



Ministry
of Justice

Tribunal Fees

The Government Response to
consultation on proposals for the
First-tier Tribunal (Immigration and
Asylum Chamber) and Upper Tribunal
(Immigration and Asylum Chamber)

September 2016



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The Government Response to consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

September 2016



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Any enquiries regarding this publication should be sent to us at

Michael Odulaja
Court & Tribunal Fees Policy
Post Point 3.38
Ministry of Justice
102 Petty France
SW1H 9AJ

Email mojfeespolicy@justice.gsi.gov.uk

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Contents

Introduction	3
Chapter 1 – Summary of Responses	4
Chapter 2 – Conclusions and Next Steps	9
Annex A: List of respondents	12

Introduction

1. This document sets out the Government Response to the consultation, *Consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)*, published on 21 April 2016.
2. The consultation sought views on proposals to:
 - increase the fees charged in the First-tier Tribunal to full cost recovery levels for the appeals in which we charge fees;
 - to introduce fees for permission to appeal applications (whether made in the First-tier or Upper Tribunal) at full cost recovery levels; and
 - to introduce fees for appeal hearings in the Upper Tribunal at full cost recovery levels.

The proposals are estimated to generate £34m income per year. Full details of these proposals are set out in **Table 1** below.

3. The consultation also sought views on possible extensions to the existing exemptions and remissions scheme that applies in the First-tier Tribunal and on whether the same scheme should apply in the Upper Tribunal.
4. This document summarises the views of those who responded to the consultation and also sets out the Government's conclusions and next steps.

Table 1: Proposed fee increase in the Immigration and Asylum chambers

Appeal type	Current fee	Proposed fee
First-tier tribunal		
Application for a decision on the papers	£80	£490
Application for an oral hearing	£140	£800
Application to the First-tier Tribunal for permission to appeal to the Upper Tribunal	Nil	£455
Upper Tribunal		
Application to the Upper Tribunal for permission to appeal (made when the application to the First-tier Tribunal for permission has been refused)	Nil	£350
Appeal Hearing	Nil	£510

Chapter 1 – Summary of Responses

5. We received a total of 150 responses to the consultation. The respondents included law firms, members of the judiciary, professional bodies, academic institutions, charities, and individual members of the public. A full list of organisations who responded is attached at Annex A.

Responses to specific questions

Question 1: Do you agree with the fee changes proposed in the First-tier Tribunal as set out in Table 1? Please give reasons.

6. We received a total of 147 responses to this question. 142 respondents disagreed with the proposal, whilst 5 respondents agreed.
7. Of the 142 respondents who disagreed with the proposals, the majority argued that the large fee increases proposed would deny access to justice for vulnerable people wishing to challenge a decision of the Home Office.
8. A number of respondents argued that the proposed fees were too high. Other views expressed included that the high cost of appealing a decision would result in fewer appellants seeking professional legal advice thereby reducing their prospects of success and that it would be unfair to restrict people's ability to challenge decisions of the Home Office which risks reducing state accountability.
9. There was also a number of respondents who expressed the view that an increase in fees would reduce the number of appeals being brought to the tribunal and cited the significant fall in employment tribunal claims as evidence of the impact of fees. Some respondents were particularly concerned about the impact on those challenging asylum decisions, stating that they are a particularly vulnerable group and that these fees would have a greater negative impact on them.
10. There was also a number of respondents who expressed particular concerns about the likely impact that these fees would have on families where they are seeking to make a joint appeal, and would, under these proposals, be liable to pay an appeal fee for each family member.
11. Other respondents suggested that it would be preferable to increase the fees gradually over time rather than to move straight to full cost recovery levels in order to better assess the impacts of the increases to fees.
12. The respondents who agreed with the proposals argued that:
 - it was right that those who used the tribunal should cover the full cost of the services that they were using; and
 - it would discourage appellants from bringing unmeritorious claims to the tribunal.
13. Other respondents indicated that their agreement with the proposed fees was conditional on there being a power for the tribunal to order the Home Secretary to reimburse the fee where an appellant is successful.

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.

