

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's response to the Ministry of
Justice consultation on proposals for
fee increases in the First-tier Tribunal
(Immigration and Asylum Chamber)
and Upper Tribunal (Immigration and
Asylum Chamber)**

June 2016

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

Contact

Bella Sankey
Director of Policy
Direct Line: 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Sara Ogilvie
Policy Officer
Direct Line: 020 7378 3654
Email: sarao@liberty-human-rights.org.uk

Sam Hawke
Policy Assistant
Direct Line 020 7378 5258
Email: samh@liberty-human-rights.org.uk

Rachel Robinson
Policy Officer
Direct Line: 020 7378 3659
Email: rachelr@liberty-human-rights.org.uk

Silkie Carlo
Policy Officer (Technology and Surveillance)
Direct Line: 020 7378 5255
Email: silkiec@liberty-human-rights.org.uk

The judiciary has never accepted the policy principle that courts and the justice system should be self-financing. Lord Scott described this approach as “profoundly and dangerously (mistaking) the nature of the system and its constitutional function”. A justice system is a fundamental part of a democratic and civilised society committed to the rule of law.

The Judicial Executive Board (JEB), 2015¹

1. The consultation paper outlines the Government’s plans to dramatically increase Tribunal fees for individuals seeking to challenge notoriously poor quality Home Office decision-making.² The plans would affect those seeking to challenge Government decisions before the First-tier Tribunal (Immigration and Asylum Chamber) (“the FTTIAC”) and to challenge FTTIAC decisions, on the basis that they contain errors of law, before the Upper Tribunal (Immigration and Asylum Chamber) (“the UTIAC”). The consultation follows the publication, in July 2015, of proposals to introduce fees designed to meet 25% of the cost of proceedings in the FTTIAC, a doubling of existing fees.³ In December 2015, notwithstanding an overwhelmingly negative response to its proposals, the Government announced its intention to implement the proposed fee increase.⁴ Before this change could be implemented, however, Government abandoned these plans in favour of the present proposals for fees set at a level to provide for full recovery of fees, quadrupling the sums it initially intended to charge.

2. The Tribunals system was designed to provide accessible justice. Liberty strongly opposes the proposed fee increases which would subvert this core

¹ Judicial Executive Board, *Written evidence submitted by the Judicial Executive Board (JEB)*, submitted to the Justice Select Committee Inquiry into courts and tribunal fees and charges, October 2015. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/courts-and-tribunals-fees-and-charges/written/22881.html>.

² Ministry of Justice, *Tribunal Fees: Consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)*, April 2006.

³ Ministry of Justice, *Enhanced fees for divorce, possession claims and general applications in civil proceedings and consultation on further fees proposal*, 22 July 2015. Available at: <https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation>.

⁴ Ministry of Justice, *Court and Tribunal Fees, The Government response to consultation on further fees proposals*, see Chapter 1, Summary of Responses. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515460/further-fees-proposals-gov-response-consultation.pdf.

purpose. We fundamentally disagree with the assertion, made throughout the consultation document, that the justice system should fall primarily to be funded by users. If access to justice is to be meaningful and equally accessible, it must benefit from the financial support of the state. Without this, countless individuals will be left unable to vindicate their human rights. We urge the Government to heed the advice of the senior judiciary and abandon these retrograde proposals.

The level of proposed fee increases

3. Currently, in the FTTIAC, a fee of £80 is payable for the consideration of an immigration decision on the papers and £140 for an oral hearing. The consultation document proposes a more than 500% increase in fees for consideration of an appeal to the FTTIAC on the papers; this would cost £490 under the new regime. An increase of almost 500% would be introduced for oral hearings which would cost £800.

