Fee Remissions for the Courts and Tribunals: Response of the Immigration Law Practitioners' Association (ILPA)

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, 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 the Presidents of the Immigration and Asylum Chambers of the Tribunals' "stakeholder" group, on the Legal Services Commission/Law Society Civil Contracts Consultative Group, on the Ministry of Justice Administrative Justice Advisory Group and on many other consultative and advisory groups.

ILPA responded to the December 2012 Ministry of Justice consultation on fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber) [1], which concerned fee remission once legal aid was withdrawn from the majority of immigration (as opposed to asylum) cases. The Government's approach was that the main fee remission system could work for in-country appellants before this Chamber but was not a workable solution for out-of-country appellants and that consequently there needed to be separate fee-remission system for the First-tier Tribunal (Immigration and Asylum Chamber). This is paraphrased in the current consultation:

> *The Government does not propose to extend the remissions system to the First-tier Tribunal (Immigration and Asylum Chamber) … Users of this tribunal largely bring either asylum appeals or appeals against immigration decisions. In the latter category a significant number of appellants reside outside the UK and a remissions system based on UK benefits and income levels would be impractical to operate.* [2]

ILPA advocated that appellants appealing to the First-tier Tribunal (Immigration and Asylum Chamber) should benefit from the same fee remission system as operates for other courts and tribunals, but with special and additional protection to take into account their circumstances, in particular the position of those outside the jurisdiction and not in receipt of UK benefits, etc. Our proposals were not accepted and the Government's position did not change as a result of the consultation.

In the current consultation[3] it is proposed that a unified fee remission scheme be created across all courts and tribunals save for the First-tier Tribunal (Immigration and Asylum Chamber).

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[1] Available at https://consult.justice.gov.uk/digital-communications/fee-remissions-immigration-asylum
[2] *Fee Remissions for the Courts and Tribunals*, Ministry of Justice, CP15/2013, April 2013, paragraph 5.
[3] Ministry of Justice, CP15/2013, April 2013.

ILPA considers that with the introduction of a unified scheme across all courts and tribunals the anomaly of a different position for the First-tier Tribunal (Immigration and Asylum Chamber) is increased and should be revisited. Our response deals specifically only with this point but we consider that the points we make are relevant to the current consultation also. We continue to oppose the imposition of fees in the immigration and asylum appellate system.

Moreover, on 25 June 2013 section 52 of the Crime and Courts Act 2013 will come into force[4]. This removes the right of appeal in family visitor cases thus substantially alerting the caseload of the First-tier Tribunal (Immigration and Asylum Chamber). For these reasons, we ask the Government to revisit the question of fee remission in the First-tier Tribunal (Immigration and Asylum Chamber).

We also wish to take issue with the reasons given in the Government response to the earlier consultation[5] for going ahead with the decision to have a separate scheme for the First-tier Tribunal (Immigration and Asylum) Chamber and urge that these be revisited.

The Government response to the consultation on fee remission in the First-tier Tribunal (Immigration and Asylum Chamber) stated at paragraph 25:

> *25. We acknowledge that we do not know precisely what the accumulative effect will be on those immigration appellants that will no longer receive legal aid (and will not receive any other exemption or will not receive a remission under the Lord Chancellor's power to remit or reduce a fee), so will have to pay a fee or will no longer receive legally aided advice to assist with the appeal process. However, we will keep this under review and revisit when more data is available.*

Data available at this time, when a unified system is being considered, should be taken into account, although we acknowledge that it is early days and little is likely yet to be available. Consideration should be given to how many applications for exceptional cases funding have been received from appellants before the First-tier Tribunal (Immigration and Asylum) Chamber. It would be helpful to look at cases subject to the post-1 April 2013 legal aid funding regime as well as at the generality of cases.

The consultation paper said

> *"It is the Government's view that appellants seeking a visa should be capable of supporting themselves while they are in the UK without recourse to public funds (or are supported by a third party e.g. a family member), and should therefore, in most cases, be able to pay the appeal fee (or are able to have the fee paid for on their behalf) to contribute towards the cost of the administration of that appeal.*[6]

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[4] The Crime and Courts Act 2013 (Commencement No. 1 and Transitional and Saving Provision) Order 2013 (SI 2013/ 1042) (C. 44)).

[5] Ministry of Justice, *Fee remission in the First-tier Tribunal (Immigration and Asylum Chamber),* 18 December 2012, available at https://consult.justice.gov.uk/digital-communications/fee-remissions-immigration-asylum

[6] *Ibid*, paragraph 19.

