



Justice Committee

Oral evidence: [Courts and tribunals fees and charges](#) HC 396

Wednesday 9 December 2015

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Written evidence from witnesses:

- [Chartered Institute of Arbitrators](#)
- [Forum of Insurance Lawyers](#)
- [Immigration Law Practitioners' Association](#)
- [Police Action Lawyers' Group](#)
- [The South Eastern Circuit](#)
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Members present: Robert Neill MP (Chair); Alex Chalk MP, Philip Davies MP, David Hanson MP, John Howell MP, Dr Rupa Huq MP, Victoria Prentis MP, and Marie Rimmer MP.

Questions [187–265]

Witnesses: **Sarah Crowther**, South Eastern Circuit and **Alice Hardy**, Police Action Lawyers Group, gave evidence.

Chair: Good morning everybody. Thank you very much for coming to give evidence to us. Before I get on to the witnesses, may I ask colleagues if we have any declarations of interest, which we have to declare? I ought to say that I am a non-practising barrister and was a member of the south eastern circuit when I was still paying my subs.

Alex Chalk: I am a practising barrister and am still a member of the south eastern circuit, and I should probably declare that I helped draft its report to QASA.

Victoria Prentis: I am a non-practising barrister who was employed for many years by the Treasury Solicitor's Department and has litigated against some of the witnesses.

Q187 Chair: Are there any other declarations beyond the ones that are on the record? Those are the specific ones. Thank you very much. Could I just ask our two witnesses—and each panel as we go along—to introduce themselves?

Sarah Crowther: My name is Sarah Crowther. I am a practising barrister and a paid-up member of the south eastern circuit. I practise from chambers in London and my practice consists of personal injury, mostly with an international element, and employment and public law claims.

Alice Hardy: My name is Alice Hardy. I am a solicitor at Bhatt Murphy Solicitors, and a member of the Police Action Lawyers Group, who I am representing today, which is a collection of lawyers who act for victims of misconduct by police.

Q188 Chair: Thank you. Can I just say, so that we save time, that I know your organisations have submitted very detailed evidence, which we have read and for which we are very grateful? In particular, in relation to employment tribunals, you will be aware that we heard an evidence session on them, so it is no discourtesy if we do not go particularly into the employment tribunals area. We would like to move on to the other areas where you offered to give evidence as well. We are in a situation where, in the financial year 2014-15, the funding gap is about £214 million in the Courts and Tribunals Service civil business budget—effectively, the difference between the fees and the running costs. That is a chunk of money. Is it wrong in principle to try to fill some or all of that gap?

Sarah Crowther: If what you are saying is should the Courts Service wash its own face in terms of raising fee income in order to meet running costs, that is not essentially something that one would oppose in principle, but it is not what we see these proposals as setting out to achieve. Certainly from the way in which we have read both the previous consultation and this one, it clearly sets out its stall to view the Courts Service as a single unit encompassing other aspects outside the civil justice system, particularly the criminal courts, and perhaps the immigration and asylum tribunals and other tribunal services as well. The difficulty is that that brings with it an assumption that civil litigants should, effectively, subsidise those parts of the system that are not fee-income generating, such as the criminal side. At that point, we would say no, it is not right in principle for civil fees to raise the income to meet that funding.

Q189 Chair: The idea of a cross-subsidy, in that sense, is not something that you would support. I understand that.

Alice Hardy: Of course, it is not wrong in principle to try to bridge that gap; it is the specific means by which we do that that we are looking at today. I would dispute, in any event, that cases of the sort that my colleagues in the Police Action Lawyers Group deal with could result in any saving to the public purse by increasing court fees, as the vast majority of the cases that we handle are against public authorities. The cost, whether it is borne by our clients or by our defendants at the end of the case, will be public money.

Q190 Chair: It is robbing Peter to pay Paul.

Alice Hardy: At the same time, most of our cases are legally aided, which again is public money.

Q191 Chair: I get that. Equally, the Secretary of State, when he gave evidence to us in July—some of you may remember—was pretty frank in saying that we have to be realistic about the economic environment we work in, as well as the social good in the rule of law, but that it is also a marketplace, which has to be reflected, too. Would you disagree with that as a broad assessment or not?

Sarah Crowther: In so far as it goes, it is difficult to disagree with the fact that there is a marketplace. Of course, what we are looking at are the specific proposals on the table, and we say that they go much further than any recognition of marketplace would either justify or need in two respects. One is in the international sense—I know that you will be hearing evidence about the possible international impact of these things—because it is true that some civil litigants have a choice of forum; they have the choice to litigate through state courts, the civil justice system, to arbitrate or to resolve their disputes in alternate means. We say that it is striking that there is no recognition of that in any of the consultation documents. The other aspect in which the marketplace element is not being recognised is in respect of litigants who are, effectively, forced to law in order to vindicate their rights. It is not a situation where people are choosing to litigate. Some of the examples that we gave in our submission, hopefully, illustrate that. We have a situation where there is an assumption in the proposal that, because somebody has a claim of high value, it means that they have liquidity, assets or other means in order to pay fees. In actual fact, we think that that link is unjustified. In many cases, the reason people are coming to court is that they are in financial straits or in economically weakened circumstances, particularly personal injury claimants or those who perhaps have claims regarding their main asset, like their family home, for example.

Q192 Chair: Do you have any thoughts from your point of view, Miss Hardy?

Alice Hardy: I generally agree. In the case of the kind of claims that are brought by my colleagues on behalf of victims of misconduct, I would dispute that there is a marketplace. These are vulnerable people who have been victims of police misconduct. In many cases, they are the families of people who have died in custody. They are bringing claims because that is their only recourse to any form of justice. I also believe—we set this out in our submissions—that there is a disproportionate impact on those types of people. There is a cap on fees at £200,000. Where damages are worth more than £200,000, the cap at £10,000 applies from then on upwards. The kind of claims that we see in our group tend to be modest in value, and they are very much within the core of claims that have been affected by the increase in fees.

Q193 Alex Chalk: In its various impact assessments, the MOJ sought to justify the proposed increases by arguing that for many claimants court fees are a secondary concern, so they say. What is your comment on that?

Sarah Crowther: I am not sure what the basis is for that assertion—whether court fees would be a secondary concern or not. It may be true that where court fees are at a relatively modest level and there are other costs of litigating, such as lawyers' fees, disbursements or expenses on experts and things like that, yes, court fees might be seen as a secondary consideration. Once you start talking about the levels of £10,000 to £20,000, which are some of the proposals on fees in the consultation, I would very much query whether that would hold true any longer.

Q194 Alex Chalk: It is easy to query things and to have an instinctive view. They cite various evidence, impact assessments and MOJ research. Have you had a chance to scrutinise that research to see whether you think it holds true, or is this a case of finger in the air, thinking, “I reckon it will be a disincentive”? Is there anything more concrete that you can bring to bear to back up your instinctive view?

Sarah Crowther: Not at this stage, no. It is a difficult one to prove concretely, in the sense that we have had the second round of the increases in fees, so it is very difficult to measure any deterrent effect. Secondly, it depends on proving a negative, in the sense that people who are deterred do not necessarily say what that was for. We think the best evidence available is of the previous scheme in respect of employment tribunals, where you can see very clearly the deterrent effect of introducing significant court fee rises, the overall effect of which has been to decrease the number of employment tribunal claims by something in the region of 80% to 90%, as we understand. Therefore, it is rather astonishing that the consultation does not seem to take any account of the likely deterrent effect of fee increases. It does not have any market analysis, if you are looking at it through a totally market-value exercise, of what is the price point at which people start to think that court fees are a legitimate consideration. In the employment tribunal sphere, you can see that it clearly has had an effect on the market, and a quite significant one. We can find no reflection of that in any of the MOJ evidence.

Q195 Alex Chalk: Just so that I am clear, as to the range of research and analysis which the Ministry’s impact assessments cite, do you have anything to say about the quality of the research and analysis upon which they base these proposals?

