

EXPLANATORY MEMORANDUM TO
THE FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) FEES
(AMENDMENT) ORDER 2016

2016 No. 928 (L. 16)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument will:
- increase the fees charged for appeals to the Immigration and Asylum Chamber of the First-tier Tribunal;
 - amend the list of fee exemptions to remove reference to certain types of decision which no longer attract a right of appeal following commencement of the Immigration Act 2014 (whilst protecting legacy cases), and to extend the exemptions scheme to include some additional types of appeals and appellants; and
 - clarify when an appeal should be treated as determined without a hearing for the purposes of the refund provisions in the Order.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is made under the powers contained in section 42 of the Tribunals, Courts and Enforcement Act 2007¹.
- 3.2 The Government believes that it is right, as a matter of principle, that those who use the immigration tribunals and are subject to a fee should pay the cost of the service they receive. It is for this reason that the fees charged in this jurisdiction increased to a level necessary for Her Majesty's Court and Tribunal Service to recover the full cost of providing the relevant service. This level is in line with the normal policy as set out in HMT's *Managing Public Money*.²

Other matters of interest to the House of Commons

- 3.3 As this instrument is subject to the negative procedure and has not yet been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

¹ http://www.legislation.gov.uk/ukpga/2007/15/pdfs/ukpga_20070015_en.pdf

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454191/Managing_Public_Money_AA_v2_-jan15.pdf

4. Legislative Context

- 4.1 This instrument amends the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 ('the 2011 Order') to increase the fees payable for appeals to that Chamber to full cost recovery levels for those subject to a fee. In addition, the instrument extends our exemptions to appellants who have had the requirement to pay the fee for their immigration application waived by the Home Office on the basis that they are destitute, or would be made destitute by paying that fee; specifically, where the requirement to pay the fee would be incompatible with the applicant's ECHR rights.

5. Extent and Territorial Application

- 5.1 This instrument extends to the whole of the United Kingdom.
- 5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The case for increasing the fees charged in the Immigration and Asylum Chambers is based firmly on the need to make sure that Her Majesty's Courts and Tribunals service ('HMCTS') is adequately funded in order to protect the principle of access to justice. The normal rule, as set out in HMT's *Managing Public Money*, is that where those who use a public service are charged a fee to access them, those fees should be set at a level designed to recover the full costs of the service. Charging less than full cost represents a subsidy by the taxpayer.
- 7.2 Under the current arrangement, the First-tier Tribunal recovers just £7m in fees from its overall costs which are around £75m per year, leaving around £68m to be subsidised by the general taxpayer. The Upper Tribunal costs around £11m per year, and there are currently no fees charged for onward appeals from the First-tier Tribunal. The Government believes that it is unreasonable to expect the taxpayer to continue to subsidise access to this tribunal and right, as a matter of principle, that those who use the immigration tribunals and are subject to a fee should pay the cost of the service they receive.
- 7.3 It is for this reason, following a public consultation, that the Government has decided to take forward the following increases which will move the fees charged in both the First-tier and Upper Tribunal to full cost recovery levels:
- increasing the fee payable for an application to the First-tier Tribunal (Immigration and Asylum Chamber) for a decision on the papers from £80 to £490;
 - increasing the fee payable for an application to the First-tier Tribunal (Immigration and Asylum Chamber) for an oral hearing from £140 to £800;
 - introducing a fee of £455 for an application to the First-tier Tribunal for permission to appeal to the Upper Tribunal;

- introducing a fee of £350 for an application to the Upper Tribunal for permission to appeal in that Tribunal (where the application to the First-tier Tribunal has been refused); and
- introducing an appeal fee in the Upper Tribunal of £510.

7.4 In the First-tier Tribunal, the Government operates a system of fee exemptions within the jurisdiction which is contained in the 2011 Order, to protect those in vulnerable positions. In December 2015³ we committed to introduce additional exemptions for those appealing decisions to revoke their refugee or humanitarian protected status; those with parental responsibility for children receiving support from local authorities under section 17 of the Children Act 1989; and children who are being housed by a local authority under section 20 of the Children Act 1989. This instrument gives effect to those commitments.

