

**EXPLANATORY MEMORANDUM TO
THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (CHAMBERS)
(AMENDMENT) ORDER 2011**

2011 No. 2342

AND

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) (AMENDMENT) RULES 2011

2011 No. 2343 (L. 18)

AND

**THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER (JUDICIAL
REVIEW) (ENGLAND AND WALES) FEES ORDER 2011**

2011 No. 2344

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instruments**
 - 2.1 These instruments are made to enable the Upper Tribunal to deal with “fresh claim” judicial review applications made either directly to it or transferred to it from the High Court in England and Wales. A “fresh claim” judicial review is one which calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision).
 - 2.2 **The Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2011** (“the Procedure Amendment Rules”) also make a minor correction to rules 46 and 47 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the UT Rules”) in connection with forfeiture cases.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 The fees imposed under the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 are the same as those imposed in the Civil Proceedings Fees Order 2008 (SI 2008/1053, as amended) in respect of judicial review proceedings in the High Court. The Order therefore provides for fees to be payable in respect of things for which fees have been

4. Legislative Context

- 4.1 Under section 15 of the 2007 Act, the Upper Tribunal has the power to deal with applications for certain types of judicial review but under section 18 of that Act certain conditions have to be met. Similarly, under section 31A(2A) of the Senior Courts Act 1981 (“the 1981 Act”), as amended, applications for “fresh claim” judicial reviews made to the High Court in England and Wales must be transferred to the Upper Tribunal if certain conditions are met.
- 4.2 A condition common to both applications and transfers is that the Lord Chief Justice has made a direction under section 18(6) of the 2007 Act. Such a direction has been made and will come into force from 17th October 2011.

Chambers Order

- 4.3 Part 1 of the 2007 Act created a two-tier tribunal system (the First-tier and Upper Tribunal) into which existing tribunals can be transferred, or proceedings can be directed.
- 4.4 Under section 7 of the 2007 Act, the functions of the First-tier and Upper Tribunal may be allocated to different chambers. **The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2011** (“the Chambers Order”) allocates “fresh claim” judicial review applications to the Immigration and Asylum Chamber of the Upper Tribunal.

Procedure Amendment Rules

- 4.5 Under section 22 of the 2007 Act, Tribunal Procedure Rules governing the practice and procedure to be followed are made by the Tribunal Procedure Committee. The Procedure Amendment Rules make changes to the UT Rules to allow for the administration of applications for “fresh claim” judicial reviews within the Upper Tribunal and also make a minor correction to the rules which apply in some forfeiture cases.

Fees Order

- 4.6 Under section 42 of the 2007 Act the Lord Chancellor may by order prescribe fees payable in respect of anything dealt with by the First-tier or Upper Tribunal. **The Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011** (“the Fees Order”) prescribes fees to be paid when “fresh claim” judicial review applications are issued in, or transferred

by the High Court in England and Wales to, the Upper Tribunal. It also sets out the circumstances in which payment of a fee may be remitted or reduced and where a refund may or must be made.

5. Territorial Extent and Application

- 5.1 As regards “fresh claim” judicial review applications, the Orders will apply to applications made in England and Wales either directly to the Upper Tribunal or transferred to it by the High Court in England and Wales.
- 5.2 The amendments to UT Rules 46 and 47 regarding forfeiture cases apply in England and Wales and in Scotland.

6. European Convention on Human Rights

- 6.1 As all three instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

- 7.1 It was originally intended to allow all immigration and asylum judicial reviews to be dealt with by the Upper Tribunal. However, following concerns expressed in the House of Lords, during the passage of the Borders, Citizenship and Immigration Bill, as to whether the Upper Tribunal was an appropriate body to exercise the scrutiny these cases require, only “fresh claim” judicial reviews can be transferred under section 53 of the Borders, Citizenship and Immigration Act 2009 (“section 53”). .
- 7.2 On 3 March 2011 the Parliamentary Under Secretary of State for Justice announced the Government’s intention to commence section 53 to enable applications for “fresh claim” judicial reviews to be transferred from the High Court to the Upper Tribunal. Section 53 was commenced on 8 August. The Lord Chief Justice has made the necessary direction under section 18(6) of the 2007 Act (which will also permit applications to be made direct to the Upper Tribunal). That direction will take effect from 17th October 2011.
- 7.3 The purpose of allowing the Upper Tribunal to receive applications and transferring such cases from the High Court is to relieve pressure on that Court, while maintaining the quality of justice and the speed of disposal for this class of judicial review. The transfer will also allow Deputy High Court Judges who currently deal with these types of judicial reviews to concentrate on more complex cases.