As set out in ILPA's response, the proposals overlooked several categories of case where there is no requirement for applicants to show they can maintain and accommodate themselves at all, for example, refugee family reunion cases reuniting refugees with members of the family that existed prior to their flight ("pre-flight" cases)[7], or applications to vary discretionary leave to remain. An application to vary existing leave to remain on the grounds of Article 8 of the European Convention on Human Rights may result in a decision to refuse an extension of leave but no corresponding decision to remove the applicant from the UK. If there is no decision to remove and the appellant is not receiving asylum support, there is no automatic exemption from payment of a fee to issue an appeal. Children turning 18 who are not in receipt of funding under s17 of the Children Act 1989 also have to apply for fee remission. As to those whose applications do contain a requirement not to have recourse to public funds: the income levels in the Immigration Rules[8] are about having adequate income to support oneself and one's dependants in the long term in the UK. In practice many of those whose income means that they do not require recourse to public funds will struggle to meet the fees. There are also appellants who may be exempt from the usual threshold for maintenance and accommodation under the Immigration Rules, either as the partner of a sponsor in receipt of a disability benefit,[9] or as the child of someone with settled status when the child is the sole subject of the entry clearance application.[10]

In the Ministry's response to the consultation (26 March 2013,) the Ministry of Justice acknowledged that the consultation paper did not list all of the categories that are not subject to the maintenance and accommodation test[11]. The proposed solution was the making of an exceptional application to the Lord Chancellor.

The making and determination of exceptional applications is more burdensome for both the appellant and the Lord Chancellor than a scheme calibrated to deal with such cases at the outset. It will be seen from the list above that those affected include persons with protected characteristics under the Equality Act 2010 and there is thus concern that having a different approach for the First-tier Tribunal (Immigration and Asylum Chamber) will give rise to breaches of duties under that Act if a scheme has been devised that fails to take account of their needs and if it is more difficult for them to obtain remission of a fee. For full details see our response annexed below.

We also contended that the figures in the consultation were wrong, because the Ministry had considered a limited time-frame and had excluded appeals by European Economic Area (EEA) nationals. The Ministry of Justice responded that there was an 'absence of better statistical information', but based on the data they had, the assumptions were correct. This response is wholly inadequate. ILPA demonstrated, and the Ministry acknowledged, that its figures were wrong. That is known. What is not known is by how much.

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[7] See the Immigration and Nationality (Fees) Order 2011 (SI 2011/445), the Immigration and Nationality (Fees) Regulations 2012 SI 2012/971 and the Immigration and Nationality (Cost Recovery Fees) Regulations 2012 (SI 2012/813) rules, HC 395 as amended, rule 319L ff.

[8] HC 395 as amended.

[9] See for example HC 395, Appendix FM. E-ECP.3.3.

[10] Paragraph 297.

[11] Paragraph 32.

The suggestion in the response to the consultation, that where multiple fees are paid by a family for the same application, those who are unable to afford the fees can make an application for the Lord Chancellor to exercise his discretionary power partially or fully to remit the fee(s)[12], again prefers the option which is more burdensome for the appellant and any legal representative or voluntary organisation assisting him/her and for the Lord Chancellor.

We also highlighted the relationship between the Fees Order and the Immigration and Asylum Appeals Tribunal Fees Guidance[13] about which ILPA had written to the Ministry of Justice on 9 March 2012. In entry clearance appeals it is often the sponsor who is in receipt of the grant of legal aid for practical reasons. The facility for the sponsor to be the main applicant for legal aid recognises that in some cases, depending on the location of the applicant at the time of the entry clearance refusal and the ease with which they can access modern means of communication, there is a real risk of injustice being done if they must be the one applying for legal aid.

The response[14] was that where the sponsor was in receipt of legal aid, some appellants would not be able to pay a fee, but that in others they would, and that this was a matter of evidence in the individual case. The Ministry's response makes reference to the Legal Services Commission's November 2012 *Clarification regarding exemptions from Immigration & Asylum Tribunal appeal fees for appellants in receipt of Legal Aid* and suggests that this had adequately addressed the matter. However, that document says:

> *" Where applications for CLR have been made on behalf of a child under the provisions of B5 of the Funding Code Procedures, and the child is the appellant identified on the CW2 form then the remission from fees will apply despite the child not having been the signatory on the CLR form."*

Whereas the Ministry's response says:

> *"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."*

We suggest that more work is needed to match the two documents. Research should be undertaken to ascertain how many applications for exceptional funding were received from appellants in these circumstances.

As set out in ILPA's February 2013 response, a different system means that appellants are to pay a fee even if they might be entitled to remission of their fee if their case were before a different tribunal. We argued that this was discriminatory and, given the prevalence of protected characteristics amongst appellants before the

[12] Paragraph 24.
[13] *First-tier Tribunal (Immigration and Appeals Chamber) Fees guidance*, Undated http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/online-fees-guidance.pdf
[14] Paragraphs 34 and 35.

First-tier Tribunal (Immigration and Asylum Chamber), a breach of duties under the Equality Act 2010.

The Ministry of Justice responded that there was an internal review of fees taking place but that the proposed approach on fees and fee remission was a 'proportionate means of achieving a legitimate aim', specifically that the availability of the Lord Chancellor's power to reduce or remit fees afforded sufficient protection to those who cannot afford to pay fees.

