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Immigration Tribunal Fees as a Barrier to Access to Justice and Substantive Human Rights Protection for Children

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Abstract: *This article argues that children's access to justice, as both a method of protection for human rights and a substantive right in itself, is undermined by recent increases to tribunal fees. The UK government has engaged in a programme of increased court and tribunal fees aimed at redistributing the financial cost of maintaining the justice system from the state to individual litigants. In this context, the government has significantly increased fees for appellants to access the Immigration and Asylum Chambers of the Tribunal. However, absent from the government's considerations have been children who would be appellants but for their parents' inability to pay the increased appeal fees. Children are independent holders of human rights, yet because they are economically inactive they are unable to independently pay such fees. The consequence is that children are prevented from having their human rights protected by an administrative Tribunal and this article therefore suggests that there is good reason to exempt child appellants from tribunal fees. Whilst this issue has immediate relevance to immigration appeals, the argument is applicable to all courts and tribunals concerned with decisions impacting upon the human rights of children.*

Introduction

This article argues that children's access to justice, as a method of protection for their substantive human rights, is undermined by the government's recent and substantial increases to tribunal fees. In the context of the UK government's ongoing commitment to reducing

public spending, it has engaged in a process of shifting the financial cost of maintaining the justice system from the state to individual litigants. Although court fees for criminal defendants were withdrawn,[1] in the civil justice system fees for courts and tribunals have been either introduced or increased. It is in this context that the government has increased appellant's fees for access to the Immigration and Asylum Chambers (IAC) of the Tribunal, including an increase of 471% for oral hearings at the First-tier Tribunal.

Part one of this article provides a short background to the government's increases in tribunal fees and argues that the government's justifications for fees increases rely on a narrative of personal choice engaged in by rational economic agents. Part two locates children within the UK's immigration appeals scheme and identifies them as independent holders of substantive human rights; rights which are explicitly at stake in immigration appeals, particularly article 8 of the European Convention on Human Rights (ECHR). Part three discusses court and tribunal fees as recognised barriers to justice and identifies again a persistent narrative of choice underpinning the law in this area. However, it is a narrative which fails to take into account children's situation as being economically inactive. The effect is that neither the case law nor the government consultation on tribunal fees sufficiently takes into account how fees are a particular barrier to access to justice affecting children, and therefore fails to adequately protect their independent human rights.

This article is concerned only with non-asylum appeals of non-British children. Most asylum appeals are covered by existing fee exemptions for those in receipt of asylum support and/or legal aid. British children are also affected by the result of immigration appeals of their parents because either the child will also have to leave the UK (constructive removal) or

[1] The abolition of the 'Criminal Court Charge' was reported at "Administration of Justice" [2016] Public Law 325, 326

they will lose physical contact with that parent.[2] The issues discussed in this article therefore also apply to British children but because their rights are affected at one step removed from an adult's immigration appeal, for the sake of clarity they are not considered in this article.

However, if one accepts the premise presented in this article, it is one that applies not only to other child applicants within the IAC, but to any arena – public and private law alike – in which the human rights of children are determined. This article argues that children should always be exempt from court and tribunal fees when their human rights are at stake.

Background

The First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber), herein collectively referred to as 'the IAC', hear appeals in cases which have public law at their heart. Immigration appeals are against decisions of the state to refuse or revoke an individual's legal status within the UK and these appeals revolve around whether the state has interfered with the human rights of individuals. Since the Immigration Act 2014 the only immigration decisions which are appealable are human rights decisions or protection decisions (related to refugee status and humanitarian protection).[3]

The grounds of appeal in non-protection immigration cases are also limited to unlawfulness under section 6 of the Human Rights Act 1998. Legal argument is thereby essentially limited to two issues when an appeal is grounded in a qualified right, such as article 8 ECHR. Firstly, was the decision contrary to law or published policy (and thereby

[2] On constructive removal generally, see Jacqueline Bhabha, *Child Migration & Human Rights in a Global Age* (Princeton, Princeton University Press, 2014), pp.67-81

[3] Nationality, Immigration and Asylum Act 2002 s.82, as amended

falls at the hurdle of being 'not in accordance with the law'), and secondly, was the decision a disproportionate interference with the human rights of the appellant.

