



## **YOUNG LEGAL AID LAWYERS**

### **Response to the Ministry of Justice Consultation on Tribunal Fees:**

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

**3 June 2016**

#### **About Young Legal Aid Lawyers**

1. Young Legal Aid Lawyers (YLAL) was formed in 2005 and has over 2,000 members. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL’s members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.
2. This is our response to the Ministry of Justice (MoJ) Consultation on Tribunal Fees. This consultation concerns the proposals to increase tribunal fees for the First-tier Tribunal (Immigration and Asylum Chamber) (FTT) and Upper Tribunal (Immigration and Asylum Chamber) (UT).

#### **Introduction**

3. The consultation poses a number of questions. We have responded to these below. Where a question falls outside of our scope of expertise we rely upon the response of the Immigration Law Practitioners Association (ILPA) to this consultation. For the avoidance of doubt YLAL supports and endorses the consultation response produced by ILPA in its totality.
4. At the outset YLAL would like to raise a few key issues in line with our objectives as an organisation, which are:
  - a. To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
  - b. To increase social mobility and diversity within the legal aid sector.
  - c. To promote the interests of new entrants and junior lawyers and provide a network for likeminded people beginning their careers in the legal aid sector.

5. The stated purpose of the MoJ's proposed increase in tribunal fees is to establish, "a properly funded courts and tribunals service that protects access to justice for all". The consultation paper notes that:

*"Access to justice is a vital part of an effective and functioning democracy, helping to maintain social order and a growing economy. Our court and tribunal system underpins access to justice and the rule of law in England and Wales."*<sup>1</sup>

6. The paper goes on to state:

*"As the Lord Chancellor and Secretary of State for Justice set out on 23 June last year, his vision is a One Nation Justice system built around the needs of the most vulnerable, putting the public first and working to make justice accessible to all."*<sup>2</sup>

7. We note and agree with these laudable objectives as set out by the MoJ. However, we do not believe that the proposed increases to tribunal fees in the FTT and UT, of as much as six times the current levels, will achieve these objectives. In fact, it is our firm view that quite the opposite effect will be achieved.
8. We have grave concerns about the potential effect the proposed changes will have on access to justice and the rule of law. This is particularly important in light of the vulnerability of the groups of persons who risk being particularly affected by the proposed changes. These groups include: those 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<sup>3</sup>. These vulnerable groups are comprised of those persons least likely to be able to generate the significant fees proposed by the MoJ, particularly when taken alongside the cost of seeking legal advice and representation.

## **RESPONSES TO THE CONSULTATION QUESTIONNAIRE**

### **Q1: Do you agree with the fee charges proposed in the First-tier Tribunal as set out in Table 1? Please give reasons.**

9. We do not agree with the fee charges proposed in the FTT as set out in Table 1.
10. It is our firm view that increased fees will prevent appellants with limited means from accessing the FTT, even in the most meritorious cases. This is plainly a denial of access to justice.
11. The MoJ Impact Assessment accompanying the consultation paper predicts a 20% fall in cases because individuals choose no longer to bring a claim due to increased fees. The MoJ accepts by way of its own published statistics that the introduction of similar

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<sup>1</sup> Ministry of Justice "Tribunal Fees: Consultation on proposals to increase tribunal fees for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)" p.2 [https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting\\_documents/consultation%20document.pdf](https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/consultation%20document.pdf)

<sup>2</sup> Ibid.

<sup>3</sup> Categories of persons identified by ILPA in their consultation response dated 3 June 2016.

fees in employment tribunals has seen a 79% fall in claims<sup>4</sup>. We consider it very likely that there will be a similarly drastic reduction in claims being brought in the FTT and further appeals brought in the UT if the proposed fee increases and fee introductions are implemented. We refer the MoJ to the comments of Supreme Court president, Lord Neuberger: that it is “*a rank denial of justice and a blot on the rule of law*”<sup>5</sup> when meritorious claims are dropped simply because an individual does not have the financial means to pursue them.

12. We do not agree with increased fees for an oral hearing. Appellants who opt for an oral hearing rather than a determination on the papers have a statistically higher likelihood of success<sup>6</sup>. This strongly suggests that an oral hearing will often be necessary to ensure that a just outcome is achieved in each case. Preventing claimants from opting for an oral hearing due to prohibitively high fees therefore constitutes a denial of access to justice. YLAL is concerned that this plain infringement of an individual’s right to access to justice may also interfere with the English common law right to an oral hearing in certain cases: *R (Osborn) v Parole Board* [2013] UKSC. In his lead judgment Lord Reed makes clear at *R (Osborn)* para 71 that an oral hearing:

*“promote[s] congruence between the actions of decision-makers and the law which should govern their actions.”*

The Supreme Court further held in *R (Osborn)* that an oral hearing should be held whenever “fairness” demands it. It is trite that the principle of “fairness” should not and cannot be predicated upon an individual’s ability to pay for an oral hearing.