Sarah Crowther: We have not conducted any independent analysis of our own, if that is what you are asking. I cannot counter it with my own figures, no.

Alice Hardy: Certainly in my own experience and the experience of colleagues in the Police Action Lawyers Group, we do have examples of people who have been prevented from accessing justice by reason of the court fees. Most of our clients are either legally aided or, despite the fact that they are of modest means, because their disposable income is more than £733 a month, they are acted for under conditional fee arrangements. Since the implementation of LASPO—I think we all understand what I refer to—there is no longer any form of after-the-event insurance to protect those people. They, therefore, have to bear the cost of their own disbursements. Firms such as ours simply cannot afford to subsidise a case for its duration and risk not being paid and also pay for the disbursements. Those claimants have to pay for their own disbursements, so somebody of modest means who may have £800 a month in income is expected to risk £10,000 or £20,000 in disbursements, which is going to substantially increase with the increase in court fees, and I have had people with good, strong and viable claims that deserve to see some form of recourse to justice be put off by that. The very nature of our cases is that they are risky. It is a rare case that has more than a 60% prospect of success. In those kinds of situations, someone without insurance is expected to risk many thousands of pounds of their own money with a 40% chance that they will not receive that money back at the outcome of the case. They do not have insurance, and the protection offered to them by the QOCS scheme—the qualified one-way costs shifting system—only protects them against adverse costs, so in the 40% chance that they do not get their disbursements back, they will also have to pay the adverse costs of their opponent.

Q196 Marie Rimmer: What is your view of the thresholds for the disposable capital and gross monthly income tests for fee remission? Fee remission has recently been described as help with fees. What is your view about that?

Sarah Crowther: We simply think that those thresholds are far too low. In the examples that we collated, which were in our submission, we came across one case where a family had had difficulties with their home, which had subsidence. They spent a lot of money gathering expert reports only for all the professionals involved in the conveyancing process each to deny liability. It was clear that they would not qualify under the fee remission scheme because they were a couple who were both working and they had two children. The fact is that they had no means of raising £10,000 or £20,000. Their only significant asset was their home, which was the subject matter of the dispute, and they could not raise money against that. They could not afford the fees. The fee remission system was no good for them. Also it does not help anybody with a small business, because the fee remission system is focused on individuals. One of the impacts that seems to us to have been overlooked is the chilling effect on small and medium-sized enterprises in being able to vindicate their rights, particularly vis-à-vis larger, wealthy or powerful corporations or institutions. We have also noted, from evidence from our members, that that is already filtering through in the advice being given—that people should hold out longer in negotiations, because if you are litigating against a small to medium-sized enterprise they cannot get a fee remission and they might not be able to afford the fee, so there is every chance that they will not issue and it might just go away, or they will under-settle it.

Q197 Marie Rimmer: Do you have any suggestions as to what level the thresholds should be?

Sarah Crowther: I am not sure it is within the competence of the south eastern circuit to suggest specific figures. I do not mean to throw it totally back to you but, in a sense, we would say that that is a question for this Committee and Government to look at. We cannot, at the moment, see any justification for thresholds being set at what are, basically, subsistence levels, and we cannot see any justification for the exclusion of people with business interests; we think it is also very important that they should be litigated properly and that people should have easy access to vindicate their rights.

Q198 Marie Rimmer: You talked about small businesses. Do you think the scheme should be accessible to charities, because at present it is not?

Sarah Crowther: Absolutely, yes. At the moment, as we understand the fee remission system, it is only available to individuals, and the income threshold levels are set very low. For anybody who is in work and earning—if they have any kind of income whatsoever of any means, regardless of their other outgoings—it is a significant amount of money to have to find, and £10,000 or £20,000 is not the kind of money that people can put on a credit card.

Q199 Alex Chalk: I have one point. You said £20,000. As I understand it, I thought it stopped at £10,000 for a £200,000 claim.

Sarah Crowther: It does currently, but there is a fresh consultation which will increase that to £20,000.

Q200 Alex Chalk: But at present we are talking about £10,000. For anything over £200,000, £10,000 is the cap at present, is that right? I want to make sure.

Sarah Crowther: At present, but the consultation is proposing that that figure will go up to a maximum of £20,000.

Q201 Marie Rimmer: Thank you for that. Alice, do you have any comments?

Alice Hardy: Yes. The fee remission scheme is not available to claimants in receipt of legal aid who are represented by solicitors. That is not a neutral point, because somebody who is in receipt of a legal aid certificate has to satisfy the Legal Aid Agency that the costs of their case are proportionate to the likely damages. The court fees place a huge burden on that ratio. A court fee is likely to take up to 5% of the costs of a case that is judged to be very good on the legal aid criteria, 10% of the costs of a case whose prospects are good or 20% of the costs of a case whose prospects are likely to be moderate. In those cases, they are not able to access the fee remission scheme. At a very early stage, they are likely to come into problems with proportionality on their funding certificates and the Legal Aid Agency may, at a relatively early stage, force them to dispense with their certificate, and they will no longer be funded. Then they are faced with the option of either pursuing the case as a litigant in person, which is likely to vastly increase the expense of their case, or to try for a conditional fee arrangement when they have no protection.

Q202 Marie Rimmer: They would not know that at the onset of the case.

Alice Hardy: They certainly would not. This is something that a defendant can take advantage of, as my colleague described, by simply not settling a case at an early stage and delaying.

Marie Rimmer: Thank you very much for that. That was very clear.

Q203 Chair: Could you explain to us how the proportionality concept works, because not everybody will follow it?

Alice Hardy: The Legal Aid Agency looks at cost-benefit criteria in establishing whether it considers a case to be proportionate. The likely costs of a case have to be proportionate to the likely benefit to the claimant. In a case that is judged to have very good prospects of success, the ratio should be 1:1 or better—the likely benefits of the case need to be equal to or more than the costs. In a case that is judged to have good prospects of success, the benefits need to be 2:1 or better, so they need to be at least double the likely costs. For a case whose prospects are assessed as moderate—between 50% to 60% prospect of success—the likely benefits need to exceed the costs by a ratio of 4:1. It is not a strictly applied ratio in actions against the police, but it is nevertheless an important consideration that the Legal Aid Agency takes into account. Where a court fee is taking up 5%, 10% or 20% of the costs of a case, a claimant is very quickly going to run into difficulties of proportionality.

Chair: That is very helpful. Thank you for clarifying that.

Q204 Dr Huq: You have both expressed disagreement with the level of court fees at a time of dwindling legal aid, so I want to ask about the relationship between the value of the claim and the costs incurred by the court. What would you say to the argument that the value of a

claim is the most objective and reasonable way to determine the appropriate fee? If you think that is a bad relationship, what measure should be used instead?

Sarah Crowther: It is a very weak link—the value of the claim to what fee should be charged. One feature is that, under the present scheme, the entire fee is charged on issue of the claim form right at the beginning of the process. That takes no account of the amount of court resource that the claim is going to use. For example, although the latest figures are that something of the order of 1.5 million claims are issued annually in the civil courts, only 3% to 5% of those will ever go to a full trial. Within the MOJ consultation, they referred to other jurisdictions where charging regimes apply. If one looks at the table that they supply, although it is not broken down in a huge amount of detail, one can see that the majority of them charge in respect of hearing fees. The majority of the costs come right at the end which, in our view, corresponds properly with the burden that the claim might place on court resource and the state. Also, in terms of its feature within the process, it is entirely understandable, because normally in a civil claim the entire civil procedure rules are designed to try to facilitate settlement and to encourage parties not to go all the way to trial. We feel that having this significant up-front barrier could almost be a perverse incentive for parties' behaviour not to settle; once you have paid that money, in relation to some of these claims, some parties might feel they might as well go all the way to trial, anyway. What you might end up doing is creating a situation where parties are more likely to fight, and to take up more court time and more court resource than the claim otherwise would have done.

Q205 Chair: Do you have any evidence to support that?

