Consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)

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 organizations. ILPA is represented on user groups of the Immigration and Asylum Chambers and on the Administrative Justice Forum.

Question 1: Do you agree with the fee charges proposed in the First-tier Tribunal as set out in Table 1? Please give reasons.

No.

We do not agree with the proposed increase to the fees to approximately six times the current levels. The Impact Assessment estimates that appeals will fall by 20% if the proposals are implemented. In the Employment Tribunals appeals fell much further than anticipated following the introduction of fees, as discussed below. Nothing in the consultation paper or impact assessment persuades us that it will be only those who do not have a good case who will not appeal if the proposals are implemented. Given the subject matter of the only remaining appeals before these chambers, that will mean persons not appealing decisions which may result in their being returned to face persecution, or in breach of their human rights or rights under EEA law.

In December 2015, the government indicated its intention to implement the proposals contained within the July 2015 Consultation on Court and Tribunal Fees (further fees proposals)[1] to increase fees in the Immigration and Asylum Chamber of the First-tier Tribunal by 25%. Less than six months later come these proposals which, as detailed below, not only do not rely on changes since that time for their justification but fail to take account of such changes.

In the ministerial foreword to the July 2015 consultation the Minister, Shailesh Vara MP wrote:

> *'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.'*

The proposals in this consultation 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

[1] Available at https://www.gov.uk/government/consultations/enhanced-fees-response-and-consultation-on-further-fee-proposals (accessed 26 May 2016).

increase State impunity and mean that the State would not be held to account for unlawful actions or omissions.

The only matters for which there remains a right of appeal following the coming into force of s. 15 of the Immigration Act 2014, subject to transitional provisions as set out in the Immigration Act (No. 3) Commencement, Transitional Provisions and Savings Order 2014 (SI 2014/2771 (C. 17)), and the Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015/ 271 (C. 18)) are cases in which a person has applied for international protection or where such protection is revoked, cases brought on the basis of human rights and cases brought on the basis of EEA law. The consequences of a wrong initial decision in these areas is grave indeed and puts the UK in breach of its international obligations under the 1951 UN Convention Relating to the Status of Refugees and its 1967 protocol, under the European Convention on Human Rights and under EEA law.

The impact assessment published with the consultation uses data from 2014-2015. This is before cases affected by changes to rights of appeal effected by the Immigration Act 2014 were reaching the Tribunal, in significant numbers.

Prior to the changes a whole range of business immigration "Points-based system" cases carried a right of appeal, many of which imposed requirements as to minimum income/investment and all of which required the person to demonstrate that they would not have recourse to public funds. The figures in the impact assessment based on 2014-2015 management information, show that of 77,170 applications for oral appeal at the First-tier Tribunal, 59% paid the full fee and 35% had the fee remitted or were exempt[2]. A comparison between the cohort of cases going through the Tribunals in 2014-2015 and those going through the Tribunals now will demonstrate that a much greater proportion of cases are now from the class in which fees were remitted or a waiver given.

Transitional provision and delays in listing make it wholly unreliable to rely on data from before 2016-2017 and there are still cases under the old provisions pending before the Tribunal. That this has not been appreciated, despite its having been flagged by ILPA and possibly by others in responses to the 2015 consultation, must cast doubt on all aspects of the impact assessment and the coherence of the policy behind the proposals, all the more so in the light of recent criticisms of Ministry of Justice impact assessments[3]. See Rights of Women's response to this consultation, for further details.

Because of these changes, it is unreliable to take the effect of former fee increases as relevant to an assessment of the likely effect of the proposed increases. It is also unreliable to treat the drop in appeals for money claims following fee increases as relevant, as the impact assessment purports to do. Even if either of these figures were meaningful, setting the likely effect of fee

[2] See https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/impactassessment.pdf.