In a consultation document of April 2016,[4] the Ministry of Justice proposed large increases to the fees paid by appellants to the IAC. Those related to the First-tier Tribunal were duly brought into effect on 10 October 2016.[5] Previously, fees for an oral appeal hearing at the First-tier were £140 per appellant, but the new fee is £800 per appellant;[6] an increase of 471%. Furthermore, as of writing, the government intends three new stages at which a fee would be levied beyond a First-tier appeal; to apply to the First-tier for permission to appeal to the Upper Tribunal (£455), to apply directly to the Upper Tribunal if permission was refused by the First-tier (£350) and, if permission is granted, for the Upper Tribunal hearing itself (£510).[7] In total, a single appellant progressing a human rights claim from refusal by the Secretary of State to the Upper Tribunal faces IAC fees of up to £1,805. Currently, neither permission to appeal applications nor Upper Tribunal hearings are subject to fees. Despite opposition from 142 of the 147 respondents to the consultation, the government determined in September 2016 that it would proceed with its proposals[8] and new First-tier fees came into force on 10 October 2016.

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[4] 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 2016) *https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/consultation%20document.pdf* [Accessed June 3, 2016]

[5] The First-tier Tribunal (Immigration and Asylum Chamber) Fees (Amendment) Order 2016 (SI 2016/928 (L.16)

[6] Above, Article 4

[7] See fn.4, para 53

[8] Ministry of Justice, '"Tribunal Fees: The Government Response to Consultation" (September 2016) *https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/results/consultation-response.pdf* [Accessed September 20, 2016], paras 6 & 52-53

There is no general means testing of IAC fees in place, and none has been introduced to mitigate these substantial increases in the fees. The means assessed remission scheme employed generally by the Civil and Family Courts was considered and rejected on the introduction of First-tier Tribunal fees in 2012[9] and the 2016 consultation has again dismissed its practicality.[10] This is not to suggest that there is no mitigation to the IAC fees. In particular, the fees are waived when a child is being housed by the local authority under section 20 of the Children Act 1989, or when a family is in receipt of section 17 Children Act support.[11] Finally, the Lord Chancellor can reduce or remit the fees "in exceptional circumstances", although no guidance is given as to what amounts to "exceptional circumstances".[12] The exceptionality of the scheme means that this is clearly not supposed to reproduce a consistent scheme for means tested remission. Finally, the government has also proceeded with a fees exemption based on the same destitution criteria as is applied to the payment of visa application fees; a minor concession arising from the consultation.[13]

Each proposed fee is calculated to recoup from appellants the full cost of the proceedings[14] and are justified by the government on the basis of the "challenging financial circumstances"[15] and the attempt to elimination of the UK's budget deficit.[16] Failing to

[9] Ministry of Justice, "Fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber): Impact Assessment" (November 2012) *https://consult.justice.gov.uk/digital-communications/fee-remissions-immigration-asylum/supporting_documents/iatfeeremissionsia.pdf* [Accessed June 3, 2016] , paras 65-81

[10] See fn.4, para 37

[11] See fn.5, article 5(c)

[12] See fn.4, para 45

[13] See fn.8, paras 59; See fn.5, article 5(b)

[14] See fn.4, para 24

[15] Above, para 23

[16] Above, para 17

recoup all the costs of judicial proceedings from appellants is considered by the government to be 'a subsidy by the taxpayer'.[17] The underlying belief underpinning the increase of tribunal fees is that because migration is an individual choice (a belief which itself is open to contention),[18] the decision to appeal the state's decision is also a personal choice, undertaken by rational economic actors who ought then to bear the costs of their actions. The provision of an appeals mechanism is therefore portrayed as a "public service",[19] rather than recognising that appeals against state decisions play invaluable roles in securing the rule of law and legal accountability of the state. The Impact Assessment accompanying the consultation repeated the narrative of individual choice, stating that; "The drop in caseload is assumed to be because individuals choose to no longer bring a claim as a result of the higher fees."[20]