ILPA proposed that for the First-tier Tribunal (Immigration and Asylum Chamber):

- Any UK-based appellant should be entitled to apply for fee remission using the same system in place for all other tribunals.
- Any out-of-country appellant should be entitled to apply for remission under the category "Remission 1" in the same system in place for other tribunals if their sponsor is in receipt of a means-tested benefit, or any of the benefits in paragraph E-LTRP.3.3 of Appendix FM to the immigration rules, on the basis that the threshold for "adequate" maintenance in all those cases would be no more than the Income Support (or equivalent) level for a British family. The use of the Remission 1 category would of course result in successor benefits to Income Support being taken into account as that system was modified to reflect the benefit system currently in force.
- All children under 18 should be exempt from paying a fee.
- All trafficked persons should be exempt from paying a fee.
- All survivors of domestic violence should be exempt from paying a fee.
- All applicants for refugee family reunion should be exempt from paying a fee.
- All cases where there is no application fee to be paid to the UK Border Agency, either in general or in the particular case (for example domestic violence cases where an applicant has successfully argued for a fee waiver[15]) should be exempt from paying a fee. Such cases include those where either no fee can be charged as a matter of law (for example cases under European Union law) or where it is recognised that to charge a fee might be a bar to justice in the case.[16]

We ask that consideration once again be given to this proposal.

Adrian Berry
Chair
ILPA
May 2013

[15] See UK Border Agency *Victims of domestic violence, requirements for settlement applications,* available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/dv-victims-settlement.pdf
[16] See in particular *R(Osman Omar) v SSHD* [2012] EWHC 3448 (Admin).

ILPA's response to the Ministry of Justice consultation Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber)

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, 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 the Presidents of the Immigration and Asylum Chambers of the Tribunals' "stakeholder" group, on the Legal Services Commission/Law Society Civil Contracts Consultative Group, on the Ministry of Justice Administrative Justice Advisory Group and on many other consultative and advisory groups.

Introduction

ILPA opposes the imposition of fees in the immigration and asylum appellate system. ILPA's concerns have been detailed in our response to the consultation *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal*[17]. The answers to this consultation should be read in light of those comments[18].

We reiterate the following overarching concerns:

- 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, particularly if the proposed changes in the legal aid system are implemented.
- There is a statutory power to prescribe fees set out in s. 42(1) of the Tribunals, Courts and Enforcement Act 2007. The power is not mandatory and its exercise is, in ILPA's view, unjustified in principle and unlikely to operate fairly in practice for the reasons set out here and in our response in 2011.
- The Ministry of Justice has stated that the aims underlying the imposition of fees for appeals in the immigration and asylum chamber is to recoup more of the costs to Her Majesty's Courts and Tribunals Service of running tribunals, to reduce the subsidy currently provided from taxes and to transfer more of the cost of the service to those who use it.[19] ILPA argued that there are more cost effective ways to save money in its response to the 2011 consultation.

We raise a particular concern that applicants are disadvantaged in terms of payment of the fee in those cases where the Home Office withdraws the decision against which they are appealing at the door of the court. In such cases, with no decision against which to appeal,

[17] Ministry of Justice, 2011.
[18] *ILPA's response to Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, 21 January 2011, response to questionnaire and covering document* available at http://www.ilpa.org.uk/data/resources/13004/11.01.511.pdf
[19] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber) Consultation,* 18 December 2012, page 3.

there is a longer any pending appeal to be determined. Rule 17(2) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) states:

> "An appeal shall be treated as withdrawn if the respondent notifies the Tribunal that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn.

The result of this is that the appellant, has no chance to succeed before the tribunal and thus to seek an award of costs equivalent to the fee paid, that award to be made against the UK Border Agency.[20]

Presenting Officers are now routinely withdrawing decisions in appeals where the evidence is such as to threaten that the appeal be allowed. However in general it does not appear that the consequence is necessarily a speedy grant of leave but rather a reconsideration which may take a significant period of time (particularly if the matter returns to an entry clearance post). It is happening not only before the day of the hearing, but at the hearing, or even during the hearing – in a recent case the Presenting Officer proposed withdrawing the decision after having heard the evidence because the appeal appeared so strong to them at that moment. One reason may be the target success rates, which can be seen from a recent job description for individuals to present the Secretary of State's case before the Tribunal.[21]

Legitimate reconsideration of a strong case where the evidence for the appeal is very different to that on the application may be pragmatic and desirable, but an institutionalised tactic of preventing litigants obtaining judicial remedies for which they have paid and waited for many months is quite different, particularly when the evidence on appeal is virtually the same as, or no more than a filling out of, that supplied on the application.

In the Immigration and Asylum Chamber of the Upper Tribunal, this problem does not arise, because the Tribunal Procedure (Upper Tribunal) Rules 2008[22] require that the tribunal consent to withdrawal of the appeal.

The imposition of fees for appeals in the First-tier Tribunal Immigration and Asylum Chamber adds impetus to the need to consider such a provision in the rules for the First-tier Tribunal. Proposals for all changes affecting fees should be referred to the Tribunal Procedure Rules Committee to identify how they would sit with the current rules and any rule changes that might be necessary. The implementation of proposals should respect the timescales identified by the Committee as necessary to effect rule changes.

Q1. Do you agree with our proposed approach to fee exemptions and remissions for the First-tier Tribunal (Immigration and Asylum Chamber)? Please give reasons.

No.

ILPA agrees that all current exemptions unaffected by the legal aid changes should be retained and agree that the Lord Chancellor should have the power to reduce or remit fees.

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[20] SI 2005/230 as amended, rule 23A. Decisions to withdraw can only be subject to judicial review if unfair or taken for an improper purpose, see *R (Chichvarkin et anor) v SSHD* [2010] EWHC 1858 (QB) (21 July 2010).