Alex Chalk: The costs of litigation and the risk of an adverse costs order could dwarf anything to do with the issue. Surely you could not say that. People would say, "Oh, do you know what, we might be at risk of an adverse costs order for 50,000 quid, but we've paid £10,000, so in for a penny, in for a pound." That cannot be right.

Sarah Crowther: There always comes a point in civil litigation when there is a settlement window, at which point the parties are not so far apart—there is a range within which mutual accommodation can be reached. Costs are always a feature in the settlement of any civil claim. The sooner the costs figures go like that, the smaller that settlement window becomes. It is a matter of perfect basic common sense that, if you are faced with a significant up-front court fee, you are going to put the parties further apart on costs much earlier in the process than they currently are. Twenty thousand pounds is a very significant sum of money on any view. It is the kind of sum that can make parties entrench. One has to remember that we are not just dealing exclusively with Russian oligarchs or people who are seen to litigate very high value disputes in the commercial court. We are talking about the ability of small businesses, individuals, home owners and people with personal injury claims to vindicate their rights. Those claims can easily come into the sum of £200,000, £300,000 or £400,000. The way we calculate damages for personal injury claims in this country is based on the lifetime loss to the claimant. A badly injured person's claim will not uncommonly exceed £200,000, £300,000 or £400,000 and, therefore, they will be in a position of being financially vulnerable and needing to claim. They might even be in a position of having an admission of liability and just needing their damages assessed, but that does not necessarily mean that they will be able to afford the claim. I would support what Alice said about the ability of solicitors' firms and individuals to fund those costs up front.

Q206 Chair: There cannot be anything wrong with the principle though, can there? If I am going to litigate, that is my choice, but there is going to be a cost to me, so I have to think twice. Is there anything wrong with that as an idea?

Sarah Crowther: If you have a personal injury situation, be it clinical negligence, a road traffic accident or somebody who is injured at work, the fact is that those people are not choosing to litigate. They are not there because they want to be in front of a court. They are in a situation where, maybe, their livelihood has been removed or they have substantial care needs. The fact is that they are driven to action either because they need to get liability resolved or because they need to get to court in order to get their damages assessed. It is wrong to think of those people as exercising a totally free choice about whether to litigate or not. If you have been injured such that you can no longer exercise your trade or profession and you can no longer earn—it does, very often, take many years before you are in a position to value that claim—and limitation is about to expire, you do not have any choice but to go to the court and to issue a claim form. We say that it is not right to think of those people as being in a marketplace for claims.

Q207 Chair: You might think that that goes into the balance as to whether you litigate—if you suffer a really serious loss in the way in which you have fairly described.

Sarah Crowther: Where is the money going to come from? If you are out of work, and you have perhaps not had an admission of liability or any payments on account of your damages, where is that money going to come from? The reality is that solicitors' firms cannot be expected to take on board the risk of not being paid for litigating a claim, and the significant disbursements as well. It will be the case that some people in that situation will, effectively, end up not having a claim.

Alice Hardy: The problem is also very acute in the case of families of people who have died in custody. In those cases, there is usually a complaint process that needs to be resolved. There may be a prosecution and then there is likely also to be an inquest, which will need to be compliant with article 2, so it will take an extensive amount of time. In those cases, you are likely to have a claim under article 2, which needs to be issued within 12 months, which will have expired by the time those processes will have been resolved. In those cases, you are forced to issue a claim protectively and pay a court fee at a very early stage before the merits of the case have really crystallised, before it is possible on a practical level to value what the damages may be, and before you have heard much of the evidence in the course of the inquest. Those people, I would agree, are not choosing to litigate. They may often be acting on behalf of the children of a deceased to ensure that they receive what they need by way of dependency payments.

Q208 Dr Huq: If there is not one standard fee set for each type or value of claim, could it not lead to a confusing structure if there are several different applicable fees?

Alice Hardy: We are used to confusing structures. The old structure—dare I call it that—pre-2014 had fees that were incurred at various stages in the process. It is not that we are used to a fee-free system. It is just that what has happened is that the proposal has very much front-loaded the payment of court fees straight on to the issue stage. There is also a significant fee attached to issue. I think the old band from 2014 was between £1,000 and £1,900—something of that order. That was proposed on the basis that the civil court

system could fund the costs as they arose, and there was no particular objection to that. As you went through the process, there would be the case management stage, there might be an interlocutory hearing, the matter would have to be set down for trial and then, finally, there would be a trial stage. The way it happens in practice is that, although 1.5 million claims a year are issued, only a tiny proportion of those ever go to a full contested trial.

Q209 John Howell: Can I stick with the issue of the legal services market? Shouldn't we be looking to the legal services market to find alternative means to help people to finance their cases? You have both argued that the charges will hinder access to justice.

Sarah Crowther: Possibly. One solicitor I spoke to said that, basically, the pips are already squeaking on this kind of thing, and that they have already raised, personally, as much collateral as they can in order to try to get leverage to borrow to fund these disbursements in the first instance. We suspect that the reality will be that only the very largest legal services firms and providers would be of sufficient size and capacity to withstand the amount of funding needed to meet all these disbursements. If you imagine the lifetime of a claim being something of the order of one to two years, and if you are not going to recover any interest on those costs pre-judgment, basically you are making an interest-free loan over that period. That is quite a substantial outlay for any legal services provider.

Alice Hardy: It is unaffordable. In firms of the type that the Police Action Lawyers Group generally represents, we are facing a situation where, since the implementation of LASPO, people on conditional fee arrangements do not have insurance, and we are no longer able to charge success fees. That means in practice that we take on the risk of not being paid for the duration of the case. If we lose the case we obviously get paid nothing, but in the cases we win we have no compensation by way of a success fee to balance out cases where we have gone without being paid for three years. I recently litigated a CFA case that took 650 hours of my time, which is six months' solid work. The case was not successful, so the firm does not get paid for six months of my work. We work on fairly tight margins. We act for vulnerable people who rely on our services. We simply cannot afford also to pay the disbursements in those cases. There is also difficulty with the time difference. When you start a CFA case, you will not get paid at all, even if you are successful, until two to three years after you have started that case. If during that time you are expected to pay the disbursements, even if you are successful at the end, there is substantial outlay that a firm needs to be able to support. It is simply unaffordable to do that.

Q210 John Howell: What about the situation where you might be charged not an up-front fee, but several smaller fees depending on the progress of the case? Would that help?

Alice Hardy: I am sorry, but I do not understand the proposition.

Q211 John Howell: Instead of being charged an up-front fee for this, would several smaller fees, as the case progresses, and depending on milestones on the case, be a better way of approaching it?

Alice Hardy: It is a problem. It is the issue fee that has increased so substantially, and that needs to be paid at a very early stage. If the reality is that you are still expected to put forward the same outlay with the substantial risk of not being paid at all, it remains unaffordable for firms to support that. It is correct to identify as one of the significant

problems the fact that the issue fee has increased so substantially, and that is at the early outset of the case.

Sarah Crowther: It depends on what stage you are talking about and the level of fees. Obviously the devil is in the detail but, yes, if one looked at a hearing fee, which would be incurred at the listing stage, that would mitigate the impact of the fees for the majority of civil money-damages claims.

Q212 Alex Chalk: Can I just put one point? This is interesting. It is ages since I did these civil claims. There used to be allocation fees, didn't there? Those have gone now, haven't they? Is that right?

Alice Hardy: No, there is still an allocation fee as well.

Q213 Alex Chalk: Okay. I thought you said in the course of your remarks that all the fees were up front.

Sarah Crowther: They are under this new scheme. Now it is very much weighted to the front end.

Q214 Alex Chalk: It is weighted at the front end, but there are still fees further down the tracks.

Sarah Crowther: There are, but they are much smaller.

Q215 Alex Chalk: They are much smaller. Is there an argument for saying that if it were spread out, exactly as you have indicated, that would be the real incentive for people to settle—if a big slug of it had to be paid at the time of it being listed and people put their cards on the table about whether they were not shadow-boxing, but going to have a trial on this? Would that be a fairer way of doing it?