4. Applicants do not currently incur fees where they seek to challenge a decision of the FTTIAC on the grounds that it has made an error of law. The current proposals would introduce fees where a claimant seeks permission, from the FTTIAC, to appeal to the UTIAC. These fees would be set at £455. Where the FTTIAC refuses permission to appeal to the UTIAC, a further application for permission can be made to the UT itself. Again, there is currently no fee for this application, but the proposals suggest creating a fee of £350 for consideration of permission to appeal by the UT. Where permission is granted on the basis that there is an arguable error of law, a fee of £510 will be charged for a hearing to ascertain whether errors of law have been made and potentially to reconsider the appeal on the correct legal basis.

5. This represents an astronomical increase which will preclude access to the justice system and therefore redress for state wrongs in many deserving cases. The present proposals show stark disregard for the views expressed by the Tribunals Judiciary which argued that, even the July 2015 proposed increase in fee levels, would “*raise serious concerns regarding access to justice as dispensed by tribunals*”.⁵ These proposals should further be seen in the context

⁵ The Tribunals Judiciary, *Written Evidence from the Tribunals Judiciary*, submitted to the Justice Select Committee Inquiry into courts and tribunal fees and charges, 14th October

of large and increasing initial visa application fees. In March 2016, visa application fees for those seeking to settle with a spouse in the UK rose from £956 to £1,195. For adult dependent relatives seeking to join family members in the UK, the visa application fee rose from £2,141 to £2,676.⁶

Exemptions and remissions

6. Two types of appeal are currently exempt from the FTTIAC fees, namely appeals against a decision to deprive somebody of British citizenship,⁷ and appeals against a decision to remove an EEA national from the UK.⁸ The Government plans to retain these exemptions and create a welcome new exemption for those challenging a decision to revoke their humanitarian protection or refugee status.

7. Exemptions also exist for certain categories of appellant. Those in receipt of asylum support are exempt, as are those in receipt of legal aid and children who receive support under section 17 of the Children Act 1989. In accordance with the Government's July 2015 proposals, under current proposals these exemptions would be extended to include those with parental responsibility for children receiving section 17 support and to children who are housed by their local authority under section 20 of the Children Act.⁹

8. The Government intends to extend the fee exemptions outlined above to cases which progress to the UTIAC, however this is in the context of plans to introduce prohibitive fees, for the vast majority of non-asylum claims, for the first time in this jurisdiction. Where an appeal is allowed in the FTTIAC, the Tribunal can require the respondent to meet any fee paid by the appellant, the Consultation Paper proposes that the Tribunal Rules Committee be asked to make similar provision for the UTIAC. However, it remains the case that the

2015. Available at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/courts-and-tribunals-fees-and-charges/written/22960.html>.

⁶ Immigration and nationality fees for all applications made from outside and within the UK, available at: <https://www.gov.uk/government/publications/visa-regulations-revised-table>.

⁷ Under Section 40 of the British Nationality Act 1981.

⁸ Under Regulation 19(3) of the Immigration (European Economic Area) Regulations 2006. Fees can be deferred where an appeal is brought on the grounds that removal would represent a breach of the UK's international protection obligations under the Refugee Convention or the EU Qualification Directive 2004/83/EC, and fees are not payable if a treaty or convention dictates that proceedings should be fee exempt.

initial cost will prove prohibitive for many appellants seeking to uphold their fundamental rights before the Tribunal. In addition to these provisions, the Lord Chancellor has a power to reduce or remit fees where he feels there are exceptional circumstances.

9. In relation to broader proposed fee increases, the senior judiciary has made clear that *“the fact that [fees] may be recoverable does not necessarily assist in overcoming that initial cost barrier, which may prove an effective barrier given the large sums that can now be involved...”*¹⁰ The Immigration Law Practitioners Association reports that:

*The current fee remission regime is difficult to navigate. It relies on letters and facsimiles rather than electronic communication. The test for fee remission in the Immigration and Asylum Chamber is one of “exceptional circumstances” not just financial considerations. The “exceptional circumstances” test is opaque to the unrepresented. All too often a request for fee remission is met with a repeated demand for payment with no acknowledgement of the case put forward. Fees create cash flow problems for those who may be eligible for full or partial fee remission but who are required to prove their income and necessary outgoings in considerable detail to establish their disposable monthly income.*¹¹