7.5 In addition to increasing fees this Order will also extend our exemptions to appellants who have had the requirement to pay the fee for their visa application waived by the Home Office on the basis that they are destitute, or would be made destitute by paying that fee; specifically, where the requirement to pay the fee would be incompatible with the applicant's ECHR rights. The exemption will only apply where the person is appealing the outcome of the same visa application for which they received the Home Office destitution waiver.

7.6 This amending Order will also clarify when a person may be entitled to a refund of their appeal fee on the basis that their appeal has been 'determined without a hearing', in line with the original policy intention at the point that fees were first introduced into the Tribunal in 2011.

Consolidation

7.7 It is not intended that this statutory instrument will consolidate any other legislation.

8. Consultation outcome

8.1 On 21 April 2016, the Government published a consultation document which sought views on reforming the fees charged in the Immigration and Asylum Chamber of the First-tier Tribunal and Upper Tribunal. The consultation closed on 3 June 2016.

8.2 The consultation proposed raising fees to full cost recovery levels, in line with the normal HMT policy. We received a total of 150 responses to the consultation. Whilst the majority of those who responded disagreed with the proposed increases to fees in both the First-tier and Upper Tribunal on the grounds that it would deny access to justice the Government continues to believe that it is unreasonable to expect the taxpayer to subsidise access to this tribunal and right, as a matter of principle, that those who use the immigration tribunals and are subject to a fee should pay the cost of the service they receive. The new fees for permission to appeal applications and appeals in the Upper Tribunal which are contained in the Government response, published on 15 September 2016, will be brought forward in due course by way of a statutory instrument subject to the affirmative procedure.

8.3 In addition, the consultation document welcomed views from respondents on possible extensions to the fee exemption scheme and specifically asked for views on adding

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515460/further-fees-proposals-gov-response-consultation.pdf - para 86.

those appellants in receipt of the Home Office destitution waiver to the scheme. The majority of respondents supported this proposal and as a result, we have decided to extend the exemptions scheme to cover all appellants who are appealing against the outcome of an application in respect of which they were in receipt of a Home Office waiver, as explained in para 7.5.

- 8.4 A number of respondents were, however, concerned that the exemption scheme did not go far enough in protecting the vulnerable from fees. In response to these concerns, the Government has decided to produce revised, clearer guidance on the use of the Lord Chancellors power to reduce, remit or defer fees where he considers there are exceptional circumstances which justify doing so. This guidance will be published at the time the new fees come into effect.

9. Guidance

- 9.1 Her Majesty's Courts and Tribunal Service will update its guidance on fees payable in line with these amendments. Forms and leaflets will also be amended to reflect the changes. In addition, the revised guidance on the use of the Lord Chancellors power to reduce or remit fees will be published at the time the new fees come into effect.

10. Impact

- 10.1 Some business, charities, or voluntary bodies may pay the fees for immigration appeals on behalf of appellants and some of the burden of the increase in fees may therefore be borne by these organisations.
- 10.2 In certain circumstances, the tribunal may order the respondent to reimburse the appellant any fee incurred in the appeal. Some of the burden of these fee increases are therefore likely to be borne by the Home Secretary.
- 10.3 An Impact Assessment has been submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website. Overall we estimate that the fee increases will generate an additional £34 million worth of fee income per annum, with £26 million coming from the fee increases contained in this Statutory Instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 Fees and the impact of any changes are constantly monitored by way of feedback from tribunals and their customers and the monitoring of fee income and volumes.

13. Contact

- 13.1 Nick Rees at the Ministry of Justice Telephone: 020 3334 4731 or email: Nick.Rees@justice.gsi.gov.uk can answer any queries regarding the instrument.