



**Consultation on Tribunal Fees:
Proposals for the First-tier Tribunal (Immigration and Asylum Chamber)
and Upper Tribunal (Immigration and Asylum Chamber) (Cm 9261)**

**Joint response by JUSTICE and
The Constitutional and Administrative Law Bar Association**

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EXECUTIVE SUMMARY

- 1. ALBA and JUSTICE believe that the proposals are seriously flawed. The proposed fee increases for the FTT will operate as a major impediment to access to justice and are likely to be unaffordable for most, if not all, current users of the appeals system. The proposal for further fees for onwards appeals to the Upper Tribunal will exacerbate the effect of fees in the FTT. The implementation of the proposals is likely to remove the ability of vulnerable persons to access an independent tribunal system. This is necessary to determine the legality of government decisions, which are of fundamental importance to their lives. In our view, the further consequence is that the changes are very likely to be found unlawful by the courts.**
- 2. With reference to the questions posed in the consultation, therefore, the proposed fee increases are objectionable in principle, and the proposed fee exemptions far too narrow in scope to remove this objection or properly mitigate it. The principle of a fully user funded tribunal system is not justified, especially where this would be the only such user funded tribunal system and where the Government's Equality Statement recognises that there is a much higher proportion of users of this tribunal from Black, Asian and ethnic minority backgrounds.**

INTRODUCTION

- 3. ALBA and JUSTICE are grateful for this opportunity to respond to the Government's consultation on Tribunal fee proposals in the Immigration and Asylum Chamber of the First-tier ('FTT') and Upper Tribunal ('UT'), first published in April 2016 (Consultation on Tribunal Fees: Proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber) (Cm 9261) ('the Consultation Document'). The organisations are separate but have in common a strong involvement, and recognised expertise, in issues of administrative law and justice including the rule of law.**
- 4. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. JUSTICE believes that providing meaningful redress for individuals with complaints against public bodies is a critical aspect of ensuring access to justice, the protection of individual rights and a fair relationship between the individual and the state. At JUSTICE we have worked actively on issues of good administration, oversight and accountability since our inception.**
- 5. The Constitutional and Administrative Law Bar Association ('ALBA') was established in 1986. ALBA currently has over 1,000 members. It is the**

professional association for practitioners of public law. It exists to further knowledge about constitutional and administrative law amongst its members and to promote the wider understanding of the law in these areas. ALBA is predominantly an association of members of the Bar, but its members also include judges, solicitors, lawyers in public service, academics and students. In particular ALBA's members include barristers who act for claimants and defendants or for either of these exclusively, in judicial review proceedings and in statutory appeals including proceedings in immigration, asylum, human rights, public procurement and planning cases. Not all members of ALBA do publicly funded work, but a substantial number will have some contact with such work and some will do a great deal of it. Even members who have no contact at all with legal aid will have concerns for the reputation of the legal system in England and Wales, the maintenance of legal standards, and the protection of the rule of law. This response has been prepared by a sub-committee of the executive committee of ALBA.

6. This document sets out JUSTICE's and ALBA's joint response to the Consultation Document. We limit our comments to our areas of expertise. Silence on a specific consultation question should not be read as approval.

BACKGROUND

7. The Consultation Document sets out proposals to move to 'full cost recovery' through imposition of heightened fees in the FTT and the introduction of fees for onward appeals to the UT. The fees in the FTT are presently £80 for a decision on the papers and £140 for a decision at or after oral hearing. A scheme exists for remission of those fees in certain cases.
8. In respect of appeals to the FTT it is proposed to raise the current fees from £80 to £490 as regards paper decisions, an increase of just over 512%. The rise in respect of appeals with oral hearings would be from £140 to £800, an increase of over 470%.
9. Paragraph 34 of the Consultation Document and relevant parts of the Impact Assessment also suggest that there is a proposal for a new fee of £455 attached to an application to the FTT for permission to appeal to the UT. However, such fee is not listed in Table 1 and therefore not covered by Question 1 of the Consultation Exercise (or elsewhere). We consider that this omission is highly concerning, especially given the cumulative nature of the proposed fees and the high cost of this additional fee.
10. In respect of the UT, in place of the current arrangement whereby no fee is charged, fees would be imposed as follows: applications to the UT seeking permission to appeal from the FTT would attract a fee of £350, and hearings before the UT would have an attached fee of £510.

11. It is important to consider the likely cumulative effect of increased fees. In an appeal which is first heard in the FTT, refused permission to appeal by the FTT, and then granted permission to appeal and heard by the UT, which then remits it for rehearing in the FTT, it appears that total fees of £2915 would arise:
- £800 for oral hearing in the FTT;
 - £455 for the application for permission to appeal submitted to the FTT;
 - £350 for the application for permission to appeal submitted to the UT;
 - £510 for the hearing in the UT; and
 - £800 for rehearing in the FTT.
12. These are very substantial fees, viewed against anything other than income and assets considerably greater than the national average in the United Kingdom. They are even more substantial viewed against incomes in many other states: for instance, £2915 exceeds by a substantial margin the annual GDP per person figures published by the World Bank for India (US\$1581.50)¹ and Pakistan (US\$1316.60), two Commonwealth countries with strong ties to the United Kingdom accounting for a substantial proportion of immigration and/or asylum applications. The annual GDP per person figure for Malawi (US\$255) is far below the contemplated fee even for a decision ‘on the papers’ (£490). The differential effect of fees at the proposed levels is likely to be considerable.