Sarah Crowther: It would certainly mitigate the impact for the majority of cases, and it chimes with the overall approach of the civil procedure rules, which of course is to encourage settlement and discourage people from going to trial. For the most part, certainly in my specialism of personal injury, it works very well. Very few personal injury actions go to court. In most, the evidence process goes through, the directions are followed and then there is a settlement meeting within the window between the end of the directions and before trial is heard. The overwhelming majority settle at that stage.

Alex Chalk: That is interesting. Thank you.

Q216 John Howell: My last question is on the volume of cases coming forward. The Ministry of Justice says that it is too early to tell. What is your evidence so far on the volume of cases coming forward?

Sarah Crowther: It is quite early to tell. The employment tribunal thing all worked very quickly because their limitation periods are so much shorter. It tends to be three to six months in employment tribunals, so you could see the tailing-off almost straightaway. In civil claims you are usually looking at a limitation period of six years, if not longer, and three years for personal injury claims. It will be more difficult to see the effect, because it will take a lot longer for it to go through. What we have got is what we are being told on the ground about people having to advise clients here and now. That is what we have said

in our submission. We have no doubt that as this moves through, and if it stays the way it is, it will have a significant deterrent effect on people bringing claims, which we think might impact on how much revenue the proposal generates, anyway.

Alice Hardy: My colleagues and I see people coming to us at the beginning to get advice on a claim, and we are having to give much more rigorous advice than previously on the risk of having to pay disbursements and not recovering them. I have personal experience of people deciding that they simply cannot afford to take the risk. We do not have statistics on that, and it is too early to tell how much further other cases would have gone. Certainly, at an early stage, colleagues and I have experience of people not getting access to justice purely because of court fees.

Q217 Victoria Prentis: I will be very quick as I know that time is pressing. The Police Action Lawyers Group has commented on other proposed court fees as well. I want to tease out from you a few comments that you made because they do not chime with my own experience, but I would welcome yours. For example, with the assessment of costs, you talk about defendants who seem to dispute costs as a matter of course, and that that might adversely penalise successful claimants who, after all, are the ones who generally get costs in legally aided matters. Another comment is about general applications and the unreasonable behaviour of defendants. Can you give us some examples? Name and shame.

Alice Hardy: Examples of unreasonable behaviour? The most common example is refusal to disclose.

Q218 Victoria Prentis: Which may not always be unreasonable.

Alice Hardy: It may not always be, but it often is. One specific example is in a case where we request disclosure at an early stage of the disciplinary records of the police officers who are the subject matter of the complaint. They are routinely refused, and routinely it requires a specific disclosure application in order to get them disclosed. On every single occasion we cite the authorities in support of our case that these are disclosable, and routinely we go through the same set of correspondence and the outcome of that is a specific disclosure application.

Q219 Victoria Prentis: Have you brought this up with the Court Users' Group?

Alice Hardy: We bring it up. It is in every single set of correspondence that precedes the specific disclosure application, and we are successful, and then there are costs that have been incurred that do not need to be. Of course, that would have been a contested application, so the interim fee for that would now be £255.

Q220 Victoria Prentis: The increases with these additional fees are quite small, but you think that they will have an effect.

Alice Hardy: Yes, but they are substantially more than the 10% increases in other areas. It is £100 more on a contested application fee and £50 more on an application by consent. That is a 100% increase on an application by consent. These costs add up. Again, it is particularly painful for a client who is funded by a conditional fee arrangement, but it also very much impacts on the proportionality of a funding certificate.

Q221 Victoria Prentis: On PI cases—turning to Sarah—in your written evidence, and today, you mentioned people who have to bring claims because they have been injured or they are suffering from psychological and other injuries, and you worry about the particular stress on these people of an uplift in costs. Surely almost all litigation is stressful for claimants. Many claimants—financial claimants, not just PI claimants—feel they have to bring claims. What is it that makes PI claimants special?

Sarah Crowther: It is very difficult unless you have been in the situation of having your whole life turned upside down as a result of something that has happened to you that was not your fault. Having been through the trauma, the pain, the psychological worry and the loss of financial status, the fact is that a lot of clients, by the time they get to me, usually shortly before the issue of proceedings, are two or three years post injury. Their injuries may not have resolved; they might have resulted in massive change in the way they live their life and it has upturned their whole family. At that point in time you are having to give advice on the lines of, “You can bring a claim. We can try and get you some compensation for what has happened to you, but you have to be aware that you are going to have to pay the disbursements out of pocket. In the event that you’re not successful, you won’t get them back.” In the situation people find themselves in, possibly not having worked for two or three years, already having borrowed money from friends and family, and already having imposed considerably on their own personal relationships, and suffering both mentally and physically at the time, it is a huge burden to put on those people. That is not just in personal injury cases. I also act for people who have lost friends and family in wrongful death claims. Very often, what you are asking a widow to do is to choose between bringing a claim on behalf of her children in order to ensure their financial security and putting herself further in debt when she has lost all her means of income in the first instance. I am not wishing to do down the difficulties that all claimants have in many cases, but personal injury and wrongful death claimants really do find themselves in a very difficult position when they are forced sometimes to make a very short-order decision if limitation is about to expire. Do they try and get the money together and go for it, or do they just write it off?

Q222 Chair: Did you get explanations as to why there is almost this blanket approach for refusing disclosure?

Alice Hardy: We have raised it at a meeting between the Police Action Lawyers Group and Sir Bernard Hogan-Howe himself. It seemed to reveal a disconnect between what he says publicly and what those acting for him say on his behalf. He said that he was surprised to learn that. We said that it was routine. We went away hoping that things might change.

Q223 Chair: But it has not.

Alice Hardy: My own personal experience is that I had the same set of correspondence a few weeks later.

Q224 Chair: It seems to be something that we should follow up.

Alice Hardy: That would be nice.

Chair: It is surprising.

Victoria Prentis: It is. The Treasury Solicitor certainly doesn't behave like that.

Q225 Chair: Has the Police Federation expressed any views around disclosure of disciplinary records?

Alice Hardy: No, not that I am aware.

Chair: I just wondered. Thank you very much. That is very useful. We are grateful to you for your evidence. We appreciate your time. We will now move on to the second panel.

Examination of Witnesses

Witnesses: **Derek Bambury**, Forum of Insurance Lawyers, and **Anthony Abrahams**, Director General, Chartered Institute of Arbitrators, gave evidence.

Q226 Chair: Good morning, gentlemen. It is nice to see you. Thank you very much for your patience and for coming to give evidence. We are interested particularly in the evidence you have given around the international competitiveness aspects and so on. Do you have any views, more generally perhaps, from the insurance point of view or otherwise, in terms of the domestic effects of the current fees regime? Is that something that you are aware of from your take on things?

Derek Bambury: Good morning, everyone. My name is Derek Bambury. I am the senior partner of Browne Jacobson. I represent the interests of the Forum of Insurance Lawyers. On the wider issues raised by the proposed further increases, I endorse a lot of what Sarah Crowther said in the previous panel. It appears that a lot of the reassurances that the Ministry of Justice attempts to draw from its own research—that it would not be impactful—seem to be based as much on perception, rather than evidence, as to their rejection of some of the research they commissioned as to the impact. The court fees are already significantly higher than they are in comparable jurisdictions. The proposal that there be a further increase is of concern, even though in the context of personal injury litigation it is proposed that it be exempted.

Q227 Chair: Mr Abrahams, are there any thoughts from your end? Perhaps you would introduce yourself.

