EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (FINANCIAL RESOURCES AND PAYMENT FOR SERVICES AND REMUNERATION) (AMENDMENT) REGULATIONS 2023

2023 No. 1177

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of this Statutory Instrument (SI) is to make legal aid freely available in England and Wales in relation to section 56(3) and (4) (legal aid) IMA[1], for those subject to removal notices under the Illegal Migration Act 2023 (IMA). In particular, this SI aims:

(a) to remove the means test for legal aid work for individuals who receive a removal notice under the IMA, in relation to that removal notice, in England and Wales (by amending the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013[2]); and

(b) to increase by 15% the fees payable for legal aid for such work in England and Wales (by amending the Civil Legal Aid (Remuneration) Regulations 2013[3]). The changes in this SI apply to licensed work and to barristers' fees. A separate SI will apply the 15% fee uplift for controlled work.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The application of this instrument (that is, where the instrument produces a practical effect) 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 IMA received Royal Assent on 20 July 2023, and is aimed, amongst other objectives, at speeding up the removal of those with no right to be in the UK.

[1] https://www.legislation.gov.uk/ukpga/2023/37/section/56?view=extent
[2] https://www.legislation.gov.uk/uksi/2013/480/contents
[3] https://www.legislation.gov.uk/uksi/2013/422/contents

6.2 To achieve the above aim the IMA: a) places a duty on the Secretary of State to make arrangements as soon as reasonably practical to remove any person who enters the UK illegally, and has not come directly from a territory where their life and liberty was threatened, either to their home country or to a safe third country for consideration of any asylum claims; and b) confers powers to detain persons to whom the above duty applies. More specifically, under section 8 IMA, the Secretary of State or an immigration officer are empowered to issue removal notices in respect of persons that meet the conditions for removal set out in section 2 IMA, whilst ss. 38-47 IMA set out when suspensive claims can be made against such removal notices (that is, when the person can provide compelling evidence that removal from the UK would give rise to a real risk of serious and irreversible harm, or when the person claims that the Secretary of State or an immigration officer made a mistake of fact in deciding that the person met the removal conditions). If the claim is refused, the IMA provides a right of appeal to the Upper Tribunal or for permission to appeal to the Upper Tribunal (if the claim is certified as clearly unfounded).

6.3 Section 56 (3) and (4) IMA brings IMA removal notices and related suspensive claims in scope of legal aid, and section 56(5) removes the merits test for such legal aid services in England and Wales. Sections 56(6) to (15) also remove means and merits tests for legal aid services (on IMA work) in Northern Ireland. The Explanatory Notes on section 56[4] IMA make Parliament's intention clear that individuals who receive a removal notice under the IMA should have access to free legal advice in relation to the removal notice.

6.4 This SI is therefore being laid before Parliament in order: to remove the means test for legal services brought into scope of legal aid by section 56(3) and (4) of the IMA in relation to removal notices and related suspensive claims in England and Wales (by amending the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013); and to increase by 15% the fees paid for such legal services in England and Wales (by amending the Civil Legal Aid (Remuneration) Regulations 2013) – the fee changes in this SI apply to licensed work and barristers' fees. A separate SI will apply the 15% fee uplift for controlled work.

7. Policy background

What is being done and why?

7.1 The overall policy objective is to give effect to Parliament's intention, as reflected in section 56 IMA and the related Explanatory Notes, of ensuring that individuals who receive a removal notice under the IMA have access to free legal advice in relation to that removal notice.

Explanations

What did any law do before the changes to be made by this instrument?

7.2 Before the entry into force of section 56 IMA and this SI, legal aid would not be automatically accessible to those in England and Wales subject to removal notices under the IMA, and higher legal aid rates would also not be set for IMA legal work and the current hourly legal aid rates for immigration and asylum work would have to be paid.

[4] Paragraph 277 of https://www.legislation.gov.uk/ukpga/2023/37/pdfs/ukpgaen_20230037_en.pdf

7.3 Section 56 IMA, once commenced, would bring IMA work in scope of legal aid and would remove merits testing for such work in England and Wales. This SI would then complement those measures by also removing means testing and by increasing by 15% fees for IMA licensed work and for barristers' fees in England and Wales. A separate SI will apply the 15% fee uplift for controlled work.

