



Tribunals, Courts and Enforcement Act  
2007:  
Proposed amendments to civil legal aid

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Comments of the Child Poverty Action Group

23 September 2008

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## Introduction

1. The Child Poverty Action Group is a registered charity which campaigns for the abolition of child poverty. Our particular area of focus is on the welfare benefits and tax credits systems administered by the Department for Work and Pensions, Local Authorities and HMRC. Over the past 25 years we have built up a great deal of expertise in the area of social security law. In particular, the CPAG plays a leading role in taking legal test cases before the Social Security Commissioners, the Administrative Court, and the higher courts concerning the rules of entitlement to benefit and aspects of the administration of the welfare benefits scheme, including appeal tribunals.
2. The focus of our test-case work is to ensure that claimants' entitlement to benefits is not diminished and, where appropriate is extended, and that the systems in place to enable claimants to check the correctness of entitlement decisions are fair, accessible and independent. Other aspects of our work are to lobby for changes to social security legislation and to make submissions to bodies when consulted on proposed changes to legislation which will affect benefit claimants.
3. It is from this perspective that we welcome the opportunity of commenting on the consultation on proposed amendments to civil legal aid in light of the implementation of the Tribunals, Courts and Enforcement Act 2007. We focus on our area of expertise, which is social security appeals before tribunals and before the Social Security Commissioners, who are to become part of the Upper Tribunal.
4. CPAG made comments to the *Leggatt* review itself. We then commented on Sir Andrew Leggatt's report *Tribunals for Users – One System, One Service*. We also commented on the consultation paper on "Transforming Tribunals" and have commented on the proposed new rules for the First and Upper Tier Tribunals of the Social Entitlement Chamber.

## Background

5. The appeal jurisdiction of the Social Security Commissioners is currently outside the scope of legal aid in England and Wales, and in Northern Ireland, although not in Scotland. From 3/11/08 the Commissioners will be replaced by the Upper Tribunal of the Social Entitlement Chamber in the unified Tribunal structure. The Upper Tribunal will have a new judicial review jurisdiction. These proposals extend the scope of legal aid to cover proceedings before the Upper Tribunal in its judicial review jurisdiction under s 15 TCEA.
6. It would be helpful to know, in commenting on the proposals, what the scope of the Upper Tribunal's judicial review jurisdiction will be in relation to social security cases. We note that the Upper Tribunal will have judicial review jurisdiction only where a case falls within a class specified in a direction given by the Lord Chief Justice, or in certain other cases transferred by the High Court or Court of Session. As far as we are aware no direction has yet been given.
7. It would also be helpful to know what guidance the LSC will give its decision makers on implementing the changes.

## Legal aid

8. Throughout the process of tribunal reform we have been disappointed by the failure of the government to address the fact that there is no public funding for representation of claimants before tribunals as of right. We believe this is a major issue which ought to have been considered as an integral part of the tribunal reform process. We find this particularly concerning in view of the cuts that have been made in civil legal aid<sup>1</sup>, and the threat that current legal aid reforms pose to legal and advice services in some areas, particularly in London. Many social security claimants rely on advice services rather than solicitors as this tends to be where the relevant expertise in this area lies.

The London Advice Services Alliance tribunal representation unit has recently closed because of the introduction of fixed fees. The following is a quote from its press release dated 8/9/08:

*The Legal Services Commission's fixed fee regime is really starting to bite and unfortunately Lasa's Appeals Team is the next in what we anticipate to be a long line of similar closures throughout the sector.*

9. In our response to the consultation on "Transforming Tribunals" we said the following, which we think it is important to repeat in this context:

*We appreciate that tribunals and the Social Security Commissioners exercise an inquisitorial jurisdiction, that they are expert bodies who make high quality decisions, that tribunal proceedings are designed to be informal and not to be adversarial. Nevertheless, the social security claimants who go before tribunals may be some of the most vulnerable members of society. They may be appealing about entitlements to benefits for subsistence, for disability or for their children. The social security and tax credits schemes are enormously complex and the rules are often difficult for lawyers to understand, let alone claimants. The unrepresented claimant faces a large government department, with access to its own solicitors and presenting officers who prepare its appeals. Research bears out the fact that claimants find it difficult to represent themselves<sup>2</sup>. Further, there may be no means of paying for medical evidence claimants need to support their appeals, whereas the Secretary of State can require claimants to attend medicals. We therefore believe that, in order to be able to assert their rights, to ensure equality of arms and to ensure fair access to justice, representation at tribunals should be brought within scope for legal aid<sup>3</sup>.*

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<sup>1</sup> Lord Falconer accepted that civil legal aid spending had been reduced by 22%

<sup>2</sup> *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review*, November 2003, Professor Adler and Jackie Gulland para 3.3

<sup>3</sup> See also the *Joint Committee on Human Rights Legislative Scrutiny: First Progress Report* Second Report of Session 2006-7 HL Paper 34 HC 263 30/1/06 p 40 which says at para 6.17 "We are not persuaded that the Government's different approach to the availability of legal aid in courts as opposed to tribunals can be justified on the basis that "tribunals are not courts". Once the Government has accepted that tribunals are as important as courts to people's everyday lives, as it has in this Bill, in our view it follows that it is necessary to consider whether legal aid should be more widely available in order to make the right of access to such tribunals practical and effective." The Committee also accepts at para 6.19 that; "In many areas dealt with by tribunals the statutory framework is complex and requires legal assistance to understand."