10. Meanwhile, in the context of Employment Tribunal fees, the Tribunals Judiciary has warned:

*Improvements in the remission process have not served to moderate... adverse impacts upon access to justice. The overall conclusion is that the fees regime and its attendant remission process have acted as a very clear disincentive to bringing a significant number of claims, which could not be categorised as obviously weak.*¹²

11. The Home Office has a discretion to waive the initial visa application fee in circumstances where an applicant already in the UK is able to demonstrate to the

¹⁰ Ibid., paragraph 14.

¹¹ ILPA, *Response of the Immigration Law Practitioners’ Association to the Justice Select Committee inquiry into courts and tribunals fees and charges*, 18 September 2015.

¹² Ibid., paragraph 2.2.

Home Office that they cannot meet the cost of the visa application. The consultation paper asks for views on whether the Government should extend this exemption so that applicants in receipt of a Home Office waiver are exempt from Tribunal fees should they wish to appeal a decision to reject their application. Liberty believes that this exemption should be extended, however, we fear it will do little to mitigate the broader injustice caused by the proposed fee hikes. The Immigration Law Practitioners Association reports that:

*ILPA's experience is that to secure waiver of a fee requires an investment of time from a legal representative, something likely to be beyond the means of immigration applicants as there is no legal aid in England and Wales for immigration cases. It is a cumbersome and insecure procedure and persons cannot place any reliance on when they may qualify under it.*¹³

The experience of the Employment Tribunal

12. The experience of the introduction of Employment Tribunal fees is instructive in considering the likely impact of the proposed fee hikes. Employment Tribunal fees were introduced in July 2013, with claimants now required to pay fees both to issue their claims and for oral hearings. Claims in respect of specified statutory rights deemed simpler to adjudicate attract an issue fee of £160 and a hearing fee of £250, in respect of claims deemed more complex, such as those involving unfair dismissal and discrimination, the issue fee is set at £230 and the hearing fee is £950. Total fees of between £410 and £1,180 have had a dramatic effect on the level of claims in the Employment Tribunal. In the year ending June 2013, around 13,500 claims were brought by individuals per quarter.¹⁴ Following the introduction of fees, claims per quarter dropped to a third of that level, around 4,500 per quarter.¹⁵ Fees of between £490 and £800 for claims in the FTTIAC will likely have the same deleterious effect.

13. A principle rationale given by the Government for the introduction of Employment Tribunal fees was that they would “*encourage individuals to stop and think about where a dispute should be settled outside the tribunal system*”

¹³ ILPA, *Briefing for House of Commons Consideration of the Immigration and Nationality (Fees) Order 2016*, 2 February 2016.

¹⁴ House of Commons Library Briefing Paper, Number 7081, *Employment tribunal fees*, 13 May 2016.

¹⁵ *Ibid.*

*and whether it is really necessary to submit a claim.*¹⁶ The Tribunals Judiciary is clear that the introduction of fees in the employment context has adversely affected access to justice, but even if the Government could establish that the introduction of fees resulted in greater effective take up of alternative dispute resolution mechanisms in employment cases, the same rationale could not be applied in the immigration context. Immigration appeals by nature involve a dispute between the state and the individual. As with Employment Tribunal claims, the outcome is frequently life-changing and often engages fundamental rights and freedoms. Unlike in the employment context, however, no out-of-court reconciliation process exists, leaving individuals fully at the mercy of administrative decision-making processes.

