

1. This response to the consultation is presented jointly by the Immigration team at Doughty Street Chambers (DSC), which comprises 19 barristers, the majority of whose practice is predominantly immigration work. These include barristers from a couple years call as barristers to twenty years call; several of the more junior members also have substantial prior experience as solicitors or caseworkers of practicing in immigration law and related fields. They have advocated at all court and tribunal levels in England and Wales, the Court of Justice in Luxembourg and European Court of Human Rights in Strasbourg. They have represented in all types of immigration case including asylum and article 3 and non-asylum cases. There are about 200 years of experience doing immigration cases in total accumulated by Doughty Street Barristers. They also regularly train and write on immigration law, and several members co-authored the Blackstone's Guide to the Immigration and Asylum Act (OUP, 2004).
2. This response will focus on the issues raised by the proposed changes to scope. The DSC Immigration team also supports the response to the consultation made by the Immigration Law Practitioners' Association (ILPA), and the response made by the Bar Council's Civil Legal Aid Sub-Committee, as well as the responses made by other specialist teams at DSC.
3. This response addresses:
 - a. General objections to the removal of immigration cases from scope.
 - b. The lack of alternatives to public funding of Tribunal appeals for those without the means to pay privately for advice and representation
 - c. The position of detainees
 - d. Cases raising Article 8 issues.
4. While we welcome the proposal to keep asylum and article 3 cases in scope, we do not agree that the issues raised by all non-asylum immigration cases do not raise issues of sufficient importance to justify public funding. The justification for retaining public law within scope in prescribed situations is said to be that "proceedings where the litigant

seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly” (para 4.97). This same important justification applies to all immigration cases: the other party is always the state, and immigration control is a state power which affects every aspect of an individual’s life.

5. Furthermore, immigrants by definition are reticent participants in the social polity for the reasons that they are strangers, often not speaking or understanding the English language, and strangers to the customs and practices of a foreign state. The circumstances facing immigrants will in most cases be daunting and even intimidating. They will come from situations where there is no such thing as a benign or benevolent encounter with the State. Many will not be able to read English properly and so will be unable to understand even the decision they are appealing, still less the law surrounding it. They will not be able to collect and present evidence in English. In short, they will not be afforded a fair hearing and an effective remedy.
6. This combined with the fact that immigration cases will always involve an encounter with the State serves as a powerful indicator that provision of funding by the State for such encounters should be withdrawn with the greatest care and always on objective and well-founded grounds.
7. We do not agree with the suggestion in the consultation paper at 4.202 that the tribunal will be easy to navigate and that non-asylum cases “do not generally involve complex legal issues”. Immigration law is now far more complicated than when the immigration tribunal system was introduced and the Human Rights Act did not exist. Moreover, migrants are liable to have even greater problems in representing themselves than UK citizens. Our experience belies the suggestion that it is easy to navigate one’s way through the tribunal system.

8. The barristers at this chambers continually encounter the positive difference a properly prepared and presented case before the Tribunal makes in contrast to those cases not properly prepared and presented. Effective legal representation at the Tribunal level (and indeed before an initial decision is reached by the UK Border Agency) can reduce the likelihood of a legally incorrect decision being made and thus the cost, time and administrative burden of onward appeals and judicial review challenges in the Administrative Court.
9. We note that despite the fact that these are clearly identified by the consultation paper as criteria influencing the decision as to which areas are to remain in and which out of scope, there is no reference in this context to any other source of advice, alternative sources of funding, or alternative routes of resolution for immigration cases. This is because in practice there are none.
10. The provision of immigration advice is very tightly regulated. Advisors must in practice be either solicitors, barristers, or registered with the Office of the Immigration Services Commissioner (OISC). This means that outside of publicly funded organisations, including non-profit advice agencies such as the Immigration Advisory Service, in practice the only persons able to give immigration advice are privately funded solicitors. For very many migrants who currently depend on the availability of public funding, the fees charged by such firms are beyond their means.
11. Conditional fee arrangements are simply not a viable alternative for the majority of immigration cases. The Tribunals have no power to award costs in immigration cases and there are no damages in immigration appeals. A 'winning' client who did not have the resources to pay his legal fees before commencing the case will not have additional resources to do so after winning it.
12. There are no viable alternative routes of resolution. In practice, the UKBA is unwilling to negotiate on individual cases: it is our experience that attempts to negotiate with Presenting Officers in advance of hearings before the Tribunal are generally futile. The

right of appeal to the Tribunal is meant to provide a quick and cost effective remedy but in cases of legal and/or factual complexity (of which there are a great many) in practice litigants who do not have access to legal advice will be deprived of effective access to that remedy.