[3] See the National ~Audit Office, *Implementing reforms to civil legal aid,* November 2014; House of Commons Public Accounts Select Committee HC 808 *Implementing Reforms to civil legal aid, 36th Report of session 2014-2015.* See also ILPA's letter of 7 August 2015 protesting the poor quality of 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 Krishnamurthy and Karen Moreton, part of the Ministry of Justice Analytical series, published on 3 August 2015. We wrote "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 misleading and gives rise to ambiguity throughout..." A response to that letter is awaited.

increases at a point mid-way between them is arbitrary. The impact assessment sets out how the guesswork has been done; it does not inspire confidence that these are educated guesses.

Further doubt is cast on the Impact Assessment by the failure to have predicted the effect of fee increases in the employment tribunal. The trends are outlined in the latest statistics, for the fourth quarter of 2015, published 10 March 2016[4]. They are continuing. The Office for National Statistics says in the 10 March 2016 release that single claims before the Employment Tribunal (as opposed to actions by multiple employees against an employer):

> *…gradually decreased from nearly 5,000 in October 2012 to just under 4,000 in June 2013. The number rose to just over 6,500 in July 2013, possibly as more claims were submitted prior to the introduction of fees. The number of single cases then fell sharply to 1,000 cases in September 2013, and averaged around 1,500 cases between October 2013 and December 2015.*

ILPA repeats its response to the July 2015 consultation[5]. The reasoning applies with all the more force given the changes described and that the current proposals, which envisage much larger increases.

The level of proposed fee increases will put access to justice beyond the means of many. The proposed increases should be considered in the context of the removal of immigration from the scope of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the reduction of appeal rights by the Immigration Act 2014, high application fees (which are not refunded if refused), and the failings of the exceptional funding system[6].

With this in mind, groups of persons who risk being particularly affected include:

- Those without leave to remain (and so no permission to work, access to benefits) appealing on Article 8 grounds;
- Those on low incomes appealing on Article 8 grounds who have no ability to pay the fees upfront;
- Young people turning 18;
- Detainees;
- the mentally ill;
- the sick;
- families, and in particular, those caring for small children, who currently have to pay a separate fee for each linked application / appeal[7].

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[4] Tribunal and gender recognition statistics quarterly: October to December 2015.

[5] Available at http://www.ilpa.org.uk/resources.php/31391/ilpa-response-to-the-government-response-to-consultation-on-enhanced-fees-for-divorce-proceedings-po (accessed 26 May 2016).

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

[7] In ILPA's view, families should only have to pay one appeal fee. We are aware that the Home Office will sometimes make the decision on a main applicant and dependents contained within one letter, which means only one appeal form has to be completed, however sometimes the Home Office will serve separate decisions for each applicant, regardless of whether or not they are dependants on the application. This essentially gives the Home Office some level of control over what amount of fees will need to be paid by the applicant and dependants in pursuing an appeal, which is clearly inappropriate. Further, the family will still be having one appeal hearing, and they should not have to pay several times over for that hearing. It cannot be an answer to this that there will necessarily be more witnesses in a case involving multiple applicants as this is not a given; an appeal with a single appellant could easily have more witnesses.

Persons in these categories are in no position to find such large sums of money in a context in which application fees, court fees and disbursements must all be paid alongside any attempt to pay for legal advice and representation.

In the migration context, people who have no ability to pay to appeal against an adverse immigration decision risk being driven underground and/or being forced into illegal or exploitative work. These concerns are particularly acute in the cases of children and young persons turning 18.

> *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.*"[8]

As to whether these groups will be protected by fee waivers, the efficacy of any such protection will depend on the precise terms and scope of any fee remission scheme. The process and evidential requirements of fee waiver schemes may prove a significant disincentive to pursuit of their claims. We discuss this below.

If people are unable to pay the appeal fee, and do not qualify for a fee waiver, then they will simply not be able to appeal. The result will be fewer people appealing against Home Office decisions, a proposition which has been accepted by the government: a 20% to 40% reduction in the uptake of appeals is anticipated in the Impact Assessment accompanying the proposals[9]. It has not been shown that a corresponding percentage of appeals are totally without merit or vexatious and this would be a difficult proposition to sustain given the relatively high success rates in migration appeals[10]. Therefore we see no basis for the conclusion that there will be no negative impact on access to justice as a result of the proposals.

