Response of the Immigration Law Practitioners' Association to the Justice Select Committee inquiry into courts and tribunals fees and charges

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

2. In this response we focus on fees in immigration and asylum cases and related matters. We have drawn on ILPA's response to the Ministry of Justice consultation *Enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals.* [1]

How have the increased court fees and the introduction of employment tribunal fees affected access to justice? How have they affected the volume and quality of cases brought?

Employment tribunals

3. It is not within ILPA's specialist expertise to comment on the introduction of employment tribunal fees in general. We are concerned at the effect of these new fees on persons who have been trafficked or subject to forced labour and domestic slavery who seek or could seek to enforce their rights in the Employment Tribunal. Examples of such cases can be found in Kalayaan's report *Ending the Abuse,* which is cited in the Ministry of Justice's *Charging fees in Employment Tribunals and the Employment Appeal Tribunal: Government Response Equality Impact Assessment*[2]. Kalayaan's report found that

> *...between May 2009 and December 2010, 53 domestic workers brought employment tribunal cases against their employers; 34 of these cases had been concluded by December 2010.Of the 14 claims brought to hearing 8 claims were successful on all grounds, in three several heads of claim were successful and in only three were the claims unsuccessful. 20 of the concluded claims have been settled. The average amount awarded through an employment tribunal judgement was £87,394 with a total of £786,548 being awarded. Meanwhile, the average size of the settlement was £11,743 with a total of £234,865 awarded.*

[1] Cm.9123.
[2] 13 July 2012.

4. The report of the Committee on the Draft Modern Slavery Bill cited the Anti-Trafficking Legal Unit (Atleu)'s evidence that the lack of legal aid severely constrained the ability of trafficked persons to bring such claims. Legal aid covers disbursements such as fees. Even where a lawyer can be found to act pro bono this does not solve the problem of paying the fees.

5. In the recent case of *Tirkey v Chandok and another* ET/3400174/2013 the Employment Tribunal upheld claims, including for unpaid wages and religious and race discrimination, brought by an Indian woman of low caste kept in domestic servitude by her employers for four and a half years. She worked seven days per week, 18 hours per day and was on call 24 hours a day. She was paid eleven pence per hour, slept on the floor and was kept in isolation. For 17 months the Legal Aid Agency declined to fund the case on an exceptional basis, suggesting that it was only a money claim and not of "sufficient importance or seriousness."[3] It was suggested that Ms Tirkey could represent herself, despite the case's involving cross-examination of her employers. The *persistent of the Anti-Trafficking Legal Unit secured the funding in the end.* The Unit said

> *It is our experience that victims seeking to hold their traffickers to account find their applications for legal aid are routinely refused. ...Other victims who do not have the necessary legal support, conviction and tenacity would have given up in the face of such comments and delays.*[4]

6. Without legal aid a person such as Ms Tirkey must meet court fees from her own pocket. A person earning eleven pence an hour has no funds to use to do so.

Immigration tribunals

7. Imposing fees on appellants in immigration tribunals has increased barriers to access to justice. Many appellants have already paid a large immigration application fee which is not refunded if the application is refused. There is no longer legal aid for immigration cases. The exceptional funding system, which is supposed to provide a safety net, has been found in the immigration test cases of *Gudanavicience* et *ors* to have been operated in so restrictive a manner as to be unlawful.[5]

8. Fees have hampered the development of pro bono assistance in response to the withdrawal of legal aid from immigration cases. While lawyers may be prepared to give their services for free in appropriate cases, the client will very often still need to find money for all disbursements, including court fees.

9. In the case of *R(Osman Omar) v SSHD* [2012] EWHC 3448 (Admin) (30 November 2012) it was held that a fee cannot be required where to do so is incompatible with the respect for the applicant's rights under the European Convention on Human Rights. That case was concerned with Home Office fees for immigration applications but we suggest that the same holds good for appeals. However, this depends upon the appellant securing representation to challenge the requirement that they pay a fee.

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[3] Anti-Trafficking Legal Project press release, *Victim of domestic servitude wins first caste discrimination claim* 21 September 2015 available at http://atleu.org.uk/our-recent-cases/2015/9/21/victim-of-domestic-servitude-wins-first-caste-discrimination-claim (accessed 29 September 2015).

[4] *Ibid.*

[5] *Gudanavicience* et *ors* [2014] EWCA Civ 1622.

10. Where persons on very low incomes now excluded from legal aid are paying, including at reduced or subsidised rates or represented pro bono, inability to pay the court fees may be a factor in whether they can take a case to court or not. ILPA members report seeing cases in which the would-be appellant is unable to secure the funding needed to pay the initial application fee and cases where the lack of a fee will preclude appealing unless a waiver is obtained. Time limits for appeals add to the difficulties as the fee must be secured within a short time frame, normally 14 days.

Case of CK

11. CK was in prison. The Home Office initiated deportation proceedings which he sought to resist relying on his rights under Article 8 of the European Convention on Human Rights. The Home Office issued a notice of decision to refuse a human rights claim, upholding the decision to make a deportation order. CK lodged an appeal to the First-tier Tribunal in which he explained that he was in prison and had no money. He then received a letter from the Tribunal stating that the appeal had been struck out as he had not paid the fee. Representations were made and the Tribunal reinstated the appeal but on condition that the fee was paid.

12. We urge the Committee to press the Ministry of Justice on how many unrepresented appellants have managed to apply for fee remission and, if they have applied, whether they have been successful.

13. Under the Immigration Act 2014, amending s 82 of the Nationality Immigration and Asylum Act 2002, the only cases in which a right of appeal before the Immigration and Asylum chambers remains, subject to transitional provision, are protection cases, cases in which it is alleged that the decision breaches a person's human rights or rights under the EU treaties and cases challenging deprivation of citizenship. There is no legal aid for other immigration cases. Many of the persons who stand to be affected are persons who have no current leave, no permission to work and no recourse to public funds. The majority of applicants are detained and/or destitute and in many cases will be facing imminent removal. Either they will be unable to pay the fee and will be denied access to justice, or they will be forced into unlawful and potentially exploitative work to pay the fee. Finding the funds to pay court fees or completing complicated applications for remission of the fees is complicated by the urgency of these cases.