Anthony Abrahams: I am Anthony Abrahams. I am the director general of the Chartered Institute of Arbitrators. We come at this from a completely neutral perspective. Indeed, we are mandated globally to encourage the settlement of private disputes by means other than in the court. In one sense, putting up the court fees is fulfilling our objective, but it is not what I would encourage. To deal with it, we want to work in partnership with the court system, but that should be the ultimate tribunal that you resort to. We know from statistics that 75% of mediated claims are settled on the day, and a further 11% follow behind. As far as arbitration is concerned, that too is now being encouraged, most recently by the Family Division President. Again, we know that in the arbitration world it is a more consensual way forward and it is one that we obviously espouse. Indeed, we have just launched our small business claims arbitration of taking claims from £5,000 to £100,000 for a fixed fee, so that limits the exposure that any party would have towards any costs and their recovery of costs, and allows them to get an award within 90 days. That contrasts

quite well with the court process, where even small claims are now taking something like 37 weeks from issue to a hearing.

Q228 Mr Hanson: We have received a lot of written evidence that emphasises the importance of the legal services market to the United Kingdom and London in particular. We have seen figures ranging at around £22 billion. I would welcome, first of all, both your assessments of what you believe to be the UK's share of the international market, and whether that is growing or receding in the current climate.

Anthony Abrahams: The market, certainly in the arbitrational field, is that we have about 7% of it in the UK. I have to be careful here because we are a global organisation and 66% of our membership is outside England and Wales. We are under considerable threat. Singapore is the example that one always quotes. They subsidise the arbitration field. They have just started their SICC—the SIC Court is perhaps not the right way to say it. The Singapore International Commercial Court is now taking cases in competition with the Rolls Building, the TCC, so we cannot sit on our laurels. Forty per cent. of arbitrations are still conducted under English law, and that is a product that is welcomed worldwide, but, again, we are under substantial competition from the civil law processes. Of course, the ICC, the International Chamber of Commerce, has been in Paris since about 1923 and attracts a huge amount of cases from the international mercantile community.

Derek Bambury: I do not have access to what would be the total global market for international litigation, and it would be difficult in any case to have access, because we are not talking about the sum total of all of the litigation that may be conducted in the different fora around the world; we are talking about litigation that could be conducted in the UK courts, and in London in particular, according to choice of law clauses and jurisdiction agreements, but could be elsewhere. That is not a figure that I am able to give any real assistance on. On the second point about whether we are maintaining our competitiveness moving forward or receding—again, it has to be slightly anecdotal—echoing the comment that Anthony has just made, we feel that the UK courts cannot, in any sense, be resting on their laurels, because, although we perhaps have a historical advantage in terms of the expertise of the judiciary and the level of resource that the English and UK courts can offer, a number of rival jurisdictions are gearing up. Singapore has already had a mention. That is the most obvious example: a very expert court that is clearly setting its cap at international litigation that is relatively free-standing in terms of where it might be conducted.

Q229 Mr Hanson: I suppose the question would be, considering the New Yorks, the Dubais, the Singapores and the New South Wales's of this world, which are increasing their challenge to UK dominance in this sector, how much would the increase in fees be a determining factor, or is it simply on other qualitative standards that they are moving to those other markets?

Derek Bambury: First, it depends on the two alternative proposals. In the interest of balance, if the fee is increased to an increased, capped, level of £20,000, in the context of the highest value litigation, it is probably not going to be a determining factor, and there will be more potent considerations, such as whether the litigation is going to be conducted in a cost-shifting jurisdiction or not. The alternative proposal that is at least mooted, which is that there would be a straight ad valorem 5% fee without any cap, would be impactful at every level of dispute, because by definition the higher the value of the claim, the higher

the value of the fee. English court fees are already significantly out of kilter with other jurisdictions, with the exception of Dubai.

Q230 Mr Hanson: The MOJ in its impact assessment cited a report from the British Institute of International and Comparative Law that says that fees are not a determining factor in whether to litigate. I would welcome a view as to whether you share that analysis or not.

Anthony Abrahams: There is a complete basket that you have to look at. It is our centenary year. We launched something called the London principles for where you would wish to arbitrate. One of the factors is the friendliness of the courts, and that is the biggest one. The support that arbitration gets under the English Act and the judges who support it is huge, but that does not mean that you physically have to come to London, and this is the problem. The minute you start putting fees up, we become far less attractive here. It is not a determining factor, but certainly if we starting looking at 5%, that is going to be weighed in the balance and will become a major factor, whereas at the moment it is not.

Q231 Mr Hanson: What about the fact that some parties would pay £100,000 in arbitration fees, potentially? I am not defending the Government, but is that not a benchmark figure that the Government would look at and say, “If someone is going to pay £100,000 in arbitration fees, what is the current fee level we are proposing versus that?”

Anthony Abrahams: But that £100,000 goes into administration, not just to the arbitrators, which is something we do not do here with the judges at the moment. Again, when you look at the comparative overall costs, it is still just cheaper to arbitrate, but by putting the fees up it becomes less attractive to come and litigate and enforce in the English courts. That is the worry.

Q232 Mr Hanson: I suppose the MOJ’s argument, which we have to examine, would be that arbitral fees are a reasonable piece of evidence that could be drawn into the equation when considering the level of court fees.

Anthony Abrahams: I do not disagree with that. You have to look at the totality of the costs. Currently you pay one fee to enter the portals of an English court. If you go to an institutional arbitration, you get the whole administrative service, including the arbitrator’s fee, but you can then extract that if you go for what is called an ad hoc arbitration where you negotiate your own fee with the arbitrator and you provide your own infrastructure to surround it—how you want to have a hearing room, where it is going to be and so on. You have that option. The problem is that, if we start pushing the prices up here, people will go for cheaper locations to have their arbitrations.

Q233 Marie Rimmer: Mr Abrahams, judges have no financial interest in the judicial process, but arbitrators may if it comes down to time spent. What is your answer to that?

Anthony Abrahams: The arbitrators come in and they have an agreed fee from the parties, that is fixed right at the start. If they do not like the fee, they cannot subsequently up it, because there is a contractual relationship between them.

Q234 Marie Rimmer: It is not on time spent.

Anthony Abrahams: No. It would be a fact that the arbitrator takes into account when assessing whether he wants to take the case or not.

Q235 Alex Chalk: Leaving aside the proposed increases at the moment and looking at the existing ones—the ones that came in in March 2015—what do you say about those in terms of their impact on our international competitiveness? Can we absorb them, or are they in and of themselves going to cause a problem?

Derek Bambury: If the Ministry of Justice is going to take an evidence-based approach, it is too early to say.

Q236 Alex Chalk: I realise that it all comes heavily caveated, but what is your feeling?

Derek Bambury: It is just too early to say, in terms of monitoring the numbers of claim forms being issued out of London, whether the deterrent effect of increasing what was still, even in March 2015, a widening of an already existing gap in the cost of paying for court resources is going to have an impact. One of the reasons is that the full effect of any loss of competitiveness of London and the UK as a venue for resolving commercial disputes is going to be felt, ultimately, when the choice of English law and English courts is being cited in choice of law clauses and jurisdiction clauses, when other nominations start to be put in. Of course, that is a very early stage, and the tail of the process may not play out for quite some time. It is too early to say whether we are already going down completely the wrong route.

Q237 Alex Chalk: I do not want to take up too much time, but on the basis of the figures and your experience—you live and breathe this stuff—would you expect it to have a difference? You know what people's motivations are. They take into account the quality of the judges, the quality of the advocates and all sorts of competing considerations. Would you expect it to have a difference?

Derek Bambury: I do not think the rise of £10,000 is going to be material in the overall equation.

Anthony Abrahams: That is what I was going to say. Where we have commercial interests who are going to arbitrate, £10,000 is probably not a barrier, but if you start putting 5% or whatever into it, you have a huge problem.

Q238 Alex Chalk: That is really your point, isn't it? It is the 5%.

Anthony Abrahams: That is it, yes. The MOJ has put a toe in the water, but we would not want it to put the whole foot in.

Q239 Alex Chalk: Very quickly, so that we can understand, what is the average quantum of the kind of claims you are talking about?

Anthony Abrahams: The average is in millions.

Q240 Alex Chalk: Very generally, the point is that £10,000 would not make a difference and £20,000 probably would not, but 5% would.

Anthony Abrahams: Yes.

Alex Chalk: That was what I wanted to know.