14. 115 responses were received to this question. 56 believed that there was merit in us considering the Home Office waiver scheme. 38 respondents disagreed with the adoption of an exemption based on the Home Office policy and 21 respondents answered by reiterating that we should not proceed with the proposed increases.
15. Those who agreed with the proposal were generally of the view that a means test for a fee waiver would ensure that those with limited financial resources were not priced out of justice. Other respondents simply stated that they agreed with the proposal or commented that introducing this exemption policy would be a positive step.
16. The 38 respondents disagreed with the proposals as they believed that the Home Office scheme would not be a beneficial scheme to adopt because the application process is unduly complicated and is not consistently applied. Some respondents argued that there have been instances where the Home Office had not applied the waiver even in clear instances of destitution. Also, respondents believed that there would be a conflict of interest by allowing the Home Office, as a potential respondent, to judge whether an appellant was required to pay a fee.
17. There were also respondents who felt that everyone should be treated equally in the eyes of the law and access to justice should not depend on means. Others disagreed because they fundamentally objected to the proposed fee increases and argued that no exemptions would be necessary if the fees did not exist or were not increased.
18. A suggestion was made by one respondent that the best approach would be to introduce the fees and review the position after one year. Only then should an exemption be considered, depending on the impact the fees have had.
19. The majority of the respondents felt that any waiver scheme should not distinguish between “in country” and “out of country” appeals as the decision should be assessed on individual merits, not where the appellant was based. Of those who did believe there should be a distinction, the majority believed that “in country” appellants should be treated more favourably, but did not provide any reasoning.
20. Those who felt that “out of country” appellants should be treated more favourably did so on the basis that they were likely to be brought by people who would be of even more limited means. Some respondents also believed that, following the changes under the Immigration Act 2016, the majority of appeals will be made “out of country” anyway and so no distinction is necessary.

Question 3: Do you believe that there are alternative options that the Ministry of Justice should consider in relation to the fee exemption scheme in the Immigration and Asylum Chamber of the First-tier Tribunal?

21. We received 109 responses to this question. 70 respondents agreed that there were alternative options that we could consider in relation to the fee exemption scheme. 9 respondents did not believe that there were any alternatives or did not believe that we should consider any further options. The remaining 30 respondents answered by reiterating their concerns about the proposed increases.

22. The respondents who believed that there were alternatives, made the following suggestions for fee exemptions:
- exempt appellants on low income to ensure the scheme directly targeted appellants of limited financial means;
 - exempt families from paying multiple fees to make a joint appeal;
 - exempt appellants in receipt of a Home Office domestic violence waiver;
 - exempt appellants who are detained;
 - exempt all asylum appeals;
 - exempt those in receipt of legal aid/asylum support;
 - exempt those in receipt of support from local authorities under the Children Act 1989;
 - exempt all deprivation of citizenship appeals; and
 - exempt all European Economic Area appeals.
23. Other respondents felt that a scheme should be targeted at tackling alleged wrong decisions made by Home Office or improving their decision making.
24. There were also respondents who addressed the fees levels and argued that a more graduated approach to fee increases should be adopted, the increases should be smaller or a payment process set up to allow appellants to pay the fee in instalments.
25. Another alternative raised by respondents was that that the standard HM Courts & Tribunals Service (HMCTS) remissions system, or a similar scheme measuring an appellant's income should be introduced into the Tribunal. Others suggested that further guidance should be provided on the use of the Lord Chancellor's exceptional power to remit or reduce fees.
26. The majority of respondents who did not believe that there were alternative exemptions either did not agree with the principle or did not expand on their reasoning. However some argued that we should not pursue a wider exemptions scheme because of the perceived implementation costs that could be incurred.

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

27. We received 116 responses to this question. 106 respondents disagreed with the proposal. 10 respondents agreed with the proposals.
28. Of those who disagreed with the proposals, the majority did so on similar grounds to those raised regarding proposals in the First-tier Tribunal, namely, that those who cannot afford to pay would be denied access to justice.
29. Other respondents argued that:
- the increases would directly affect vulnerable people who should be able to access these services for free;
 - the increases were too high and there should be a taxpayer subsidy;

- a case only goes to the Upper Tribunal when a party believes that the First-tier Tribunal has made an error in law, and it would not be right for either party to pay a fee in this instance; and
 - the Home Office often made decisions that were wrong and it would be unfair to charge such high fees to challenge these decisions.
30. The respondents who agreed with the proposals stated that it was right that those who used the Upper Tribunal should cover the cost of the services they were using. Some respondents agreed without explaining their reasons, while others agreed with the policy provided that the fees could be recovered from the losing party if the appeal was successful.