[21] See http://www.barcouncil.org.uk/media/157388/tsol_job_description.pdf

[22] SI 2008/2968 (L 15) as amended, rule 17(2).

However, we disagree with the different fee remission system for immigration appeals (which excludes access to Her Majesty's Courts and Tribunals Service court fee remission system). These proposals will not ensure that the poorest appellants are able to access the Tribunal if they are unable to meet the fee. We also do not consider that adequate fee remission can be achieved without the amendment of the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011[23] to allow exemptions based on the financial position of the sponsor as well as of the appellant in entry clearance cases.

We are unpersuaded that the estimate that 2,500 out of 92,000 appeals will be affected is reliable. We consider that it is an underestimate for the reasons given below.

We emphasise that those appealing to the tribunal and their sponsors will generally be taxpayers and that the opposition the consultation paper purports to set up between taxpayers and those using the tribunal is inaccurate.

- Difference of approach from that in other tribunals

We disagree with the preferred option in this consultation. This would require appellants to pay a fee even if they might be entitled to remission of their fee if the case were before another tribunal. ILPA considers this to be inherently discriminatory. What is at stake is access to justice and no rational basis has been advanced for not giving those appearing before the Immigration and Asylum Chamber access to the same system than operates in any other branch of the tribunal or court system, albeit that supplementary measures may be required to deal with those of limited means but not in receipt of UK benefits, for example because they are outside the jurisdiction. The information and evidence available support users of the Immigration and Asylum Chamber being asked to pay nothing or to pay less than appellants in other parts of the tribunal system, not to pay more.

It is still the case that no fees are charged in other chambers of the First-tier Tribunal, such as the Immigration Services Tribunal, the Care Standards Tribunal and the Mental Health Tribunal and the Tax Tribunal. Appeals before the Tax Tribunal can relate to very substantial and expensive financial disputes, where the means of the parties are often far greater than the means of appellants before the Immigration and Asylum Chamber.

Following a consultation on the introduction of fees in the Employment Tribunal, the Government decided to extend the current Her Majesty's Courts and Tribunals Service civil courts' remission system to employment tribunals and the Employment Appeals Tribunal "to protect access to justice".[24] The question of access to this system was not addressed in the Government's response to the previous consultation.[25] However, it was stated in that response that in recognition of the potential for indirect discrimination the Government would "continue to seek and analyse any new evidence in relation to the equality issues raised in the consultation responses" and "put in place rigorous, regular and early reviews of the impact of these proposals on equality groups in line with Public Duties and analyse and act upon the results of these reviews."[26] The progress with, and outcome of, any such review is not clear from the Equality Impact Assessment and the Ministry of Justice acknowledges it has "a

[23] SI 2011/2841.
[24] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal Summary of Responses,* 13 July 2012, page 9, paragraph 23.
[25] *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, Response to the consultation,* 09 May 2011.
[26] *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, Response to the consultation,* 09 May 2011, page 41, paragraph 177. http://www.justice.gov.uk/downloads/consultations/appeals-fee-charges-consultation-response.pdf

number of gaps in the research and statistical evidence we have been able to source regarding the potential impact of our reforms on a number of protected characteristics".[27]

The main premise of these proposals is that all appellants appealing to the tribunal in an immigration matter are capable of supporting themselves while they are in the UK without recourse to public funds at a level exceeding means-tested benefits and should therefore be able to afford an appeal fee. Paragraph 19 of the consultation paper states:

> *"It is the Government's view that appellants seeking a visa should be capable of supporting themselves while they are in the UK without recourse to public funds (or are supported by a third party e.g. a family member), and should therefore, in most cases, be able to pay the appeal fee (or are able to have the fee paid for on their behalf) to contribute towards the cost of the administration of that appeal. This is reflected in our preferred option for immigration appeal remissions."*

This assumption is incorrect as a matter of fact.

The proposals overlook several categories of case where there is no requirement for applicants to show they can maintain and accommodate themselves at all, for example, refugee family reunion cases reuniting refugees with members of the family unit that existed prior to their flight ("pre-flight" cases)[28], or applications to vary discretionary leave to remain. Many appellants in such cases will be in receipt of public funds or on a low income. An application to vary existing leave to remain on Article 8 grounds may result in a decision to refuse an extension of leave but no corresponding decision to remove the applicant from the UK. The decision could be an immigration decision giving rise to a right of appeal under s.82 (2) of the Nationality, Immigration and Asylum Act 2002 but if there is no decision to remove and the appellant is not receiving asylum support, there is no automatic exemption from payment of a fee to issue an appeal under the Fees Order, unless the appellant receives legal aid.

> ***Case study – X, Y and Z***
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> *Masters X, Y and Z are aged 12, 15 and 17 years old and live in Zimbabwe. Their mother was killed by ZANU PF activists and they live with their elderly grandparents. They are wholly dependent on their father, Mr W, who is a refugee in the UK. Mr W is a student nurse and his only income is a National Health Service bursary and a loan. His partner in the UK is in receipt of maternity pay as she has just given birth and the couple have a new baby to support. The applications for X, Y and Z are refused and they are unable to take advantage of any of the fee exemptions under the Fee Order after April 2013 although they would otherwise qualify for legal aid. Mr W is unable to afford the fees for the appeals because of his low income.*

Children turning 18 who are not in receipt of funding under s.17 of the Children Act 1989 would also have to apply for fee remission. Without a representative to assist them in applying for a discretionary fee waiver, they will be at a great disadvantage.