THE IMPORTANCE OF ACCESS TO JUSTICE

13. JUSTICE and ALBA attach great importance to the constitutional principle of access to justice, which has long been understood as an aspect of the rule of law. In this context we welcome the declaration in the Ministerial Foreword to the Consultation Document referring to the speech of the Lord Chancellor/Secretary of State for Justice given on 23 June 2015 citing the aspiration of the Government to 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.*’ Whilst the Ministerial Foreword refers to budgetary pressures, the aspiration of accessible justice remains the test by which the proposals in the Consultation Document must be judged.
14. Accessible justice is a key element of the rule of law. We recall, for example, the late Lord Bingham of Cornhill’s identification, as part of the rule of law, the necessity that: ‘*Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve*’ within which he describes ‘*denial of legal protection to the*

¹http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?order=wbapi_data_value_2014+wbapi_data_value+wbapi_data_value-last&sort=asc [viewed 31 May 2016].

poor litigant who cannot afford to pay as *'one enemy of the rule of law.'*² He was there addressing the question of need for legal aid. High fees for access to courts or tribunals represent a further 'enemy of the rule of law' even before questions of representation or advice are reached.

15. More recently, Baroness Hale of Richmond, addressing the Law Centres' Federation Annual Conference 2011 on legal aid and access to justice, expressly cited the importance of access to justice as a part of the rule of law:

*First, there is the level of constitutional principle. We are a society and an economy built on the rule of law. Businessmen need to know that their contracts will be enforced by an independent and incorruptible judiciary. But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced. As the Bar Council has put it, 'individuals' belief that they live in a society in which harm done falls to be recompensed, or that obligations made will be honoured, is important.' If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall.*³

16. In the same speech Lady Hale cited Dr E.J. Cohn's work of 1941, 'Legal Aid for the Poor', in which the importance of legal aid to the administration of a modern democratic society was identified as follows:

*Legal aid is a service which the modern state owes to its citizens as a matter of principal. It is part of the protection of the citizen's individuality which, in our modern conception of the relationship between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves. Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc., so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the State to make its machinery work alike, for the rich and the poor.*⁴

17. The imperative for effective access to justice is particularly acute as regards tribunals, the purpose of which is to afford such access more readily than might otherwise be possible. Both the Government and authoritative experts on administrative justice have long judged this to be the purpose of the creation of

² Bingham, T, *The Rule of Law*, 85-89, 88 (Allen Lane, London 2010).

³ Copy of speech available at: <https://archive.org/details/269299-speech-111125>

⁴ EJ Cohn, 'Legal Aid for the Poor: A Study in Comparative Law and Legal Reform' (1943) 59 *Law Quarterly Review* 250, 253.

tribunals: 'Tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts...'⁵ It is these factors – including economy to the user – which represent the basic justification for tribunals' existence. Wade and Forsyth have observed that the charging of large fees would be inimical to this purpose of tribunals:

*Many tribunals charge a small fee for the use of their services. But the imposition of large fees undermines the cheapness and accessibility long recognised as important advantages of tribunals over courts. Thus the Council was critical of the decision to impose full cost fees upon the users of leasehold valuation tribunals, and after opposition in Parliament the government agreed to an upper limit of £500. The imposition of full cost fees is particularly objectionable in matters – such as leasehold valuation – which would otherwise fall within the jurisdiction of the county court and be eligible for legal aid.*⁶

18. We would add to this that other cases in which the imposition of full cost fees is particularly objectionable, would seem to include the following, all of which arise in the context of current immigration and/or asylum appeals:⁷
- (i) proceedings concerning fundamental individual rights and freedoms;
 - (ii) proceedings against the State itself, where the State is able to deploy very substantial means against persons potentially of moderate, small, or no means;
 - (iii) litigation arising from State decision-making in which the quality of decision-making is regularly called into question by the outcome of tribunal proceedings (e.g. in asylum adjudications – arguably the most serious category of State decision-making as regards individuals, and a class of decision to which the proposed fee changes would apply – the 2015 statistics showed 30% of State decisions were overturned on appeal⁸); and,
 - (iv) proceedings in areas of complex and frequently changing law. In this context we note that in *R (Alvi) v SSHD*⁹ Lord Hope cited with evident sympathy the observation of Longmore LJ in *DP v SSHD* [2012] EWCA Civ 365, [14], lamenting '*the absolute whirlwind which litigants and judges now feel themselves in due to the speed with which the law, practice, and policy change in this field of the law.*'

⁵ Wade, H and Forsyth C, *Administrative Law* (10th edn, Oxford, OUP, 2009), pp. 770-1.

⁶ *Ibid.*, pp. 790-1.

⁷ See section entitled 'The Content of Affected Appeals'.

⁸ <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2015/asylum#asylum-appeals> [viewed 31 May 2016].

⁹ *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.

19. We believe strongly that it is wrong to treat access to justice either as a mere commodity or as a potential obstacle to legitimate action by the executive, rather than acknowledging it as a fundamental component in the democratic balance of powers. What is at stake is a right of such weight that, as Laws J put it in *R v Lord Chancellor, Ex. p. Witham*, 'the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right'.¹⁰
20. The right of access to the courts has long been regarded as of fundamental importance (see for example *R (Medical Justice) v SSHD* [2011] EWCA Civ 1710). In many instances, however, access to the courts is only a reality because fees are either absent or set at a level which can reasonably be met by applicants.
21. We therefore consider that any limitation on access to the tribunals will be subject to anxious scrutiny by the courts. In a significant recent decision we note the observation of Underhill LJ (with whom Davis and Moore-Bick LJJ concurred) in *R (UNISON) v Lord Chancellor* [2015] EWCA Civ 935; [2016] ICR 1, [40] as regards fees set at a level much lower than the suggested cumulative charges proposed in this Consultation Document. In that decision the Court of Appeal found the relevant jurisprudence to establish:¹¹

(a) (unsurprisingly) that it is not objectionable in principle for the state to charge a fee for access to the courts;

(b) that there should be "a proper balance" between the right to charge such a fee and the right of a claimant to bring a claim before the court; and

(c) that the balance will not be properly struck if the fee is "disproportionate".

