

**Note on Draft Civil Proceeding, First-tier Tribunal, Upper Tribunal and Employment Tribunal Fees (Amendment) Order 2016****Immigration Law Practitioners' Association (ILPA)**

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.

**Draft Civil Proceeding, First-tier Tribunal, Upper Tribunal and Employment Tribunal Fees (Amendment) Order 2016**

The Order provides for:

- 10% increase in certain High Court and County court fees including certain fees for judicial review proceedings in the High Court;
- 10% increase in certain fees in judicial review proceedings in the Upper Tribunal (Immigration and Asylum) Chamber
- Amendments to fees in Employment Tribunal proceedings placing two categories of claim in the lower fee bracket rather than the higher fee bracket.
- Amendments to fees in Magistrates Courts and the First Tier Tribunal Property Chamber.

We set out below reasons for opposing the introduction of increased fees for judicial review proceedings which is the area which falls within ILPA's expertise.

**Importance of access to justice for the rule of law**

Immigration judicial reviews heard in the High Court include:

- Challenges to the lawfulness of detention;
- Challenges to the validity of legislation including incompatibility with the Human Rights Act 1998;
- Challenges related to the inclusion of sponsors on the register of sponsors for the Points-Based System;
- Challenges related to nationality law and citizenship.

Immigration judicial reviews heard in the Upper Tribunal (Immigration and Asylum Chamber) include:

- Judicial reviews of decisions in individual asylum and immigration cases.

In the Ministry of Justice consultation on further fees proposals (July 2015), the Minister, Shailesh Vara MP, acknowledged 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 stated that this is why we need to make sure that the courts and tribunals are properly funded. To achieve this, the Government planned 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.

Imposing increased fees on appellants also adds to the inequality of arms in a system in which in all cases individuals are appealing against government decisions.

### **The reduction of statutory rights of appeal in immigration cases makes access to judicial review even more important**

The Immigration Act 2014 dramatically reduced rights of appeal in immigration and asylum cases. It is no longer possible to bring an appeal to the Tribunal against an unfair or wrong decision in applications for leave to enter or remain as a student, skilled worker or entrepreneur under the Points-Based system.

There is therefore a greater need for full and unencumbered access to the remedy of judicial review which provides the only avenue of independent judicial scrutiny of an incorrect decision made by the Home Office.

The Immigration Act 2014 also provided a power to certify deportation appeals with the effect that, other than in cases based on fear of persecution or ill-treatment abroad, a person can be removed before the appeal is heard if to do so would not breach human rights and rights under European Union law and in particular would not cause 'serious and irreversible harm'.

Section 63 of the Immigration Act 2016 (which is not yet in force) will extend this provision to include all immigration cases not based on fear of persecution or ill-treatment abroad. Such cases will include persons refused because they are held not to meet the income thresholds for family reunion under the immigration rules, or a child refused where there is a dispute over whether the parent in the UK has sole responsibility for them. It will affect young people who were given leave to remain as unaccompanied minors and now, at 17 ½, do not wish to pursue an application for asylum or humanitarian protection but do wish to contend that it would be a breach of their rights to private and family life to be made to leave the UK. It could affect children or adults. It could affect persons considered to be trafficked who have not applied for asylum but have applied not to need leave in the UK for the purposes of their recovery. It will affect all the family members of those removed, including British citizens.

In such cases, judicial review will provide the only remedy to challenge the certification of case as one in which the appeal may be conducted from outside the UK without leading to a breach of human rights including serious and irreversible harm. Access to judicial review will therefore be an essential safeguard against poor quality decision-making in this context and the risk of removal leading to breaches of human rights breaches.

### **The fee increases affect those least able to pay**

The proposed uplift on fees in judicial review applications places the burden of making good the shortfall in revenue on the shoulders of those least able to pay. Those who do not qualify for legal aid may be deterred from bringing a case by the fees involved. People on low incomes risk being forced into potentially exploitative work in order to pay the court fee.

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.

In many cases, applicants 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.

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. Increased fees may act as a barrier to access to the courts for such organisations.

### **There are better, alternative ways to raise revenue for Courts and Tribunals**

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), 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.

### **Future concerns**

The Ministry of Justice has recently launched a consultation proposing significant increases in fees for appeals to the First Tier Tribunal (Immigration and Asylum Chamber) amounting to approximately six times the current fee and the introduction of fees in the Upper Tribunal (Immigration and Asylum Chamber) for applications for permission to appeal. We set out our concerns in relation to these new increases in our response here:

<http://www.ilpa.org.uk/resources.php/32196/ilpa-response-to-ministry-of-justice-tribunal-fees-consultation-on-proposals-for-the-first-tier-trib>