

RENÉ CASSIN RESPONSE TO CONSULTATION ON PROPOSALS FOR THE FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) AND UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER FEES)

Overview

René Cassin has long been concerned with issues of access to justice. The proposed 500% fee rises in the asylum and immigration courts outlined in the box below will result in justice being delayed and denied to some of the most vulnerable people in our society. The following sees our substantive response to the Government's consultation on this issue.

Table 1: Proposed fees for appeals in the First-tier Chamber

Fee type	Current fee (£)	Proposed fee (£)
Application for a decision on the papers	80	490
Application for an oral hearing	140	800

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 oppose the proposed changes to the fee charges in the First-tier Tribunal. The reasons for this are manifold with a number of them revolving around issues of access to justice.

In the first instance, a fee hike of over 500% will lead to many people being unable to afford to appeal a Home Office decision. This may result in them choosing to not contest a decision for which there may be ample factual and legal grounds for them to do so. Such an outcome would be particularly worrying given that the government's own statistics for 2014/15¹ show that 40% of appeals were allowed or granted at the First Tier Tribunal (Immigration and Asylum Chamber). It is therefore manifest that Home Office decision-making is often poor



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¹ <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>

and highlights why both the appeal system and its accessibility are vital.

Implementing a proposal in the full knowledge that this will result in an increase in miscarriages of justice is not only an affront to the rule of law, but will ultimately lead to more claims for compensation against the government. The proposals therefore risk the government inflicting upon itself the costs and administrative burdens of fighting (and possibly losing) actions against the Home Office and the other arms of the state that administer immigration law enforcement.

Alternatively, it may be the case that appellants are unable to afford both the services of a lawyer and the court fee and will choose to represent themselves. This of course means a disparity of “arms” in the First Tier Tribunal that may well lead to unfair outcomes. An increase in the number of litigants in person is not conducive to good decision-making. Not only should appellants have access to legal counsel but it is prudent for contested Home Office decisions to be argued against by someone legally qualified in order that the matter is assessed robustly by both the appellant's and defendant's side.

It will also be the case that fewer people will decide to not appeal adverse Home Office decisions. This is not mere conjecture; after the introduction of the court fees in the Employment Tribunal, the Ministry of Justice stated in a report that *“The trend in single claims had been gradually declining for the last five years, but the rate of decline increased in October to December 2013. The fall in receipts for Employment Tribunals seen from October to December 2013 coincides with the introduction of Employment Tribunal fees in July 2013”*.² However, one hardly needs a government report to acknowledge that a 500% increase in something's cost will reduce demand for it. These fee increases are therefore being proposed in the full knowledge that fewer Home Office decisions will be challenged. The ability to review the decisions of public bodies is a fundamental right afforded to those living in democratic countries and the Ministry of Justice should not be so rash as to undermine such a right in such a dramatic way.

² <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2015>

Furthermore, it is not uncommon for charities, civil society organisations and the friends and families of appellant to pay their court fees. This is not something that always appears on appeal forms and therefore the government and Her Majesty's Courts and Tribunal Service (HMCTS) may not be aware of this fact. In these difficult economic times these supporters will simply not be able to afford to help out with such a radical increase to the cost of an appeal. Thus not only will individuals not being able to pay court fees themselves cause an increase in the number of people choosing to self-represent or not appeal at all, but so too will the fact that those who often pay on their behalf will not be able to continue doing so.

In any event, these proposals cannot be fully assessed by a cost-benefit analysis until the Ministry of Justice provides a full costing breakdown. An explanation needs to be provided as to why previous increases to the court fees in the Immigration and Asylum Chamber (IAC) did not raise the money the department expected in the past. As stated in paragraph 13 of the proposal the initial decision to introduce court fees in order to raise 25% of the running costs of the service in fact only raised 9%. Consequently, in order to make up this shortfall, in December 2015 the Ministry of Justice again decided to raise fees. No evidence has been provided as to whether this subsequent raise managed to raise the 25%. Thus, given the past failure of the government to properly match increases in fees to expected revenue raised, it is imprudent of the government to implement yet another (this time particularly large) increase without providing a full breakdown of the costing.