## Submissions

10. **We submit that legal aid should be extended to all hearings before the Upper Tribunal**
11. **The proposals to extend the scope of legal aid so as to cover the judicial review jurisdiction of the Upper Tribunal under s 15 Tribunals, Courts and Enforcement Act 2007, should be further extended to cover the appeal jurisdiction of the Upper Tribunal under s 11 TCEA 2007.**
12. As discussed above, appeals to the Upper Tribunal in England and Wales are not within scope for legal aid. Exceptional funding under s 6(8) Access to Justice Act 1999 may be available in certain cases. Whilst this is vital to organisations like ours which have no alternative funding to cover test cases, and to social security claimants who almost by definition have no means to pay for representation, in our experience it has serious shortcomings. In particular; it is limited in what it covers, it is time consuming to apply for, the guidance for decision makers within the LSC is unclear, and there are often delays in getting decisions which must be referred to the MoJ for approval<sup>4</sup>.
13. Further, the Legal Services Commission's policies are poorly adapted to proceedings before the Social Security Commissioners, which will presumably continue to be the case with the Upper Tribunal. The Commissioners often join several cases and hear them together, presumably so that they can make a decision which covers different aspects of an issue and avoids the need for it to be re-litigated on different facts. The LSC seems to take the view that they need only fund one of the cases as a lead case, despite the fact that the other cases may raise different issues, there may be a conflict of interest, or there may be a need for representation by an organisation with specialist knowledge of the issue in question. As far as we are aware, the LSC also has no means of fairly evaluating which of the cases ought to receive the funding.
14. It is not clear what will happen in cases which raise both judicial review and appeal issues. For example;

*The Department for Work and Pensions (DWP) decides on 1/8/07 that the claimant is not entitled to income support because she has no right to reside in the UK. On 1/11/08 the claimant asks for the decision of 1/4/07 to be revised at any time on the basis that it was an official error. The DWP refuses to revise its decision. The claimant has no right of appeal against this refusal to revise and applies to the Upper Tribunal for judicial review.*
15. In this example in order to consider the lawfulness of the refusal to revise, the Upper Tribunal would need to consider the substantive issue, ie whether the claimant had a right of residence in the UK. Presumably legal aid would be available for this. However, if the claimant had appealed in time to a first-Tier tribunal, and then appealed the decision of the first-Tier Tribunal to the Upper Tribunal no legal aid would be available. The only difference between the two cases would be that they are dealt with in different jurisdictions.

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<sup>4</sup> CPAG's recent experience of applying for exceptional funding has been exasperating. We have applied on four occasions in 2008, all of these applications have been turned down; three are currently under review. Difficulties we have encountered are; irrelevant and intrusive requests for information, unclear guidance, decision makers misinterpreting the rules, or interpreting them very harshly or even, we would argue, unlawfully.

16. In other cases, the Upper Tribunal may have cases which involve both judicial review and appeal issues, for example:

*The claimant appeals out of time against a decision by the DWP to refuse to allow him to export disability living allowance to France. The tribunal chair refuses permission to appeal. The claimant applies for judicial review of the tribunal's decision to the Upper Tribunal.<sup>5</sup>*

17. In this scenario the Upper Tribunal would need to consider in its judicial review jurisdiction, whether the first-Tier Tribunal was right to refuse permission to appeal or not, and might then deal with the appeal issue of whether the claimant could export DLA itself, or might remit it either to a first-Tier tribunal or a DWP decision maker depending on the facts. Presumably the claimant could get legal aid for the judicial review issue, but it is not clear if s/he would get legal aid for the appeal issue or whether or not s/he got legal aid for the appeal issue may depend on who it is considered by.

18. We submit these scenarios highlight the injustice of bringing the Upper Tribunal's jurisdiction under s 15 TCEA within scope for public funding, but not including its jurisdiction under s 11. Both the appeal and the judicial review issue in the claimant's case may be equally complex; indeed it may very well be that the appeal raises more complex points of law than the judicial review, which may relate purely to procedural matters. Both jurisdictions are exercised at High Court level. It is very difficult to see why public funding is not made available for both

19. Similarly we submit that if appeals before the Upper Tribunal in Scotland merit public funding, then the same must be the case for appeals at the same level in England, Wales and Northern Ireland.

## About CPAG

CPAG promotes action for the prevention and relief of poverty among children and families with children. To achieve this, CPAG aims to raise awareness of the causes, extent, nature and impact of poverty, and strategies for its eradication and prevention; bring about positive policy changes for families with children in poverty; and enable those eligible for income maintenance to have access to their full entitlement. If you are not already supporting us, please consider making a donation, or ask for details of our membership schemes, training courses and publications.

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<sup>5</sup> Whether this is dealt with by further appeal or by judicial review may depend on the outcome of any appeal to the Court of Appeal in CHR/3855/2005 and CDLA/948/2007.