22. In this context the Court went on to set out important guidance:

41. Thus although some help is to be got from the case-law it does not provide any clear criterion for identifying at what level a particular court fee becomes "excessive" or "disproportionate". It is necessary to go back to the underlying principle. That is that a claimant must not be denied access to a court, and thus access to justice; and that such access should be practical and not merely theoretical. In my view it follows that the basic question is whether the fee payable is such that the claimant cannot realistically afford to pay it. If that seems a trite conclusion to so elaborate a discussion I must apologise. But it does add something. It means that the focus is squarely on what the claimant

¹⁰ *R v Lord Chancellor, Ex. p. Witham* [1985] QB 575 at 585.

¹¹ At paragraph 40.

can afford to pay (rather than, for example, considerations of the value of the claim or the cost of the service), and it also emphasises that the approach must be realistic. The criterion of whether the claimant can realistically afford to pay the fee is consistent with the well-established test in Levez, albeit that that was not concerned specifically with court fees, provided due weight is given to the phrase "impossible in practice". As I read it, this was the approach followed by both Divisional Courts.

23. It is not only under the common law that access to justice has, in the past, been protected in the context of fees. In *R (QB) v SSHD* [2010] EWHC 483, Black J upheld the challenge to the Home Office policy regarding waiver of visa fees on the basis that, in that case, it was inconsistent with article 8 of the European Convention on Human Rights ('ECHR') and/or fundamental rights. In the case of *R (Osman Omar) v SSHD* [2012] EWHC 3448 (Admin) it was held that a fee cannot be charged where to do so would breach the person's rights under the ECHR. Although those cases concerned fees charged by the Home Office for immigration applications, we suggest that the same principles would undoubtedly hold true for fees charged in immigration appeals.
24. We acknowledge that Article 6 ECHR, the right to a fair trial, has been held not to be applicable in immigration and asylum cases. However, in *R (Gudanaviciene and Others) v The Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622; [2015] 1 WLR 2247 the Court of Appeal held that Article 8 ECHR, which provides the right to private and family life, and is at issue in many immigration appeals, can give rise to a need for financial assistance. Although *Gudanaviciene* was concerned with the provision of legal aid, the same principles are likely to apply in cases where an appeal fee is charged. As such, where an appellant is unable to pursue their appeal because of the level of fees charged in our view this is likely to breach the ECHR.
25. Furthermore, barring relatively extensive waiver provisions, proposals for fees set at cost recovery levels in cases engaging ECHR rights appear likely in some cases or overall to breach Article 13 ECHR, the right to an effective remedy. In *GR v Netherlands*, ECtHR, Application no. 22251/07, 10 January 2012, the European Court of Human Rights ('ECtHR') held that a failure to waive the application fee for a residence permit constituted a breach of Article 13 where the fee was almost equivalent to the appellant's net monthly income. Given the scale of the proposed fees here, there are likely to be appellants who are similarly denied an effective remedy in breach of the ECHR. While Article 13 is not one of the rights incorporated by the Human Rights Act 1998 into domestic law in the UK, an appellant would still have recourse to the ECtHR to seek to enforce such right.
26. Access to justice is also explicitly protected under Article 47 of the Charter of Fundamental Rights of the European Union which is directly enforceable before English courts and tribunals: *Benkharbouche v Sudanese Embassy* [2015]

EWCA Civ 33. Further, the Court of Justice of the European Union has held that, in assessing whether or not an obstacle to access to justice is proportionate, national courts have to take into consideration, amongst other things, the importance of the issues at stake: *Case C-279/09 DEB v Germany*, 22 December 2010. Given the importance of the rights that are the subject of appeal before the Immigration and Asylum Chamber, such as the right to asylum and the right to reside in the UK, the proposed fees are also therefore likely to breach Article 47 CFR in cases where EU law is engaged.

THE CONTENT OF AFFECTED APPEALS

27. We referred at paragraph 18 above to the content of particular tribunal proceedings as relevant to the question of whether fees would be lawful or justifiable. It therefore appears to us important to identify the content of the class of proceedings affected by the current proposals.
28. The system of statutory appeals has been changed considerably in very recent times. Up to 19 October 2014 a large number of immigration or asylum related decisions were appealable under section 82 Nationality Immigration and Asylum Act 2002 ('NIAA 2002'). Prior to amendment by section 15 Immigration Act 2014, effective from that date, section 82 NIAA 2002 provided that:

82 Right of appeal: general

(1) *Where an immigration decision is made in respect of a person he may appeal to the Tribunal.*

(2) *In this Part "immigration decision" means—*

(a) *refusal of leave to enter the United Kingdom,*

(b) *refusal of entry clearance,*

(c) *refusal of a certificate of entitlement under section 10 of this Act,*

(d) *refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,*

(e) *variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,*

(f) *revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,*

(g) *a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),*

(h) *a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),*

- (i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),*
- (ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c. 77) (seamen and aircrews),*
- (ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),*
- (j) a decision to make a deportation order under section 5(1) of that Act, and*
- (k) refusal to revoke a deportation order under section 5(2) of that Act.*