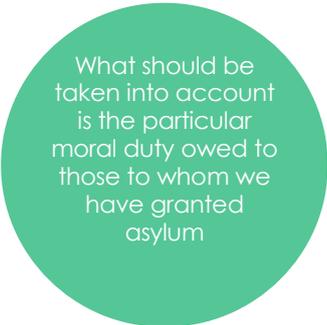
The government should also be mindful of the duties of HMCTS under Section 6(1) of the Human Rights Act 1998 which requires public bodies to act in a way compatible with the European Convention on Human Rights. Of particular relevance here is Article 6 of the Convention, the right to a fair trial. The European Court of Human Rights held in *Weissman and Others v Romania*³ that court fees set at an unfairly high rate would be in violation of Article 6. The government is at serious risk of doing the same here. It would therefore be wise policy to take a more cautious approach to raising money for HMCTS and not risk

³ ECHR 2 DEC 2011. The case cited the UK case of *Unison, Regina (on The Application of) -v- The Lord Chancellor and Another Admn (Bailii, [2014] EWHC 218 (Admin))*.

litigation that may find the policy unlawful and incur legal costs (and possibly compensation payments) on the part of the government.

What should also be taken into account is the particular moral duty owed to those to whom we have granted asylum under the 1951 Refugee Convention. While individuals applying for asylum will generally be exempt from court fees given that they will usually be legally aided or assisted by asylum support, applications for refugee family reunion once that status generally falls outside the scope of legal aid. Appellants making such applications will therefore be generally required to pay court fees. This is unfair given that many who have recently been granted refugee status are often in precarious financial positions and do not have the means to pay this expense.

That notwithstanding, Dominic Raab, Parliamentary Under-Secretary of State for the Ministry of Justice acknowledged in a written statement to the House of Commons⁴ that many of the court fees that this government has implemented are at a rate “above the cost of the proceedings to which they relate”. Whether the same applies to this proposal is unclear from both the statement and the consultation document. If it is the case that the proposed fee hike seeks to raise money for HMCTS from appellants over and above the cost of their appeals that would be grossly unfair. Not only would access to justice be undermined in the ways already mentioned but the government would also be effectively taxing the use of a service in a regressive and inequitable manner. It would, in a sense, be a flat tax.



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⁴ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-04-21/HCWS691/>

At paragraph 2 the Ministry of Justice's proposal states that the underlying reason for these proposed changes is that the "government is committed to delivering a balanced budget by 2018/19". This attitude, however, does a disservice to a country that has a great tradition of upholding justice and the rule of law. Her Majesty's Courts and Tribunals Service do not simply provide a service to the public that the government can use to raise revenue. Rather, its purpose is to ensure that the law is upheld and that people are able to put their case before a judge. These standards are the cornerstone of democracy and, for the reasons mentioned above, these proposals risk putting these values in jeopardy.

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 fee waiver is, in principle, a sensible idea. However its current form does not adequately satisfy its purpose and it therefore requires radical change. Practitioners have noticed that it has been applied in an

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unpredictable and inconsistent manner. For example, sometimes a fee waiver will be denied even in a clear instance of destitution or homelessness. Additionally, lack of sensible decision making for fee-waiver applications can result in a greater financial burden on the state. For example, requiring individuals and families to pay a fee when they manifestly

cannot afford it will often result in them requiring support from the local authority over and above the cost of the court fee. This is particularly the case given that the fee is required to be paid in one lump sum.

There is no reason to differentiate between in country and out of country appeals. There is no reason to suppose that people who have not been afforded an in country right of appeal are in better financial situation than those who have. Indeed the converse might well be the case.

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?

Yes. Not only does the fee waiver not function in a matter fit for purpose but it should also be restructured to account for others who require it but who do not currently fall within its scope. This would include individuals with no recourse to public funds and those with incomes below the benefit cap. Furthermore there are others who are in vulnerable situations with “hidden” costs such as victims of serious domestic violence and those with disabilities who should be excluded.

It would also be sensible that those with linked appeals, for example families, should only have to pay one fee. Requiring families to pay multiple fees for the same case will only result in great financial hardship, particularly as the fee has to be paid in one lump sum. Furthermore, the fact that the time frame in which to appeal a decision is so short (generally 14 days, or 28 for an out of country appeal) make it difficult for appellants to gather together money in such a short amount of time. Increasing the fees by over 500% will exasperate this problem.