Question 5: Do you agree with our proposals to introduce fees for applications for permission to appeal in both the First-tier Tribunal and Upper Tribunal? Please provide reasons.

31. We received 119 responses to this question. 8 respondents agreed with the proposal. 111 respondents disagreed.
32. The majority of respondents who disagreed with these proposals raised similar issues to those raised in their responses to questions 1 and 4. This included that:
- they would deny vulnerable people access to justice;
 - the fees proposed were too high; and
 - the Home Office and First-tier Tribunal judges often made mistakes and it was wrong to charge fees to challenge these decisions.
33. There were also respondents who expressed a concern that these proposals, along with other increases to existing fees would together make the entire appeals process completely unaffordable.
34. Of the 8 respondents who agreed with these proposals, the majority argued that:
- those who used the tribunals services should bear the costs;
 - it would reduce the amount of unmeritorious appeals that needed to be subsidised by the general taxpayer; and
 - higher fees would prevent certain appellants prolonging the appeal process to avoid deportation.
35. Other respondents agreed in principle regarding charging fees for permission to appeal applications as it would be consistent with the approach to substantive appeals lodged in the Tribunal, but they disagreed with the levels proposed.

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.

36. There were 91 people who responded to this question. 73 respondents believed that any fee exemptions in the First-tier should be extended to the Upper Tribunal. 18 respondents disagreed.

37. Those who argued that it was right to extend the fee exemptions to the Upper Tribunal did so on the basis that:
- we should not restrict access to justice for those who use the Upper Tribunal any more than for those who use the First-tier Tribunal;
 - it was fair that certain appellants received fee exemptions; and
 - it would ensure a consistent approach across the tribunals.
38. There were also other respondents who disagreed with the fees proposals but agreed that if the proposals were implemented, the fee exemptions should be consistent across both the First-tier and Upper Tribunals.
39. One respondent argued that fee exemptions in the Upper Tribunal should go even further than in the First-tier Tribunal, given the amount of money that the appellant would have to spend to get to that stage of proceedings.
40. The main arguments advanced by those respondents who disagreed with the proposals were that:
- the exemptions proposed in the First-tier Tribunal did not go far enough; and
 - it was not fair that only a sub-set of appellants would receive help.
41. Some respondents suggested that there should be a review, one year after any proposals are implemented and consideration should be given then as to whether an exemptions scheme is required.
42. The remaining respondents who did not offer a direct answer to this question reiterated their view that no fees should be charged and that the proposed fee exemptions were inadequate.

Question 7: We would welcome your 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.

43. Of the 150 people who responded to the consultation, we received 69 responses to this question.
44. A number of respondents disagreed with our equalities impact assessment on the basis that they felt that incorrect data was used to measure the impact, our assessment was inadequate or they disagreed with our evaluation that any differential impact would be justifiable.
45. Other respondents cited particular groups who would in their view be unfairly impacted by these proposals, including those appellants who identify as LGBT, those from minority ethnic groups and those of limited financial means. None of those respondents provided any firm evidence to support those assertions.
46. Whilst we did not receive any firm evidence, the arguments raised by respondents have been taken into account when producing the final equalities statement which has been published alongside this Government Response.