The level of the proposed fees means that access to justice will be affected. The same legal principles set out in the *Unison* case apply to the proposed fee increases in the Immigration and Asylum Chambers. That Article 6 of the European Convention on Human Rights has been held not to apply to immigration and asylum cases[11] does not alter the analysis since, as recognised by the Court of Appeal in *Unison,* the same principles are implied in Articles 3 and 8 of the European Convention on Human Rights and under common law. As such, if a decline in the numbers of appeals brought is partly accounted for by claimants being unable to afford to bring proceedings, the level of fees and/or the fee remission criteria will need to be revisited.

In terms of the lawfulness of the proposed increases, fees must be proportionate as a matter of effective access to justice under the European Convention on Human Rights, European Union law and also domestic common law (see recent summary *per* Underhill LJ in *R (Unison) v Lord*

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[8] "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

[9] Impact Assessment MOJ005/2016, available at https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/impactassessment.pdf (accessed 26 June 2016).

[10] https://ukaji.org/2016/04/28/allowed-appeals-and-initial-decision-making/

[11] *Maoouia v France*, European Court of Human Rights, Application no. 39652/98.

Chancellor [2015] EWCA Civ 935: a challenge to the introduction of fees in the employment tribunal, currently pending before the Supreme Court).

There may be human rights cases in which the European Court of Human Rights holds that a person cannot be required to exhaust domestic remedies by appealing to the highest court which can be seized of the case in the UK before having recourse to the European Court of Human Rights because such a remedy is not accessible to them because of the fee.

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 *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, has emphasised that the proportionality of any barrier to access to justice must be assessed *inter ali*a 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.

Finally, 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 to the Legal Aid Agency. 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, 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.

We are unclear what is proposed in respect of persons seeking international protection. The consultation paper states at paragraph 44 that a fee can be 'deferred' if an appeal is brought on the grounds that the appellant is a refugee. What does this mean? Does it mean that no fee would be payable upfront but that it will become payable at a later stage? The recognition of persons as refugees gives effect to the UK's international obligations under the 1951 UN Convention relating to the status of refugees and its 1967 protocol. It also gives effect to obligations under EU law[12]. In very many cases of applications for international protection, the appellant will qualify for legal aid, but it cannot be assumed that this will be the case for all. Worries about repayment would then hang over a person recognized as a refugee, just at the time when they should be able to start to rebuild their lives, crawling out from under the weight of the social exclusion they have suffered as persons seeking asylum. What implications would inability to pay the deferred fee have for future in-country, entry clearance or settlement applications?

Question 2: Is there merit in us considering an exemption based on the Home Office visa fee waiver policy? If so, do you think there should be a distinction between in country and out of country appellants? Please provide reasons.

The task is to create a fair system of appeal fees, not to create an unfair system and rely solely on a system of fee remission for fairness.

The lawfulness of the proposed fee increases will depend on the inclusivity of the exemption scheme.

[12] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

A remission scheme must be based on financial circumstances and it must be sufficiently clear to enable individuals to know at the time of application for the waiver whether or not they are eligible.

We agree with the proposition set out in paragraph 47 of the consultation paper that all those who qualify for a fee remission under the Home Office scheme should benefit from a fee remission before the Tribunal. This will not, however, provide a comprehensive system of fee remission.

The Home Office scheme has been designed against a backdrop of exceptions and reduced fees which it does not therefore cover.

Those making an application for asylum or based on Article 3 of the European Convention on Human Rights do not a pay a fee to the Home Office. They should not pay a fee to appeal. As described above, it is unclear what the reference to "deferred" fees in asylum cases means.

EEA nationals pay a fee to the Home Office designed to reflect the fee paid for a passport and thus not based on full costs recovery.