There should also be changes to the way the court fee is charged in order that people are able to incur the expense more easily. For example, there should be the option to pay for it in instalments in order to allow for issues of cash flow. Another alternative could be that the requirement to pay the fee only comes into effect once the First Tier tribunal has dismissed the appeal. This would save the appellant having to find the money in advance and also save the tribunal costs as it would not need to spend time taking payment and then having to refund it if the appeal is won.

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

No. As stated in our answer to Question 1, imposing court fees at a level as high as this imposes a huge financial burden on immigrants (and their supporters) as well as raising issues of access to justice.

Furthermore, the introduction of court fees in the Upper Tribunal once permission to appeal has already been granted is particularly pernicious. This is because it has already been accepted by a judge (either in the First Tier Tribunal or the Upper Tribunal) that the case has merits to be substantively heard in the Upper Tribunal. Additionally, under the proposed system, if permission to appeal was granted in the Upper Tribunal the appellant will have already paid a fee in order for that to be decided. To then require the appellant to pay yet another fee for the substantive hearing in the Upper Tribunal Fee is unfair, not least because it has already been accepted that the First Tier Tribunals' decision was lacking.

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 again refer to the points set out in answer to Question 1 which set out why such high fees will result in unfairness and an undermining of justice.

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.

Introduction of court fees in the Upper Tribunal ...is particularly pernicious

As we have already argued, there should not be any fees charged in the Upper Tribunal. If the government feels compelled to introduce such fees then the same exemptions we outlined above should apply in addition to the ones proposed by the Ministry of Justice. If anything, it is even more important that they apply in the Upper Tribunal than the First Tier Tribunal. This is because once a case has reached the Upper Tribunal; the appellant will have already paid the court fees for the hearing in the First Tier Tribunal (and possibly for an application for permission to appeal to the Upper Tribunal as well) as well as incurring legal costs. Thus the appellant will be in an even more precarious financial position than when the case was before the First Tier Tribunal.

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.

As the Ministry of Justice's equality statement accepts (at Paragraph 4.3), given that the Immigration and Asylum Chambers of the Tribunal are used disproportionately by those of Black, Asian and minority ethnic backgrounds there is the risk that the proposed court fee hike amounts to indirect discrimination under the Equality Act 2010. At Paragraph 4.5 it is argued that this is permitted given that the proposals are "a proportionate means of achieving the legitimate aim of protecting access to justice whilst making sure that HMCTS continues to be funded properly". Such reasoning is questionable.

In the first instance, no substantive case has been made as to why fee increases would protect access to justice. Indeed, as we argued in our answer to question 1 the converse is the case. The argument that making it more expensive to appeal a Home Office decision in fact enhances access to justice is baffling. The second strand of the Ministry of Justice arguments, i.e. ensuring that HMCTS is adequately funded, is indeed a legitimate aim; the question therefore remains of whether this is a proportionate means of pursuing it.

As we have already explained at length, the proposal to raise court fees in the Immigration and Asylum Chamber raises questions of access to justice and procedural fairness. As acknowledged by the Ministry of Justice this will disproportionately affect individuals of Black, Asian and minority ethnic backgrounds. It is unclear why the government has to raise funds for HMCTS in this way. The costs could be spread across the entire judicial system in order to ensure that those from minority groups are not disproportionately impacted. However, if the government does choose to press ahead with these significant changes to the UK's system of justice we strongly recommend that it also make changes to the fee waiver policy to mitigate this disproportionate impact. We have set out some suggestions as to how this may be done in answer to questions 2, 3 and 6 above.

There is a risk that the proposed court fee hike amounts to indirect discrimination

The question of equality must be looked at not only within the Immigration and Asylum Chamber but comparatively across the entire Courts and Tribunals system. The question therefore becomes why is HMCTS choosing to recoup 100% of costs specifically from the IAC and not from other parts of HMCTS (apart from the employment tribunal) when it is aware that the IAC is disproportionately used by members of ethnic minorities. The Ministry of Justice has not provided an adequate explanation for this and we therefore submit that raising fees in the chamber disproportionately used by these groups may be contrary to equalities legislation.

*With many thanks to Michael Goldin for his help and assistance on this submission