> ***Ms A*** [to ensure anonymity, this is a hypothetical example, adapted from actual cases] *Ms A is 17 ½. She was trafficked to the UK for the purposes of domestic servitude when she was nine. She managed to escape and claimed asylum when she was 14 years old, was refused and was given discretionary leave to remain until she was 17 ½. Aged 17½ she did not wish to apply for asylum, because she did not fear*

[27] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Initial Equality Impact Assessment,* December 2012, p.17, paragraph 15.

[28] See the Immigration and Nationality (Fees) Order 2011 (SI 2011/445), the Immigration and Nationality (Fees) Regulations 2012 SI 2012/971 and the Immigration and Nationality (Cost Recovery Fees) Regulations 2012 (SI 2012/813) rules, HC 395 as amended, rule 319L ff.

persecution on return to her country of origin. She did however wish to assert a claim to remain in the UK based on her length of residence here and having no ties with her country of origin, relying on Article 8 (right to private and family life) of the European Convention on Human Rights. She made this application and was refused. She wishes to appeal. She is entitled to public funds. She is studying. She has been unable to find part-time work. She is very poor and has so far been unable to save up the fee.

As to those whose applications do contain a requirement not to have recourse to public funds: the income levels in the Immigration Rules[29] are about having adequate income to support oneself and one's dependants in the long term in the UK. In practice many of those whose income means that they do not require recourse to public funds will struggle to meet the fees. For example, the appeal fees for a family of five will amount to some £720, not a sum available to everyone who manages well day to day. The requirement to pay such fees could prevent those on low incomes from accessing justice.

ILPA considers it to be inequitable to require such applicants to apply for fee remission at the discretion of the Lord Chancellor.

It is also contradictory to require applicants for family reunion to pay a fee for an appeal against a refusal of entry clearance, where it is acknowledged that no fee should be required for the application in the first place as there is no maintenance and accommodation requirement for "pre-flight" refugee family reunion under the Immigration Rules. The Entry Clearance Guidance states:

"c) Family reunion costs and charges

Applications for family reunion for pre-existing family members under Part 11 of the Immigration Rules are gratis and the sponsor will not be required to meet any maintenance and accommodation requirements in the Immigration Rules."[30]

There are also appellants who may be exempt from the usual threshold for maintenance and accommodation under the Immigration Rules, either as the partner of a sponsor in receipt of a disability benefit,[31] or as the child of someone with settled status when the child is the sole subject of the entry clearance application.[32]

The Immigration Rules state that when applicants apply for entry clearance to join a partner:

"E-LTRP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of-
(a) a specified gross annual income of at least-
(i) £18,600;
(ii) an additional £3,800 for the first child; and
(iii) an additional £2,400 for each additional child; alone or in combination with
(b) specified savings of-
(i) £16,000; and
(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-LTRP.3.2.(a)-(f) and the total amount required under paragraph E-LTRP.3.1.(a); or

[29] HC 395 as amended.
[30] Entry Clearance Guidance SET 10.1.
[31] See for example HC 395, Appendix FM. E-ECP.3.3.
[32] Paragraph 297.

(c) the requirements in paragraph E-LTRP.3.3.being met, unless paragraph EX.1. applies.

… E-LTRP.3.3. The requirements to meet this paragraph are-
(a) the applicant's partner must be receiving one or more of the following -
(i) disability living allowance;
(ii) severe disablement allowance;
(iii) industrial injury disablement benefit;
(iv) attendance allowance; or
(v) carer's allowance; and
(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds."[33] [emphasis added]

Annex A of the consultation refers to the absence of any "explicit minimum figure for what represents sufficient maintenance" in the Immigration Rules.[34] The provisions that do exist are set out above. However, for those who would fall within the scope of E-LTRP 3.3, and for any child applicant who is not applying for entry clearance at the same time as their sponsor's partner, the relevant threshold for maintenance is "adequacy", which has been held to mean no more than the income support level for a British family of the same size. This derives from a tribunal determination[35] which recognised there should be no discrimination made between immigrant and non-immigrant families when defining the meaning of what was adequate. This is acknowledged in the Entry Clearance Guidance.[36]

Such appellants and their sponsors may face the barriers of disability and in some cases age, language or the impact of trauma they have experienced on top of the challenge of presenting the case without the assistance of a legal representative. Tribunal systems and correspondence are not as user-friendly as they might at first sight appear, especially to those unfamiliar with UK systems and procedures. At present an appellant or their sponsor may have the benefit of legal aid funding to pay for an interpreter to explain the remission system. After April 2013, there will be no such facility. In any other tribunal, a family with an income of no more than the Income Support level would be entitled to fee remission. Not to extend the same rules on remission to immigration appellants discriminates against them.