14. We continue to await the outcome of the Government's post-implementation review of Employment Tribunal fees,¹⁷ but the Ministry of Justice has decided to pursue the present proposals heedless of the consequences for access to justice. The senior judiciary has warned the Department against pursuing further increases in the absence of substantial evidence of the likely impact. In a response to an Inquiry undertaken by Parliament's Justice Select Committee, the JEB warned:

*The very limited nature of the data available underlines our central concern that significant changes are being made to fee levels without there having been proper time to monitor and assess the effects of fee increases on demand.... In the absence of statistical data on the courts, the judiciary fears that the scale and range of fee reforms will inevitably have had or will have an impact on claims brought and thus impair access to justice.*¹⁸

Discriminatory attacks on access to justice

15. Inequality of arms between the Home Office and individuals seeking to vindicate their human rights in the immigration context is stark. Those immigration cases which make it – against the odds - to the Tribunal frequently

¹⁶ Helen Grant MP, former Parliamentary Under-Secretary of State for Justice, First Delegated Legislation Committee, Monday 10 June 2013.

¹⁷ Employment Tribunal Fees Post Implementation Review, Terms of Reference available at: <https://www.gov.uk/government/publications/employment-tribunal-fees-post-implementation-review>.

¹⁸ *Ibid.*, paragraph 12-13.

involve very vulnerable people with extremely limited means, many of whom do not speak English as their first language.

16. The present proposals form part of an all-out assault on access to justice for those seeking judicial redress in immigration matters. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed legal aid for the vast majority of immigration matters coming before the Tribunals. Further, in 2013, the Government published plans to introduce a residence test for legal aid. In this, its most brazen attempt yet to tie access to the justice system to British citizenship, the Government planned to remove legal aid for those who cannot establish lawful residence for a continuous period of twelve months, either immediately prior to the application or at any point in the past.¹⁹ A successful legal challenge in the High Court found the residence test to be discriminatory and unlawful,²⁰ and the Supreme Court recently held that the test, which purported to award legal aid without reference to need or an order of priority of need, was unlawful.²¹

17. Liberty believes that the same criticism can be made of the removal of immigration law from the scope of legal aid and of the introduction of hugely increased Tribunal fees in immigration matters. The present proposals make insufficient reference to the ability of an individual to pay and the importance of the issues at stake - frequently cases involving fundamental human rights. A limited exemption scheme will assist those pursuing some kinds of claim and some of those unable to pay. The broad thrust of the proposals, however, sees non-nationals singled out for the imposition of a hefty - and for many prohibitively high - increases in fees which will obstruct access to justice.

18. In a continuation of this trend, the Immigration Act 2014 restricted appeal rights before the FTTIAC to protection cases, human rights cases, matters engaging EU Treaty rights and appeals against deprivation of citizenship.²²

¹⁹ Draft regulations were laid in 2014: The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014.

²⁰ *The Public Law Project R (On the Application Of) v The Secretary of State for Justice the Office of the Children's Commissioner*, [2014] EWHC 2365 (Admin) (15 July 2014). This decision was overturned in the Court of Appeal in *Public Law Project v The Lord Chancellor* [2015] EWCA Civ 1193.

²¹ Supreme Court hearing decision is available at: <https://www.supremecourt.uk/news/r-on-the-application-of-the-public-law-project-v-lord-chancellor-160418.html?platform=hootsuite>.

²² Section 15 of the Immigration Act 2014 amending sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002.

Where applications for leave to enter or remain in the country are made outside of these areas and refused by the Home Office, applicants must rely on a process of internal Home Office review. Unsurprisingly, a recent Chief Inspector of Borders and Immigration Report found serious and systemic problems with the rigor and independence of the administrative review process set up to replace independent judicial oversight.²³ As a result of the mass removal of appeal rights, the number of cases reaching the Tribunal has fallen dramatically.²⁴ The outcome is more injustice for individuals and less scrutiny for Government.