14. Since 19 December 2011, fees are payable when certain immigration appeals are lodged.[6] If an immigration judge allows the appeal, he or she may make an award to refund all or part of the appeal fee paid. The President of the Tribunal issued guidance to immigration judges on deciding on fee awards. This includes:

> *If an appellant has been obliged to appeal to establish their claim, which could and should have been accepted by the decision-maker, then the appellant should be able to recover the whole fee they paid to bring the appeal.*

[6] First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 (SI 2011/2841) and rule 22(2)(b) of the First-tier Tribunal (Immigration and Asylum Chamber) Procedure Rules 2014 (SI **2014/2604 (L. 31))**

15. This guidance has been followed, and the practice has generally been that when an appeal is allowed because of new evidence submitted after the refusal, or to the judge, the fee will not be refunded, or only be partially refunded. The refund is made by HM Courts and Tribunals Service, as this is the body to which the fee was paid, but HM Courts and Tribunals Service recoups the money monthly from the Home Office.

16. The need to pay the fee can mean that less money is available for legal advice and representation and for disbursements such as translators and interpreters and medical reports. One member comments:

> *While a significant proportion of this client group have managed to scrape together (over time) sufficient funds to pay privately for some help, an equally significant proportion have simply disappeared. Yes, they still ring and ask for an appointment, but when informed about the changes to legal aid, they say they will need to "think about it" and never call back. The concern is that these clients, already living under the radar because of their lack of status, simply disappear without a chance of obtaining even the most basic advice about their options."*

17. The crux of the test for cases under Article 8 of the European Convention on Human Rights is whether the proposed interference with the right to private and family life is reasonable and proportionate. Thorough-going knowledge of the established and developing principles in domestic and European jurisprudence is essential to do justice to these cases. Those affected include people unfamiliar with UK laws and procedures, many with very limited or no support networks in the UK, with little or no understanding of what would constitute a correct application of the law, or a correct procedure. In many cases English will not be the litigant's first language. These difficulties for applicants, in the absence of advice from a qualified specialist, are compounded by the Home Office's regularly producing decisions which are wrong and many of which are inconsistent with the decided case law. ILPA has submitted detailed evidence on these matters to the Justice Select Committee on 14 May 2014[7]

18. The current fee remission regime is difficult to navigate. It relies on letters and facsimiles rather than electronic communication. The test for fee remission in the Immigration and Asylum Chamber is one of "exceptional circumstances" not just financial considerations. The "exceptional circumstances" test is opaque to the unrepresented. All too often a request for fee remission is met with a repeated demand for payment with no acknowledgement of the case put forward.

19. Mr Jason Yaxley, then Head of Immigration and Asylum Jurisdictional and Operational Support Team said in his letter on behalf of Ministry of Justice to ILPA on 20 August 2013 that:

> *On the other hand we do accept that there will be some situations where, for instance, the appellant may not be able to afford the fee because they are a refugee child abroad and the sponsor in the UK is in receipt of legal aid. In such a situation it may be appropriate for the Lord Chancellor to exercise his discretion and reduce or remit the fee. But that will depend on evidence being produced to the effect that the fee cannot be paid.*

[7] See http://www.ilpa.org.uk/resource/26355/evidence-submitted-to-the-justice-select-committee-on-legal-aid-14-may-2014 (accessed 29 September 2014).

20. In, for example, a refugee family reunion case, a refugee child abroad and those endeavouring to support him/her may have very limited evidence of means, quite likely not even possessing paper and pen with which to prepare a statement.

21. Fees create cash flow problems for those who may be eligible for full or partial fee remission but who are required to prove their income and necessary outgoings in considerable detail to establish their disposable monthly income. The process and evidential requirements may prove a significant disincentive to pursuit of their claims. Fee remission and public funding are not available to companies. ILPA members frequently act for small-and medium-sized businesses challenging decisions made by the Home Office in relation to sponsor licensing under the Points-Based System. The cumulative effect of the proposed fee increases may act as a barrier to access to the courts for such organizations.

22. Compensation claims in the immigration context, for example against public authorities for unlawful detention or assault/injury in an immigration context, raise questions of the utmost gravity, of breaches of the UK's domestic and international obligations and lack of accountability for breaches of human rights and unlawful and unconstitutional action by officials.

23. Persons including detainees, the mentally ill, the sick and those caring for small children are in no position to find the money, particularly given that application fees, court fees and disbursements must all be paid alongside any attempt to pay for legal advice and representation.

How has the court fees regime affected the competitiveness of the legal services market in England and Wales, particularly in an international context?

24. Not answered. Immigration law is primarily concerned with administrative law matters and immigration cases will be heard in the courts of the country whose immigration laws and rules are the subject of challenge.

What have been the effects on defendants of the introduction of the criminal courts charge? Has the criminal courts charge been set at a reasonable and proportionate level? Is the imposition and collection of the charge practicable and, if not, how could that be rectified?

25. Not answered.

How will the increases to courts and tribunals fees announced in Cm. 9123, "Court and Tribunal Fees", published on 22 July 2015, and the further proposals for introducing or increasing fees included for consultation in Cm. 9123, affect access to justice?

26. Please see our submission to the Ministry of Justice in response to Cm 923 appended hereto.

ILPA

30 September 2015

APPENDIX

ILPA response to *The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals*

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

Preliminary

In the ministerial foreword, the Minister, Shailesh Vara MP acknowledges that

'The courts fulfil a vital role in an effective and functioning democracy. They provide access to justice for those who need it, upholding the principle of the rule of law.'

