that this proposal is perceived by our team to be no more than the next in a long line of steps taken by the Government to restrict access to justice to this group of people.

8.2. It is accepted within the Impact Assessment at [66] that "it is reasonable to anticipate that our proposals may have a differential (adverse) impact on the characteristic of race and also, perhaps, religion/belief". It is our view that further steps which adversely impact those with these protected characteristics cannot be justified.

8.3. Many cases that reach the Court of Appeal involve foreign national offenders who may have been in the UK as long-term residents with British family members. It must be highlighted that at the end of 2020 the Guardian made a specific request of the Home Office under freedom of information laws to provide a breakdown by nationality of foreign national offenders deported in the past five years under the 2007 UK Borders Act (see https://www.theguardian.com/uk-news/2020/dec/27/home-office-criticised-for-refusal-to-state-deportees-nationalities).

8.4. According to the article, the Home Office refused the request on the basis that, although it held the information, to disclose it was "likely to prejudice diplomatic relations between the UK and a foreign government", and could "prejudice the operation of immigration controls". So long as the Home Office continues to decline to release such information into the public domain, it will be impossible to complete or contribute to an accurate assessment of the impact of any new restrictions on these groups.

8.5. What is clear, however, in the case of foreign national offenders, is that certain groups will be more adversely affected than others. It was recently acknowledged that sentencing of offenders by the criminal courts has not historically achieved racial parity. As automatic deportation is entirely contingent upon the length of sentence handed down by a criminal court, it should be considered highly relevant that it has been acknowledged within new sentencing guidance published on the Sentencing Council website that a higher proportion of Black and Asian offenders receive immediate custodial sentences for certain offences than White offenders and that for Black offenders custodial sentence lengths have on average been longer than for White offenders.
(See https://www.theguardian.com/law/2020/dec/09/judges-told-they-should-consider-previous-racial-bias-before-sentencing and
https://www.sentencingcouncil.org.uk/offences/crown-court/item/firearms-carrying-in-a-public-place/).

8.6. A summary of data collected between 2009-2017 showing the disparity between length of sentences based on race is published on the government website at https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/courts-sentencing-and-tribunals/average-length-of-custodial-sentences/latest and the summary confirms as follows:

- "on average, White offenders were given the shortest custodial sentences every year from 2009 to 2017, compared with all other ethnic groups
- in 2017, Asian and Black offenders were given the longest sentences on average, at 27 and 26 months respectively
- the average custodial sentence length increased for all ethnic groups between 2009 and 2017 – the biggest increase was for Asian offenders (from 19 to 27 months)

- in 2017, the difference in the average custodial sentence length between Asian and White offenders was 9 months"

8.7. This supports the proposition that Black and Asian foreign national offenders are more likely to have been given an immediately and/or lengthier custodial sentence for like-crimes and therefore are also more likely to be subjected to deportation proceedings than White foreign national offenders committing the same offences. It follows, therefore, that the introduction of restrictions on the ability of persons subject to deportation proceedings to access the higher courts is therefore likely to disproportionately affect Black and Asian individuals.

Question 8: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the Government should consider? Please give data and reasons.

9.1. Please see Question 7 above

Question 9: What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please give data and reasons.

10.1. As already stated, many cases that are taken to the Court of Appeal involve foreign national offenders who may have been in the UK as long-term residents with British family members. It is our view that, without the oversight of the Court of Appeal, this may lead to more separated families.

We hope that this feedback is of assistance and are available to discuss matters further if any further input is desired.

We are grateful to Samina Iqbal, Sarah Pinder, Charlotte Bayati, Amarjit Seehra, Emma Harris and Lawrence Youssefian for their individual contributions to this Consultation response.

Yours faithfully

Goldsmith Chambers Immigration & Public Law Team