It is often the case that recipients of disability benefits also receive a means-tested benefit such as Income Support. Such sponsors or appellants would be eligible for legal aid and under the normal Her Majesty's Courts and Tribunals Service fee remission system they would automatically be eligible for full remission based on Remission category 1. This would also be true of a recipient of guaranteed State Pension Credit. A sponsor or appellant in receipt of means-tested benefit should automatically be exempt from fee payment. To do otherwise would risk discrimination, as they would be entitled to fee remission in any other branch of the court system.

The consultation makes no mention of the problems with the relationship between the Fees Order and the Immigration and Asylum Appeals Tribunal Fees Guidance.[37] ILPA wrote to the

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[33] Immigration Rules, Appendix FM, E-LTRP. www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/app-family-members/family-life-as-a-partner/
[34] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber) Consultation*, 18 December 2012, page 17.
[35] UKAIT [2006] 00065 *KA and Others (Pakistan).*
[36] Entry Clearance Guidance, MAA4, www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/maa/#header4
[37] http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/online-fees-guidance.pdf

Ministry of Justice about this on 9 March 2012.[38] In that letter we addressed the issue of entry clearance appeals, where it is often the sponsor who is in receipt of the grant of legal aid for practical reasons. The facility for the sponsor to be the main applicant for legal aid recognises that in some cases, depending on the location of the applicant at the time of the entry clearance refusal and the ease with which they can access modern means of communication, there is a real risk of injustice being done if they must be the one applying for legal aid. For example, allowing the sponsor to apply for legal aid avoids the prospect of an appellant missing an appeal deadline because they could not return a completed legal aid form from a refugee camp in Kenya.

We wrote:

> *"We consider that there needs to be clarification of this basis of exemption because on the one hand the aforementioned guidance and the Order are clearly addressed to the Appellant, i.e. 'You [the Appellant] are in receipt of Legal Aid' whereas in an entry clearance appeal, if that appeal is Legal Aid funded, it is very likely to be the sponsor who is strictly speaking in receipt of Legal Aid. The sponsor will have signed the CLR form as the applicant for that type of Legal Aid funding, though in some cases the Appellant will have to sign the form too, namely cases in which the Appellant is the sponsor's 'partner' (fiancé(e), spouse, civil partner, etc.)"*

ILPA asked the Ministry of Justice to amend the Order and to issue appropriate guidance to make clear that where, in an entry clearance appeal, either the sponsor or the appellant is in receipt of legal aid, the appeal is exempt from a fee. This was in line with the policy intention behind the exemption. The Legal Services Commission has issued guidance clarifying its position.[39] The Ministry of Justice has not yet amended the Order.

When a legal aid assessment is done, the means of an appellant must be taken into account when making a grant of funding to a sponsor, unless the sponsor receives a means-tested benefit. However, a strict application of the Fees Order and the Guidance would mean the appellant would not be eligible for a fee exemption in these circumstances. This is contrary to the policy intention behind the proposals for the introduction of fees, which was that those who could afford to pay, should pay. Those who could not, would be exempt, including those in receipt of legal aid:

> *"We have carefully considered the possibility that introducing fees would cause some potential appellants to forego an appeal because they could not afford the fee. We have therefore decided that those appellants who qualify for Legal Aid will not have to pay the fee themselves."*[40]

The importance of that policy intention is at the heart of the current consultation, paragraph 12 of which states:

> *"We currently utilise the fact that legal aid solicitors establish whether or not appellants meet the financial eligibility criteria for legal aid. If they do and receive legal aid then they are then exempt from paying an appeal fee. This enables us to ensure that the poorest appellants are able to use the Tribunal to determine their appeal."*

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[38] See Appendix

[39] *Clarification regarding exemptions from Immigration & Asylum Tribunal appeal fees for appellants in receipt of Legal Aid,* 23 November 2012.

[40] Ministry of Justice, *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal,* 21 October 2010, page 17.

In ILPA's view, appellants with a sponsor in receipt of legal aid should be entitled to an exemption for payment of a fee on the basis that legal aid funding could not be granted to the sponsor if the appellant's income was too high.

At present, a representative funded by legal aid can assist appellants by making an application for fee remission on their behalf. However, from April 2013, under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, this will no longer be the case.

- **Impact of the proposal**

ILPA questions the statistical basis for the assumptions underlying the Government's proposals. The Ministry of Justice estimates that the number of appeals affected by the removal of legal aid is approximately 2,500.[41] In our view, this figure may be higher and thus the impact of the proposals, greater than anticipated, for the following reasons.

The Ministry of Justice impact assessment focused on the following appeal categories: managed migration, entry clearance officer and family visit visa appeal categories. However, within the projected 2,500 people that the Ministry of Justice calculates will be affected by the removal of legal aid in 2012-2013, the Ministry of Justice has acknowledged:

> *"…we have not explicitly accounted for those appellants that may not pass the UKBA maintenance and accommodation test as the amount of appellants who will be requiring a fee remission is likely to be the same regardless of whether they go through the UKBA maintenance and accommodation test."*[42]

The estimate of 2,500 people likely to be affected in 2012-2013 is based on an estimate using data from the initial stages of the fee exemption process (from 19th December 2011 to 30th June 2012). The data used for the estimate is thus for less than a full calendar year.[43]

The Ministry of Justice has also explicitly acknowledged that it has excluded nationals of the European Economic Area (EEA) and Switzerland and their family members appealing the refusal of documents to evidence their rights of residence, or, for workers from EU accession states, to evidence their rights to work.