13. In the Ministerial Foreword to the consultation paper, Dominic Raab, Parliamentary Under-Secretary of State, MoJ, states:

*“I do not believe it is sustainable or right to maintain a fee structure in immigration and asylum proceedings whereby we recover from users, who are appealing against decisions of the Home Secretary, only 9% of the cost in the First-tier Tribunal and none of the cost in the Upper Tribunal. For this reason we are now proposing in this consultation to increase the fees charged in the First-tier Tribunal (Immigration and Asylum Chamber) and to introduce fees in the Upper Tribunal (Immigration and Asylum Chamber) to reflect the true cost of running those services.”*<sup>7</sup>

14. We express our concern that this is outwith the stated objective of the consultation: to maintain a court and tribunal system that meets “*the needs of the most vulnerable, putting the public first and working to make justice accessible to all.*”
15. We consider that the proposals constitute a significant limitation on access to justice. Restricting access to justice in this way is not a necessary or proportionate way of achieving the MoJ’s goal of reducing its deficit.

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<sup>4</sup> <https://www.tuc.org.uk/workplace-issues/employment-rights/tribunal-fees-have-been-“huge-victory”-britain’s-worst-bosses>

<sup>5</sup> <http://www.bbc.co.uk/news/uk-24545584>

<sup>6</sup> [http://www.nuffieldfoundation.org/sites/default/files/files/Tribunal\\_decision\\_making\\_vFINAL.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Tribunal_decision_making_vFINAL.pdf)

(statistics from DLA appeals)

<sup>7</sup> Consultation paper at p.2

**Q2: 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.**

16. We consider that there is merit in considering an exemption based on the Home Office visa fee waiver policy. We do not agree that there should be a distinction between in country and out of country appellants.

17. We support and endorse the response of the Immigration Law Practitioners Association (ILPA) to this question.

**Q3: 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?**

18. We believe that the proposed fee exemption scheme is not sufficient to meet the needs of vulnerable groups.

19. We support and endorse the response of the Immigration Law Practitioners Association (ILPA) to this question.

**Q4: Do you agree with our proposal to introduce fees at full cost recovery levels in the Upper Tribunal? Please provide reasons.**

20. We do not agree with the MoJ proposal to introduce fees at full cost recovery levels in the Upper Tribunal for the reasons set out in our answer to Q1.

**Q5: 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.**

21. We do not agree with the MoJ proposals to introduce fees for applications for permission to appeal both in the FTT and the UT for the reasons set out in our answer to Q1.

**Q6: 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.**

22. We consider that, should the fee proposal put forward by the MoJ for the UT be introduced, the Government should extend the fee exemptions policy that applies to the FTT to fees for appeal to the UT. For the avoidance of doubt, YLAL does not agree with the fee proposal put forward by the MoJ for the introduction of tribunal fees in the UT.

23. We support and endorse the response of the Immigration Law Practitioners Association (ILPA) to this question.

**Q7: 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.**

24. YLAL notes that the equalities statement does not address the disproportionate impact of the fees on women. The gender pay gap (currently 19.2%<sup>8</sup>) means that women are less able to meet the cost of the fees.
25. We support and endorse the response of the Immigration Law Practitioners Association (ILPA) to this question.

## **CONCLUSION**

26. In conclusion YLAL opposes the MoJ proposals to:
- a. increase tribunal fees in the FTT;
  - b. introduce fees at full cost recovery levels in the UT;
  - c. introduce fees for applications for permission to appeal both in the FTT and the UT.
27. YLAL considers that the proposals create a significant and unmanaged risk that vulnerable appellants will be denied access to justice in breach of their human rights. We question the evidential basis and reasoning put forward by the MoJ. We consider that the proposals are contrary to the rule of law.
28. We do not believe that the fee exemptions proposed by the Government go far enough. We urge the Government to extend the fee exemptions across the tribunal system, both at FTT and UT level.

**Young Legal Aid Lawyers**

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<sup>8</sup> <http://www.equalpayportal.co.uk/statistics/>