The government also pursues a narrative of personal choice in the context of appeals to the Upper Tribunal. Permission to appeal to the Upper Tribunal is limited to instances of an error of law having been made by the First-tier.[21] However in the consultation document the imposition of a fee is justified by the government on the basis that the same principles apply to both First-tier and Upper Tribunals appeals and that appeals to the Upper Tribunal are made on the basis that "a party is dissatisfied with a decision of the First-tier Tribunal".[22] The use of the term "dissatisfied" obscures and undermines the importance of the issues at

[17] Above, para 22

[18] See Alice Bloch, Nando Sigona and Roger Zetter, *Sans Papiers: The Social and Economic Lives of Young Undocumented Migrants* (London, Pluto Press, 2014), pp.35-39; Louise Ackers, "From "Best Interests" to Participatory Rights - Children's Involvement in Family Migration Decisions" (2000) 12 Child and Family Law Quarterly 167

[19] See fn.4, para 22

[20] Above

[21] Tribunals, Courts and Enforcement Act 2007 s.11(1)

[22] See fn.4, para 33

stake, given that an error of law arises from a significant mistake by a First-tier judge in the procedure followed, or in their application of the law. These are not errors that can attributed to the appellant.

This narrative of personal choice is one which is open to general critique as it is a discourse which seeks to shift access to justice away from being an individual right – and thus an obligation on the state – with its underlying rationale in government accountability and the rule of law. This general critique is one which is amplified when one considers the child as an appellant.

The IAC fees increase exists in a wider context of erosion of the ability to access the IAC. Immigration, including family migration and deportation, was one of the areas of law from which legal aid was withdrawn under LASPO 2012, a move described as "an all but fatal blow to family migrants' right to access justice".[23] The Immigration Act 2014 reduced the number of grounds of appeal to the IAC to three; appeals against refusal of a protection or human rights claim, or revocation of a protection status. This effectively ended any right of appeal for migrants who are in the 'points based system' for work or student visas.[24] The 2014 Act also introduced the 'deport now, appeal later' regime of non-suspensive appeals in cases at which the deportation of a foreign national offender is at issue. The 2014 Act permits the Secretary of State to require that deportation appeals brought by foreign national

[23] Frances Meyler and Sarah Woodhouse, 'Changing the Immigration Rules and Withdrawing the 'currency' of Legal Aid: The Impact of LASPO 2012 on Migrants and Their Families' (2013) 35 (1) Journal of Social Welfare and Family Law 55, 73

[24] Colin Yeo, 'Full Immigration Appeals Ended: Immigration Act 2014 Brought Into Force' (*Free Movement,* 2 March 2015) <https://www.freemovement.org.uk/full-immigration-appeals-ended-immigration-act-2014-brought-into-force/> accessed 1 September 2016

offenders be brought from abroad, unless "serious irreversible harm" would result.[25] The Court of Appeal upheld the lawfulness of this scheme in *Kiarie v Secretary of State for the Home Department*,[26] finding that the procedural requirements of article 8 ECHR require only that an appellant has access to a court procedure which is essentially effective and fair, even if it is not the best procedure possible.[27] The Immigration Act 2016 extends this power to all immigration appeals brought on human rights grounds by any category of migrant,[28] although as of October 2016 this is not yet in force.