In relation to EEA appeals alone, the Ministry of Justice states that figures from UK Border Agency show that approximately 4,000 EEA appeals a year are generated from immigration cases where there is no requirement for the applicant to prove that they will be maintained and accommodated in the UK without recourse to public funds, but says it was not possible to assess how many of these appellants pay a fee and may be affected by the removal of legal aid provision. [44]

The Ministry of Justice has stated that the impact of the proposals in this consultation has been calculated without reference to pending requests for fee remission.[45] We request that the Ministry of Justice provide full figures for the number of pending requests for 2011-12 to give

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[41] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber) Consultation*, 18 December 2012, page 11, paragraph 13.
[42] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Impact Assessment*, November 2012, page 15, paragraph 52.
[43] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Impact Assessment*, November 2012, page 8, paragraph 16.
[44] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Impact Assessment*, November 2012, p.15, paragraph 51.
[45] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Initial Equality Impact Assessment,* December 2012, page 18, paragraph 69.

a more realistic picture of the potential number of appellants who could be affected by these proposals.

We consider that the full impact of these proposals on many impoverished applicants and sponsors will take time to become apparent as cases that would be out of scope from April 2013, but which started at the advice stage before then, slowly work through the system.

During the course of the debates surrounding the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Government made repeated statements about the ability of litigants to access the tribunal system themselves. The Government response to the consultation on the introduction of the Act said:

> *"86. The Government's view is that, in general, individuals in immigration cases should be capable of dealing with their immigration application and should not require a lawyer. Tribunals are designed to be accessible to users. Interpreters are provided free of charge."*[46]

The Minister, Mr Jonathan Djanogly MP, told the Public Bill Committee examining the Bill:

> *"While we appreciate the importance of those matters to the individuals concerned, immigration tribunals are designed to be user-friendly and interpreters are provided free of charge. The issues at stake are generally factual, rather than points of law. Most immigration cases do not routinely justify taxpayer funding, and they are therefore being removed from the scope of legal aid."*[47]

The Lord McNally told the House of Lords at the second reading of the Bill:

> *"Similarly, in areas such as employment, routine immigration applications and welfare benefits issues, legal aid will no longer be available. As noble Lords well know, the original rationale of the tribunals system was precisely to enable people to make their case without the intervention of a lawyer."*[48]

Although ILPA does not agree with the contention that individuals can manage their cases without legal support, we observe that one of the stated justifications for removing legal aid is significantly weakened if appellants are unable to access the tribunal because they cannot afford the fee.

Q2. If you do not agree with our proposed approach to fee exemptions and remissions for the First-tier Tribunal (Immigration and Asylum Chamber), what other approach do you think should be considered and why? Please give reasons.

We do not agree that fees should be charged at all, for the reasons given above and in our 2011 response.

If contrary to our recommendation, fees are to be charged, we recognise the difficulties for the tribunal in assessing the means of an appellant from overseas in many circumstances. We also recognise that the normal fee remission system does not work neatly for an appellant from overseas or those in the UK not entitled to public funds. However, this is not a reason to exclude UK-based appellants from the fee remission system. What is needed is to operate the

[46] Ministry of Justice: *Reform of Legal Aid in England and Wales: the Government Response*, June 2011, page 133, paragraph 86 http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf
[47] Hansard, 6 September 2011: Column 329.
[48] Hansard, 21 Nov 2011 : Column 821.

fee remission system that operates in other tribunals, but to supplement with special measures to protect appellants before this chamber. We make the suggestions below for additions to the normal fee remission system that, combined with it, would provide a measure of protection in this chamber.

- Any UK-based appellant should be entitled to apply for fee remission using the same system in place for all other tribunals.

- Any out-of-country appellant should be entitled to apply for remission under the category "Remission 1" in the same system in place for other tribunals if their sponsor is in receipt of a means tested benefit, or any of the benefits in E-LTRP.3.3, on the basis that the threshold for "adequate" maintenance in all those cases would be no more than the Income Support (or equivalent) level for a British family. The use of the Remission 1 category would of course result in successor benefits to Income Support being taken into account as that system was modified to reflect the benefit system currently in force.

- All children under 18 should be exempt from paying a fee.

- All trafficked persons should be exempt from paying a fee..

- All survivors of domestic violence should be exempt from paying a fee.

- All applicants for refugee family reunion should be exempt from paying a fee.

- All cases where there is no application fee to be paid to the UK Border Agency, either in general or in the particular case (for example domestic violence cases where an applicant has successfully argued for a fee waiver[49]) should be exempt from paying a fee. Such cases include those where either no fee can be charged as a matter of law (for example cases under European Union law) or where it is recognised that to charge a fee might be a bar to justice in the case.[50]

Equality Impact Assessment Questions

Q3. What do you consider to be the potentially positive or adverse equality impacts on appellants appealing an immigration decision of the proposed remission system for immigration appeals?