Chapter 2 – Conclusions and Next Steps

Conclusions

47. The case for revisiting the fees charged in the Immigration and Asylum Chambers is based firmly on the need to make sure that HMCTS is adequately funded in order to protect the vital principle of access to justice.
48. The Immigration and Asylum Chambers of both the First-tier and Upper Tribunals play an important role in our justice system and securing their funding for the long term is essential to making sure that they continue to function effectively. This requires some tough decisions about where the burden of that funding should properly fall.
49. It was in this context that the Government decided not to proceed with the increases, announced in December 2015, to the fees charged in immigration and asylum proceedings designed to achieve 25% cost recovery. We took the view that, in light of the current financial circumstances, it was no longer justifiable that the taxpayer should be responsible for funding the majority of the costs of administering these cases. That is why we consulted on moving to full cost recovery in those cases where a fee is payable.
50. The Government is grateful for all those who have taken the time to respond to the consultation *on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)*. We have given careful consideration to the responses and the issues that they have raised and our conclusions are set out below.
51. The Government's policy, set out in *Managing Public Money*, is that where fees are charged to access public services, they should normally be set a level designed to recover the full costs of those services, unless there are good reasons not to do so. Under the current arrangements, we recover significantly less than the full costs of the Immigration Tribunals. We do not currently charge any fees for appeals in the Upper Tribunal, which cost an estimated £11m in 2015/16. Whilst in the same year, we only recovered £7m in fees from the First-tier Tribunal, compared with running costs of around £75m.
52. Also the Government does not believe that it is reasonable to expect the taxpayer to subsidise access to this tribunal. It is right, as a matter of principle, that those who use the immigration tribunals and are subject to a fee should pay the cost of the service they receive.
53. For this reason it is our intention to proceed, as per our consultation, with the implementation of the higher appeal fees in the First-tier Tribunal and the introduction of new fees for appeals in the Upper Tribunal and for permission to appeal applications.
54. Nevertheless, we recognise that there is force in some of the arguments made by respondents to the consultation around providing additional protection for those in particularly vulnerable positions and we intend to address those concerns through the adjustments to the fee waivers and exemptions policy.

55. As the consultation indicated, it is the Government's clear intention to share the burden of funding as fairly as possible therefore we will continue to exempt fees in the First-tier Tribunal for those people in particularly vulnerable positions. This includes:
- those who qualify for legal aid or asylum support;
 - those who are appealing against a decision to deprive them of their citizenship; and
 - those children bringing appeals to the tribunal who are being supported by a local authority.
56. In addition, we confirmed that while we intend to remove the exemptions relating to rights of appeal that no longer exist following the changes made by the Immigration Act 2014, we will include a 'savings provision' that allows those exemptions to continue to apply to cases that began under the old system at a time when those decisions were appealable.
57. We also made clear that we would stand by our commitment, given in December 2015, to extend the exemptions scheme to cover:
- those people appealing decisions to revoke their refugee or humanitarian protected status;
 - those with parental responsibility for, children receiving support from local authorities under section 17 of the Children Act 1989 (or any equivalent legislation in Scotland, Wales or Northern Ireland); and
 - children who are being housed by a Local Authority under section 20 of the Children Act 1989 (or any equivalent legislation in Scotland, Wales or Northern Ireland).
58. The consultation paper sought views on further exemptions and we specifically asked whether respondents thought we should consider exempting those people in receipt of a Home Office destitution waiver as set out in chapter 1 of this document.
59. After careful consideration of the responses, the Government is minded to proceed with this exemption on the basis that it believes it is right as a matter of principle that those appellants who have already been assessed as destitute by the Home Office should not be put to the expense of paying a tribunal fee. We will therefore extend our exemptions to appellants who have had the requirement to pay an application fee waived by the Home Office on the basis that they are destitute, or would be made destitute by paying that fee; specifically, where the requirement to pay the fee would be incompatible with the applicant's ECHR rights. Where such a person brings an appeal against the outcome of that fee-exempt application, they will not be required to pay a tribunal fee.
60. Whilst the majority of respondents supported our proposals to extend the exemption scheme to include those in receipt of a Home Office destitution waiver, a number also argued that we should go even further. Some of the respondents felt that certain types of appeals or appellants should be exempt, whereas others argued that a means tested scheme, similar or the same as the standard HMCTS 'Help with Fees' scheme, should also be adopted in the Immigration and Asylum Chamber.
61. Having analysed these options, we are not persuaded that exempting the specific appeals or appellants suggested by consultees would strike the right balance between protecting those with limited financial means whilst making sure that those who can

afford to pay are covering the cost of their proceedings. We also considered the possibility of adopting the standard HMCTS 'Help with Fees' scheme however, as indicated in the consultation paper, the reason that the scheme has not applied in this jurisdiction previously is because of the difficulty in assessing income for persons based abroad and the complexity associated with different standard of living thresholds in the various countries from which out of country appellants apply. These difficulties still exist and on that basis we have decided not to apply the scheme to this jurisdiction.