19. This trend towards the erosion of access to justice on the grounds of nationality was continued in the Immigration Act 2016, with the removal of in-country appeal rights for those seeking to rely on human rights protections before the FTTIAC.²⁵ Part 4 of the Act is designed to target Article 8 cases involving the right to respect for private and family life. Where a claim to remain in the UK to reside with, for example a British spouse, a minor child or an elderly relative requiring care, is refused by the Home Office, under the Act the applicant will be forced to return to his or her country of origin and to attempt to bring an appeal from there.²⁶

Administrative incompetence

20. This assault on access to justice must be viewed in the context of notoriously low quality Home Office decision making, frequently reversed by the Tribunal. According to the latest Tribunal statistics in October to December 2015, a total of 14,005 cases were registered under the post-2014 Act categories in the FTTIAC, 7,797 of which were human rights appeals.²⁷ A total of 95 cases were registered

²³ Independent Chief Inspector of Borders and Immigration, *A report on the inspection of the administrative review processes introduced following the 2014 Immigration Act*, 26 May 2016.

²⁴ In the period October to December 2015, there were 18,368 FTTIAC receipts; a decrease of 29% when compared with the same period in 2014. Ministry of Justice, *Tribunals and Gender*

Recognition Certificate Statistics Quarterly October to December 2015, p. 9.

²⁵ The Immigration Act 2014 introduced certification and the removal of in-country appeal rights to deportation appeals raising human rights issues. The 2016 Act extended this provision to all immigration appeals.

²⁶ Save where the Home Office considers that removal itself would represent a human rights violation. Long-standing concerns about the quality of Home Office decision-making mean that assessments of whether serious and irreversible harm would be occasioned by removal simply cannot be relied upon.

²⁷ *Ibid.*, p. 10.

under the post Act categories in the UTIAC in October to December 2015.²⁸ Of the 10,603 cases that were determined at hearing or on paper in the FFTIAC in October to December 2015 (the majority of which concern issues of fundamental rights and freedoms), 41% were allowed.²⁹ For the Upper Tribunal, of the 1,391 cases determined during the same period, 27% were allowed.³⁰

21. The quality of Home Office decision making has come in for consistent criticism. A Report published at the end of last year by the Parliamentary and Health Ombudsman revealed serious problems with decision making processes in the Home Office. 7 out of 10 complaints made about the department were upheld by the Ombudsman, and the report concludes that “*delays, poor decision making and not doing enough to address the injustice caused to individuals and their families are the key issues in complaints about the Home Office.*”³¹ The same report found:

*The second most cited factor in complaints we upheld were concerns about the way the Home Office made decisions where it had room for discretion. This featured in 17% of upheld complaints in 2014-15. In one in ten investigations we upheld, there were concerns about Home Office mistakes in decision-making which was not discretionary.*³²

22. The Ombudsman also highlighted weaknesses in the way the Home Office engages with the consequences of administrative errors.³³ The Report concluded that:

... the Home Office failed to address delays and poor decision making in the immigration system last year and did not deal adequately with the impact these failings may have had on individuals and their families. The delays and poor decision making meant that people had to endure prolonged uncertainty, were not able to be with their loved ones, were denied access to education or

²⁸ Ibid., p. 10.

²⁹ Ibid., p. 16.

³⁰ Ibid., p. 16.

³¹ Parliamentary and Health Service Ombudsman, *Complaints about UK government departments and agencies, and some UK public organisations 2014-15*, p. 22.

³² Ibid., p. 22.

³³ Ibid., p. 22.

*unable to work, or had to pay unnecessary legal fees and/or application fees. The impact on them was exacerbated by poor complaint handling...*³⁴

23. Whilst asylum claims will not generally be caught by the proposed fee regime, recent findings around Home Office decision-making in this area speak to wider concerns about the Department. In a report published in February 2016, the Independent Chief Inspector for Borders and Immigration reported that “*roughly one in five of the paper files sampled revealed some form of administrative error.*”³⁵ The Inspectorate reviewed a sample of 56 asylum decisions and found that in 40% of cases there had either been a failure to include enough information in the record to assess whether decisions had been made correctly, or substantive errors had made in the process of determining the claim.³⁶

24. A review of the new process of Administrative Review set up by the Home Office after multiple avenues of appeal were abolished also reveals poor quality initial decision making and a failure to identify mistakes during a process of internal review, “*file sampling indicated that valid applications were being incorrectly rejected and that the quality assurance process was not identifying and rectifying this.*”³⁷

Broader attacks on the universality of rights protections

25. If human rights are to mean anything they must be equally accessible to all. This Government and its predecessor have not simply placed justice beyond the reach of many seeking to uphold basic rights and freedoms, they have made concerted efforts to limit the application of rights protection to foreign nationals

³⁴ Ibid., p. 24.