Children, the Immigration System, and their Human Rights

Children are most directly and obviously affected by the outcome of immigration appeals when the appeal relates directly to the right of residence held by the non-British child. There are two main situations to which this relates. Firstly, this transpires when a non-British child has applied for and been refused entry clearance to enter the UK to join a parent who is a British citizen or settled in the UK.[29] Refusal of entry clearance prolongs the separation of parent and child. Secondly, a non-British child may be dependent upon a right of residence being extended to their non-British parents. If the parents have their right to remain curtailed or refused, the child's right of residence is likewise affected.[30]

[25] Peter Jorro, "The Enhanced Non-Suspensive Appeals Regime in Immigration Cases" (2016) 30 Journal of Immigration, Asylum and Nationality Law 111, 112

[26] [2015] EWCA Civ 1020, [2016] 1 WLR 1961

[27] Above, p.1981

[28] See fn.25, 121

[29] Immigration Rules 1994 (HC395, as amended), r297

[30] Immigration and Asylum Act 1999 s.10 (as amended)

In both sets of circumstances the child possesses an independent right of appeal to the IAC. Likewise, the child's welfare is at stake[31] and both circumstances engage the child's individually held human right to a family and private life under article 8 of the European Convention on Human Rights.[32]

Some authors find the statement that children to have individually enforceable human rights to be controversial. They argue that children lack a necessary precondition for holding rights, variously described as either rational capacity[33] or moral agency.[34] However, it is claimed by others that "All that can be said about the universality of human rights in general also applies [to children]."[35] This is particularly true of welfare rights; those rights, such as family life, which are directly related to individual wellbeing.[36] This theoretical universalism is carried through into practical expression; the European Convention on Human Rights states

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[31] Kalina M Brabeck, M Brinton Lykes and Cristina Hunter, "The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families" (2014) 84 American Journal of Orthopsychiatry 496, 500; Nikki Smith, "Children's Rights Nationally and Internationally During the Deportation of Their Parents or Themselves: Does the Right to Sovereignty Trump the Best Interests of the Child?" (2012) 5 the crit: A Critical Legal Studies Journal, 34-38

[32] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; [2009] AC 1198

[33] Laura M Purdy, *In Their Best Interest? The Case Against Equal Rights for Children* (Ithaca, Cornell University Press, 1992), pp.33-35

[34] Robert Noggle, "Special Agents: Children's Autonomy and Parental Authority" in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford, Oxford University Press, 2002), pp.100-102

[35] Adam Lopatka, "The Rights of the Child Are Universal: The Perspective of the UN Convention on the Rights of the Child" in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (Dordrecht, Martinus Nijhoff Publishers, 1992), p.48

[36] Harry Brighouse, "What Rights (If Any) Do Children Have?" in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford, Oxford University Press, 2002), p.38

that its rights are for "everyone", and its guaranteed freedoms ensure that "no one" be subject to what is prohibited. Furthermore, article 14 of the Convention prohibits discrimination in the enjoyment of the Convention's rights.[37]

However, in the practical enforcement of human rights in a UK court, most children are at a significant disadvantage because they rely on an adult (usually a parent) to bring proceedings. However, requiring the intercession of an adult to secure the practical effectiveness of human rights does not preclude children from independently possessing those rights in the first place.

That children with independent rights of appeal to the IAC have individual substantive human rights at stake is also supported by UK law. The House of Lords found that even when immigration decisions are made with respect to one member of a family, it is a decision which touches on the human rights of all members of a family, concluding that "there is only one family life".[38] It is further supported by the Secretary of State's duty under s.55 of the Borders, Citizenship and Immigration Act 2009 to "safeguard and promote the welfare of the children", a duty which the Supreme Court has interpreted as requiring that the child's best interests be considered first.[39]

Finally, that child appellants have individual, independent and substantive human rights to be considered and determined by the IAC is supported by the fact that child appellants are also subject to the same fee regime as adults, and that each appellant pays the same fees even if their appeals are heard together as one family unit. As previously mentioned, the government's rationale for fees increases is full cost recovery; costs which are

[37] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Aldershot, Ashgate Dartmouth 1999), pp.3-5

[38] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] AC 155, para 43

[39] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, para 26

linked explicitly in the consultation document to the delivery of substantive justice.[40] The effect is that when more children have their human rights at stake in an immigration appeal, the higher the financial barrier is to actually accessing that appeal.