Exemptions and reduced fees before the Tribunal should reflect these aspects of the Home Office scheme.

Beyond this, visa fee waiver policy does not provide a satisfactory basis for a fee waiver scheme. It is insufficiently certain. If a person is in receipt of support under section 17 of the Children Act 1989 or of asylum support then they are eligible for a fee waiver but otherwise applicants' finances are assessed by a Home Office caseworker. The Home Office Immigration Directorate Instruction entitled "Fee Waiver for FLR (FP) & FLR(O) forms"[13] sets out the following as guidance on qualifying for a fee waiver:

> "*An applicant will qualify for a fee waiver in the following circumstances:*
> *1. When the applicant has demonstrated, by way of evidence, that they are destitute. (As set out more fully below, a person is deemed to be destitute for these purposes when they do not have adequate accommodation or any means of obtaining it; and/or they cannot meet their other essential living needs); or*
>
> *2. When the applicant has demonstrated, by way of evidence, that they would be rendered destitute by payment of the fee, because whilst they have adequate accommodation and can meet their essential living needs:*
>
> *a) They have no additional disposable income such that they could either:*
>
> *(i) pay the fee now; or*

[13] April 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf

(ii) save the required amount within a reasonable period (12 months) (and it would be reasonable in all the circumstances to expect the applicant to delay their application for this length of time);
in either event, without compromising their ability to accommodate themselves adequately or meet their other essential living needs; ***and***
b) They have no ability to borrow the required amount from family or friends; ***and***

c) There is no basis for concluding that the applicant's financial circumstances are likely to change within a reasonable period (12 months) (and it would be reasonable in all the circumstances to expect the applicant to delay their application for this length of time); or

3. The applicant has demonstrated, by way of evidence, that notwithstanding the fact that neither 1. nor 2. apply, there are exceptional circumstances in their case such that the fee waiver should be granted. The 'exceptional circumstances' relied on must relate to the applicant's financial circumstances and their ability to pay the fee. For further guidance on 'exceptional circumstances' see Section 4.10 below."

That official is being asked to determine on a case by case basis whether not to waive the fee would lead to a breach of human rights, a matter considered by the courts in the case of *R(Osman Omar) v SSHD* [2012] EWHC 3448 (Admin)[14]. This creates uncertainty and a significant number of these assessments have subsequently successfully been challenged by commencing proceedings for judicial review. This in no way assists access to justice and is a disproportionate way of operating a system of fee remissions. Instead, a scheme should be devised that will avoid both breaches of human rights and fine judgments as to whether human rights are breached or not.

One ILPA member writes

In the few instances where I have helped with or advised on a fee waiver application, the Home Office has never accepted it first time round, it has always asked for more information or evidence.

Case study re: Home Office exemption scheme

Mr J was a man whose claim for asylum had failed. He had two children by a woman settled here, but the relationship broke down. When he got legal advice about applying to remain as the parent of children here, he had no way of paying the Home Office fee. He applied for a fee waiver and sent in his bank statements (which had no recent activity as he had no recent money) and a letter from his friend about sleeping in the church, and his own bank statement, showing that he is on benefits and has no spare money. The Home Office returned the application, stating it was not satisfied he was destitute and that it wanted to see all the bank statements from Mr J's two bank accounts. They had not realised one bank account was his friend's, or that they already had all the details of the lack of transactions on his own. This had to be spelled out to the Home Office along

[14] See also GR v Netherlands ECtHR Application no. 22251/07. *R (Witham) v The Lord Chancellor* [1997] EWHC Admin 237 and *Gudanaviciene* [2014] EWCA Civ 1622 are also in point.

with further confirmation from the homeless day centre before they finally agreed to a fee waiver. His application to stay as a parent is still pending.