29. Since amendment of that provision by the Immigration Act 2014, the range of affected decisions is much narrower – in essence limited strictly to cases invoking international protection or human rights:

82 Right of appeal to the Tribunal

- (1) A person (“P”) may appeal to the Tribunal where—*
 - (a) the Secretary of State has decided to refuse a protection claim made by P,*
 - (b) the Secretary of State has decided to refuse a human rights claim made by P, or*
 - (c) the Secretary of State has decided to revoke P's protection status.*
- (2) For the purposes of this Part—*
 - (a) a “protection claim” is a claim made by a person (“P”) that removal of P from the United Kingdom—*
 - (i) would breach the United Kingdom's obligations under the Refugee Convention, or*
 - (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;*
 - (b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—*
 - (i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;*
 - (ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;*
 - (c) a person has “protection status” if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;*
 - (d) “humanitarian protection” is to be construed in accordance with the immigration rules;*
 - (e) “refugee” has the same meaning as in the Refugee Convention.*

Additionally, certification provisions at sections 94 and 96 NIAA 2002 allow unmeritorious or repeat claims to be certified preventing a right of appeal, either in-country or at all.

30. It will be obvious therefore that the limited categories of cases remaining within the statutory appeals system contain some of the most important issues arising in any form of proceedings, concerned, as they are, directly with the protection of life and liberty or raising other serious issues such as freedom of expression or the protection of family life, including the family life of British citizens and legal residents.
31. In addition, appeals will also arise against deprivation of citizenship status under section 40A British Nationality Act 1981. These also concern fundamental issues regarding membership of the body of British citizens, or protection by other British citizenship status. Finally, appeals will also arise relating to European Economic Area rights under Part 6 of the Immigration (European Economic Area) Regulations 2006.

THE SIGNIFICANCE OF APPEALS DETERMINATION

32. Appeals are, of course, important as a means of resolving disputed questions of fact and/or law. Given the strictly circumscribed areas in which appeals are now provided under section 82 NIAA 2002, and the certification provisions in NIAA 2002 which prevent unmeritorious or repeat claims, the appeals affected by the fee proposals are particularly important. As noted above, the restriction of appeal rights means that every appeal under section 82 NIAA 2002 filed since October 2014 will concern fundamental rights in some form. These are not appeals relating simply to questions of entitlement to leave to remain under the Immigration Rules HC 395. There is abundant authority pointing to the standards required of adjudication in relation to the protection of fundamental rights as requiring '*the most anxious scrutiny*', in line with the observations of Lord Bridge of Harwich in *Musisi v SSHD; R v SSHD, Ex p. Bugdaycay* [1987] AC 514, 531 and abjuring application of '*only the highest standards of fairness*', per Bingham LJ, as he then was, in *R v SSHD, Ex p. Thirukumar & ors* [1989] Imm AR 402, 414.
33. Members of ALBA active in this area, whether for individuals challenging decisions of the State or for the State itself, would also emphasise, on the basis of their experience, that appeals have a secondary importance to the system of administering and adjudicating claims to protective status in the United Kingdom: they are also fact finding exercises independent both of the State and of the appellant. The Secretary of State and the courts regularly rely in this context upon the content of previous independent adjudications within the statutory appeal process. Factual findings bind the State, save where a conclusion is demonstrably flawed or fresh material undermines a historic finding or possibly where no assessment of credibility following oral evidence

arises: *R v SSHD, Ex p. Danaei* [1997] EWCA Civ 2704; [1998] Imm AR 84, [1998] INLR 124 per Simon Brown LJ, as he then was. In the appeals context an unappealed or undisturbed previous appellate finding has been held to provide in principle the ‘starting point’ for any new appellate consideration: *Devaseelan v SSHD* [2002] UKIAT 702; [2003] Imm AR 1 and *Djebbar v SSHD* [2004] EWCA Civ 804; [2004] INLR 466. The independent factual findings determined by appeals also enable the State to provide answers to very large numbers of representations asserting the existence of a ‘fresh claim’ to human rights or international protection. Paragraph 353 of the Immigration Rules HC 395¹² provides in this context that:

353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

- (i) had not already been considered; and*
- (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.*

This paragraph does not apply to claims made overseas.

353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

In considering whether representations have ‘a realistic prospect of success’ that phrase is treated as meaning a realistic prospect of success on statutory

¹² The requirement to consider representations is codified by paragraph 353 HC 395 but not dependent upon it. This was identified by the Court of Appeal per Sir Thomas Bingham MR (as he then was) in *R v SSHD, Ex p. Onibiyo* [1996] QB 768; [1996] 2 WLR 490. In *BA (Nigeria) v SSHD* [2009] UKSC 7; [2010] 1 AC 444 Lord Hope, with whom Lords Brown, Scott, and Rodger concurred, emphasised the importance of the ability to seek the establishment of a fresh claim: ‘*The ability of asylum seekers who make unsuccessful claims to be allowed to remain to discover further reasons why they should not be removed from the country where they seek refuge is an inescapable feature of any system that is put in place to meet a State’s obligations under the Geneva Convention on the Status of Refugees and article 3 of the European Convention on Human Rights....*’

appeal to an independent fact finder.¹³ Judging whether this exists is generally aided considerably by reference to past adjudications applying *Devaseelan* and *Djebbar* principles. A new fact finder is assumed to act in conformity with the standards there set out, including by treating previous factual findings determined on appeal as the 'starting point' for any new adjudication. However, it will be noted that the reliance upon adjudications as establishing facts for various purposes is predicated upon there being an unobstructed access to appeal and to onward appeals from first instance decisions. The appeals system thereby provides certainty to the vast array of 'fresh claims' that are brought, avoiding the need for the courts to adjudicate on applications where a similar set of circumstances has already been adjudicated upon. This already controls the costs burden upon the State, while ensuring those with genuine claims are able to access the system.

