



Consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)

Freedom from Torture is the only human rights organisation dedicated to the treatment and rehabilitation of torture survivors who seek refuge in the UK. We do this through direct and second-tier services from our specialist centres in Birmingham, Glasgow, London, Manchester and Newcastle. Each year we support more than 1,000 torture survivors, primarily via psychological therapies, forensic documentation of torture, legal and welfare advice, and creative projects, like Write to Life. We are the only human rights organisation in the UK that uses the in-house evidence of clinicians to hold torturing states accountable internationally.

We support torture survivors to speak out about their situation to those in power; and to help break down negative attitudes to refugees. Together with survivors, we use our experience to train other service providers to understand and meet the needs of torture survivors in the UK.

To discuss any of the matters in this response please contact Lucy Gregg, Senior Policy Advisor, at lgregg@freedomfromtorture.org or on 020 7697 7839

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

No.

Freedom from Torture does not agree with the proposed increase to the fees to almost six times the current levels and opposes any fees which will increase the financial burden on survivors of torture and other vulnerable refugees. We have grave concerns about proposals which reduce access to justice by creating a financial obstacle to refugees including survivors of torture securing their right to protection under International law.

The vast majority of our clients, all of whom are survivors of torture, are non-UK nationals who have applied for international protection. The consequences of survivors of torture being unable to apply their statutory right to appeal a wrong decision is grave indeed and risks people being returned to countries where they face torture. We are unclear what is proposed in the consultation document in respect of persons seeking international protection. The consultation paper states at paragraph 44 that a fee can be 'deferred' if an appeal is brought on the grounds that the appellant is a refugee. The recognition of persons as refugees gives effect to the UK's international obligations under the 1951 UN Convention relating to the status of refugees and its 1967 protocol. It also gives effect to obligations under EU law¹, the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the 1950 European Convention on Human Rights (ECHR). The uncertainty of the use of 'deferment' including when a payment of fees may be deferred until, is clearly unsatisfactory. It is nowhere explained or defined in the consultation document.

¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

In very many cases international protection applications, the appellant will qualify for legal aid and/or be accommodated under Section 95 of the Immigration and Asylum Act 1999. We are aware of many asylum seeking survivors of torture, often with documentable physical and psychological evidence of torture and highly vulnerable, who are not in receipt of legal aid because they have been wrongly refused Controlled Legal Representation on the merits of the case. The process of challenging these decisions can be difficult and lengthy and is not always concluded by the time of the appeal hearing. The torture survivor may not seek an adjournment, including because if they are unrepresented, they may be unaware that such an option exists or be unable to articulate a compelling case based on their circumstances.

Furthermore, despite being eligible for legal aid, there are large numbers of torture survivors in treatment with us who are represented by private solicitors due to a number of factors including: strong family connections with particular solicitor firms, especially where the same language and culture is shared; lack of confidence in the independence of publicly funded lawyers because of experiences in their country of origin; lack of awareness of their eligibility for legal aid; and pressure from within their communities usually involving a view that legal aid lawyers provide low quality advice.

The Home Office frequently makes errors in its asylum decision-making and the proposed fee changes increase the risk that the financial burden for correcting these will fall on survivors of torture and other vulnerable refugees who have been wrongly denied protection. Common problems include substitution of our doctors' expert opinion with the decision-makers' own unqualified judgments on clinical matters, failure to consider all of the clinical evidence in the round, and failure to properly take account of psychological evidence of torture. These decision-making errors, all of which are clearly contrary to Home Office policy, leave survivors of torture with no other choice but to appeal. The extent of the problem in Home Office decision making is reflected in our 2011 *Body of Evidence* report that shows appeal overturn rates at 69%² for asylum claims where medico-legal reports had been available at initial decision stage, and evidence (not yet published) Freedom from Torture gathered between 2014-2016 shows that this is a continuing trend, indicating appeal overturn rates as high as 75%. Furthermore, higher fees will likely cause many survivors of torture paying for legal representation to avoid instructing for a medico-legal report where this might be necessary for consideration of their appeal.

One further concern we have relates to the significant difference in fees between paper and oral hearings meaning that more people are likely to opt for the cheaper paper application and not the more expensive oral hearing in the First-Tier Tribunal. This will be unaffordable for many and will invariably result in a less comprehensive consideration of their case. Given the life and death matters at stake in asylum claims, Freedom from Torture strongly cautions against use of differential fee models to incentivise modes of access with poor outcomes for claimants, who may be unaware of the implications for their case.