62. We do, however, recognise that the Home Office destitution waiver scheme does not apply to out of country appellants. Appellants in that situation who are facing significant financial hardship however, will still have recourse to the Lord Chancellor's exceptional power to remit or defer fees. We intend, as suggested by some respondents to the consultation, to provide revised clearer guidance on the use of the exceptional power. This should provide greater clarity to any appellant who is considering making an application for a remission or deferral under this power.
63. In addition to seeking views on possible exemptions, we also asked respondents whether the same exemptions scheme that applies in the First-tier Tribunal should apply equally to the Upper Tribunal. We agree with the majority of respondents who addressed this point that there was no obvious reason why proceedings in the Upper Tribunal should be treated any differently to those in the First-tier. Therefore, all exemptions within the First-tier will be replicated in the Upper Tribunal alongside any others that we have outlined above.

Next Steps

64. In conclusion, the Government believes that this proposed package of fee increases will enable us to secure the funding of the Immigration and Asylum Chambers of both the First-tier and Upper Tribunal. Whilst, at the same time protecting, access to justice and the most vulnerable appellants through extension of the fee exemption scheme and further guidance around the Lord Chancellor's exceptional power to reduce or remit fees.
65. We will aim to implement our proposals in respect of the fee increases in the First-tier Tribunal and the changes to the exemptions scheme in that tier as soon as possible. However, our proposals for new fees in the Upper Tribunal and permission to appeal applications will be implemented on a slightly longer timetable. This is to allow sufficient time to seek the necessary procedural rule changes referred to in the consultation document and also enable us to make sure that we ready for a smooth operational transition.

Annex A: List of respondents

Administrative Bar Law Association	International Care Network
Asylum Welcome	Joint Council on the Welfare of Immigrants
Bail for Immigration Detainees	Justice
Bar Council	Kenworthy's Chambers
Barnt Green and Redditch Quakers	KM Solicitors
Beers solicitors	Latitude Law
Bristol Defend Asylum Seekers Campaign (member)	Law Society
BritCits	Law Society of Scotland
British Red Cross	Leicestershire Law Society
Cardinal Hume Centre	Leigh Asylum Seekers
Caritas Social Action Network	Lewisham Refugee and Migrant Network
Chambers of Jan Doerfel	Liberal Democrats of Seekers for Sanctuary
Church of England	Liberty
Citizens Advice Bolton	Linköping University
Clean Break Theatre Company	M&K
Coram CLC Children's Legal Centre	Malikl Legal
CSAN and Cardinal Human Centre	Maxim Law
Duncan Lewis	McGill and Co.
Durham University	National Justice and Peace Network
Equality and Human Rights Commission	Network
Ethnic Minorities Law Centre	No Resource to Public Funds Network
First-tier Immigration and Asylum Chamber	Norwich Arts Centre
Fountain Solicitors	Oxford University
Freedom from Torture	People to People Solidarity
Garden Court Chambers	Plymouth City Council
Garden Court North Chambers	Rawa and Co.
Geraint Jones Solicitors	René Cassin
Greater Manchester Immigration Aid Unit	Rights of Women
Habeas Corpus Project	Schneider Goldstein Immigration Law
Holy Trinity	Sheffield Citizens Advice & Law Centre
Hussain Immigration Law	Slough Immigration Unit
Immigration Law Practitioners Association	Southwark Citizens Advice Bureau

Stopcocks Women Plumbers

The Public and Commercial Services Union

Unison

UNITE

University of Birmingham

University of Bristol

University of Exeter

University of Liverpool

University of Strathclyde

Voice for the Voiceless-UK

Wilson Solicitors

Wingfield Landscape

Please note we received a total of 150 responses to consultation. The remaining 74 responses were provided by private individuals responding in their personal capacity.

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