34. ALBA members who are experienced in this area (again for both State and individual) also emphasise another advantage of appeals being accessible at moderate or no cost, which is not adverted to in the Consultation Document. The appeals system in its present form tends to support more efficient and cost-effective immigration control, in the following respects:

- i. First, it encourages individuals and families, who might otherwise be undetected and choose to remain unlawfully in the United Kingdom, to come forward to make (generally paid) immigration (and asylum) applications to the Secretary of State for the Home Department. A large number of such persons identify themselves to the Secretary of State notwithstanding being undetected prior to that point. An aspect of the incentive to do this is the ability to seek to make good a case to an independent tribunal, should that case not be accepted by the Secretary of State;
- ii. Second, just as access to appeal encourages individuals and families to disclose their presence and circumstances to the State, it provides a substantial motivation for remaining in contact whilst decisions or progress in appeal proceedings is awaited. This is likely to be a significant factor in assisting the Secretary of State to manage immigration control without incurring much higher costs relating to management (such as reporting or administration of tagging) and use of detention.¹⁴

¹³ *WM (DRC) v SSHD; SSHD v AR (Afghanistan)* [2006] EWCA Civ 1495.

¹⁴ In the experience of ALBA members, it may have other significant consequences beneficial to the United Kingdom as well as to the persons concerned, for instance enabling persons who have disclosed their presence and remain in contact thanks to the incentive of an appeal process to report and assist in the investigation of criminal conduct or to report communicable diseases.

In the case of each of the matters listed above, the systemic incentive to comply with temporary admission or immigration bail would be reduced by any substantial obstacle to appeal, or even the widespread belief that such obstacle arose. Indeed, in cases where an individual or family is conscious that an appeal (or continuation of appeal) has become unaffordable, this produces a positive incentive to abscond from immigration control. These potentially important factors appear not to have been considered in the present process.

THE IMPACT ASSESSMENT AND ACCESS TO JUSTICE

35. The imposition of fees has obvious implications for access to justice. ALBA and JUSTICE are very concerned to see that the Impact Assessment states not only that the Government favours moving to full cost recovery by imposition of the fees already set out, but also that:

i. This will *not* be reviewed after imposition to ensure access to justice is not harmed (or not disproportionately harmed)¹⁵ ;

ii. Current assumptions in the Impact Assessment¹⁶ seem to eliminate the primary question of access to justice (something which may vitiate the process of consultation itself). The Impact Assessment states under the heading '*Key assumptions/sensitivities/risks*' that '*Our central scenario is based on the assumption that fee changes will cause a 20 percent fall in demand... The drop in caseload is assumed to be because individuals choose to no longer bring a claim as a result of the higher fees.*' This shows clear acknowledgment (based on experience) of likely diminishing access. Yet the next '*key assumption/sensitivity/risk*' states that '*It has also been assumed that there will be no detrimental impact on tribunal case outcomes, on access to justice and on the legal services used to pursue or defend claims from the increase in fees.*' This appears to import a key assumption which is not only inconsistent with a prior assumption, but also which undermines the essential question arising in the instant context, which is precisely that of access to justice.

36. We note that the Introduction to the Consultation Document refers to a net cost to the taxpayer of courts and tribunals in England and Wales of '*around £1 billion*'.¹⁷ It is not clear how much of this relates to the FTT and/or UT, whether this reflects recent efforts in other areas of the justice system to make efficiency savings and cost reductions, or whether these figures accurately reflect the reduction of access to appeals from October 2014 already noted, which given limited current cost recovery will reduce costs much more than income. It is

¹⁵ Impact Assessment, page 1.

¹⁶ *Ibid.*, page 2.

¹⁷ Consultation Document, paragraph 3.

also not clear why the Government proposes to move to full cost recovery only in respect of the cases dealt with by the FTT and UT. If the imperative for full cost recovery is great, ALBA and JUSTICE do not understand why it eventuates as a proposal for full cost recovery in only a part of the system, especially as none of the cases concerned here are money cases.

THE IMPORTANCE OF BASING POLICY UPON EVIDENCE

37. JUSTICE and ALBA are deeply concerned by the Government's failure to take an evidence-based approach as regards the proposals in the Consultation Paper. The Ministry of Justice has recently been criticised by both the National Audit Office and the Public Accounts Committee for its limited understanding of the evidence base for reforms to legal aid.¹⁸ In both cases, this criticism particularly concerned the limited nature of the impact assessment performed and the impact of the measures on access to justice. Similarly, we consider that, in circumstances where reform may impact negatively on access to the justice system, and in light of the important constitutional function that the justice system serves, there is a particular imperative for the impact of measures to be fully explored before they are introduced.
38. Whilst the Consultation Document rightly acknowledges the importance of access to justice, this recognition is meaningless given the imposition within the Impact Assessment document of an internally contradictory and unexamined assumption that access to justice will not be impeded. The Consultation Document in fact appears to focus on generating from users of the FTT and UT the income required to fully fund the service, not considering adequately or at all the likely effect of such proposals on access to justice.
39. ALBA and JUSTICE emphasise that, without sufficient regard to evidence, it is impossible to be confident that these proposals will not have an unacceptable adverse impact on access to justice. JUSTICE and ALBA are very concerned that the proposed fees may indeed have such an effect. Without a proper evidence based approach the Government is at real risk of exceeding the authority provided by enabling provisions, breaching the constitutional principle of access to justice, the common law right of access to the courts (and tribunals), Article 47 CFR, Articles 13 and, where applicable, Article 8 ECHR.
40. The Government's questions are addressed below.