He then states that this is why we need to make sure that the courts and tribunals are properly funded. To achieve this the Government plans to charge 'those who use the system' higher court fees. ILPA agrees that it is essential that courts and tribunals are properly funded and can function to serve the people. It does not follow that those who seek justice and have suffered a breach of their rights are the ones who should pay when cases they bring are often in the public interest and hold government to account for unlawful actions.

Increases to fees and the introduction of further fees will undermine the rule of law and the vital role the courts play in an effective and functioning democracy, to the benefit of all. It is fundamental to the functioning of democracy and the rule of law that barriers to access to justice are not created as this would increase State impunity and mean that the State would not be held to account for unlawful actions or omissions.

Reponses

ILPA has only answered those questions on which it has particular expertise.

Questions 1- 5

Question 1: Do you agree with the proposal to raise the maximum fee for starting proceedings for the recovery of money from £10,000? Please give reasons.

No.

These cases include cases of:

- abuse of position or powers by public authority
- breach of human rights by public authority
- child abuse
- abuse of adults with learning disabilities or otherwise at risk
- judicial review
- habeas corpus
- sexual offences

Although these will be cases that include a money claim, the primary reason for bringing them will often be to hold the State to account. Where an individual's rights have been violated, they have not chosen, for example, to be unlawfully detained or to have clear indicators that they are trafficked ignored.

It is vital that cases which challenge the lawfulness of actions of officials, including misfeasance in public office assault or false imprisonment and those that challenge inhumane and degrading treatment,[8] can continue. The barriers to access to justice created by the court fees proposed contribute to the creation of a system in which access to justice is the preserve of individuals with means and companies and corporations.

The maximum court fee payable by a claimant was increased to £10,000 in March 2015, an increase of nearly 600% for claims of £200,000. The government is now proposing that this fee be doubled, to 'at least' £20,000, which would represent an increase of over 1,000 per cent in fewer than six months. In such a short space of time it is impossible to assess the impact of the first fee increases on access to justice, let alone predict what impact a further increase might have.

The Impact Assessment dated 21 July 2015, *Enhanced Court Fees for high value Money Claims and all other Civil Court fees currently set at or below full cost recovery levels*, IA No: MoJ 009/2015, states that:

'It has also been assumed that fee changes would not affect court case volumes…We would assume that there would be no detrimental impacts on court case outcomes nor on access to justice from any increase in court fees and no impacts on the legal services used to pursue or defend claims'.

Neither detailed evidence nor cogent argument is cited in support of this assertion. The court fee increases were opposed by 90% of respondents to the Government consultation that preceded the new consultation announcement, many of whom presented reasoned argument and evidence. The Consultation paper states that:

18. The majority of respondents to the consultation disagreed with the proposed fee increases.

It is irresponsible to make such assumptions without evidence, including without any assessment of the impact of the first fee increase on access to justice. In this regard we emphasise that we envisage an assessment of significantly higher quality than the Ministry of Justice's report *Research into the effects of the Legal Aid, Sentencing and Punishment of Offenders Act (2012) on onward immigration appeals* by Anita

[8] See, for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin); *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (5 August 2011; *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012); *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012); and *R(MD) V Secretary of State for the Home Department* [2014] EWHC 2249 (Admin).

Krishnamurthy and Karen Moreton, part of the Ministry of Justice Analytical series, published on 3 August 2015. In its letter to the Minister protesting the poor quality of this report, ILPA said:

> ***I****LPA had already protested during the research at the very small number and narrow range of persons selected for interview, expressing particular concern at the lack of representation of those outside London and at the quality of the interview with the ILPA Legal Director, where the interviewer appeared rushed and disinterested. The final report suggests that those concerns were well-founded.*
>
> *The dominant trophe in the report is apophasis: while claiming not to draw conclusions as to the effect of the Legal Aid Sentencing and Punishment of Offenders Act 2012 from a cohort of cases, the majority of which are not proceeding under the funding regime established by that Act, the document repeatedly does so. …*
>
> *The approach taken is all the more disappointing given that the Legal Aid Agency collects codes which, based on the detailed information that lawyers provide, should allow the cohorts to be distinguished and permit the disaggregation of data into cases funded under the Act and cases whose funding pre dates the Act. It was possible to have set out the number of cases funded the old and new regimes in the sample studied*

Now it is proposed to increase the court fee threshold from £10,000 for those with claims in the range £200,000 and above to £20,000.

In particular, it is anticipated that the higher court fees proposed will:

- Discourage individuals from going to court when they have meritorious claims. Those out of work due to injury caused by negligence or ill-treatment are unlikely to risk losing what little money they had left on court fees, even if they had a strong claim.

- Provide an incentive for large companies and the government to deny liability, knowing that the injured parties would not be in a position to pay expensive court fees, thus removing incentives for government, large companies and insurers to settle out of court when they are liable.

It will be said against us that some of the cases covered by the proposals are within the scope of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and which will satisfy the means and merits test for legal aid. However, we question the wisdom, not to mention the cost, of having one part of government pay large fees to another, in this case the Legal Aid Agency paying Her Majesty's Courts and Tribunal Service. It is bureaucratic to have the Legal Aid Agency pay solicitors firms, who then pay Her Majesty's Courts and Tribunal Service the fee. Costs are shifted around the system. This is all the more the case when the payment of costs are taken into account: at the end of the case, costs (including the court fee) are sought by successful claimants from the defendant government department only to be repaid, via solicitors firms, to the Legal Aid Agency, which gave them the money to pay the fee originally. As such, it is likely that the policy objective as stated in the Impact Assessment IA No: MoJ 009/2015 of 'reducing overall taxpayer subsidy for HMCTS' will not be achieved.

More fundamentally, this bureaucratic and costly process will cause detriment to legally aided claimants and would-be claimants as well as those paying privately. The increase in the court fee would have a significant detrimental impact on the ability of legal aid cases to proceed in the County Court and High Court. If a large fee is required at the outset of a case, this can cause problems in obtaining funding from the Legal Aid Agency and can affect the Legal Aid Agency's view of the cost benefit analysis. Previously, the level of the fee would have a negligible impact on the assessment, and a relatively small initial grant of

funding would allow a case to proceed through a number of litigation steps, including settlement negotiations. As a result of the proposed changes, therefore, the weak will be disproportionately disadvantaged and equality before the law will be undermined.

