



**Fee waiver policy ruled unlawful: understanding the implications of the Upper Tribunal's judgment in *R (Dzineku-Liggison) v SSHD***

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# Fee waivers: the judgment

*R (Dzineku-Liggison) v SSHD* JR/2249/2019 (so far unreported)

Link to the judgment below this article:

[www.doughtystreet.co.uk/news/r-dzineku-liggison-v-sshd](http://www.doughtystreet.co.uk/news/r-dzineku-liggison-v-sshd)

# Fee waivers: the backstory (1)

*Osman Omar* [2012] EWHC 3448 (Admin)

- Origin of the requirement to waive the fee in human rights claims where applicant is unable to pay
- Leads to 2013 fee waiver policy
- But Home Office treats it as confined to situations analogous to its unusual facts, i.e. cases of destitution (as defined for asylum support purposes)

# Fee waivers: the backstory (2)

*Carter* [2014] EWHC 2603 (Admin)

- Dispute as to what *Osman Omar* really says
- Court rejects Home Office's narrow interpretation
- Correct question is: can the person 'get their hands on the [sums] necessary to pay the fee'?
- But fee waiver policy still remains unchanged

# Fee waivers: Liggison Judgment (1)

## Background

- Family of 5 Ghanaian Nationals. Applied for LTR on Article 8 Grounds
- Immigration fees and IHS £7665
- Submitted unable to pay fees.
- Not destitute - supported by family and friends
- January 2019 fee waiver refused – policy challenge

# Fee waivers: Liggison Judgment (2)

## Unlawful Policy

- R (Ellis) v SSHD [2020] - It is for the court to interpret policy
- Absence of an express statement of the underlying test
- Lack of logical structure to guidance
- Requirement for “exceptional circumstances” obscures affordability test
- [89] *“I come to the clear conclusion that the overall effect of the guidance is to circumscribe unduly the circumstances in which an individual might qualify for a fee waiver.”*

# Fee waivers: Liggison Judgment (3)

## Unlawful on the facts

- [92] Ordinary course is that a decision made pursuant to an unlawful policy should be quashed
- [94] Holistic approach needed to assess financial evidence
- [95] Requirement to show cannot borrow “practically impossible to prove”
- [96] – Even if it was applied, affordability test not rationally applied

# Fee waivers: the 'Ahsan argument' (1)

In *Dzineku-Liggison* SSHD concedes that

- ✓ a human rights claim doesn't require a fee + form
- ✓ people can simply write to the HO, saying their removal would breach HRs
- ✓ HO would have to treat that as a HR claim and would have to consider it
- ✓ but priority may be given to applications made with form + fee



## Fee waivers: the 'Ahsan argument' (2)

However these concessions aren't found to help the SSHD:

- ✓ They don't appear in any policy document & judge doubts HO has internal mechanisms to ensure compliance
- ✓ SSHD did not say this in her decision letter
- ✓ on the contrary, she told the As they were liable to be removed
- ✓ inconsistent with 'best interests' to defer decision indefinitely

# Fee waivers: the 'Ahsan argument' (3): the context

- *Ahsan* [2017] EWCA Civ 2009: SSHD accepts any human rights claim must be considered, regardless of fee, timing or format
- *Shrestha* [2018] EWCA Civ 2810: not arguable that HRs raised in s.120 notice constitute HR claim
- *Balajigari* [2019] EWCA Civ 673: HR claim in a covering letter
- *MY Pakistan* [2020] UKUT 00089 (IAC): SSHD may require fees + forms in HR cases & ignore claims made in 'wrong' format

# Fee waivers: some outstanding questions

- Q Is a HR claim made without a form and a fee an application for leave to remain?
- Q Can the SSHD lawfully decide to deprioritise HR claims made without a form and a fee?
- Q If I make an HR claim without a form or fee while I've already got leave to remain, does s.3C apply?
- Q What do I do now?

# Fee waivers: how to approach them now

- Judgment stayed – policy and online form still in force
- Raising Liggison in pre-action correspondence. Regardless to policy, true test agreed as affordability
- Holistic approach to evidence
- Third party payments