¹⁸ NAO, Implementing reforms to civil legal aid, November 2014; Public Accounts Committee, Thirty-sixth Report of Session 2014–15, Implementing reforms to civil legal aid, HC 808.

Question 1: Increasing the fees charged

41. The Government proposes to increase the fees in the FTT as described at paragraph 8 above. In respect of appeals to the FTT decided on the papers it is proposed to increase the current fees by just over 512%. The rise in respect of appeals with oral hearings would represent an increase of over 470%. In addition, the Impact Assessment suggests that a new fee of £455 would be attached to an application to the FTT for permission to appeal to the UT. Such an application presently attracts no fee. The experience of ALBA members with substantial experience in this area representing individuals and/or the State is that, in general, oral procedures are necessary for the adequate resolution of immigration and asylum appeals, and that resort to the UT is frequently justified; these observations acquire still greater force given the effective limitation of appeals since October 2014 to fundamental rights and asylum questions.
42. ALBA and JUSTICE believe that it is important to see FTT fees in a broader context which includes the risk that appeals will require the payment of substantial further fees in the UT. Such an observation is not unrealistic, on the State's figures: the most recent figures for immigration and asylum appeals state that 24% of appeals to the UT were remitted back to the FTT (justifying the observation of ALBA members active in this area referred to in the previous paragraph), and allow that a substantial further number may have been reversed by the UT instead (the figures do not distinguish allowed appeals from dismissed appeals).¹⁹
43. Whilst the principle of full cost recovery might not, provided adequate arrangements for waiver and/or reduction are made, be objectionable *per se*, it is extremely difficult to see how this could be so in fundamental rights cases without exemptions and/or remission on a scale so substantial as to undermine the viability of attempting full cost recovery in the first place. JUSTICE and ALBA point in this regard to the strong observation of Wade and Forsyth in relation to the general principle of the accessibility of justice in tribunals, referred to in paragraph 17 above, to which here all of the factors identified at paragraph 18 above apply very strongly. JUSTICE and ALBA are deeply concerned about the lack of robust analysis of how the proposed policy will impact on access to justice and of the lawfulness, therefore, of such proposals. Overall, we believe that the proposals are seriously flawed.
44. ALBA and JUSTICE note that the Government's impact assessment does not measure the likely impact on access to justice of the increase in fees *per se*. Instead it estimates the likely '*drop in caseload*', (i.e. the decrease in the volume

¹⁹ Tribunals and Gender Recognition Certificate Statistics Quarterly, October-December 2015, Ministry of Justice Statistics bulletin 10 March 2016, p 15.

of appeals,) which it puts at 20%.²⁰ This figure would include appeals that might otherwise have succeeded but which are dropped for lack of means, (i.e. those denied access to justice) as well as appeals dropped for lack of merit as a result of the fees. We are highly concerned that the Impact Assessment elides the most important issue to be considered in any proper policy formation regarding fees, namely the question of access to justice: the Assessment records that *'It has also been assumed that there will be no detrimental impact on tribunal case outcomes, on access to justice and on the legal services used to pursue or defend claims from the increase in fees.'* As is already stated above,²¹ this appears to import a key assumption which is not only inconsistent with a prior assumption, but also undermines the essential question arising in the instant context, which is precisely that of access to justice.

45. JUSTICE and ALBA are also concerned that, as well as being assumed to involve no impact on access to justice, the estimated drop in caseload is itself, at best, no more than a very rough and ready figure, arrived at by taking the mid-point between two known impacts: the drop in cases following the introduction of fees in the FTT in 2011, which the Government states had a negligible impact, and the 40% drop in cases following the introduction of enhanced fees for money claims.²² We are not in a position, without further information, to comment on the first of these figures. However, it seems to us that taking the second figure as in any way relevant is likely to lead to erroneous conclusions. The profile of applicant and the issues at stake in money claims compared to immigration and asylum claims are entirely different. In our view, the Government has failed to produce any meaningful analysis on this point. This level of analysis (or failure of analysis) seems to ALBA and JUSTICE incompatible with the gravity of the issue of access to justice in the context of the particular category of cases concerned here given that they concern questions of fundamental rights.²³
46. Moreover, past Government assessments of the impact of fees do not provide any reassurance. In particular, the Government failed to anticipate the drop in cases and the corresponding impact on access to justice of introducing fees in the Employment Tribunal, where the number of cases has fallen by nearly 70% since fees were introduced.²⁴
47. JUSTICE and ALBA also note that, with the passing of the Immigration Act 2016, non-suspensive appeals will now be the norm in immigration appeals.²⁵

²⁰ Immigration and Asylum Chamber Full Cost Recovery, Impact Assessment Number: MoJ005/2016 available at https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/impactassessment.pdf

²¹ See section entitled 'The Impact Assessment and Access to Justice'.

²² *Ibid.*

²³ See section entitled 'The Content of Affected Appeals'.

²⁴ Tribunals and Gender Recognition Statistics Quarterly: October to December 2015, Table 1.2.

²⁵ Immigration Act 2016, Part 4.