If, contrary to our submissions, cases funded by legal aid are not exempted from the payment of fees, then

- those cases should be included in a system of fee remissions;
- the legal aid budget should be increased by the sum designed to cover all the fee increases, adjusted upwards at the end of the year if more cases took place than had been foreseen; and
- all reports of legal aid expenditure should be adjusted for the sums paid in court fees.

As to those represented *pro bono*, while lawyers may be prepared to give their services for free in appropriate cases, the client will very often still need to find money for all disbursements, including court fees.

Question 2: We would welcome views on whether the maximum fee for starting proceedings for the recovery of money should be increased:

- **to at least £20,000; or**
- **to a higher amount;**

Alternatively, do you believe that there should be no maximum fee for commencing a money claim? Please give reasons.

See above. The maximum fee for starting proceedings for the recovery of money is too high. It should not be increased. It should be returned to the pre-March 2015 level.

The Government states in the Impact Assessment IA No MOJ 009/2015 that:

Demand

22. We assume that court user demand would not change in response to planned fee rises (i.e. that court fee changes themselves would not change court case volumes). External and internal research conducted to date on behalf of the MOJ suggests that this assumption is reasonable:

Individuals and small businesses participating in published MoJ research conducted by Ipsos Mori tended to view litigation as their only remaining option with emotional motivations tending to be their primary reason for taking their case to court. Users with legal representation tended to have little awareness of legal costs, including court fees, typically viewed court fees as a low proportion of these and exhibited less sensitivity to price than those who represented themselves as court fees were typically the sole costs they paid. However, when asked about specific hypothetical increases to court fees, the research participants felt they were affordable and would not deter them from going to court.

It is not stated whether those consulted were persons paying privately or in receipt of legal aid. A person in receipt of legal aid will not necessarily know very much about costs. It is not stated whether legal representatives, who advise on costs, were consulted.

Without an emotional or other motivation it may be unlikely that a person gets involved in litigation, but that does not mean that they cannot be deterred from so doing by costs.

Legal aid rules are supposed to mirror what a reasonable privately paying client would do. Looking then to the legal aid analysis as a way of understanding all cases, at the outset of the case the individual, whether legally aided or privately paying, will be establishing that there is a sufficient benefit in bringing the case, considering the prospects of success; carrying out a costs benefit analysis and addressing the question of proportionality.

Question 3: Do you agree with the proposal to exempt personal injury claims from the higher cap and that the maximum fee of £10,000 should continue to apply in these cases? Please give reasons.

Not answered; this is not ILPA's area of expertise.

Question 4: Do you agree that if the maximum fee for money claim is increased as proposed, the disposable capital test for a fee remission should also be amended so that the disposable capital threshold for a fee of £10,000 is increased to £20,000 and to £25,000 for a fee of £20,000? Please give reasons.

ILPA agrees that the disposal capital test should be increased. The current threshold risks deterring persons with meritorious cases from going to court. We suggest that increases should be greater as individuals should not be made to risk all that they have.

Question 5: Are there any other benefits or payments that should be excluded from the assessment of a person's disposable capital for the purposes of a fee remission?

No. All the current bases for remission of fees should remain.

More generally than money cases, in immigration appeals, exemptions based on the financial position of the sponsor as well as of the appellant in entry clearance cases should be permitted.

Question 6: Do you agree with the proposal to uplift all civil fees not affected by one of the other specific proposals by 10%? Please give reasons for your answer.

No.

The Government proposes a blanket increase in cost of civil court cases. The cost of a general application is proposed to double to £100. The fee for a contested application is proposed to increase by over 60% from £155 per application to £255. In the course of the case, each party may have to make many general applications. It is not possible for the parties in proceedings simply to agree, for example, to extend time for certain steps in the litigation, including seeking more time to engage in settlement negotiations. Any amendments to orders and directions must be approved by the court and thus require an application. To create a disincentive for parties to seek to conduct litigation in a reasonable and proportionate matter and engage in settlement is contrary to the approach of the Civil Procedure Rules and is not in the interests of justice.

In relation to immigration fees the rationale for the changes is stated to be the failure to cover sufficient costs of hearings. However, in respect of onward appeals it is not justified to require the parties to meet the full costs of putting right a lower court's error. This is true generally of appeals and was accepted in the response to the consultation on the introduction of fees in the Immigration and Asylum Chamber of the First-tier and Upper Tribunals[9] as one of the reasons weighing against introducing fees for the Upper Tribunal. As recorded in the Government's response, the unanimous view of respondents was that it was unreasonable to expect appellants to pay the tribunal system to correct its own errors (paragraph 16).

Appeals to the Court of Appeal usually raise points of law which will have impact beyond the parties to the case. It is in the public interest for these appeals to be heard by the Court of Appeal. This is particularly the case where the second appeals test set out in s 13(6) of the Tribunals, Courts and Enforcement Act 2007 applies –
as is the case for appeals from the Upper Tribunal (Immigration and Asylum Chamber) – restricting appeals to those where the appellant can show either that the appeal raises an important point of principle or practice, or that there is some other (legally) compelling reason for it to be heard. The appeal will only succeed if it is shown that the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the lower court. These are errors that should be put right by a higher court.

Further, in relation to the proposed uplift on judicial review applications, the approach taken puts the burden of making good the shortfall in revenue on the shoulders of those least able to pay, for example refugees seeking family reunion with family members trapped in situations of conflict and danger overseas. ILPA has consistently argued that money should rather be saved by adopting a 'polluter pays' approach. The Home Office continues to make poor decisions (with high overturn rates on appeal[10]), to create delays in immigration proceedings and to fail consistently and timeously to give effect to the decisions of the courts. If the Home Office were to bear the costs of these myriad failings, not only would court costs (and legal aid payments) be reduced but there would be a strong incentive for immigration and asylum decision-making to improve, and thus for savings in all cases. The dramatic reduction of rights of appeal in immigration and asylum cases effected by the Immigration Act 2014, means that there is a greater need for full and unencumbered access to the remedy of judicial review.