There are costs associated with processing applications for fee remissions. In classes of case where a high proportion of appellants are likely to qualify for a fee remission, it would be more efficient, as well as not carrying the same risks as far as access to justice is concerned, not to impose the fee in the first place. In October to December 2015, there were 5,300 Employment Tribunal issue fee remissions requested. Of these, 3,500 (66%) cases had the full issue fee paid outright whilst 1,400 (25%) cases were awarded either a full or partial issue fee remission. For the remaining 400 (8%) cases, it appears that the claim was not taken further. The proportion awarded full or partial issue fee remission increased by five percentage points compared to the same period in 2014 and is the highest since fees were introduced.

Question 3: Do you believe that there are alternative options that the Ministry of Justice should consider in relation to the fee exemptions scheme in the Immigration and Asylum Chamber of the First-tier Tribunal?

All those who are exempt from fees under the visa fee waiver policy should be exempt from fees for appeals. As should all those whom the Home Office does not require to pay a fee. But there are alternative options which, in our view, are preferable to the visa fee waiver policy.

Any fee remission scheme enacted in the Immigration and Asylum Chamber must be sufficiently simple, clear, user friendly and quick to complete that it does not act as a deterrent in its own right, unrelated to the merits of the claim. Individuals should be able to know from looking at the terms of the scheme itself, whether or not they will qualify.

A person who has been granted legal aid should be exempt from paying the fee . There is a need to deal with applicants who have made applications for exceptional funding from the Legal Aid Agency. Liability to pay a fee should be deferred until a decision has been taken on an application for exceptional case funding. Following that a person they should be provided with a period in which to try to find the fee themselves if necessary.

Similarly liability to pay a fee should always be deferred until there is a decision on an application for fee remission and if the application is refused, the person be given a period in which to find the fee.

Allowance should be made for appeals where more than one fee is payable. Only one fee should be payable where members of the same family appeal against decisions turning on the same factual matrix and same legal arguments. This is proportionate since Tribunal processes and hears such appeals together and the costs are not the same as in the same number of separate appeals.

It would be sensible to include in any list of passporting means-tested benefits asylum support, under sections 4 and 95 of the Immigration and Asylum Act 1999 and the support which will replace section 4 when the Immigration Act 2016 comes into effect: support under s 95A of the Immigration Act 1999 and under paragraphs 10A and 10B of Schedule 3 to the Nationality, Immigration and Asylum Act 2002. Those entitled to such support are "destitute" or about to become so and will thus all qualify under the low income limbs of any test.

The fee scheme in general should be incremental: there should be a small payment made at the initial paper application stage, followed by the balance to fall payable closer to the hearing. There are several reasons for adopting this approach.

The first relates to the government's rationale for the proposed increases, that fees should cover costs. Costs at the date of the lodgement of the appeal will be small, and the fee payable at this stage should be a corresponding sum, with the balance due before the oral hearing. An incremental approach to the payment of fees reflects how costs are incurred by the Tribunal.

Secondly, given the high level of the fees and cash flow problems identified in our answer to question 1, this provides appellants who are not eligible for fee waiver with additional time in which to get the rest of the appeal fee together. Timescales in the Immigration and Asylum Chambers of the Tribunal are very tight and appeals must be lodged in days.

Thirdly, given the extensive delays currently being experienced between the appeal being lodged and the hearing taking place, it is possible that an appellant's position may have changed with the effect that it is no longer necessary to pursue the appeal. If they have already paid a substantial fee up front, there will be little incentive for them to withdraw, however if they can avoid paying the larger fee, then they are likely to seek to do so. The Employment Tribunal appeal fee scheme is administered in this way, with the fee being split into an issue fee and a hearing fee[15]. This scheme should also make provision for an issue and a hearing fee.
Aside UK Visas and Immigration's scheme, discussed above. Other models for a scheme include:

- The First-tier Tribunal (Immigration and Asylum Fees Order 2011 (SI 2011/2841)
- Her Majesty's Courts and Tribunals Service' EX160 scheme which operates in other tribunals.
- Other existing schemes, for example that used by the Legal Aid Agency which is based on net disposable income.