We are concerned that the impact on the ability of appellants to effectively appeal from abroad is not well understood.²⁶ A fee increase of this magnitude risks compounding difficulties that appellants will face in appealing from abroad and deny them access to justice. Indeed, it may bring considerable uncertainty to attempts to operate a system of certification which assumes ready access to appeals from abroad, undermining the recent reasoning of the Court of Appeal in *R (Kiarie) v SSHD*; *R (Byndloss) v SSHD* [2015] EWCA Civ 1020; [2016] 1 WLR 1961 where the system of certification was declared not to be unlawful.

48. JUSTICE and ALBA therefore believe that the increase in charges will seriously impact access to justice. This is a matter of utmost gravity given the nature of the claims potentially affected and the express exclusion of any analysis of access to justice factors from the Impact Assessment. Without a remissions system which fully reflects the extent of these costs so as to preserve access to justice, the proposed changes appear likely to be unlawful: in this context we quote Underhill LJ who, in the recent *R (UNISON)* case, at [41], delineated the 'underlying principle': '*That is that a claimant must not be denied access to a court, and thus access to justice; and that such access should be practical and not merely theoretical. In my view it follows that the basic question is whether the fee payable is such that the claimant cannot realistically afford to pay it.*' It seems to us that, given the extent of the costs appellants would face in pursuing an appeal under these proposals, any fair remission system would result in a very small number of people actually paying the proposed fees. This is particularly so given the complexity involved in creating a fair system reflecting incomes or assets outside the United Kingdom.²⁷ By contrast, given the scale of the proposed charges, without a fair remission system, individuals with valid bases for appeal would be prevented from exercising appeal 'rights' and the entire fee scheme would be declared unlawful. Overall JUSTICE and ALBA believe that in the absence of an evidence-based approach to the potential limitation of access to justice, the current proposals are insufficiently developed.
49. We are also concerned that there may be unanticipated consequences which will not only reduce savings, but reverse these. An example would be the risk that asylum (and, in exceptional circumstances, immigration) claimants who are currently able and content to pay for tribunal fees, representation or support by themselves, or with the assistance of community or family schemes, and thus do not rely upon Legal Aid, will have a strong new incentive to rely upon asylum support or Legal Aid in order to guarantee remission of tribunal fees. Members of ALBA believe that a significant number of persons and families presently rely by choice upon private rather than public support and upon private funding for legal advice and representation. This is reflected in the relatively low numbers of asylum claimants availing themselves of publicly

²⁶ See, for example, JUSTICE briefing on the Immigration Bill 2015-16, House of Lords Report Stage, paragraph 29, available at <http://justice.org.uk/immigration-bill-4/>

²⁷ See paragraph 12 above.

funded legal representation (of between one third and 40% in 2013).²⁸ If any significant numbers resort to legal aid in the face of tribunal fees, then the change would not only eliminate the current income in fees from such claimants; it would eliminate it and give rise to likely very substantial costs in publicly funded advice and representation. Other areas of potentially serious unanticipated consequences lie in: the dependence of the system for dealing with fresh claims upon the judicial assumption, justified in most current circumstances, of effective access to the FTT or UT (or predecessors thereof); and the loss or reversal of the incentive to come forward and remain in touch with the immigration and other authorities represented by appeals processes to which there is ready access. As stated above,²⁹ these factors appear to have attracted no consideration to date in the effort of this policy formation.

Question 2: Exemption based on the Home Office visa fee waiver policy

50. ALBA and JUSTICE believe that the process of policy formation has been seriously flawed and that the policy proposal is unsatisfactory as an unquantified but very substantial threat to access to justice in areas of practice justifying much greater concern. Our response to question 2 (and all further responses) should be seen in the context of our answer to question 1 above.
51. The Home Office fee waiver scheme, in short, waives the fee where the subject '*is destitute*'; or would be rendered destitute by payment of the fee; or there are '*other exceptional circumstances*'.
52. We do not believe that '*destitution*' or the potential therefore through payment of a fee represents an appropriate measure for exemption or waiver. It is not appropriate given the level of fees being proposed, the subject matter of the proceedings, and the application of the access to justice principle we have already identified. The burden of this formula falls on the somewhat uncertain formula '*other exceptional circumstances*.' A formula of this type is likely to be needed as a backstop to any exemption policy, as we indicate below, but is unsuitable through an absence of certainty to carry the weight of the test.
53. Assuming some form of extension of cost recovery, ALBA and JUSTICE broadly welcome the Government's extension of exemptions to cover out of country appellants. As the Consultation Document records (paragraph 37), the absence of such remissions in the past has resulted from the inability to resolve extremely difficult questions as to the mechanism for the setting of fee levels. ALBA and JUSTICE would query whether in many cases fees will be at a level which justifies the cost of setting and collecting them at all: for instance, the

²⁸ Evaluation of the Early Legal Advice Project - Final Report, page 36 available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/199962/horr70.pdf

²⁹ See section entitled 'The Significance of Appeals Determination'.

number of asylum or human rights claims from high income countries is likely to be very low. However, as the Consultation Document indicates, this difficulty is now exacerbated by the move to out of country appeals in the Immigration Acts 2014 and 2016.