Question 7: Do you agree with Government's proposal to increase the fees charged for proceedings in the First-tier Tribunal (Immigration and Asylum Chamber) as set out in Table 1 above? Please give reasons.

No.

Imposing fees on appellants adds to the inequality of arms in a system in which in all cases individuals are appealing against government decisions. Appellants have already paid a large immigration application fee. These fees are not refunded if the application is refused. Appellants may also have to pay for legal representation, in particular in immigration cases where there is no longer any legal aid. The exceptional funding system, which is supposed to provide a safety net, has been found to have been operated in so restrictive a manner as to be unlawful.[11]

[9] Available at http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/appeals-fee-charges-consultation-response.pdf (accessed 15 September 2015).
[10] See, e.g., Impact Assessment of Reforming Immigration Appeal Rights, 15 July 2013. Available at http://www.parliament.uk/documents/impact-assessments/IA13-24A.pdf (accessed 15 September 2015).
[11] *Gudanavicience* et *ors* [2014] EWCA Civ 1622

Fees should be related to the applicants' ability to pay. In the case of *R(Osman Omar) v SSHD* [2012] EWHC 3448 (Admin) (30 November 2012) it was held that a fee cannot be required where to do so is incompatible with the respect for the applicant's rights under the European Convention on Human Rights. That case was concerned with Home Office fees for immigration applications but we suggest that the same holds good for appeals.

The right of access to the court is a fundamental right recognised by the common law: see the recent judgment of Lord Neuberger in *R (Evans) v Attorney General* [2015] UKSC 21. We are mindful that, as set out in the judgment on legal aid: *Gudanavicience* et *ors* [2014] EWCA Civ 1622, even though Article 6 of the European Convention on Human Rights, the right to a fair trial, has been held not to be applicable in immigration and asylum cases, other articles of the European Convention on Human Rights such as, and very pertinent in these cases, Article 8, the right to private and family life, can give rise to a need for financial assistance. *Gudanavicience* was concerned with legal aid, but the principles apply in cases where an appeal fee is charged. Article 13 of the European Convention on Human Rights (the right to an effective remedy) is also in point. In *GR v Netherlands* (Application no. 22251/07, judgment of 10 January 2012), it was held that a failure to waive a fee of 830 Euros required for processing an application for a residence permit constituted a breach of Article 13. The applicant had provided some evidence of his means but had not met the precise evidential requirements laid down by the Dutch authorities. While Article 13 is not one of the rights incorporated by the Human Rights Act 1998 into domestic law in the UK, there is still recourse to Strasbourg, and the arguments deployed are in point.
Access to justice is also protected by European Union law, where it is an aspect of the general principle of effective judicial protection, expressly recognised in Article 47 of the Charter of Fundamental Rights of the European Union, directly applicable in English law. Unlike Article 6 of the European Convention on Human Rights, Article 47 applies to immigration and asylum cases within the scope of EU law.
The case law of both the European Court of Human Rights and of the Court of Justice of the European Union (see for example C-279/09 *DEB*) has emphasised that the proportionality of any barrier to access to justice must be assessed *inter alia* by reference to the importance of the matters at stake. Where a person is seeking to prevent his or her removal from the jurisdiction, the issues at stake are both important and urgent.

Persons including detainees, the mentally ill, the sick and those caring for small children are in no position to find the money, particularly given that application fees, court fees and disbursements must all be paid alongside any attempt to pay for legal advice and representation.

> *"While a significant proportion of this client group have managed to scrape together (over time) sufficient funds to pay privately for some help, an equally significant proportion have simply disappeared. Yes, they still ring and ask for an appointment, but when informed about the changes to legal aid, they say they will need to "think about it" and never call back. The concern is that these clients, already living under the radar because of their lack of status, simply disappear without a chance of obtaining even the most basic advice about their options."* [12]

Case of CK
CK was in prison. The Home Office initiated deportation proceedings which he sought to resist relying on his rights under Article 8 of the European Convention on Human Rights. The Home Office issued a notice of decision to refuse a human rights claim, upholding the decision to make a deportation order. CK lodged an appeal to the First-tier Tribunal in which he explained that he was in prison and had no money. He then received a letter from the Tribunal stating that the appeal had been struck out as he had

[12] "*Fig leaves and failings*", Jo Renshaw, solicitor at Turpin Miller LLP in Oxford, *New Law Journal* , 8 April 2014, see http://www.newlawjournal.co.uk/nlj/content/fig-leaves-failings

not paid the fee. Representations were made and the Tribunal reinstated the appeal but on condition that the fee was paid

While ILPA recognises the important role which the system of fee remissions, together with the availability of legal aid, play in ensuring that impecunious litigants are able to access the court, it makes the following observations about the limitations of that system:

(1) The availability of legal aid is greatly diminished. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 has removed most immigration cases from the scope of legal aid altogether. Where persons on very low incomes now excluded from legal aid are paying, including at reduced or subsidised rates or represented *pro bono*, inability to pay the court fees may be a factor in whether they can take a case to court or not.

(2) Fees create cash flow problems for those who may be eligible for full or partial fee remission but who are required to prove their income and necessary outgoings in considerable detail to establish their disposable monthly income. The process and evidential requirements may prove a significant disincentive to pursuit of their claims. The test for fee remission in the Immigration and Asylum Chamber is one of "exceptional circumstances" not just financial considerations.[13]

(3) Fee remission and public funding are not available to companies. ILPA members frequently act for small-and medium-sized businesses challenging decisions made by the Home Office in relation to sponsor licensing under the Points-Based System. The cumulative effect of the proposed fee increases may act as a barrier to access to the courts for such organizations.