The proposed level of fee increase seriously threatens access to justice making it beyond the reach of many. This was acknowledged in the Government's response to the consultation on the proposed introduction of fees in the Immigration and Asylum Chamber of the First-tier and Upper Tribunals³. As recorded in the Government's response, the unanimous view of respondents was that it was unreasonable to expect appellants to pay the tribunal system to correct its own errors⁴. In our experience, many survivors of torture

² Available at: <https://www.freedomfromtorture.org/sites/default/files/documents/body-of-evidence.pdf>

³ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515460/further-fees-proposals-gov-response-consultation.pdf

⁴ Question 7 Paragraph 32 and 34, Question 10 Paragraph 42 and 44

seeking asylum in the UK are in no position to find such large sums of money. The inability to pay the court fees may be a factor in whether a survivor of torture can take a case to court or not. Alternatively, people who have no ability to pay the application fee risk being driven underground and/or being forced into illegal or exploitative work. Freedom from Torture sees in our daily work how survivors of torture and their families are forced into debt to try and pay the existing fees. Freedom from Torture regularly hears of family members in the countries or origin of appellants taking loans, selling prized possessions like family jewellery, or selling livelihoods like fishing boats or farming land to pay for fees in the UK.

Question 2: *Is there merit in us considering an exemption based on the Home Office visa fee waiver policy? Please provide reasons.*

There is merit in considering exemptions but there is consensus in the non-profit immigration advice sector that the Home Office fee waiver policy is not fit for purpose because it is applied in an unpredictable and inconsistent manner⁵ and that decisions by case workers on an individual's eligibility for a fee waiver often has to be challenged by way of judicial review. This in no way assists access to justice and is a disproportionate way of regulating access to the Tribunal.

Freedom from Torture agrees with paragraph 47 of the consultation document which highlights that where an individual has already received a Home Office fee waiver in respect of their application, it is justifiable to automatically grant a fee exemption when that same person subsequently appeals against the Home Office decision. Freedom from Torture argues this principle should be extended so that any person who did not pay a fee to the Home Office in relation to their application should be exempt from appeal fees.

However, not all individuals in need of a fee exemption will have been able to apply for or been granted a Home Office fee waiver. As previously explained, some survivors of torture in treatment with Freedom from Torture are not eligible for legal aid or asylum support because they have support from within their community and therefore they may be subject to the proposed fee increase. They have nonetheless been successfully referred to our services as a survivor of torture with serious health needs. It is imperative that a remission scheme is in place to assess the means of individual appellants and grant fee remissions based on their ability to pay. This should not be based solely on the Home Office fee waiver policy.

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?*

Freedom from Torture believes that in relation to asylum cases, an exemption for all asylum-seekers would be more efficient to administer from a cost perspective. Given the importance to the individual of the issues involved and the vulnerability of appellants it is vital that the right of access to the Tribunal is unimpeded.

There are other groups Freedom from Torture believes should also be exempt from tribunal fee structures:

Former unaccompanied children leaving care

In paragraph 43 of the consultation document, the government has stated its intention to exempt from fees children receiving support under Section 20 of the Children Act 1989. It

⁵ See also responses from Rights of Women and René Cassin

is very important that this is followed through; however, Freedom from Torture regularly works with unaccompanied children who have experienced or witnessed torture, and also sees the difficulties leaving the care system poses for their rehabilitation. In addition Freedom from Torture therefore urges that all former unaccompanied children who are no longer receiving Section 20 support are similarly exempt from fees.

In Freedom from Torture's experience, former unaccompanied children who are care leavers are likely to have Article 8 immigration claims based on their right to private and family life in the UK. Many have been at school and college in the UK; they have built up a strong social network and often have little, if any connections to their country of origin. The UK is the only home they know. However, the Government's decision to remove legal aid for non-asylum immigration cases in 2013 has meant that many of these young people will have to pay the increased fee because they are not eligible for legal aid. Furthermore, provisions in the Immigration Act 2016⁶ mean former looked after children who require leave to enter or remain when they turn 18 and who have an immigration claim are now excluded from local authority support meaning they will fall out of the proposed fee exemption under Section 20. They will no longer be receiving assistance available under leaving care provisions including access to accommodation or subsistence as well as foster placements leaving them destitute and vulnerable to exploitation. Research has already highlighted that cuts to legal aid are putting these young people at risk of being exploited through unregulated labour, sexually exploited, or being groomed by criminal networks, in order to raise funds to cover legal fees⁷. This situation is set to become worse if the proposed fee increases are introduced and likely to have a significant impact on the rehabilitation of former unaccompanied children who have experienced or witnessed torture.

Family cases

Freedom from Torture believes families should at the very most only have to pay one appeal fee. Freedom from Torture is aware that the Home Office sometimes makes the decision on a main applicant and dependents contained within one letter, which means only one appeal form has to be completed, however sometimes the Home Office serves separate decisions for each applicant, regardless of whether or not they are dependants on the asylum application. This means that a family may have to pay varying appeal fee amounts based on decisions that the Home Office has made, introducing an element of arbitrariness to the amount a family may have to pay to resolve their cases. Further, the family will usually have one appeal hearing, and they should not have to pay several times over for that hearing.