Question 3: Alternative exemption options

54. Our response to this question should be seen in the context of our answers to questions 1 and 2 above. We welcome the exemption of deprivation of citizenship and EEA cases,³⁰ though the first group is a small one and the imposition of substantial charges in the second category would likely face formidable legal obstacles.
55. We also support the exemption of those in receipt of asylum support, legal aid, and section 17 Children Act 1989 support.³¹
56. However, ALBA and JUSTICE believe there to be a strong case that the scheme could not be operated lawfully without further substantial remission arrangements to enable access to justice. As above we are of the view that there is insufficient merit in basing fee exemptions on the Home Office visa fee waiver policy: we believe 'destitution' to be a wholly inappropriate level at which to set the line for exemption.
57. We have already noted that, as to exemptions generally, JUSTICE and ALBA broadly welcome the Government's proposed exemptions. However, we consider there to be no real chance that the scheme could operate successfully without further exemptions to reflect the issues already outlined, for instance those that arose in the *R(UNISON)* decision of the Court of Appeal (see paragraphs 21-22 above).
58. Whilst in the absence of adequate evidence in the Consultation Document it is impossible to reply with certainty, we feel that it is possible to make some observations in principle.
59. The current HMCTS scheme, often referred to as the EX160 scheme after the relevant form, is based primarily on a gross income calculation, not on an assessment of net income (a 'disposable income' test). The EX160 scheme used to have some element of a disposable income test but this changed following a 2013 consultation.³²
60. We believe that as part of an adequate waiver calculation there is much to be said for setting a level of gross income at which a waiver or part-waiver applies.

³⁰ Consultation Document, paragraph 40.

³¹ *Ibid.*, paragraph 42.

³² https://consult.justice.gov.uk/digital-communications/fee-remissions-court-tribunals/supporting_documents/feeremissionscourtribunals.pdf

This introduces an element of certainty which is in the broader interests of justice and administration. The level of gross income should, of course, bear reasonable relation to the level of the expected fee and the issues in the proceedings. We do not have enough information to identify a fixed level for present purposes, and the identification of this would in any event have to depend upon other alternative bases for qualification for a waiver.

61. The value of a gross income test is in identifying persons whose income is so low that they can be taken as entitled without more complex calculation. However, we do not believe that a gross income test in isolation represents a satisfactory basis on which an individual might be *denied* exemption or remission. We strongly believe that an alternative test having the form of a disposable income test (which might also extend to accessible capital) would be necessary. We note the conclusion of Underhill LJ (with whom Davis and Moore-Bick LJ concurred) in *R (UNISON) v Lord Chancellor* at [41]:

First, what claimants can afford depends not only on their income but equally on their expenditure. Once essential living expenses are met (though I accept that what is or is not “essential” itself involves questions of judgment), any remaining income may be treated as disposable, and whether claimants can afford to pay a court fee will depend on what else they choose to spend their income on. It follows that a claimant cannot be said to be unable to afford to pay a court fee simply because the choice to forgo other expenditure may be difficult. The test is whether any such difficulty is “excessive”, i.e. such as to make payment of the fee impossible “in practice”.

Again as regards this test, the level of disposable income would have to bear reasonable relation to the level of the expected fee and the issues in the proceedings.

62. Finally, we are of the view that an ‘exceptional circumstances’ exemption would not be a desirable centrepiece for the calculation. But we would view it, together with reasonable interpretation and operation of it, as an important final savings provision.
63. In short we believe that in addition to the exemptions already indicated, it is likely that there would have to be:
- i. a gross income type test of the EX160 type;
 - ii. an alternative measure based upon disposable income (and perhaps capital);
 - iii. a savings provision focused upon ‘exceptional circumstances’.

In out-of-country appeals all of these would have to be addressed taking appropriate account of questions of valuation by local standards.

Question 4: Full cost recovery in the Upper Tribunal

64. The Government proposes to introduce fees of £350 for applications for permission to appeal a decision of the FTT which are lodged in the Upper Tribunal ('UT') and of £510 for appeals heard by the UT.
65. JUSTICE and ALBA have already outlined their serious concerns about access to justice, including concerns regarding the lawfulness of the current proposed arrangements, in our response to question 1. Our concerns apply equally to the fees charged in the UT.
66. Moreover, we consider that it is a further restriction on access to justice to charge a fee where the UT is being asked to correct the errors of the FTT. We accept that the Government has sought to address the inequity of the proposal by looking at whether the Tribunal Procedure Committee ('TPC') could make rules to allow the recovery of fees paid (e.g. where the appellant wins their appeal before the UT). However, we have two concerns about this as a way of addressing the problem:
- i. This is, at the moment, a hypothetical. Until such a time as the TPC makes such provisions, the Government's proposal remains unjust and, as outlined in our response to question 1, unlawful in certain cases;
 - ii. The proposal would still limit access to justice for those unable to raise the fee required to appeal in the first place

Question 5: Fees for applications for permission to appeal

67. The Government proposes to introduce fees of £455 for permission to appeal in the FTT in addition to the £350 to renew that application in the UT.
68. We reiterate the points we have already made in response to questions 1 and 4.

Question 6: Extending fee exemptions to the Upper Tribunal

69. JUSTICE and ALBA are of the firm view that, just as the same issues of access to justice and lawfulness apply in the UT, the same fee exemption policy should apply, if any fee becomes chargeable in respect of resort to the UT.

Question 7: Impacts on those with protected characteristics

70. JUSTICE and ALBA note that, if these proposals are implemented, the Immigration and Asylum Chamber would be the only fully user funded part of the tribunal system. This is not addressed adequately or at all anywhere in the Consultation Document. Given that, as is recognised in the Government's Equality Statement,³³ there are highly disproportionate number of people from Black, Asian and minority ethnic backgrounds within FTT service users, such proposals would have a disproportionate impact on such groups.
71. We do not have any (additional) data or evidence on this point as it is outside our area of expertise.

JUSTICE and ALBA
3 June 2016

³³ Immigration and Asylum Chamber Full Cost Recovery, Equality Statement, paragraphs 4.3, 6.4 and Table 1 in particular, available at https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/equalitystatement.pdf