Fees and Access to Justice

That court and tribunal fees can inhibit access to justice is recognised by the academic literature, the European Court of Human Rights (ECtHR) and domestic public law. In the literature, Thomas describes increased fees as one of the factors which have "weakened" administrative justice[41] and Clayton recognises an inherent and "difficult tension" between increasing court fees and the right of access to a court.[42] The ECtHR has also determined that court fees may breach article 6 ECHR; describing that article as encompassing a "right to a court".[43] Although the ECtHR does not find court fees objectionable per se, the fees must be proportionate to "the particular circumstances of a given case, including the applicant's ability to pay them".[44]

The cases which have been determined by the ECtHR to date are all related to domestic private law matters which include some pecuniary or property benefit claimed by the applicant.[45] The concept of proportionality between the fees paid and the value of the

[40] See fn.4, para 6

[41] Robert Thomas, "Administrative Justice, Better Decisions, and Organisational Learning" [2015] Public Law 111, 111

[42] Richard Clayton, "Public Interest Litigation, Costs and the Role of Legal Aid" [2006] Public Law 429, 434

[43] *Kreuz v Poland* Application no 28249/95 (ECHR, 19 June 2001), para 53

[44] Above, para 60

[45] *Kreuz v Poland* Application no 28249/95 (ECHR, 19 June 2001); *Podbieski and PPU Polpure v Poland* Application no 39199/98 (ECHR, 26 July 2005); *Weissman and Others v Romania* Application no 63945/00

claim is one that has therefore not been developed with specific reference to access to justice in public law matters, nor in relation to access to the substantive articles of the Convention itself. However, the ECtHR was particularly concerned about excessive fees in *Kreuz v Poland* in which the applicant, alongside his pecuniary claim, also alleged a breach of the principles of the rule of law by the contracting state.[46] It is therefore not inevitable that a principle of proportionality should apply to public law matters which provide no definable pecuniary benefit to the claimant because when what is being protected (the rule of law or access to justice) is priceless, the language of proportionality has limited utility.

The ECtHR jurisprudence was discussed by the Court of Appeal in *R(Unison)*.[47] In that case Underhill LJ summarised the jurisprudence and found that a human rights breach will occur at the point at which the "fee payable is such that the claimant cannot realistically afford to pay."[48] Underhill LJ also found that in order to properly assess a claimant's realistic ability to pay, one must take into account both the income *and* expenditure of the claimant; the affordability of the fee is then to be judged against the remaining disposable income.[49] This is precisely the form of general means assessment scheme explicitly rejected by the government for application to the IAC.

There may also be a domestic constitutional right of access to the courts which Moses LJ recently summarised as encompassing a duty on the government "not to impede access to

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(ECHR, 24 May 2006); *Kijewska v Poland* Application no 73002/01 (ECHR, 6 September 2007); *Urbanek v Austria* Application no 35123/05 (ECHR, 9 December 2010)

[46] See fn.43, para 63

[47] *R (on the application of Unison) v Lord Chancellor* [2015] EWCA Civ 935; [2015] ICR 1

[48] Juliette Casey, "The Right to a Fair Trial and Access to Justice in Employment Tribunal Cases" (2015) 36, Scots Law Times 172, 177

[49] Above, 177

the court",[50] and by Laws LJ as "a duty, owed by the state, not to place obstacles in the way of access to justice."[51] The introduction of court fees above affordable levels was found in *Witham*[52] to be one such unlawful obstacle. However, this constitutional right may be limited so that any increase to court fees must be approved expressly by Parliament. In *Witham* it was found that although access to a court is a "fundamental constitutional right", prohibitive court fees would not be contrary to that right if the government "persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door."[53]