³⁵ Independent Chief Inspector of Borders and Immigration, *An Inspection of Asylum Casework March – July 2015*, p. 6.

³⁶ Out of the 22 cases where the Inspectorate could not access all factors to have been properly considered: “*in 13 it was not possible from the record to determine whether material facts had been assessed in accordance with the Asylum Policy Instruction; in three cases material facts had been considered but not assessed in accordance with the Instruction; and, in six cases membership of a particular social group was not appropriately considered.*” Ibid., p. 28

³⁷ Ibid., p. 5. “*In addition to the 15 cases where the reviewer had identified caseworking errors, the inspection found a further 10 incorrect refusal decisions, according to the Immigration Rules and Home Office guidance, that the reviewer had missed, and six further cases where the decision was correct but one or more reasons were incorrect or missing.*”

and reduce the ability of judges to fairly balance individual rights against the wider public interest under our Human Rights Act.

26. The Article 8 right to respect for private life, protected by the Human Rights Act, provides a framework of protection allowing a fact-sensitive balancing exercise to be carried out between the rights of an individual and the wider public interest in issues such as immigration control. The Immigration Act 2014, however, introduced provisions prescribing the weight to be attached to private life in specified circumstances. Liberty argued that this is a serious and unconstitutional incursion into the judicial function. The JCHR also raised pronounced concerns during the Parliamentary passage of the legislation, noting:

...we are uneasy about a statutory provision which purports to tell courts and tribunals that "little weight" should be given to a particular consideration in such a judicial balancing exercise. This appears to be a significant legislative trespass into the judicial function. We note that the Government did not provide us with any other examples of such statutory provisions, which suggests that this approach may be unprecedented.³⁸

27. An even more direct attack on the universality of our human rights framework is evident in the latest iteration of Conservative plans to repeal our Human Rights Act and replace it with a British Bill of Rights. In October 2014, the former Justice Secretary and current Leader of the House of Commons, Chris Grayling, published a set of substantive proposals on the desired contents of a "British Bill of Rights and Responsibilities."³⁹ Article 8 protection for private and family life is specifically explored in the section of the paper dealing with exceptions to the application of rights protection. It is proposed that foreign nationals convicted of an offence in the UK would not be able to rely on Article 8 to challenge deportation. The Immigration Act 2014 already significantly limits the availability of Article 8 protection for those convicted of serious offences, in the absence of compelling circumstances which must be over and above an unduly harsh impact on a British child. We can only conclude that the intention now is to remove this

³⁸ Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill: Eighth Report of Session 2013-14*, paragraph 60.

³⁹ The Conservative Party, *Protecting Human Rights in the UK, the Conservatives' Proposals for Changing Britains Human Rights Laws*,

tiny area of residual discretion for the most compelling cases impacting innocent British children. This would effectively remove human rights protection for some foreign nationals and their families.

The human impact

28. Attempts by Government to erode rights protections, combined with experience of the Home Office Administrative Review system, successive reports expressing concern about the quality of Home Office decision-making and the high incidence of successful appeals before the FTTIAC, highlight the importance of an independent, judicial appeals process. Access to such a process will be removed for many individuals seeking to uphold their human rights should the proposed fee increases be introduced. Whilst some provision for fee remission is in place, the huge financial cost of pursuing an immigration appeal will represent a prohibitive cost and a barrier to justice for many individuals attempting to uphold their basic rights and freedoms.

