Chambers of Jan Doerfel

Direct Public Access Barrister

Mr Michael Odulaja
Court & Tribunal Fees Policy
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Dear Mr Odulaja,

Response to the Ministry of Justice's April 2016 "Tribunal Fees" Consultation on Proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)

The consultation makes clear that access to justice is a rule of law cornerstone which underpins our society and that "*Courts and tribunals 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 that underpins our society, and indeed our economy. That is why we must make sure that our courts and tribunals are properly funded*."

It is therefore accepted that access to justice is an integral part of the rule of law and hence guards a principle of central importance as opposed to constituting a commodity.

It is furthermore noted, that asylum/immigration proceedings (ie proceedings by individuals against state decisions) protect against breaches of the UK's international treaty obligations and hence play a central role in enabling the UK to comply with the same. In the light of this fact, we believe that it is inappropriate and disproportionate to apply the costs recovery principle to immigration and asylum proceedings. It is our view that it is also for this reason, that all asylum and human rights appeals should be entirely exempted from tribunal fees both in the FTT and UT.

It is very notable that there is no evidence provided as to how the proposed fees are calculated, on what are they based or how are they arrived at, if they are intended to reflect the "costs" of the relevant hearings.

Some of the fee estimates provided in the consultation seem illogical. The consultation suggests that the full cost for a permission to appeal application to the UT is £350 (when considered by the UT – see para.53 of the consultation document) but £455 if looked at by the FTT (see para.34). This makes no sense when the permission to appeal application at the UT stage is not only considered by a more senior judge but also is meant to set out additional grounds in the permission application as to why the FTT erred in not granting the permission to appeal application. It is not logical that a FTT judge looking at a shorter application should be priced at £105 more than a more senior judge looking at a longer application.

General Pervasive Response and Concerns to Consultation

What is misguided and entirely against access to justice and the rule of law in the extant proposals is the following:

A) That the ***hike*** in court fees proposed places the burden of ALL and/or the vast proportion of court/tribunal funding sought on the court user when primary responsibility for such lies with the Ministry of Justice.

B) The increases proposed are at least a 600% increase of the current fee levels for First Tier tribunal ("FTT") fees for applications on the papers, an increase of over 500% for oral hearing applications in the FTT, and a completely new introduction of substantial fees for appeals to the Upper Tribunal, as indicated below in relation to Question 4 - each are therefore disproportionate.

C) The reality is that such fees proposed are in fact prohibitive rather than functional - users are likely to experience the multiple fee hike as a barrier to accessing justice.

D) Access to justice will become commoditised as the bottom line of the proposals amounts to 'if you want access to justice, you'll have to pay for it - if you can.'
This disregards the fact that ability to pay quite simply does not correlate with merits of a case nor with the general importance of a case or issues at stake in a case.

E) In the year ending March 2016, 39% of 12,799 asylum appeals were allowed[1]. In year ending June 2015, 30% of asylum appeals were allowed. It is clear that access to justice is required in these tribunals based on the merits rather than whether or not the court fee is a surmountable object. Furthermore, the success rates also indicate root problems resulting in court costs. If the objective is to save public money, then wider options for cost savings should be explored. What should be happening is addressing the **need** for appeals by addressing the central problems such as frequent poor (and legally flawed) decision-making at Entry Clearance Posts and by the Home Office (which are often overturned on appeal) as well as the submission of incomplete, abusive and often misleading grounds of permission to appeal leading to Upper Tribunal hearings on the question of errors of law (which are subsequently refused by the Upper Tribunal – although resulting in legal costs for the Appellant) and result in court time and hence court costs borne by the taxpayer.

The consultation is skewed in that it take a very tendential and limited view focusing solely on individual migrants as litigants as opposed to both parties involved, namely the Home Office/FCO and the individual appellant.

F) A similar fees hike and introduction was introduced in the Employment tribunal structure in July 2013. It saw a drop in claims of 79%, and a continuing annual average drop in claims

[1] https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2016/asylum#asylum-appeals (para 11)

of between 65-75%[2]. Coupled with these proposals, it is of extreme concern that access to justice is being commoditised rather than supported.

It begs the question:

i) is the court revamp/hearing costs which the Government says these fees are intended to fund, a potential overspend/over projection if subsequently reduced number of users will remain able to access it if they can afford to do so? OR

ii) is a parallel system of justice effectively or in reality more accessible to the richer or more commercial user, actually likely to be cultivated? Comparative statistics and in any event the likely effect of the current proposals, suggest the latter.

G) Litigants in person who cannot afford legal representation and other individuals who do not qualify for legal aid and may not qualify for the suggested fee exemptions, are particularly vulnerable and at a considerable disadvantage should these fees be introduced.

H) It is of concern that these fee hikes are proposed also at a time when there is a real concern at the potential number of appeals to removal on the basis of the, uniquely unreported yet widely publicised and available, judgement of Quadir & SM v SSHD where over 10,000 international students apparently wrongfully removed from the UK would now have to pay massively increased fees to appeal and most likely out of country now. In any event and not particular to this case, prohibitive fees should not be the means by which to indirectly or directly pursue unrelated aims such as the reduction of immigration – even less so, by restricting or sacrificing the important principle of access to justice.

The Consultation asks:

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

No, for the reasons set out above.

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.

If fees are charged (which I oppose for the reasons set out above), I believe that the HMCTS remissions scheme should be in operation in relation to all immigration cases at the First Tier

[2] file:///C:/Users/Jan%20Doerfel/Downloads/Scanned%20from%20a%20Xerox%20multifunction%20device.pdf

and Upper Tier Tribunal (to the extent that Appellants are not already exempted from paying fees as a result of existing fee exemptions).