That large court and tribunal fees do preclude some potential appellants from bringing cases is borne out by experience. For example, the introduction of fees for the Employment Tribunal in 2013, the subject of the *R(Unison)* litigation, resulted in a drop of sex discrimination claims of 83%, and other substantial falls of 30-80% in all the other areas of its work.[54] Likewise, enhanced fees for money claims caused a reduction of 40% of applications; the government's chosen comparator for its assessment of the impact of the IAC

[50] *R (Public Law Project) v Lord Chancellor* [2014] EWHC 2365 (Admin), [2015] 1 WLR 251, p.267

[51] *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34, [2013] 1 WLR 3667, p.3681

[52] *R v Lord Chancellor (ex p Witham)* [1998] QB 575

[53] Above, p.586. See also *Khawaja v Secretary of State for the Home Department* [1994] 1 AC 74, 111, in which Lord Scarman found that to withdraw a constitutional right that Parliament must "make its meaning crystal clear".

[54] UK Parliament, "Impact of Employment Tribunal Fees: Key Issues for the 2015 Parliament" *https://www.parliament.uk/business/publications/research/key-issues-parliament-2015/work/employment-tribunal-fees/* [Accessed 6 May 6, 2016]

proposals.[55] Against this backdrop, the government's own assumption is that the proposed increase in IAC fees will reduce appellant numbers, although its assumption that there will be 20% fewer applications[56] appears arbitrary, and fails to distinguish differences in likely impact upon appeals to the First-tier (at which fees are already levied) and to the Upper Tribunal (at which there are currently no fees).

The limited remission criteria for IAC appeal fees underline that the government too acknowledges that appeal fees can act as a substantive barrier to justice. The government's consultation described extending fee exemptions to children in local authority care or in receipt of local authority support as an exercise recognising difficult "financial circumstances" and in protecting "the most vulnerable."[57]

The narrative that decisions about appeals are a matter of choice, undertaken by rational economic actors, pervades both the government consultation, and the decision of Underhill LJ in *R(Unison)*. The latter defined the test for an article 6 ECHR breach as "whether the introduction of the fees regime has in at least some cases made it not simply unattractive but in practice impossible to pursue a claim."[58] Choice is also important for the boundaries of the common law right to access justice. In *Witham*, Laws LJ found court fees to be "the cost of going to court at all … They are not at the choice of the litigant"[59] and thus to fall within the power of the court to regulate under the constitutional right of access to the courts. In the recent legal challenge to the proposed "residence test" of twelve months before

[55] Ministry of Justice, "Immigration and Asylum Chamber Full Cost Recovery: Impact Assessment" (14 April 2016) *https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/impactassessment.pdf* [Accessed May 19, 2016], 2

[56] Above

[57] See fn.4, para 25

[58] *R (on the application of Unison) v Lord Chancellor* [2015] EWCA Civ 935; [2015] ICR 1, para 67

[59] See fn.52, p.586

a person became eligible for legal aid, Moses LJ in the High Court found that restrictions on legal aid could also unlawfully constrain an individual's choice to seek "the protection which domestic law affords".[60]

Ultimately, however, whereas this narrative of personal economic choice may be justified when applied to adults (as in all the facts before the ECtHR and domestic courts to date), it is a narrative that is difficult to sustain when applied to children. Children are economically inactive because, generally, they are prohibited by law from working. Even when they have financial resources they most often do not have personal control over its disposal. This means that they lack the personal financial resources that are the necessary precondition of having a genuine choice as to whether to deploy those resources in bringing a paid-for immigration appeal. However, children as a whole have not been given sufficient attention by either the courts or government in considering the issue of court and tribunal fees as a barrier to access to justice.

Children, Fees and Access to Justice

Generally, society accepts the placing of cost-benefit decisions on autonomous adults as they are able to weigh their interests against the costs of pursuing those interests. Society also places on parents the burden of most cost-benefit decisions which affect their children; decisions which society assumes are then taken in the best interests of the child. The narrative of economic choice is sustained, but in a way which shifts the economic burden onto a child's parents.