Procedure Amendment Rules

- 7.4 To enable the Upper Tribunal to deal with “fresh claim” judicial reviews in the same way as the High Court, changes are proposed to the UT Rules. The changes include automatic strike out if an applicant fails to pay the required fee when

- 7.5 The instrument also amends UT Rules 46 and 47 in connection with forfeiture cases, to ensure that a right of appeal which was previously available, and which may have been inadvertently lost in 2008, continues to be available. (The forfeiture rule is the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing. Forfeiture questions in certain social security or war pensions cases are dealt with by the Upper Tribunal).
- 7.6 The Tribunal Procedure Committee does not propose to produce a consolidated version of the UT Rules but an informal consolidated version can be found at <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm>.

Fees Order

- 7.7 The Fees Order enables the Upper Tribunal to charge fees for “fresh claim” judicial reviews in the same way as the High Court.
- 7.8 The power to impose fees in tribunals has previously been exercised in the areas of gambling and land and its exercise is envisaged in the draft First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 currently before Parliament.

8. Consultation outcome

- 8.1 Following the Government’s announcement of its decision to commence section 53, the Tribunal Procedure Committee produced two consultation documents in relation to changes which are now contained in the Procedure Amendment Rules. The first was entitled “*Judicial Review of “Fresh Claim” decisions immigration and asylum cases*” and was issued on 31st March and closed on 17 June 2011. The second, entitled “*Judicial Review in the Upper Tribunal*” was issued in May and closed on 30 June 2011.
- 8.2 Both consultation papers sought views on proposed changes to the UT Rules. There were 7 responses to the first and 5 responses to the second consultation. The second consultation period concerned some very technical proposals and the view was taken by the Tribunal Procedure Committee that a shorter period of 6 weeks was sufficient and that it should be directed to specialists in the field of judicial review. The effect of the changes is to align the procedures in the Upper Tribunal as far as possible with those of the High Court. The consultation documents and the Tribunal Procedure Committee’s response can be found at:

<http://www.justice.gov.uk/about/moj/advisory-groups/ts-committee-closed-consultations.htm>

8.3 No consultation was carried out for the amendments to the UT Rules on forfeiture due to the minor nature of the changes made.

8.4 No consultation process was carried out for the Chambers Order or for the Fees Order because no change is being made to the chambers structure or to the fees. There is only a change of venue.

9. Guidance

9.1 HMCTS produces guidance for all tribunal jurisdictions which are routinely issued to appellants at key stages of the appeals process and will also be available from the HMCTS website.

9.2 A Practice Direction of the Senior President of Tribunals will also be issued for “fresh claim” judicial reviews pursuant to section 23 of the 2007 Act and will supplement the Procedure Amendment Rules, providing further guidance to parties on the appropriate procedure.

10. Impact

10.1 The impact of these measures on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 No separate impact assessments have been prepared for these instruments. A Regulatory Impact Assessment (RIA) was prepared for the 2007 Act. This can be found at:

<http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm>

10.4 The RIA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals, bringing tribunals together in one organisation. No additional costs have been identified from the setting up of the First-tier Tribunal and Upper Tribunal in the first 4 years and no further costs have been identified to change this assumption.

10.5 No impact assessment has been prepared in respect of the Fees Order as this only enables the receipt by the Upper Tribunal of fees equivalent to those currently payable under the Civil Proceedings Fees Order 2008, for which impact assessments were separately made.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 MoJ will keep the Chambers structure and the tribunal rules continually under review and is currently reviewing the High Court and specialist jurisdiction fees structure.

13. Contact

Mr Aundrae Jordine at the Ministry of Justice Tel: 020 7073 4083 or email: aundrae.jordine2@hmcts.gsi.gov.uk can answer any queries regarding the “fresh claim” judicial review instruments.

Graeme Wilson at the Ministry of Justice, Tel: 0131 271 4325 or email: graeme.wilson@scotland.gsi.gov.uk can answer any questions regarding the amendments to the UT Rules on forfeiture.