29. One such vulnerable group is recognised refugees in the UK seeking to be reunited with family members.⁴⁰ LASPO sought to exclude legal aid in these cases, with former Parliamentary Under-Secretary of State, Jonathan Djanogly, claiming that “[refugee family reunion cases] are immigration applications, rather than asylum ones, and they are generally straightforward.”⁴¹ For those seeking refugee family reunion, the availability of legal aid remains dependent on a much criticised and inconsistent system of exceptional funding.⁴² Current proposals for a dramatic increase in Tribunal fees would create an insurmountable obstacle to reunion for many families torn apart by war and persecution.

⁴⁰ Under the Immigration Rules, or outside of the Rules if family relationships are not recognised by the Rules, e.g. a refugee parent in the UK seeking to be reunited with an adult child, or any refugee child in the UK seeking to be reunited with a parent or sibling.

⁴¹ Commons Hansard, 31st October 2011. The decision to exclude legal aid in refugee family reunion matters was recently upheld by the Court of Appeal. The Court did, however, make clear that exceptional funding may be required in such cases, finding that the exceptional funding system has been operated in such a restrictive way as to be unlawful. *Gudanaviciene & Ors, R (on the application of) v The Director of Legal Aid Casework & Or* [2014] EWCA Civ 1622.

⁴² In a 2015 Report, the . However grants of exceptional funding in immigration matters rose in response to the High Court decision in *Gudanaviciene*, no statistics have been produced since the Court of Appeal ruling in that case.

The case of AT⁴³

M, a 19 year old granted refugee status in the UK after his arrival as an unaccompanied child, sought to be reunited in the UK with his mother and 15 year old brother. M's family had been separated after his father was imprisoned in Eritrea for political reasons. M fled the country for the UK with a relative, whilst his mother and brother ultimately fled to a refugee camp in Sudan. M's mother and brother made the journey to Khartoum the following year to apply to join M in the UK. They were forced to live on the streets or seek shelter in churches and refuges in the city. Upper Tribunal President, The Hon. Mr Justice McCloskey, described "*the enormous efforts to which the [M's mother] went, the hardships which she has borne and the sacrifices which she has made all in pursuit of family reunion.*"⁴⁴ The Tribunal frequently referred to the strength and stability of the family unit and to the desperate effect of separation on all members, noting that:

*The mother and younger son plainly live in deprived and dangerous circumstances. They are destitute. The second Appellant has been unwell for a long time. This is a fractured family. Neither son has had the benefit of a father, or father figure, for several years. The mother struggles on, battling against the odds, deprived of the immense assistance and support which the sponsor would be capable of providing. Meanwhile, M has become increasingly stressed and preoccupied. He appears to be under-achieving academically and his social activities have become limited.*⁴⁵

In his distressed condition, M was unable to fulfil his potential as a productive member of British society and the Tribunal found that "*reunification will promote, rather than undermine, the public interest in this respect.*"⁴⁶ The Upper Tribunal allowed the appeal, upholding the Article 8 right to respect for private and family life of mother and sons.

Notwithstanding the compelling circumstances of this case, Entry Clearance had been refused to the Appellants. By the time of his appeal in the UT, M was no longer a child and, absent a grant of exceptional legal aid funding, would not qualify for an exemption from Tribunal fees. In addition to any costs related to his legal representation and the initial application for entry clearance, M or his destitute family

⁴³ *AT and another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea* [2016]

⁴⁴ *Ibid.*, paragraph 8.

⁴⁵ *Ibid.*, Pparagraph 9.

⁴⁶ *Ibid.*, Pparagraph 36.

members may, under the current proposals, have been required to pay a fee of £800 for a hearing in the FTTIAC, £455 for permission to appeal and £510 for a hearing in the UTIAC. Given that the Home Office did not consider this case sufficiently exceptional or compassionate to allow the family to reunite outside of the Immigration Rules, there remains at best extreme uncertainty around the application of discretionary remittance or fee waiver operated by either the Lord Chancellor or the Home Office. Whilst Tribunal fees may ultimately have been recovered in light of the UT's decision, prohibitively high initial costs may well have left this family with no practical means of redress.