Chair: That puts it quite neatly, doesn't it? I understand that. The bigger the quantum, the more that comes in. Are there any other questions for Mr Bambury and Mr Abrahams from my colleagues? Brevity is no discourtesy. You have made the point very clearly and we are grateful to you for your evidence. Thank you very much.

Examination of Witnesses

Witnesses: **Jo Edwards**, Chair, Resolution, and **Carita Thomas**, Co-convenor, Legal Aid Working Group, Immigration Law Practitioners' Association, gave evidence.

Q241 Chair: Good morning. Thanks for coming to give evidence to us. Perhaps you would like to introduce yourselves.

Carita Thomas: My name is Carita Thomas. I am an immigration solicitor and represent the Immigration Law Practitioners Association.

Jo Edwards: I am Jo Edwards. I am a practising family lawyer and family mediator. I am here as national chair of Resolution, which represents about 6,500 family professionals who work with separating couples.

Q242 Chair: Thank you very much. Just out of interest, perhaps I can start, Ms Edwards, with some of the written evidence that you have given. Again, we are grateful to both of you and your organisations for doing that. I was struck by a passage in Resolution's evidence that says: "the case for setting fees purely on the basis of the cost of the service provided by the courts has not been made in relation to family proceedings." What did you mean by that? Why?

Jo Edwards: In relation to family proceedings, there are various things that we would say. First and foremost, unlike most of, if not all, the witnesses from whom you have heard this morning, divorce is not a choice, unless you decide that getting divorced is a choice. We say that it is not when people have reached that conclusion if their marriage is an unhappy one and they want to dissolve it. If that is the decision they have reached, they have to pay the court fee, whether they resolve things through mediation, which is what I would always advocate, or otherwise. This is not an optional fee. It is something that has to be paid come what may.

The second point, as far as the cost of the actual administrative process of divorce is concerned, is that, as things stood about a year ago, the cost of that was put at £270. If one is assuming that the fee will go up from £410 to £550, a significant profit is being made on that. This is all against a backdrop of quite a rapid move in family proceedings towards a very much more administrative process. As I am sure the Committee is aware, with effect from last November we have moved to 11 regional divorce centres. Legal advisers are looking at divorce petitions and deciding whether the case for a divorce has been made out. Legal advisers are looking at things at the decree nisi stage. If anything, I would expect that the cost of the divorce process is going down but, at the same time, this in turn would potentially be impacting on some of the most vulnerable in society.

Q243 Chair: Thank you. But if you are setting a fee, the cost of the proceedings is a perfectly legitimate and proper thing to take into account, isn't it?

Jo Edwards: Of course. Absolutely so, but only two years ago the fee was increased to £340; in fact, it is £385 all in because there is a separate fee for a decree absolute. We have gone to a position where £750 was being mooted, which, frankly, would have deterred very many people from pursuing divorce proceedings at all, to £550 now. The move has been quite a quick one and completely unjustified by reference to what this is costing as a service.

Q244 Dr Huq: You have already given your view on the original increase from £340 to £410, and now the proposed increase to £550, especially at a time of dwindling legal aid. What is your view on the effectiveness on the fee remission system in relation to divorce proceedings?

Jo Edwards: I have tried to get some opinion from our members around the country of whom, as I have said, we have 6,500. The overwhelming sense I get from members is that the fee remission scheme in family proceedings in relation to the divorce fee just is not working, for the reasons you have heard already this morning. First and foremost, the capital and income thresholds are so low that they are not making a realistic difference. The other main point that came across from very many of our members is that people just do not know about it. They do not know that it is available to them. At a time when fewer and fewer people are actually taking legal advice, and therefore are not being signposted, they are not going to know about this.

I could talk about the figures of people who are in relationships where there is domestic abuse; there are about 1.2 million women in this country, and very many men as well, who are subjected to domestic abuse. Very often, a form of abuse is financial control. These people cannot see a way out. They cannot see how they are going to access legal advice and, in direct answer to your question, they will not know about the fact that fee remission is available. They may well just be staying in unhappy relationships and marriages. I am bound to say, much as with LASPO, that the lack of impact assessment means that for me and for our members it seems as though there could be whole strata of society that we do not know about who are not accessing their rights and who are not pursuing divorce proceedings. In turn, that means they are not able to access financial remedies and other remedies that may be available to them. Potentially, they are remaining dependent on the state. If they are pursuing their rights, they are more likely than not doing it as litigants in person, and therefore there is an additional burden on the family courts, which is very well rehearsed—approximately a threefold increase in the number of cases in family proceedings where both parties are representing themselves. All around, we have all these factors coming together and it is very difficult to see, in truth, where the savings are being made, but we are absolutely clear that the appropriate place for this is not by increasing the divorce fee to £550.

Q245 Dr Huq: You said in your written evidence that it will hit middle earners most because it looks at equity in the home and those sorts of things. What proposed changes would you make to the disposable capital or gross monthly income tests that are in place now?

Jo Edwards: I listened with interest to the evidence that the previous panel members gave this morning to that question. It is very difficult for me to sit here today and give a view as to what the appropriate level would be. It would need to be looked at a lot more closely. The secondary point, in any event, is lack of awareness and lack of knowledge. Without

people going to lawyers as much as they were without appropriate signposting, without proper joined-upness, if I can use that phrase, even if the thresholds were increased slightly, those secondary issues would likely still remain. I keep harking back to the point about this particular fee. Everything has to be done to incentivise couples who are facing the trauma of divorce—I have been doing this work for 18 years and it is a huge trauma for any couple going through it. They should be encouraged into mediation. They should be encouraged to look at alternatives to court, but I have made the point already that they do not have an option about paying the fee, whichever way they decide to go. There are also practical difficulties, as previous members of the panel have said, because they have to pay this fee right up front. They may recover it; they may not. The higher the fee gets, the greater and more fertile the ground for debate will be between couples as to whether they are going to share the fee or whether one of them is going to pay slightly more of it than not. Again, one risks satellite litigation over that issue, with yet more costs to the court service. Whatever angle you look at this from, it makes no sense whatsoever to us to impose this increase. I am very aware, as far as this discrete point is concerned, that it is not a consultation—it is what is planned—but we are treating it as such because we, the Law Society and many other member organisations are so concerned about the impact on separating couples of this change.

Q246 Chair: Would you explain a bit about satellite litigation to the lay person?

Jo Edwards: In talking through a typical divorce process, I was speaking to a client yesterday about how we were going to frame her divorce petition. I could go off on a tangent about no-fault divorce, but that is something for a different day. It is something that Resolution members feel very strongly about. When one is looking at a draft petition, one of the boxes one ticks is what claim, if any, you are making for the costs of the divorce suit—both the court fee and any lawyers' fees that are being incurred. When two lawyers are involved, which is increasingly not the case—I have made that point—typically there will be a conversation that will happen. One will say, “To what extent is your client prepared to contribute to the costs?” Normally, some form of accommodation can be reached. If there cannot be an agreement about that, however, potentially there needs to be a determination by a judge as to who is going to be responsible for the costs of the divorce suit itself. Of course, that is the case in defended proceedings anyway, but they are by far the minority. Around 1% of divorce cases are defended. The vast majority, at the moment, go through the undefended process, which is a purely paper exercise. I fear, and I have heard other Resolution members say that they fear, that the higher the cost of the divorce suit, the more likely it is that this is going to be a ground that people are disputing, so judicial time is going to be needed to sort out that mess of fees, which should not be necessary given the baseline of actual costs that I have described already.

Q247 Dr Huq: Would it then be appropriate to have a separate and lower fee for undefended divorces if it is a quicker process?

Jo Edwards: I am not sure that that works, because as I have said already 99% of divorces are undefended anyway. I do not think it would be appropriate for me to comment as to whether in the defended camp one should have a separate fee on top of that. The reality is that if cases are defended—I had one last year which very nearly went to a five-day hearing, albeit that was exceptional, because it was about which country the divorce should take place in—I can see that there is an argument: some people may say, “If that

much court time is being taken up, that ought to be looked at.” That is not the view I take. I take the view that, given that the majority are appropriately undefended, it should be the same layer of costs for everybody and it should be maintained where it actually is.