The increased fees will not necessarily produce the desired savings in the Ministry of Justice budget. For those claimants who are in receipt of public funding, the cost is shifted on to the Legal Aid Agency (see answer to question 1 above). Higher proposed fees are likely to result in increased numbers of applications for fee remission as those applicants with moderate incomes who could, for example, afford the current fee for issuing a judicial review claim, may have to apply for a fee remission in respect of the new proposed fee. This will carry an increased administrative burden, thus reducing the savings made by increasing the fees.

Amendments

We disagree with the proposal for

> *"…an amendment to ensure that HMCTS is not required to return any fee paid for an appeal that has been received but is subsequently determined to be invalid"*

It is difficult for persons with no legal advice to get it right in the complex field of immigration law. It is far from infrequent that the question of the validity of the appeal involves matters of substantive law, for example in the determination of the question of whether a person has a right of appeal under EEA law as a family member of an EEA national, when it is the relationship itself that is in dispute.

The proposals contrast with the approach to refunds in administrative reviews in immigration cases, internal Home Office reviews that are used in cases from which appeal rights were withdrawn by the Immigration Act 2014. In administration review there is a commitment to refund the application fee where the application is rejected as invalid. Given that the rationale behind both administrative review and appeal are the same: ensuring the correction of errors and the vindication of rights and deal with the

[13] First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 (SI 2011/2841), paragraph 7.

same body of law, there is no reason to differentiate between the two. Fees paid in respect of appeal applications that are found to be invalid should be refunded.

We disagree with the proposal for

> *"…an amendment to clarify that HMCTS is not required to return any full or partial fee which has been paid by the appellant before an appeal is withdrawn by the appellant, or when the decision against which the appeal has been brought is withdrawn by the respondent;"*

This would be an incentive to appellants not to withdraw appeals and a reason for tribunal judges to decline to give permission[14] for the Home Office to withdraw appeals, on the basis that it was not fair and just[15] so to do.

A refund is an additional incentive to settle. The more cases that settle, the greater the saving in court running costs. To remove this incentive would appear short sighted.

The Home Office frequently rejects applications for inappropriate or unlawful reasons and people should not have to pay for the Home Office's mistakes. Problems can arise where an application is declared invalid through the fault of a third party (e.g. a bank) or a minor inadvertent error on behalf of the applicant. The Upper Tribunal's dissatisfaction with the Home Office's approach to invalidity and payment procedures is shown in the decision of *Basnet (validity of application - respondent)* [2012] UKUT 00113(IAC). It recommended therein that "in cases of a failure to collect the fee in an application made in time, there is prompt communication with the applicant to afford an opportunity to check or correct the billing date". Withdrawing a decision may be one way to give effect to these recommendations and we suggest that a tribunal judge would wish to be able to permit this without penalizing the would-be appellant.

Case study: OE

OE's cheque bore the figures £561 but the words 'five hundred and sixty-one pence'. Instead of sending the cheque back for a quick correction, the Home Office declared the application invalid, after her leave had run out.

There is a need for the Ministry of Justice or the Home Office to use this opportunity to make provision to refund appeal fees when the Home Office withdraws a refusal decision before the case goes to an appeal before an immigration judge. Since 19 December 2011, fees have been payable when certain immigration appeals are lodged, as provided in the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 (SI 2011/2841) and rule 22(2)(b) of the Tribunal Procedure Rules.[16] If an immigration judge allows the appeal, he or she may make an award to refund all or part of the appeal fee paid.

The President of the Tribunal issued guidance to immigration judges on deciding on fee awards. This included:

> *"If an appellant has been obliged to appeal to establish their claim, which could and should have been accepted by the decision-maker, then the appellant should be able to recover the whole fee they paid to bring the appeal."*[17]

[14] SI 2014/2604 (L 31) Paragraph17(1)
[15] *Ibid*. Paragraph 2(1).
[16] SI 2014/2604 (L 31).
[17] See, paragraph 5 https://www.judiciary.gov.uk/wp-content/uploads/2014/07/joint-guidance-4-fee-awards.pdf (accessed on 15 September 2015).

This guidance has been followed, and the practice has generally been that when an appeal is allowed because of new evidence submitted after the refusal, or to the judge, the fee will not be refunded, or only be partially refunded.

The refund is made by HM Courts and Tribunals Service, as this is the body to which the fee was paid, but HM Courts and Tribunals Service recoups the money monthly from the Home Office. The (Immigration and Asylum Chamber) Fees Order 2011makes no provision for refunds when the immigration decision appealed against is withdrawn and the case never goes to hearing. Lord Avebury raised this omission in the debate on that order in the House of Lords on 12 October 2011,[18]

> *"Where the UKBA decides to revoke the decision that it has made before the appeal has been heard, presumably on the basis that it cannot justify the refusal, it would be manifestly unfair not to refund the fee that has been paid, and in any case the administrative costs in these cases must be even less than in the cases that are determined on paper alone."*

The Lord McNally's response did not fully address this issue:

> *"...the order provides that the tribunal may instruct UKBA to refund the fees of successful appellants, thus ensuring that they do not have to pay to correct the errors of the agency. That in itself will incentivise the agency to improve its initial decision-making - I take the point made by my noble friend Lord Avebury about that - and will reduce the rate of successful appeals to the tribunal."*
>
> The Home Office has consistently refused to refund appeal fees in cases where it has concluded, without the case going before the Tribunal, that its decision is wrong. Official correspondence has set out[19] the view that
>
> *"…fee awards are not payable when a decision is withdrawn. If a decision is taken to withdraw a case, it is not an acknowledgement that the case could and should have been accepted by the initial decision-maker. It does not follow that the initial decision was incorrect. Decisions may well have been taken correctly at the time of the original decision but been rendered unsustainable because new information has been received which was not available to the original decision maker. In situations where new evidence has been made available by the applicant, it is appropriate to withdraw the case so as to avoid the unnecessary public expense. It is for these reasons that it would not be reasonable for us to adopt a policy of refunding fees where a decision has been withdrawn."*

When the appellant or sponsor provides new information that could have been provided earlier at a later stage, this refusal to refund the fee may be justified. But when the grounds of appeal reiterate the information and evidence which was submitted with the application but not properly considered or understood, it is not.