The exemptions in the 2011 Order which continue to be relevant under the new system of appeals should be maintained, but the extent of changes since 2011 is such that the order cannot be used as a basis for a new scheme. Moreover, the scheme is not clear and transparent. One member described it as "esoteric".

The starting point for a scheme of fee remission should be one based on Her Majesty's Courts and Tribunals Service form EX160 which provides for both full and partial remission of the fees, and applies to those both within and outside the UK.

The EX160 scheme considered by the Court of Appeal in *R (Unison) v SLC* [2015] EWCA 935 applied a disposable income test. The current scheme does not do so directly. It looks at gross income, at receipt of specified benefits and finally at exceptional circumstances, the limb of the test in which account can be taken of net income. Exceptional circumstances are already a ground for remission or reduction of the fee under s. 7 of the 2011 Fees Order. Those with greater than the specified permissible income and capital under the scheme must look to the exceptional circumstances element of the test. We consider that the question of the way in which the EX160 Scheme should take account of net income should be examined across all tribunals.

[15] See https://www.gov.uk/employment-tribunals/make-a-claim (accessed 26 May 2016).;

The EX 160 scheme whatever scheme has the advantage of treating persons in the Immigration and Asylum Chambers in the same way as persons before other tribunals.

Aspects of the EX 160 scheme which should be adopted whichever scheme is chosen are its simplicity and clarity and that it provides for the fee to be refunded within three months, if the person subsequently demonstrates that s/he was eligible for a fee remission at the time they paid the fee.

Form EX160 sets out specific levels of income which will mean someone is eligible for the waiver, so that people can clearly ascertain whether or not they can get a full or partial fee waiver at the point of asking for one. In relation to partial fee remissions, a calculator is provided so that appellants can see exactly how much they would need to pay[16].

Form EX160 contains the following gross income thresholds for full and partial remissions, respectively:

Gross monthly income thresholds – full remissions

Gross monthly income with:	Single	Couple
No children	£1,085	£1,245
One Child	£1,330	£1,490
Two Children	£1,575	£1,735
£245 for each additional child		

Gross monthly income cap thresholds – partial remissions

Gross monthly income with:	Single	Couple
No children	£5,085	£5,245
One Child	£5,330	£5,490
Two Children	£5,575	£5,735
£245 for each additional child		

Her Majesty's Courts and Tribunals Service does not make deductions from the income. This is why its sums are lower than in a disposable income test.

The Legal Aid Agency's test provides a threshold of £2,657 but this applies for a single person all the way up to a family with four children. The income threshold for this family under the Her Majesty's Courts and Tribunals Service scheme is £2,222. The Legal Aid Agency uses a disposable income threshold of £733 and taken off deductions for housing (up to £545), tax and National Insurance, employment expenses of £45 and deductions for partners of £181.91 and £291.49 per child to get to the final figure. Large families may be particularly affected by any fee remission scheme based on a gross income test.

[16] https://hmctsformfinder.justice.gov.uk/HMCTS/GetLeaflet.do?court_leaflets_id=2835

The consultation paper states at paragraph 37:

> *The general HMCTS remissions scheme does not apply in the First-tier Tribunal (Immigration and Asylum Chamber). Historically this has been as a result of the difficulty in assessing the income of individuals who may be based outside of the United Kingdom in many cases. This difficulty could be exacerbated if the changes to the non-suspensive rules governing many types of appeal right contained in the Immigration Bill, which is currently before Parliament, are implemented. If these changes are made, it will mean that individuals may be removed from the country before their appeal is heard.*

Under ss. 92 and 94B of the Nationality, Immigration and Asylum Act 2002 as inserted by s. 17 of the Immigration Act 2014, an appeal may be certified, obliging the person to pursue the appeal from outside the UK, before the person has appealed or after the appeal has started. In the former case, although the appeal is "out of country" the person was in the UK when the fee had to be paid. In the latter, they must nonetheless lodge their appeal within 28 days of leaving the UK. While the provisions apply only in deportation proceedings at the moment, s. 63 of the Immigration Act 2016, not yet in force, will extend its application to all cases. We do not envisage insurmountable difficulties over and above those that apply to persons in-country, in assessing the income of such persons.

