

**EXPLANATORY MEMORANDUM TO**  
**THE CIVIL LEGAL AID (REMUNERATION) (AMENDMENT) (NO. 2)**  
**(CORONAVIRUS) REGULATIONS 2020**  
**2020 No. [XXXX]**

**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.

**2. Purpose of the instrument**

2.1 This instrument amends the Civil Legal Aid (Remuneration) Regulations 2013 (“the Remuneration Regulations”).

2.2 This instrument revokes the Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020/515 (“the Amendment Regulations”), which introduced two new fixed fees payable for asylum and immigration (non-asylum) cases, called “stage 2c – online procedure” fees.

2.3 This instrument inserts a definition of online procedure advocacy services and two new tables of fees, payable for asylum and immigration (non-asylum) cases which are using the online procedure. It also makes transitional provision for cases where legal aid was granted before revocation of the Amendment Regulations.

2.4 This instrument also makes provision for barristers to submit application for payments on account for certain legal services three months from the date of the legal aid certificate and every three months thereafter.

2.5 This instrument allows for the increase in the cumulative percentage amount that can be claimed as a payment on account from 75% to 80%.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

**4. Extent and Territorial Application**

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

**5. European Convention on Human Rights**

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

## **6. Legislative Context**

- 6.1 The Remuneration Regulations make provision for remuneration by the Lord Chancellor to persons who provide civil legal services for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”).
- 6.2 The fees and rates for civil legal services are set out in Schedule 1 of the Remuneration Regulations. Part 1 sets out the standard and graduated fees. Part 2 sets out the hourly rates.
- 6.3 The fees and rates set out in the Remuneration Regulations are subject to the definitions and payment schemes contained in the contracts made between the Lord Chancellor and a provider of civil legal services under Part 1 of LASPO. The relevant contract for present purposes is the 2018 Standard Civil Contract (“the contract”).

### Immigration Tribunal Appeal Fees

- 6.4 The detailed remuneration provisions are contained in the contract Specification (Immigration and Asylum) (“the specification”). The specification sets out the rules for immigration and asylum fee schemes, which refers to Schedule 1 to the Remuneration Regulations in relation to the actual fees, hourly rates and escape thresholds. The contract and the specification are publicly available at the following link: <https://www.gov.uk/government/publications/standard-civil-contract-2018>.

### Civil Legal Aid Payments on Account

- 6.5 Civil legal services funded under LASPO are classified into different categories, namely Gateway Work, Controlled Work, Licensed Work and services which require special procedures (such as Special Case Work, emergency representation, family mediation and cases under the Exceptional Case Funding scheme).
- 6.6 Regulation 29(2) of the Civil Legal Aid (Procedure) Regulations 2012 defines Licensed Work as:
- i) family help (higher); or
  - ii) legal representation that is not Controlled Work or Special Case Work.
- 6.7 Regulation 11 of the Remuneration Regulations sets out the circumstances and conditions in which barristers in independent practice can claim payments on account for civil legal services other than Controlled Work or in respect of advocacy services in family proceedings.
- 6.8 Regulation 12 of the Remuneration Regulations sets out the amount that the Lord Chancellor can pay as a payment on account following an application made in accordance with Regulation 11.