Q248 Dr Huq: If the remission system was more generous so that there was more help with fees, would you then think that the fee increases were acceptable at all?

Jo Edwards: No. Although the primary plank of our objection is very much on behalf of the most vulnerable in society and those for whom this would be a huge financial wrench, it sends out the wrong signal. I hesitate to use the phrase “divorce tax”—I am going off at a tangent again—but I have followed quite closely the debate in Australia this year, of which you may be aware, where the figures were virtually the same. The divorce fee is 845 Australian dollars; it was hiked up to \$1,200. The Senate then put it back down again. The phrase “divorce tax” was used there quite frequently. There were the same arguments—for the vulnerable in society, this is not a choice they have and so on—but the view there has very much been taken that, given that most people appropriately try to keep their divorce disputes away from the court, one should be keeping the cost of the divorce itself relatively low. If you are interested in the debate in Australia, there is so much that rings true here as well.

Q249 Victoria Prentis: That is very interesting. In your research, you talk about a study done by the MOJ in 2013, and you say it is not sufficiently robust. Is there any other real evidence available?

Jo Edwards: To my knowledge, no. Our primary position is to persuade you to form the conclusion that this increase should be pushed to one side completely. If that is not viable, our secondary position would be that there needs to be more of an evidence base for it, and there needs to be an impact assessment. I was trying to remind myself what, if any, impact assessment there had been of the previous increase from £340 to £410. I am not sure that there has been very much at all from what I can see. Last night, I was looking at the divorce figures; you will be aware, I am sure, that the most recent divorce statistics were published two weeks ago. They related to 2013. It was a surprise to me that actually there was a 2.9% decrease year on year in the number of divorces, whereas it had been static for two or three years leading up to that. Different theories have been posited, but it would be interesting to see whether there is some continued decrease around the margins as a result of continued changes to court fees. In direct answer to your question, no, I am not aware of any other research, but that is the plea we make. We do not think that there was robust enough research done when this was looked at previously. If this is being seriously mooted, there needs to be a much wider consultation and a much wider impact assessment undertaken.

Q250 Victoria Prentis: The issues you have raised—you touched on this—are about vulnerable people struggling to pay, and a possible discriminatory effect on women. Are these issues already, in your view, a problem with the fee at £410?

Jo Edwards: To a significant degree, yes. I have talked already about the impact of LASPO, as have most witnesses this morning.

Q251 Victoria Prentis: But you do not want to suggest a figure.

Jo Edwards: I do not want to suggest a figure, I am sorry. The reality is that the bigger the court fees become, the ever-less likely it is that those individuals will access any sort of legal advice. I have said already that that either means they are not pursuing their rights to see their children or money claims, or they are but they are doing so in a way that increases the amount of court time that they need. All round—I was just reminding myself of it this morning—in addition to the divorce fee, which has to be paid in every case, there is the potential of £255 in fees to pursue a money claim, if that is contested, albeit £55 if it is an agreement, and a further £215 if there are contested issues with regard to children. All told, there is the potential for costs of £880, which for the average type of person we are talking about is already a very significant sum. The reality is that they would simply not be able to access legal advice if those costs creep up ever further.

Chair: Unless there are any other questions on the divorce point, Mr Howell is going to move us on to some immigration tribunal matters.

Q252 John Howell: You have been very patiently waiting, Ms Thomas. Can you explain how the typical fee remission system works?

Carita Thomas: Yes. I understand that your question relates to the fee remission system in the immigration tribunal.

John Howell: Yes. Correct.

Carita Thomas: The fee remission system works at present in that appellants have to make their case to the tribunal about why a fee remission should be granted. It is not clear to me, as a legal representative of several years' qualification, how that is meant to be carried out, but normally the way I do it, certainly when I am representing people, is that I put it in a letter. The only way that I understand appellants can do this is in paper form. There is no facility by the online appeals mechanism, which is available for all immigration appeals, to make an argument within that internet-based site that you wish to have fee remission. It is only through a paper process. Just to put a human face on this, I would like to give you an example of a case that I have had in the past two weeks. I have been representing a victim of trafficking, who is a refugee. She wishes to bring her son here from Nigeria through refugee family reunion. We had to make an appeal, which I am applying for exceptional legal aid funding to assist her with. She is not automatically exempt from paying a fee because there is no legal aid any more for these cases. She instructed me about her circumstances and I put forward the argument about fee remission in a covering letter that was submitted with the appeal. The tribunal then wrote to her with a letter simply demanding payment. She is virtually illiterate. She only understood the words "need to pay a fee" or "her case has been struck out." She did not even understand that it needed to be paid by January. She paid it immediately without even speaking to me because she was so scared at the thought that she would lose the chance to bring her son here. I had already set out in my letter the arguments about fee remission.

As has happened time and time again, the tribunal does not look at the correspondence that you send them initially. Obviously it is logged, because the appeal is filed, but then you have to remake the arguments every single time after the appeal is filed. As a legal representative, that is easy to do, although time-consuming, but as an unrepresented appellant—the people I am most concerned for—I would be extremely surprised if they would ever be making those arguments on their behalf. I have never met an appellant who

understood that fee remission was available or, indeed, anybody who is assisting appellants who is not legally trained—for example, charitable workers, or members of a community who are British citizens who speak English and can read appeal forms—who understands that fee remission is even available.

The fee remission system in the immigration tribunal is not one purely based on financial cost, as opposed to the fee remission system that operates in all other civil courts. You have to show that there are exceptional circumstances that show why you cannot pay the fee. “Exceptional circumstances” are not clearly defined; it just means exceptional circumstances, not purely that you have insufficient funds. I would argue that that is completely unfair when it comes to comparison with other venues, and particularly in immigration cases, especially now that appeal rights are so restricted. A large amount of cases that are going to be subject to these appeal fees are human rights cases, which, for the applications themselves that may lead to appeals being brought, do not have any requirement to pay a visa fee, and do not have any requirement at the application stage so that you can maintain and accommodate your dependant if they come here. There should be no assumption that these individuals are rich people. ILPA has put forward various suggestions about automatic exemptions that should operate for certain categories of people who are not currently covered by the fee scheme, and also to make it how fee remission operates clearer.

Q253 John Howell: What sort of cases attract the Lord Chancellor’s fee reduction?

Carita Thomas: The sort of cases that would attract it would be cases that are in relation to a removal notice. There is a big list—it is going to be modified in light of the changed rights to appeal—but they are cases that attract a removal notice, cases where you have an asylum claim, cases where somebody is supported by the local authority under section 70 of the Children Act and cases where someone is legally aided. Those sort of cases are automatically exempt; fee remission would apply to them because there are special boxes you can tick so the tribunal can easily process them. Cases that are going to attract the exceptional circumstances fee remission scheme are, essentially, going to be human rights cases. The asylum cases are already exempt, but it is going to be human rights cases, particularly thinking about entry clearance cases—for example, refugee family reunion.

Q254 John Howell: In your responses to previous Ministry of Justice consultations, you have argued that the remission system present in other courts and tribunals should be extended to first-tier immigration. Could you say how that would work?

Carita Thomas: ILPA does not agree with fees in the immigration tribunal at all, but if the fee remission system is extended, yes, there should be parity between all courts and tribunals. If it is to work, it should be possible to say that if you are on, for example, a means-tested benefit, you should be entitled to fee remission without having to go through an exceptional argument about why there should be fee remission. There should also be a category that recognises the low income of various sponsors who wish to bring their dependants here from overseas who do not have to meet high income thresholds. You should be looking at the income of the sponsors, as you do in other civil courts when you assess the income of individuals in those courts. It is complicated in the immigration tribunal because sponsors’ means—the ones who are trying to bring their dependants here—are not always the primary focus for assessment. In reality, many people support low-income individuals overseas; they send money overseas to support them and the

individuals overseas do not have any money, so the income of the sponsor should be the one that is looked at.