While it is possible that a person might have found, and not declared, cash in hand employment obtained on arrival at destination, this is also possible in the UK. Living expenses may be cheaper or more expensive overseas, but there is likely to be capital expenditure associated with setting up in another country. Earnings may fluctuate wildly immediately following return.

Anyone who qualified for a fee waiver on the basis of their income pre departure should be treated as qualifying. In other cases, up to date evidence can be required and supplied from overseas. The burden is on the person requesting the fee waiver to satisfy those imposing the fees and granting a waiver that they are eligible for a waiver. Barriers to access to justice are created if there is no system of fee remission for persons overseas. For example where a currency is weak or wages low relative to the UK a person may have no ability to pay.

As to entry clearance cases raising human rights, the only class of entry clearance case in which an appeal can now be brought, we suggest that the Ministry of Justice examine carefully up to date figures which take account of the effects of appeals regime introduced by the Immigration Act 2016 to determine how many of these there are. In applications under the family immigration rules, the family will already be being required to prove their means. If this could not be done then the Home Office would be in no position to apply the Immigration Rules to the decision on the entry clearance application. It would also be useful to look at the number of cases in which it is anticipated that the question of fee remission will arise. We anticipate that in very many of these cases the family income makes it unlikely that there will be an application for a fee waiver. In refugee family reunion cases, no fee is payable to the Home Office and, as we understand the proposals, no fee will be payable for this appeal.

In addition to thresholds in any scheme, there should be a residual discretionary power to waive fees in respect of those whom payment of the fee would cause undue hardship.

In so far as a scheme does not, whether by operation of a residual discretion or otherwise, make provision for net disposable income to be taken into account in considering a fee waiver, it may be necessary to consider means tests which endeavour to measure net disposable

income. If this is done then there should be specific guidance as part of a fee waiver scheme to what level of disposable household income will mean that the fee should be waived. Disposable income must be calculated with reference to the timescales of an immigration appeal. It should not be calculated by reference to third party support because it is not possible for the tribunal to police the terms of repayment, which could be exploitative. To ask a person to evidence that they cannot obtain third party support is to ask them to prove a negative, potentially within a very short timescale, and will give rise to evidential problems and attendant injustice. We refer you to the response of Rights of Women for further discussion of this point.

Question 4: Do you agree with our proposal to introduce fees at full cost recovery levels in the Upper Tribunal? Please provide reasons.

No.

We repeat our answer to question 1. These arguments apply with greater force in relation to onward appeals, where a right of appeal only arises insofar as there may be a material error of law. It is in the interests of justice, therefore, for these errors to be corrected on appeal and it is not justified to require the parties to meet the full costs of putting right a lower tribunal or 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[17] 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[18] .

Given that Upper Tribunal judgments may be reported and often 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.

A system of awarding costs if an appellant succeeds on appeal to the Upper Tribunal would not offer sufficient protection because not everyone can afford the costs in the first place. Under the proposals an appellant who has an oral hearing in the First-tier Tribunal, has permission to appeal refused by the First-tier Tribunal, is granted permission by the Upper Tribunal and succeeds before the Upper Tribunal will have paid £2115 in fees. This is beyond the means of many appealing in this chamber.

Question 5: Do you agree with our proposals to introduce fees for applications for permission to appeal both in the First-tier Tribunal and the Upper Tribunal? Please provide reasons.

No. We repeat our answers to questions 1 and 4. For the reasons given, the levels of fees, £455 and £350, for an oral renewal will result in persons not appealing or not renewing an application which has been wrongly rejected.

[17] 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).
[18] Paragraph16.

Question 6: Do you believe that alongside the fees proposals in the Upper Tribunal, the Government should extend the fee exemptions policy that applies in the First-tier Tribunal to fees for appeals to the Upper Tribunal? Please provide reasons.