Case study: RE

RE was refused entry clearance because she had provided evidence of her English language exams showing that she had passed the relevant listening and speaking and reading tests but not the writing test. Reading and writing were not required under the rules and she had achieved more than was required by the rules. She was refused because she had failed the writing test. After she lodged an appeal, and following repeated representations from her legal representatives, the entry clearance manager realised the mistake and withdrew the refusal. But the Home Office refused a refund of the fee because the case had not gone before an immigration judge.

We disagree with the proposal for

[18] House of Lords *Hansard*, 12 October 2011, cols. 1796 - 1808

[19] E.g. in a letter to Fiona Mactaggart MP of 2 October 2013

> *"…an amendment to clarify that where a notice of decision contains a combination of decisions some but not all of which are fee exempt, a fee is due in relation to the chargeable elements of the appeal;"*

Only one fee is payable in any event so the effect of his measure is to remove the exemption in mixed cases. Very many asylum and humanitarian protection cases involve a "mixed" element of rights to respect for private and family life. It would put solicitors, barristers and tribunal judges in an impossible ethical and practical position if they were unable to progress those elements of the case of a person seeking asylum.

Question 8: Do you agree with the proposal to introduce a 10% discount for applications lodged online? Please give reasons.

We do not object to any reduction in fees. For the reasons given above, we consider that the fee applying in the majority of cases is too high.

A significant number of those making applications in the Immigration and Asylum Chambers will not be able to benefit from the discount, in particular either because they are impecunious or detained and as a consequence do not have access to the internet. Thus, the exemption is unlikely to benefit those in greatest need and should therefore not be taken into account when calculating the cost benefit of any costs recovery scheme.

Further, there is no provision for fee remission when applying on-line; if the desire is to encourage on-line applications this must be addressed.

Question 9: Do you agree with the Government's proposal to revise the scheme of exemptions for the Immigration and Asylum Chamber, including the proposal to exempt from fees those individuals appealing against a decision to revoke their refugee and humanitarian protection status? Please give reasons.

ILPA agrees with the proposals for saving provisions and with the proposal to exempt appeals against refusals of refugee and humanitarian protection cases from fees.

We agree with the proposal for

> *"…a widening of the exemption provisions so that they clarify the interpretation of the exemption for those in receipt of support under section 17 of the Children Act and to include an additional exemption for proceedings relating to children supported under section 20 of the Children Act 1989."*

ILPA does not agree with the proposals to require fees in other appeals under the Immigration Act 2014. Under that Act, rights of appeal other than in protection cases are limited to cases in which it is alleged that the decision breaches a person's human rights or rights under the EU treaties.[20] There is no legal aid for immigration cases and all those who currently do not have leave do not have permission to work in the UK or any access to public funds, other than in where they receive asylum support.
The Government proposes[21] to bring before parliament an immigration bill that will affect rights of appeal extending provisions that a person facing removal may be removed from the UK for the duration of his/her appeal (with return at State expense if the appeal succeeds). Asylum support is currently

[20] Section 15.
[21] See e.g., Policy Paper Queens Speech 2015: what is means for you https://www.gov.uk/government/publications/queens-speech-2015-what-it-means-for-you/queens-speech-2015-what-it-means-for-you#immigration (accessed on 15 September 2015).

under review[22] with proposals to exclude more persons from support. Thus the class of persons who will be denied support if these proposals are brought into effect will be greater than the class of persons contemplated at the time when this consultation paper was prepared and will, if the proposals set out in the consultation paper come into effect, include families with children. It is proposed that the power to support persons who have never had an asylum claim is removed and that many persons in the cohort of persons who previously had an asylum claim lose support. These are persons with no recourse to public funds and no right to work. Therefore if the proposals in this consultation paper were applied to them, either they would be unable to access the courts and be denied access to justice or they would be forced into illegal and possibly dangerous and exploitative work to meet court fees. That, we suggest, is not an acceptable foreseen consequence of any government policy.

The current fee remission regime is difficult to navigate. It relies on letters and facsimiles rather than electronic communication. The "exceptional circumstances" test is opaque to the unrepresented. All too often a request for fee remission is met with a repeated demand for payment with no acknowledgement of the case put forward.

Mr Jason Yaxley, then Head of Immigration and Asylum Jurisdictional and Operational Support Team said in his letter on behalf of Ministry of Justice to ILPA on 20 August 2013 that

On the other hand we do accept that there will be some situations where, for instance, the appellant may not be able to afford the fee because they are a refugee child abroad and the sponsor in the UK is in receipt of legal aid. In such a situation it may be appropriate for the Lord Chancellor to exercise his discretion and reduce or remit the fee. But that will depend on evidence being produced to the effect that the fee cannot be paid.

A refugee child abroad and those endeavouring to support him/her may have very limited evidence of means, quite likely not even possessing paper and pen with which to prepare a statement.

Question 10: Do you agree that it is right to increase fees for immigration judicial review applications in the Upper Tribunal?

No.

See above. Many of the persons who stand to be affected are persons who have no current leave, no permission to work and no recourse to public funds. Either they will be unable to pay the fee and will be denied access to justice, or they will be forced into unlawful and potentially exploitative work to pay the fee.

The majority of applicants are detained and/or destitute and in many cases will be facing imminent removal. Finding the funds to pay court fees or completing complicated applications for remission of the fees is complicated by the urgency of these cases. Fees cannot be paid on line and time is of the essence. Insofar as cases are legally aided, they will already have met the legal aid merits threshold and these are the cases in which there will be no overall saving because costs are shifted from one part of the Ministry of Justice to another.