13. While the proposal to maintain in scope challenges to the lawfulness of an immigrant's detention is to be welcomed and fits with the UK's obligations under article 5, ECHR, we are of the view that this funding should be extended to all claims involving those who are in detention, subject to the merits test. Only rarely will such people have access to alternative sources of funding – given in particular that they are unable to take employment while detained (even if they otherwise have permission to do so). Their ability to access advice is already severely constrained by the restriction on their liberty, which in turn makes them particularly vulnerable. It is much harder to litigate in person when detained – it is harder to collect evidence, to file and serve documents, or otherwise properly prepare for a hearing. Important documents may be misplaced either at the time of arrest or when subsequently moving from one place of detention to another.
14. Moreover, very often the legality of detention will be tied up with the merits of any ongoing immigration application. It is thus difficult for advice to be given about the prospects of securing release from detention without also considering the merits of any ongoing immigration application/ appeal, and for a judge to decide whether to grant bail without making an assessment of the underlying merits. Continuing detention may therefore *depend* upon the merits of the underlying case.
15. Of course, any funding will be subject to a merits test. It is not suggested that all claims be funded but only ones that satisfy a merits test-ones where there are real prospects that the case will eventually succeed.
16. The consultation paper acknowledges that some cases 'may be of importance, in that they raise issues of family or private life' (para 4.201) but in our view fails to adequately acknowledge the significance of the issues raised in these cases. The right to respect for family life is a fundamental human right but not absolute. The State can interfere with or

even prevent the exercise of the right. The State must however justify its restriction or interference. For any effective assessment of the right an independent tribunal must be aware of the strength of the family life, of the circumstances in which the immigrant lives, his background, the circumstances facing him and his family if removed from the UK. Very often the other family members, particularly children, will be British citizens whose right to enjoy family life with their parents, spouse or other close family member is placed in jeopardy by the decision whether or not to allow the migrant to remain in or enter the UK. To establish the correct facts is a daunting exercise and time consuming one. An immigrant, a litigant in person, is unlikely to know the legal and factual tasks he must surmount. Before a tribunal the Home Office will have the advantage of a Presenting Officer, and a decision maker who will have assessed the case already. The mere assertion of justification of an interference with the right to family life will often suffice in the absence of strong countervailing factors or evidence.

17. Again it is not suggested that all cases where article 8 is raised should be funded. Only cases that pass a merits test should be funded.
18. The courts up to the House of Lords have partaken in a tortuous route since the HRA 1998 came into effect in the correct application of article 8 to immigration cases. Indeed, as declared by the HL in *Huang* [2007] UKHL 11, the Tribunal and even the court of Appeal had got it hopelessly wrong in such cases as *Edore* [2003] EWCA Civ 716, *Mahmood* [2001] 1 WLR 840 and *Huang* itself. It took the courts seven years to agree as to the correct test to apply when deciding if a decision to interfere with article 8 ECHR rights is justified. And that was in respect of cases that were publicly funded. Of course, if there was no such funding such cases would most likely not have gone beyond a first stage.
19. We strongly disagree with the proposal to remove statutory appeals to the Upper Tribunal, Court of Appeal and Supreme Court from scope in immigration cases. In at least seven cases since 2004 in an exclusively immigration context the House of Lords (now Supreme Court) has been required to deal in detail with article 8: *Razgar* [2004]

UKHL 27, *Huang* [2007] UKHL 11, *EB Kosovo* [2008] UKHL 41, *Beoku-Betts* [2008] UKHL 39, *Chikwamba* [2008] UKHL 40, *EM Lebanon* [2008] UKHL 64, and, most recently, *ZH (Tanzania)* [2011] UKSC 4. All of these cases held that the approach to Article 8 previously consistently adopted by the tribunal and the UKBA was wrong. Six of those cases were statutory appeals-cases that it is proposed would now not be within scope. It is the experience of barristers in this Chambers that anything up to 75% of statutory appeals brought on behalf of immigrants to the higher courts-often involving article 8 issues- are successful. The figure is similar in respect of clients represented by them before the Tribunal.

20. Two scenarios where article 8 issues arise with the greatest clarity are in cases involving children and deportation cases. Parliament has enacted section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the UKBA to safeguard and promote the welfare of children within the UK. The House of Lords in the very recent case of *ZH (Tanzania)* has held that the interests of children in an immigration context must be a primary consideration especially where British citizen children are involved.
21. Given the absence of costs provisions we also believe that public funding should be provided where the action is initiated by the state rather than the individual. This is consistent with the rationale for removing most immigration cases from scope, namely that people have made a free and personal choice to come to or remain in the United Kingdom.¹ Individuals facing deportation, curtailment of leave, revocation of indefinite leave to remain or even nationality are not exercising a free and personal choice. The proposals as they stand would also result in an applicant in the Upper Tribunal unfunded for representation purposes albeit his appeal before the First Tier Tribunal had succeeded- in cases where the Secretary of State appeals.
22. Deportation cases are paradigm cases of state initiated action. The justification for deportation advanced by the SSHD will be the public good. Again the State will have

¹ a rationale which we do not necessarily consider to be justified, but do not address further here because we understand that it will be amply addressed elsewhere.

devoted substantial assets by way of dedicated decision makers and Presenting Officers to bolster the decision to deport. The very fact of attendance by a Presenting Officer at a tribunal who will speak the same language as the IJ and share a common legal and cultural heritage puts the immigrant at a huge disadvantage-often not even able to speak the shared language of the Tribunal and the PO.

23. We therefore oppose the proposal to remove all non-asylum immigration work from scope. We do not think the proposal to remove funding from all of the following cases is justified:

- (a) Those cases involving alleged violation of Article 8, ECHR. Funding should be maintained subject to the merits test;
- (b) Those involving children;
- (c) Cases where the applicant or appellant is in prison or immigration detention, including the underlying case;
- (d) Challenges to state-initiated action, such as deportation;
- (e) Appeals on a point of law to the Upper Tribunal or higher courts.