The scheme is clearly used in relation to all other jurisdictions so is obviously administratively practicable as well as workable. It is already in operation in relation to immigration-related judicial review matters dealt with by the Upper Tribunal so court staff is clearly familiar with the scheme. It makes perfect sense in terms of consistency for this scheme to be operated across all Upper Tribunal and First Tier Tribunal matters and no logical reasons have been put forward in the consultation why the HMCT remissions scheme is suitable for immigration judicial review matters at the Upper Tribunal but not immigration appeals at the First-tier and Upper Tribunal level.

The decision not to apply the HMCTS remission scheme is clearly directly discriminatory on grounds of nationality (and indirectly on grounds of race – as clearly shown in page 6 of the Equality Statement which posits "*92% of appellants coming to the Tribunal … were of Black and Minority ethnic backgrounds"* - and national origin) as all the Appellants in immigration and asylum matters (as opposed to in other court proceedings) are not (or no longer) British. The fee exemptions suggested fall far short of the HMCTS remission scheme and hence a much higher financial and evidential burden is applied to these Appellants/litigants (as opposed to parties in other proceedings).

We also believe that such discrimination constitutes a breach of the non-discrimination provision in Article 26 of the International Covenant on Civil and Political Rights 1966 to which the UK is a party.

Considering the issues at stake (asylum, risk of persecution/torture/human rights violations and fundamental life-changing judicial decisions deciding where adults and children will spend their lives and future), accessibility and access to justice should not be restricted as a result of the operation of a **more** restrictive remission scheme. Inversely, access to justice correlating with the height of fees should be easier not more difficult.

This is furthermore the case, where the issues at stake relate to international human rights obligations **by the Government** e.g. not to return persons in breach of the 1951 Geneva Convention (in breach of the refoulement prohibition) and the European Convention on Human Rights. For this reason, it is our view that human rights and asylum cases should be **entirely** fee exempt.

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, the HMCTS exemption scheme for the reasons set out above.

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

No, for the reasons set out above.

First of all, the costs are clearly prohibitive. In a case where an Appellant has applied for permission to appeal to the Upper Tribunal (addressed first to the FTT) which has been refused by the FTT, then makes such an application to the UT (which is then 'granted' on the papers to the extent that an UT judge believes that it is arguable that a FTT judge fell into error and orders a hearing, then costs will be £**1,315** in court fees alone (£455 (permission application to FTT) + £350 (permission application to UT) + £510 (UT hearing)). In addition to that, by far the great majority of Appellants will have to pay legal costs as the issue in question is whether the FTT judge committed errors of law – not a question which Appellant's are able to identify themselves.
This means that there are substantial court fees plus legal fees which many Appellants will either be unable to afford or will lead them into compromising situations where they will have to fall into further debt.

Furthermore, it should also be borne in mind that applications for permission relate to **errors of law** – which clearly should not happen in the first place but do happen. Appellants should not have to shoulder the burden of such fees (whether in the short term or in the long term – e.g. even if the fees were subsequently reimbursed).

This is particularly so if either the FTT or the UT have granted permission to appeal to the UT on the papers (i.e. at the paper stage) on the basis that they share the view that the permission to appeal application identifies (or may identify) errors of law in the initial First Tier Tribunal Judge's determination which should go to an oral hearing.

To expect an Appellant to bear the costs for this hearing is perverse in that such costs only arise where the initial Tribunal decision is faulty or arguably faulty. In terms of enabling access to **justice**, it should be an interest if the **State** (and not solely of an Appellant or Applicant) that decisions rendered are legally correct (and not infected by errors of law).

To introduce fees for error of law proceedings (which are currently exempt from fees) is equivalent to the State seeking to **uphold** faulty and legally flawed determinations at the level of the First Tier Tribunal (and, notably, always determinations that err to the detriment of the individual seeking a remedy against a Home Office/Entry Clearance Officer decision, not the State). No mention is made of UT and FTT fees being introduced for the Home Office to appeal determinations by FTT judges in an Appellant's favour. And if they did do so, the money would come out of tax payers' resources in any case, meaning that there would be no equality of arms at all when it comes to challenging faulty FTT determinations. I furthermore note – in this context - that, in my experience, many Home Office appeals (against the initial FTT determination) are misleading (in terms of the facts presented, misguided and a waste of resources), leading to an unjustified and unmeritorious use of the Courts system which incurs public expenses. I would advise that a review take place as to the efficacy of Home Office appeals to the UT and that public resources are saved by **reducing** the number of unsuccessful (and meritless) appeals brought (and permission applications lodged) by the Home Office which take up court time and court resources.

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, for the reasons set out above.

It is also notable, in terms of a fee to the FTT to request permission to the UT, it is not infrequent that permission is refused at FTT level but granted by a more senior and knowledgeable judge at the UT. Again, by introducing effectively three sets of fees (in order to finally establish whether there has been an error of law), this will serve as a deterrent not on the basis of the merit of cases but on the basis of the financial means of an Appellant. This clearly obstructs access to justice based on the wrong basis.

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.

I believe that the only uniform and non-discriminatory approach to fees exemptions across the courts system is the HMCTS remission scheme which should apply equally to the FTT and the UT should the Government introduce fees at the UT level. I also believe that asylum and human rights cases should be wholly fee exempt as the courts system enables the **UK Government** to comply with its international obligations arising from the 1951 Geneva Convention and the European Convention on Human Rights and not to act in breach of e.g. non-refoulement prohibitions contained therein.

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.

Please see my answer to Question 2 above.

I hope that you find the above useful and I look forward to learning how it has been considered as part of your report on the results of the consultation. Please kindly acknowledge receipt of this submission.

Your sincerely

Mr Jan Doerfel
Immigration Barrister