However, this argument is problematic. Firstly, the "presumption of shared interests"[61] between parents and children is not always sustainable. The costs and benefits of

[60] See fn.50, p.271

migration are not equally shared between family members, "Yet children are often considered parcels that are easily movable across borders with their parents and without particular cost to the children".[62] Where there is a conflict of interests between child and parents there are a range of institutional barriers to children being able to litigate independently held human rights. However, the existence of other barriers should not excuse failing to consider the additional barrier presented by substantial tribunal fees.

Secondly, and more pressingly, is the effect of increased tribunal fees on the cost-benefit analysis of pursuing an immigration appeal, even where a child and parent's interests in pursuing an appeal notionally coincide. The increases in the tribunal fees for both child and adult appellants are a substantial cost to be weighed in the cost-benefit analysis. With tribunal fees brought in for the First-tier and proposed for the Upper Tribunals to total up to £1,805 per appellant, the cost increases for each child that a family has. Therefore a family of two parents and one child would incur tribunal fees of £5,415, if they had two children the fees would be £7,220, and with three children the family would incur fees of £9,025, and so on. These levels of costs clearly have the potential to weigh the decision making of the household away from pursuing a human rights appeal. The effect is to potentially alter the notional coincidence of interests between parents and child, so that the parent's interest in not incurring increasing financial costs (including the possibility of incurring substantial debt) now outweighs the child's interests in pursuing their human rights claim. The altered cost-benefit balance actually becomes more acute when the human rights interests of more

[61] Louise Ackers, "From "Best Interests" to Participatory Rights - Children's Involvement in Family Migration Decisions" (2000) 12 Child and Family Law Quarterly 167, 171

[62] Jacqueline Bhabha, *Child Migration & Human Rights in a Global Age* (Princeton, Princeton University Press, 2014), p.69

children are at stake; the more children who are would-be appellants, the higher the tribunal fees and the greater the financial incentive to not pursue the appeal.

Immigration appeals engage the article 8 ECHR rights of children to a family and private life. Article 8 includes a positive obligation to render the exercise of that right effective.[63] Although article 6 ECHR itself does not apply to immigration cases,[64] the Court of Appeal has found that, as between the substantive requirements of article 6(1) (the civil limb) and the procedural requirements of article 8, there is no "real difference" and that they are "in practice the same".[65]

Therefore, this article suggests that only a blanket fee exemption for child appellants is consistent with the promotion and protection of the rights of children. A blanket exemption recognises that appeal fees are always impossible to meet by the child themselves and that when the cost falls on their parents it skews the cost-benefit analysis so as to reduce the likelihood that an IAC appeal will be pursued.

Conclusion

Whenever courts, such as the IAC, make decisions which affect the human rights of a child, those rights are held by the child as an individual person who holds that rights claim separately and independently from their parents.

The narrative pursued by the government in its proposals for increased court and tribunal fees is that of choice; a rational economic actor weighing the value of the claim against the cost of bringing it. However, this narrative does not reflect children's situation;

[63] *Gudanaviciene & others v Director of Legal Aid Casework & another* [2014] EWHC 1840 (Admin); [2014] WLR(D) 266, para 18

[64] *Maaouia v France* Application no 39652/98 (Grand Chamber, 5 October 2000) [2000] ECHR 455

[65] *R (Gudanaviciene & others) v Director of Legal Aid Casework & another* [2014] EWCA Civ 1622, para 70

children are not economically active and therefore large fees increase children's dependence on their parent's ability to fund litigation. This increased dependency further undermines children's status as independent holders of human rights because fees act as a barrier to children bringing cases to protect their own human rights.

Excessive or disproportionate court and tribunal fees are accepted to be a barrier to justice. They act as a deterrent against bringing cases, and this will include circumstances where the claim has merit. The effect of large fees for each appellant means that the more children involved as parties to the case, the greater the deterrent effect. Perversely, this means the more children whose human rights are at stake, the less likely it is that an appeal will be brought to protect those rights. The proposed solution is to make child appellants exempt from court and tribunal fees.

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