



Bar Council response to the First-tier Tribunal Immigration and Asylum Chamber Fees consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's (MoJ's) consultation paper entitled "Consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)"¹.
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council asserts that the current proposed 500% increase in fees for those seeking justice through the Immigration and Asylum tribunal system is yet another step by Government towards putting access to justice beyond the means of those who most need it. The courts should not be used as a means of taxing those seeking justice.
5. The Bar Council believes that a fair, efficient and accessible civil justice system is one of the fundamental prerequisites to an effective democratic society. Crucially, it is not only those accessing the justice system who benefit from the existence, availability and proper administration of such a system, but all members of society, and society as a whole. The consultation paper notes that new fees are being introduced while existing fees are being raised "to reflect the true cost of running those services". It is, however, right that a significant

¹ Ministry of Justice (2016) Consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber). Available here: <https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees>

proportion of the costs of the system should be borne by the taxpayer rather than those who seek to use the system.

6. We remain concerned about the continued shift in paying for the justice system away from the state and towards those who use the justice system and appear before the courts to resolve their legal issues. The Bar Council has previously put forward this position in its responses to the Ministry of Justice's consultations: "Consultation on Further Fees Proposals"², "Court Fees: Proposals for Reform"³ and "Court Fees Consultation on proposals to reform fees for grants of probate"⁴.

7. Our justice system is world renowned and is supposed to provide justice for all. This move which follows several preceding increases to court fees in recent years sends a damaging message to other jurisdictions around the world. As a result, access to justice is becoming increasingly out of reach for many as the Government continues to price many people out of the justice system.

8. As previously stated by the Bar Council,⁵ we continue to be concerned about the impact of further fee increases on high value litigation conducted in London. The Lord Chancellor has criticised the 'creaking' nature of court administration,⁶ and given that London's court fees are already the most expensive in the world,⁷ the Bar Council is concerned about that court users are being asked to pay increasingly higher fees without an equivalent service being provided.

9. It also does not appear that the raising of court fees is achieving the predicted results. This move follows on the heels of "enhanced" court fees in the civil courts for money claims including late payments, debt and compensation last year. This was a blanket 5% fee on small businesses and individuals bringing claims worth between £10,000 and £200,000, with fees of

² Available on the Bar Council website:

http://www.barcouncil.org.uk/media/396406/2015.09.15_bar_council_response_to_moj_consultation_on_further_fees_prop....pdf

³ Available on the Bar Council website:

http://www.barcouncil.org.uk/media/275349/bar_council_response_to_moj_consultation_on_court_fees_proposals_for_reform_300114.pdf

⁴ Available on the Bar Council website:

http://www.barcouncil.org.uk/media/428276/bar_council_s_response_to_the_moj_s_consultation_on_court_probate_fees_va705282_.pdf

⁵ See paragraph 7 of the Bar Council's 2015 response to the MoJ's consultation "Consultation on Further Fees Proposals":

http://www.barcouncil.org.uk/media/396406/2015.09.15_bar_council_response_to_moj_consultation_on_further_fees_prop....pdf

⁶ The Rt Hon Michael Gove MP (23 June 2015) 'What does a one nation justice policy look like?'

Available at: <https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like>

⁷ Centre for Commercial Law Studies School of International Arbitration, Queen Mary University of London (2013) 'Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions'. Available at: <http://www.law.qmul.ac.uk/docs/news/118693.pdf>

up to £10,000 payable up-front, risking the exclusion of those making genuine claims. However, a letter⁸ from the Ministry of Justice to the Justice Select Committee in March this year revealed that the Ministry had not collected anywhere near as much as it expected from the increased court fees.

10. The Bar Council is of the view that these proposals will deny those seeking justice from having their asylum and immigration case heard, and that the proposed cost is most likely to deter them when they have a legitimate claim. Many people, including families from war torn countries such as Syria, may face deportation when they could in fact have a right to stay here, but simply don't have that amount of money to spare to bring their case. The outcome is therefore likely to be the opposite in that the MoJ will still not get its money, while some are denied justice.

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

11. No.

12. The fee charges proposed for the First-tier Tribunal are disproportionate, and based on the premise that the justice system should be paid for by those seeking to use it. As outlined in paragraphs 4-10, the Bar Council asserts that the justice system should be paid for by society as a whole.

13. Many immigrants are severely disadvantaged and impecunious, usually do not speak English as their first language and cannot navigate the legal system as Litigants in Person. Consequently, they will invariably need to pay for legal representation and may not be able to afford this if they have to pay the increased court fees. This is particularly significant given the complexities in immigration law which frequently require expert legal assistance to aid interpretation.

14. The Bar Council very strongly believes that that the United Kingdom has an obligation under customary international law to process refugee claims fairly. Increasing the fee by 500% may place the United Kingdom in breach of its obligations to handle such claims. When an asylum-seeker has lodged an application, whether at the border or within the territory, the state in question has usually taken upon itself to examine that application.

15. The idea of safety within customary international law should also encompass a guarantee of access to fair asylum procedures. Such high tribunal fees would have the effect of preventing access to fair asylum procedures.

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.

⁸ Available here: <http://www.parliament.uk/documents/commons-committees/Justice/correspondence/Letter-dated-16-March-2016-from-Richard-Heaton-Perm-Sec-MoJ-on-MoJ-Supplementary-Estimate.pdf>

16. No.

17. The bar is set very high at destitution. The Home Office explicitly states in their guidance that asylum support and destitution are not treated the same for the purposes of fee exemption.

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?

18. The Home Office should, as a minimum adopt the same fee exemption scheme as in the other parts of the Ministry of Justice. The Bar Council is very concerned that any fee exemption scheme should not prejudice children, and that all appeals where children are involved should automatically receive a fee exemption.

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

19. No. Please see our answers to the questions above.

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.

20. No.

21. The MoJ acknowledge in their consultation paper that to introduce fees for immigration bail applications “raise fundamental issues relating to the right of the liberty of the individual”. The Bar Council sees little difference between this situation and that of those seeking to make an appeal following a decision on their case. Families and individuals should not be deterred from appealing decisions made due to the cost of doing so.

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.

22. Yes.

23. The Bar Council is always in favour of measures which help enable access to justice particularly by the most vulnerable. In implementing fee exemption policies the MoJ should ensure that the qualifying criteria are not made too burdensome on claimants.

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.

24. The Bar Council has no quantitative data on the predicted impact of these proposals.

Bar Council
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For further information please contact:
Melanie Mylvaganam, Policy Analyst: Legal Affairs, Practice and Ethics
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7092 6804
Email: MMylvaganam@BarCouncil.org.uk