## **7. Policy background**

### *What is being done and why?*

### Immigration Tribunal Appeal Fees

- 7.1 The Remuneration Regulations set the fees and rates payable to legal aid providers who have a contract with Lord Chancellor to provide legally aided services. The fees and rates are set at levels so as to remunerate legal aid providers for the work they do as part of their legal aid contract. Changes to fees and rates cannot be made without a statutory instrument and changes to the legal aid contract.
- 7.2 As part of the HMCTS Reform Programme, HMCTS are digitising the First-tier Tribunal (Immigration and Asylum Chamber). They have created an end-to-end online procedure, whereby appeals are submitted digitally and progress via this procedure from initial application to hearing. The online procedure requires additional preparation, including (but not limited to) the mandatory submission of an appeal skeleton argument which allows the Home Office a chance to review their original decision, before a hearing is listed.
- 7.3 The coronavirus pandemic brought forward the digitisation of the First-tier Tribunal (Immigration and Asylum Chamber) to ensure that the tribunal could continue to function. It is now mandatory to use the online procedure for asylum and immigration (non-asylum) appeals unless it is agreed with the tribunal that it is not possible to do so.
- 7.4 The intention behind the Amendment Regulations was to remunerate legal aid practitioners appropriately for the work required by the online system. Following litigation, the department has indicated its intention to lay a further statutory instrument to revoke Amendment Regulations and so the fees detailed within will no longer apply.
- 7.5 The department further indicated that remuneration for online procedure cases will instead be by hourly rates as set out in Part 2 of the Remuneration Regulations, with the exception of remuneration for advocacy, which will continue to be remunerated by standard fees. This instrument inserts two tables of fees for the online procedure. Table 4(ca) sets out the online procedure advocacy services standard fees and Table 8(ca) sets out the online procedure hourly rates.
- 7.6 Regulation 4 of this instrument makes transitional provision for cases in which legal aid was granted before the revocation of the Amendment Regulations. These apply to appeals in which the fees being revoked (the stage 2c fees) have already been claimed as a claim amendment is allowed by the legal aid contract or appeals where legal aid has been granted before this instrument comes into force but practitioners have not yet been paid. The provision allows for legal aid practitioners to choose to be remunerated either by the stage 2c fee (and, where relevant, the additional fees in Table 4(c)) or by the hourly rates and standard fees set out in the new Tables 4(ca) and 8(ca).
- 7.7 Appeals where legal aid has been granted after the coming into force of this instrument will be remunerated by the fees set out in Tables 4(ca) and 8(ca).

#### Civil Legal Aid Payments on Account

- 7.8 Currently, there are three conditions for payment. Firstly, barristers can claim payments at 12, 24 or 36 month intervals from the certificate being granted, with a final payment at the end of the case when a final bill is submitted by a legal aid provider. The application has to be made within a two-month window either side of the periods. Secondly, the proceedings must have continued for 12 months and it

appears unlikely that a costs order will be made to be assessed within the next 12 months and this delay in assessment will cause hardship. Thirdly, payments on account can be made where proceedings are concluded or where a provider is entitled to have the costs assessed, but the barrister has not been paid for at least six months since the provider was entitled. This instrument replaces these three conditions with one condition. Applications for payments on account will be able to be made three months from the date of the legal aid certificate and every three months thereafter.

- 7.9 During the pandemic, stakeholders argued that this policy caused hardship for barristers and uncertainty as to whether barristers could viably continue their work due to the infrequency of payments. This change will provide barristers with more flexibility in their arrangements for payments on account and speed up payments to them.
- 7.10 This instrument allows the Lord Chancellor to pay the barrister up to 80% of the amount that the Lord Chancellor considers to be the barrister's reasonable fees. At present, the percentage amount that can be claimed as a payment on account is 75%. This is in part to ensure that a final bill is submitted at the end of a case, allowing for a detailed assessment of the costs of a case and will trigger recoupment of overpayments.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 There are no plans to consolidate the Remuneration Regulations at this time.

## **10. Consultation outcome**

- 10.1 The department has not undertaken a formal policy consultation in relation to these changes.
- 10.2 A contractual consultation in relation to immigration tribunal appeal fees has been undertaken by the Legal Aid Agency with the Contract Consultative Bodies as is required by the contract. This is a technical consultation on the application of the policy, to ensure that the contract and specification clearly set out the rules and guidance surrounding the change for legal aid practitioners.

## **11. Guidance**

- 11.1 The Legal Aid Agency will update its guidance to legal aid providers to reflect the changes stemming from this instrument via its website, as is usual practice.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 The impact on the public sector is confined to the Legal Aid Agency and Ministry of Justice. The contractual elements of the changes stemming from this revocation will be managed by the Legal Aid Agency, with guidance being provided to all relevant providers.

12.3 An Impact Assessment has not been prepared for this instrument because it falls below the threshold required for producing one.

**13. Regulating small business**

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

13.2 The legislation applies to small businesses only insofar as it affects specific operational arrangements, as set out in operational guidance, of the Legal Aid Agency and providers of legal aid services.

**14. Monitoring & review**

14.1 The operation and expenditure of the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency.

**15. Contact**

15.1 Abi Marx at the Ministry of Justice. Telephone: 07976766336 or email: [abigail.marx@justice.gov.uk](mailto:abigail.marx@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Jelena Lentzos, Deputy Director of Legal Aid Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Alex Chalk MP, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.