Family reunion cases

Freedom from Torture believes refugee family reunion cases should be exempt from fees. Since there is no longer legal aid for these cases, individuals have to make these complex applications themselves⁸ and it is reasonable to assume that a person who has recently been granted refugee status is in a disadvantaged situation because they will not have had long to find and secure work or save to pay fees. Our legal advisors have been required to advise on numerous poor decisions by British embassies on family reunion applications. For example, one of our clients, an Iranian national, was granted refugee status and applied for his wife and children to join him in the UK. This was refused because it was considered he had not provided evidence that they had lived at the same address prior to departure

⁶ See part 5 - support for certain categories of migrants

⁷ The Children's Society (2015) *Cut Off From Justice: The impact of excluding separated migrant children from legal aid* <http://www.childrensociety.org.uk/what-we-do/resources-and-publications/cut-off-from-justice-the-impact-of-excluding-separated-migrant>

⁸ British Red Cross (2015) *Not so Straightforward: the need for qualified legal support in refugee family reunion* <http://www.redcross.org.uk/~media/BritishRedCross/Documents/About%20us/Not%20so%20straightforward%20refugee%20family%20reunion%20report%202015.pdf>

from Iran or that they had provided evidence to show their relationship was still subsisting. A lawyer assisted him in lodging an appeal for which he had to pay a fee and the UKVI was also asked to review the case. On review, the application was accepted, but by this time our client had already paid the appeal fee.

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

No.

We repeat our answer to question 1 and include further comment below.

Freedom from Torture's previous arguments apply with greater force in relation to onward appeals, where a right of appeal only arises insofar as there is an arguable material error of law. It is in the interests of justice, therefore, for these errors to be corrected on appeal and it is not justified to require the parties to meet the full costs of putting right a lower tribunal's error. The inability to pay the tribunal fees will often be a factor in whether the applicant can take a case to appeal or not. We already see cases where legal representatives do not pursue meritorious appeals to the Upper Tribunal because such applications are financially 'at risk' under legal aid provisions. Unless an alternative legal aid representative can be found, a process which in our experience can now take up to three months, clients are often forced to pursue these appeals on a private basis. The introduction of fees at this stage of the appeal process will further compound the difficulties which are experienced when pursuing these appeals. In asylum claims this is completely unacceptable and seriously undermines access to justice.

The proposed increases also should be considered in the context of other changes which are resulting in the cumulative effect of limiting access to justice across the board including the removal of immigration from the scope of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the erosion of appeal rights under the Immigration Act 2014, high application fees (which are not refunded if refused), and the failings of the exceptional funding system.⁹ The proposals also acknowledge that the result of these proposals will be fewer people appealing against Home Office decisions with a 20% to 40% reduction in the uptake of appeals anticipated in the Impact Assessment accompanying these proposals¹⁰. However, analysis strongly suggests that it cannot simply be assumed a corresponding percentage of appeals are without merit¹¹ so therefore the claim that there will be no negative impact on access to justice is clearly flawed.

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

No. We repeat our answers to questions 1 and 4.

⁹ *Gudanaviciene et ors* [2014] EWCA Civ 1622.

¹⁰ Impact Assessment MOJ005/2016, available at https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/impactassessment.pdf (accessed 2 June 2016).

¹¹ Robert Thomas, School of Law, University of Manchester, The UK Administrative Justice Institute <https://ukaji.org/2016/04/28/allowed-appeals-and-initial-decision-making/>

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.*

We do not believe that fees should be introduced in the Upper Tribunal for reasons previously stated, however, if they are, there should be provision for a fee waiver.

A fee remission in the Upper Tribunal is all the more important since the point of the hearing is to rectify the First-tier Tribunal's errors and may involve points of law which have importance beyond the parties and which it is in the public interest to litigate.

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.*

The equality statement (at Paragraph 4.3) accepts that people from Black, Asian and minority ethnic backgrounds and those with disabilities will be disproportionately affected by these proposals. The Government considers this justifiable.

Freedom from Torture agrees that the proposed fees will have a disproportionate impact on people with protected characteristics including on the basis of race given that the Immigration and Asylum Chambers of the Tribunal are used disproportionately by this group, as well as on the basis of disability. Many of the clients we work with have a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on your ability to do normal daily activities, meaning they fit the disability criteria used for the purposes of anti-discrimination law. We do not consider the impact of these proposals on these groups to be justifiable.

For the reasons set out above, Freedom from Torture argues that these fees will not achieve the aim of protecting access to justice. Furthermore, Freedom from Torture is concerned as to the Government's approach in choosing to recover 100% of costs specifically from the Asylum and Immigration Tribunal and not from other parts of HMCTS (with the exception of the employment tribunal) when it is aware that this approach will disproportionately impact on members of ethnic minorities and those with disabilities.

Furthermore, if these fee increases are introduced, this would be done without any impact assessment of other related external policy changes, namely the current fee order introduced in 2011, LASPO in 2012 or Immigration Acts 2014 and 2016 whereby appeal rights have been considerably restricted.

**Freedom from Torture
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