30. Outside of this context, many more families will face lasting injustice as a result the proposed fee requirements.

The case of EM⁴⁷

EM fled to the UK from Lebanon following her divorce from her husband. During her marriage her husband subjected her to violence, beating her, trying to throw her off a balcony and trying, on one occasion at least, to strangle her. Her husband was imprisoned for theft from her father's shop. He ended EM's first pregnancy by hitting her on the stomach with a heavy vase, saying he did not want children. On the day EM's son was born EM's husband came to the hospital with his family to take the child away to Saudi Arabia, but was prevented from doing so. When EM arrived in the UK her son had reached the age of seven when, under the system that regulates the custody of a child of that age under Shari'a law in Lebanon, his physical custody would pass to his father or another male member of his family. Any attempt by EM to retain custody of him would be bound to fail because the law dictates that a mother has no right to the custody of her child after that age. She may or may not have been allowed supervised visits with her son, but under no circumstances could he remain with her. EM and her son were permitted to stay in the UK because the House of Lords found that family life between mother and child would be destroyed if they were returned to Lebanon with very serious implications for both.

EM's case was considered by the equivalent of the FTTIAC and the UT before reaching the higher courts. Were the appellant to pursue an Article 8 appeal under the proposals set out in the present consultation, in addition to any legal costs

⁴⁷ *EM (Lebanon) v Secretary of State For The Home Department [2008] UKHL 64.*

incurred in this complex case, EM may well have been required to pay a fee of £800 for a hearing in the FTTIAC, £455 for permission to appeal and £510 for a hearing in the UTIAC. These additional costs may have proved a prohibitive barrier to the Tribunal and prevented the appellant from avoiding a flagrant violation of the human rights of her and her infant son.

The case of Beoku-Betts⁴⁸

At the time of his appeal before the House of Lords, the appellant was a 29 year old national of Sierra Leone. He arrived in the UK aged 18 following a military coup in his country, during which he had been subjected to a terrifying mock execution.⁴⁹ Initially he was granted 12 months leave to enter as a student. The appellant's sister was a UK national by birth and the appellant's father was granted British citizenship. The appellant's mother and young sister were granted leave to remain in the UK. Having completed his A-levels the appellant was granted permission to stay in the UK and study law at university; he had mistakenly thought he would be permitted to remain until the end of his studies - on realising his mistake the appellant applied for leave to remain on account of his terrible experiences in Sierra Leone and his family life in the UK. Although the Court believed the appellant's account, they found that the situation in Sierra Leone had changed and that he would no longer be in danger. However the appellant was allowed to remain mainly because, after his father died of cancer and following the family's traumatic experiences in Sierra Leone, he was a huge source of emotional and practical support for his family members in the UK, and in particular his 13 year old sister and his mother whom he travelled home to be with most weekends during his university studies and whom he lived with after leaving university. The appellant had no family in Sierra Leone and Article 8 allowed the UK Courts to consider the effect the appellant's removal would have on his family members who had already suffered a great deal.

Should the appellant in this case seek to pursue an Article 8 appeal under the proposals set out in the present consultation, in addition to any legal costs he would incur, he may well be required to pay a fee of £800 for a hearing in the FTTIAC, £455 for permission to appeal and £510 for a hearing in the UTIAC.

⁴⁸ *Beoku-Betts v Secretary of State for the Home Department [2008] UKHL.*

⁴⁹ *Beoku-Betts v Secretary of State for the Home Department*, paragraph 8.

31. In the face of consistent reports of bad administration, inefficiency and poor-quality decision making, rather than attempting to improve the system, the Government apparently wishes to insulate itself from effective challenge regardless of the human consequences. Liberty urges Government to abandon these toxic proposals. The prospect of legal redress is not only vital to secure individual rights and freedoms, it is the surest way of ensuring a society in which respect for human rights and values of equality and due process guide the behaviour of decision makers.

Rachel Robinson