For the reasons given above, fees should not be introduced in the Upper Tribunal and fees in the First-tier Tribunal should not be increased. If, contrary to our representations, fees are increased and fees are introduced in the Upper Tribunal then there should also be provision for a fee waiver there.

In addition to the reasoning in our answers to questions one to three, fee remission in the Upper Tribunal is all the more important since the point of the hearing is to rectify the First-tier Tribunal's errors and may involve points of law which have importance beyond the parties and which it is in the public interest to litigate.

Question 7: We would welcome views on our assessment of the impacts of the proposals set out in Chapter 1 on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

The government recognises that there will be an over representation of people with certain protected characteristics among those affected but argues this indirect discrimination is justified and that the proposed changes to fees are a proportionate means of achieving the legitimate aim of protecting access to justice whilst making sure that Her Majesty's Courts and Tribunals Service continues to be funded properly.

We agree that the proposed fees will have a disproportionate impact on certain groups with protected characteristics. For the reasons set out above, we disagree that these fees will achieve the aim of protecting access to justice.

We refer you to the written evidence from the Council of Employment Judges which was provided in response to the Ministry of Justice's internal inquiry into the introduction of Employment Tribunal fees (which has not yet been published[19]).

> "**Summary**
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> *36. There can be no doubt that there has been a decline in cases presented to Employment Tribunals but the EJs' experience that there has been a particularly marked decline in the types of cases brought by ordinary working people, that is, claims for unpaid wages, notice pay, holiday pay and simple claims of unfair dismissal, is borne out by the statistics. The Council considers that there is clear evidence that fees are deterring meritorious but lower value claims, whether they be money claims, unfair dismissal or discrimination complaints where compensation for injury to feelings and lost earnings may be relatively low. High fees deter such complaints and act as a barrier to justice and, in the context of discrimination, undermine the aims of the Equality Act 2010.*

[19] http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2015/courts-and-tribunals-fees-and-charges/

37. Fees have had no impact on weeding out weak claims: if they had done so the number of claims succeeding in front of EJs would have increased significantly. EJs' experience is that misguided but determined litigants remain undeterred by fees. Furthermore, the Council maintains that the claims which are the least costly to the public purse are the short, single money and unfair dismissal complaints; long multi-day cases are the most costly but the hearing fee is the same whether it is a one day unfair dismissal claim or a twenty day discrimination or whistle-blowing claim. It is the latter types of case that predominate since fees, meritorious or otherwise. This calls into question whether the aim of transferring a proportion of the cost of Tribunals to users has been met whereas fees have created a clear barrier to justice for those that need it most (notwithstanding the existence of a remission system)."[20]

Whilst it is possible to draw some comparisons between the introduction of fees in the Employment Tribunal and the Immigration and Asylum Chamber, those appealing in the Immigration and Asylum Chamber are more likely to be disadvantaged than those bringing employment cases. Anyone with an employment claim has an initial, independent, arbitration process to follow in the form of ACAS, whereas there is no such alternative for anyone bringing a case in the Immigration and Asylum chambers Further, whilst those in the Employment Tribunal have three months to gather the funds to pay court fees, the deadline to appeal against decisions in immigration cases can be as short as five days.

No consideration is given to the equality implications of introducing a full recovery model in the Immigration and Asylum Chamber, where those appealing are third country and EEA nationals and where time limits are so tight and not introducing such a model in other tribunals.

Conclusion

ILPA opposes these fee increases which risks denying access to justice to persons would otherwise have appealed decisions which result in in breaches of their human rights. The evidence and reasoning for the changes in the impact assessment is of a poor quality.

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[21]), 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 both increased justice and savings in all cases.

ILPA
3 June 2016

[20] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/courts-and-tribunals-fees-and-charges/written/21948.html

[21] See Professor Robert Thomas *Allowed appeals and initial decision-making,* 28 April 2016 at https://ukaji.org/2016/04/28/allowed-appeals-and-initial-decision-making/ and also 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).