Q255 John Howell: What do you make of the Ministry of Justice's argument that a standard remission system is not appropriate because of "practical difficulties of applying income and capital tests to those who may be based outside of the UK"?

Carita Thomas: Those things can be got round, to be honest with you. I have to make such arguments when I am making an exceptional legal aid application or a normal legal aid application. It is the case that I have to evidence what income people have overseas. It is true that people overseas do not always have bank accounts. I stress again that the sort of cases that now apply with the modified appeal rights regime are human rights cases. That really has to be taken into account in the particular immigration context where people from overseas who are coming here on such human rights applications do not have to meet any income requirement anyway. A large part of the justification has been that it is complicated to assess for that reason, but the reason we need it is that there are visa fees which are paid by these individuals and a maintenance and accommodation threshold to be met, but that is not the case with human rights cases as a whole.

Q256 Chair: When the fees were first introduced, the idea was to recover 25%—just a quarter of the costs of the tribunals. Is that unreasonable to have as an objective?

Carita Thomas: I would ask that question of the Ministry of Justice. Why is it reasonable when you bring a case against the state to place the entire burden on appellants? Why should the state not be held to account for unlawful decisions? I have seen no proposal by the Ministry of Justice to try to apply the polluter pays principle in any serious way to the Home Office and entry clearance officer decisions to say, "You should be financially penalised in some serious way," as appellants now are, "for decisions that you make which are wrong." ILPA endorses the comments of the Civil Justice Council about the inherent importance of appeals as a social good in order to uphold the rule of law.

Q257 Chair: A social good for which the taxpayer must pick up the tab all the time.

Carita Thomas: But there is no opportunity for appellants to negotiate with the state. It is entirely different from cases where there are individuals against each other. You have no opportunity to incentivise by having fees, potentially, to encourage negotiation and mediation; there is no such facility in immigration cases. It is often the case that you might have an entry clearance appeal, for example, where you must file an appeal and pay an appeal fee in order to get the case looked at by the manager of the person who made the initial unlawful decision. Why should it be the case that, before even an internal review can take place, you have to pay a fee for that privilege? The state should be held to account for unlawful actions.

Q258 Chair: But at the end of the day, it is only covering about 9%, so it is pretty modest, isn't it? Do you think that the increase in fees is going to make much difference to that level of recovery?

Carita Thomas: The impact on individuals who are suffering from these fee increases is so great; Jo has already outlined that we are particularly concerned about the people affected by this who have human rights cases, who have protected characteristics and who

are extremely vulnerable. Again, that echoes concerns raised long ago by the Civil Justice Council when the initial fees were brought in. The Ministry of Justice appears to have taken no real account of various concerns made by the judiciary, and certainly it has made no proper evidenced case about why it is necessary to raise fees with no alternative scheme proposed for how the Government should be paying for their unlawful actions.

Q259 Chair: I see, but you are not against the principle of some recovery, or perhaps you are.

Carita Thomas: In principle, we do not agree with fees, for the reasons I have already outlined, because of who they impact, and also because we do not believe that the case has been made out. I would like to note that, in the tribunal's own statistics, it acknowledged in June 2012, just after fees were initially brought in at the tribunal, that there had been a decline in appeal receipts, which means appeals filed, since 2008-09, and that trend has only increased. If you take into account the cumulative impact of the removal of legal aid, the removal of appeal rights and visitors' appeals—in fact, so many appeals—you now see an extremely restricted regime, and it is too soon to bring in further changes without assessing what real financial need exists for having further fees brought in, which will impact only the most vulnerable, with no alternative for the Government.

Q260 Marie Rimmer: After the 2014 order under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid is generally unavailable for immigration cases except for detention, domestic violence and trafficking. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 gives us exceptional funding, which is paid from the Legal Aid Agency, as I understand it. I want to talk about the Gudaviciene case, the immigration test case where the Lord Chancellor was found to be unlawful. You have cited that in your written evidence, saying that that case showed that the exceptional funding scheme was being applied in too restrictive a manner. What has been the result of that judgment?

Carita Thomas: The Government have, genuinely and helpfully, taken on board the concerns that were raised in Gudaviciene, and have gone through the court process. However, I believe it is too early to say what the exact impact means in practice. Anecdotally, it seems that more cases of exceptional funding applications for legal aid are being granted. Again, the changes have been extremely recent—for example, for modifying the form and saying that people who do not have representatives do not have to use a form at all to make applications. That has been extremely recent, so it is hard to say how it is going to work in practice. I believe, from my personal experience, that there are still some issues that need to be resolved about the application, for example, of the means test by the exceptional funding team, as opposed to other areas of the Legal Aid Agency. There is not always a uniform approach. This has been a matter of difficulty for me, but I also know anecdotally that more cases are being granted, so we will have to give it some time to see how that works out.

Q261 Chair: Just going back to where we were, you talked about some of the initial impact assessments and so on, when they first introduced the fees. The argument was made that, in effect, there was over-consumption, because weak cases were being brought, and therefore putting some fees in would act, to a degree, as a deterrent against what they called “a dead-weight loss” to society. There is something in that, isn't there?

Carita Thomas: With great respect, I would disagree. I do not think that that has been made out at all.

Q262 Chair: Okay. Would you explain why?

Carita Thomas: Again, I would refer you to the tribunal statistics, which show a continuing decline in appeals being filed in the immigration tribunal, and, as this Committee will be well aware, the Government continue to bring in measures that will restrict appeal rights, and there have been legal aid changes. Those are significant changes to the whole regime of appeals, which have meant that fewer appeals are being brought. You can see from anecdotal experience in practice that it is the case that now fewer appeals are being brought. Also from my own experience, individuals have come to me to ask about the triple whammy of now having to pay legal fees, the ancillary costs that can arise in proceedings, for example, of DNA tests, when the Government do not carry them out at first instance, as they should, and appeal fees, which can be a severe disincentive. More importantly, I know that people have been driven in desperation to seek to borrow huge amounts of money to pay those fees. I draw the Committee's attention back to those individuals who face potential indebtedness and jeopardising their own welfare by cutting money for utility bills in order to pay fees. Those are the individuals whose cases are the most important—the human rights cases that are going to be affected by the appeal regime. Again, I would ask you, please, to consider the individuals in the small amount of appeal cases that remain, who are the ones most affected.

Q263 Chair: But is there anything wrong with the principle of having some mechanism—whether it is the right one or not is arguable—for weeding out weak cases, essentially?

Carita Thomas: Again, with great respect, we do not agree that there should be fees payable in the immigration context.

Q264 Chair: You can take a punt whatever the strength of your case because you have nothing to lose. That is the argument, isn't it? How do you deal with the argument that if you have no fees, you simply take a punt because you have nothing to lose?

Carita Thomas: The state should be held to account for its actions. There is no way to negotiate. These are matters of fundamental importance, and the judiciary has emphasised the importance of having access to justice and equality of arms for those who wish to pursue a human rights claim. With great respect, we would argue that those individuals should be allowed to bring their appeals. I repeat that the Government have not made their case about why there is, indeed, such a need only to penalise appellants and not the state through the mechanism of fees.

Q265 Chair: Are there any further comments or questions from any of my colleagues to either of the witnesses?

Jo Edwards: May I just come back on one point? It is the question of exceptional case funding. In the context of family cases, in response to Marie's point, when Carita spoke about immigration and her experience of exceptional case funding, she could equally have been talking about family cases. The experience of Resolution members is that it has been extremely bleak trying to secure exceptional case funding. It was promised as the safety value post-LASPO, but it has not proven to be that. Yes, since the relaxation of the rules,

since the case you cited, our members are reporting some change. It is too early to say what the impact is, but that is certainly not the answer in family cases. It is not providing the sort of support that we hoped it would do.

Chair: That is very helpful. Thank you very much for that. Unless anything else arises, that is the end of the evidence session. Thank you very much for your time and for your evidence. That is the end of the public hearing.