These proposals will have an adverse equality impact on appellants and their family members. The equality impact assessment concludes:

> *"Evidence suggests that there would not be any direct discrimination towards any groups because the proposal is not expected to treat anyone less favourably than others because of a protected characteristic."*[51]

[49] See UK Border Agency *Victims of domestic violence, requirements for settlement applications,* available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/dv-victims-settlement.pdf

[50] See in particular *R(Osman Omar) v SSHD* [2012] EWHC 3448 (Admin).

[51] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Initial Equality Impact Assessment,* December 2012, page13, paragraph 50.

However, the proposed system for applying for remission directly discriminates between users of the Immigration and Asylum Chamber and users of other branches of the tribunal system. The users of the Immigration and Asylum Chamber are treated less favourably than other users of other tribunals and courts. ILPA has previously observed that the introduction of fees for immigration appeals risked unlawful race discrimination due to the difference in treatment between appellate chambers in the tribunal system, as the majority of appellants are of minority ethnic origin and we repeat those concerns.[52]

The cumulative equality impact assessment considered the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and concluded:

> *"2.101 It is estimated that 92% of clients (excluding unknowns) who would be affected by the change in the scope of the immigration category are likely to be from BAME groups (see Table 5). This estimate is not only substantially greater than both the proportion in the adult population (11%) and the cases that are expected to be affected overall (25%), but also represents the biggest impact on this particular protected group."*[53]

The Equality Impact Assessment for the current consultation acknowledges the impact on many ethnic groups:

> *"This data confirms the assumption that the proposals will affect appellants from a range of nationalities and ethnic groups. Nationalities likely to be most affected include Somalia, Nigeria, Pakistan and Eritrea whose citizens issue over a third (34%) of MM, ECO and FVV appeals that have been legal aid funded."*[54]

The Ministry of Justice has also acknowledged that its proposals would have a differential impact upon appellants by reasons of sex, stating:

> *"The proposals may have a greater impact on women as they are over-represented amongst legal aid funded appellants (53%) when compared to all appellants (46%)."*[55]

In our view the proposals would also have a disproportionate impact on disabled sponsors who are not required by the Immigration Rules to meet the same maintenance and accommodation threshold as those who are not in receipt of a disability benefit and who would likely be passported to fee remission in any other tribunal by virtue of their benefits or income.

We ask the Ministry of Justice to provide details of its "rigorous, regular and early reviews"[56] of the impact of the proposals in the 2011 consultation on groups with protected characteristics, of the outcome of those reviews and of the analysis and actions carried out as a result of the reviews.

Q4. How could these impacts be mitigated?

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[52] *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, ILPA's reply to questionnaire,* Question 1, page 2.
[53] *Reform of Legal Aid in England and Wales: Equality Impact Assessment,* 21 June 2011.
[54] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Initial Equality Impact Assessment,* December 2012, page 11, paragraph 39.
[55] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Initial Equality Impact Assessment,* December 2012, page 11, paragraph 42.
[56] *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, Response to the consultation,* 09 May 2011, page 41, paragraph 177. http://www.justice.gov.uk/downloads/consultations/appeals-fee-charges-consultation-response.pdf

See response to question 2.

The Ministry of Justice acknowledges that extending the existing the Her Majesty's Courts and Tribunals fee remission system to the Immigration and Asylum Chamber would address a number of equalities concerns raised by the proposed scheme:

> *"However, we do think it likely that the equalities benefits of the rejected option, if it could be made to work, are that more poorer overseas appellants in these particular race and gender groups would be likely to have their appeal fee remitted."* [57]

Q5. Are you aware of any further evidence that could aid our analysis of potential equality impacts? If so please provide us with this evidence.

The Government has already committed to "rigorous, regular and early reviews",[58] of the impact of the 2011 consultation proposals. We ask the Government to provide the data from these reviews and explain how they have been conducted. The data used as the basis for the current Equality Impact Assessment relates to figures from the Legal Services Commission dated 2009-2010. Until assessments can be made using up-to-date figures, the proposed levy of additional fees should be suspended.

Appendix

ILPA letter to Mr Tom Matley, Ministry of Justice, 09 March 2012. *[not included, available on request]*

See also

- ILPA's response to the Ministry of Justice consultation on *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal*, 21 January 2011, available http://www.ilpa.org.uk/data/resources/13004/11.01.511.pdf

- First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 (Fees Order) SI 2011/2481 http://www.legislation.gov.uk/uksi/2011/2841/contents/made

- Immigration and Asylum Appeals Tribunal Fees Guidance (the Guidance)

  http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/online-fees-guidance.pdf

- Clarification regarding exemptions from Immigration & Asylum Tribunal appeal fees for appellants in receipt of Legal Aid, 23.11.12 http://www.justice.gov.uk/downloads/legal-aid/civil-categories-of-law/clarification-regarding-exemptions-from-immigration-asylum-tribunal-appeal-fees.pdf

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[57] *Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber), Initial Equality Impact Assessment*, December 2012, page15, paragraph 61.

[58] *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, Response to the consultation,* 09 May 2011, page 41, paragraph 177. http://www.justice.gov.uk/downloads/consultations/appeals-fee-charges-consultation-response.pdf

Chair
ILPA
28 January 2013