The Ministry of Justice agreed following its consultation on the introduction of fees for immigration appeals that fees should not be charged in Upper Tribunal Immigration and Asylum Chamber. Given that judicial reviews are heard in this chamber rather than in the Administrative Appeals Chamber, not to

[22] Reforming support for failed asylum seekers and other illegal migrants, August 2015. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/451088/Reforming_support_for_failed_asylum_seekers_and_other_illegal_migrants_-_Consultation_Document.pdf (accessed on 15 September 2015).

charge for judicial review there would just as much promote consistency as would equating these with fees in the High Court and ILPA reiterates its call for fees for judicial review in the Upper Tribunal to be abolished

The only justification advanced in the addendum to the 2011 consultation paper for applying these fees to (at that time) fresh claim judicial reviews was the desire "that Claimants should not be worse or better off in respect of fees by the transfer". ILPA does not consider this to be an adequate justification. Individuals seeking to bring judicial reviews do not have a choice of jurisdiction and will not therefore be evading the higher fees in the High Court by issuing their claims in the Upper Tribunal.

ILPA opposes the strike out provision in rule 8(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No. 2698 (L. 15) as amended). Non-payment of fees should not result in automatic strike out of judicial reviews. ILPA considers that it is wrong for judicial reviews in this chamber to be treated more severely than other judicial review claims in the Upper Tribunal. These claims raise extremely important issues. The applicants making the (complicated) applications for remission of fees will often be detained or destitute. The powers of the Upper Tribunal to strike out a claim for failure to comply with an 'unless order'[23] are sufficient to deal with cases of failure to pay by those who are in a position to do so. This approach provides an essential procedural safeguard that an applicant will be given a 'final warning' that if s/he does not comply with a direction to pay the court fee, his/her claim will be struck out.

It would be helpful if the Ministry of Justice looked at how many unrepresented appellants have managed to apply for fee remission and, if they have applied, whether they have been successful.

Question 18: We would welcome views on our assessment of the impacts of the proposals for further fee increases set out in chapters 3 and 4 on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

Under paragraph 2 of Schedule 18 to the Equality Act 2010, in matters relating to immigration control, public authorities carrying out immigration and nationality functions as defined do not have to have due regard to the need to advance equality of opportunity in respect of the protected characteristics of age, race or religion or belief, with race meaning race so far as relating to nationality, or ethnic or national origins. They do, however, have a duty to have due regard to such a need as far as the other protected characteristics are concerned, including matters that may be relevant to immigration applications such as sexual orientation, or matters that may affect a person's ability to produce documents such as disability, including on mental health.

Some communities have higher proportions of people subject to immigration control than others and they will be particularly affected. There are higher refusal rates for some nationalities than for others and people will lose money.

The Equality Impact Assessment in the 2011 consultation Fees in the High Court and Court of Appeal Civil Division' (CP15/2011) acknowledged that the proposals were likely to affect ethnic minority groups more severely because of the high percentage of the workload of both the High Court and the Court of Appeal which involves immigration and asylum matters. It was stated therein:

[23] Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2008/2698 (L 15), rule 8(3)(a).

Legal types of cases affected
Due to the wide variety of fees included in these proposals, the types of case affected will also vary.

In particular, both issue fees and hearing fees are applicable to any general claim issued in the High Court, and appeal fees are applicable to every type of appeal. However, in some specific cases we can ascertain more information about the impact on protected groups by type of case:

Appeals in the Court of Appeal
Of 1,180 appeals in the Court of Appeal Civil Division in 2010, 302 originated in the Immigration and Asylum Tribunal2. It is likely that these cases involved an applicant from a minority ethnic group; this equals 26% of all appeals in this court. This could indicate a potential adverse impact in relation to ethnicity for increases to appeal fees.

Judicial review in the High Court

Of 10,548 judicial review applications received by the Administrative Court of the High Court in 2010, 8,122 concerned immigration or asylum issues; this represents 77% of the total. It is likely that these cases involved an applicant from a minority ethnic group; this could indicate an equality impact in relation to ethnicity for increases to judicial review fees.

Applications for urgent hearings in the High Court

Based on accounts given by High Court staff, a substantial proportion of urgent applications in the High Court concern deportation proceedings, which are likely to involve an applicant of minority ethnic origin. While we can't quantify this number as urgent applications are not currently subject to separate fees, it is possible that there could be an equality impact in relation to ethnicity for this proposal.

Many of these cases will also involve people who are at risk for other reasons, such as mental and physical health problems. Those with special needs may require the same services from the State as others, but they require that the State do more to ensure that they get them.

The 2011 Equality Impact Assessment expressly acknowledged that the Government did not have the information available to it to enable it properly to analyse the impact of the proposals on protected groups. We are not aware of substantive research in the meantime and indeed, in the context of legal aid changes, there has been substantial criticism of the Ministry of Justice for its failure to obtain adequate evidence as a basis for its policy making.[24]

We refer you to the document Impact Assessment[25] of reforming immigration appeal rights which the government prepared for the Bill that became the Immigration Act 2014. The "sensitivity analysis" therein[26] predicted some 5,600 potential cases that may launch a judicial review and up to 1000 could go to a full hearing. These will all involve persons under immigration control, i.e. persons who are not British citizens. Given the high proportion of the work of the Administrative Court and Court of Appeal which involves immigration and asylum cases, and that the only other part of Her Majesty's Courts and Tribunals Service which will be affected by these proposals in the Immigration and Asylum Chamber of the Upper Tribunal, it is difficult to avoid the conclusion that these proposals will have the effect of excluding persons under immigration control from access to justice.

[24] See discussion in response to question 1 above.
[25] HO0096.
[26] See Sensitivity Analysis: Option 2, text surrounding table 6.

We refer you to ILPA's evidence on the changes to legal aid and also to our briefings on the appeals provisions of the Bill that became the Immigration Act 2014.

ILPA (18 September 2015)