Why is it being changed?

7.4 The changes introduced by this SI are necessary in order to meet Parliament's stated intention to make legal services freely accessible to those subject to a removal notice under the IMA and, in respect of England and Wales, to incentivise and maximise capacity within the legal aid sector to deal with IMA Work.

7.5 As indicated in the Impact Assessment that accompanied the Government's response of 28 September to the consultation[5], the Government feels that the 15% uplift in fees for IMA work is appropriate at this time given the expected demands, timescales and complexity of IMA work. Previously, a 15% rise in remuneration was utilised to motivate legal practitioners to join the Law Society Advanced Family Panel and/or the Children Panel. The Government believes that this rate of increase of IMA work is a meaningful step to incentivise immigration and asylum legal aid providers to take on work incurred under the IMA. This rate will also bring the increase in line with the level recommended by the Criminal Legal Aid Independent Review (CLAIR).

What will it now do?

7.6 In relation to England and Wales, this SI is linked to the commencement of section 56 IMA (via a separate SI) and:

(a) Amends the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013 to remove the means test for legal aid work on removal notices and related suspensive claims under the IMA.

(b) Amends the Civil Legal Aid (Remuneration) Regulations 2013 to increase by 15% the hourly fees for legal aid licensed work and for barristers' fees related to removal notices under the IMA. A separate SI will apply the 15% fee uplift for controlled work.

8. European Union Withdrawal and Future Relationship

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 This instrument is part of a group of SIs aimed at implementing various aspects of the IMA. Section 56 IMA itself will be commenced, together with other outstanding IMA provisions, through a separate SI. As this SI is amongst the initial instruments to be laid before Parliament and focused on making legal aid available for IMA legal work in England and Wales (rather than implementing wider substantive provisions on removal and detention), consolidation is not appropriate.

[5] Paragraph 20 of https://assets.publishing.service.gov.uk/media/6515797a6a423b0014f4c57d/legal-aid-fees-ima-consultation-impact-assessment.pdf

10. Consultation outcome

10.1 Between 27 June and 7 August 2023, the Ministry of Justice conducted a public consultation on increasing by up to 15% the fees for legal aid work under the IMA[6].

10.2 The outcome of the consultation and the Government's response thereon were published on 28 September 2023[7]. In summary, the Government received 38 responses to the consultation. Most stakeholders welcomed the proposal to set higher fees for IMA work but called for an increase greater than 15% to incentivise the market and suggested that the increase should apply more widely than IMA work.

10.3 Taking the responses into account, the Government indicated in its consultation response of 28 September 2023 that, for IMA work, hourly rates for legal services will be 15% higher than existing hourly rates, and IMA fees will be reviewed within two years of implementation.

10.4 No consultation was carried out in respect of the removal of means testing for IMA legal work as it was a necessary change to give effect to the will of Parliament, as set out in the Explanatory Notes to section 56 IMA[8], that individuals subject to a removal notice under the IMA should have access to free legal advice in relation to that removal notice.

11. Guidance

11.1 With regard to England and Wales, published Legal Aid Agency's guidance on the provision of civil legal aid and on fees payable for such work is expected to be amended following the entry into force of this SI.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 The impact on the public sector, as set out in the Impact Assessment[9] accompanying the Government's response to the consultation on increasing fees, will be an additional steady state cost to the Legal Aid Fund from the fee uplifts of around £0.1m per annum per 1,000 legal aid applicants.

12.3 A separate full Impact Assessment has not been prepared for this instrument because of low level impact per business (see p.3, and paragraphs 117-118, 132 and 145 of the economic Impact Assessment on the then Illegal Migration Bill[10]), and because information on the estimated impact of higher legal aid fees is already publicly

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[6] https://consult.justice.gov.uk/digital-communications/legal-aid-fees-in-the-illegal-migration-bill/; https://www.gov.uk/government/consultations/legal-aid-fees-in-the-illegal-migration-bill/legal-aid-fees-in-the-illegal-migration-bill

[7] https://www.gov.uk/government/consultations/legal-aid-fees-in-the-illegal-migration-bill/outcome/legal-aid-fees-in-the-illegal-migration-act-government-response

[8] Paragraph 277 of https://www.legislation.gov.uk/ukpga/2023/37/pdfs/ukpgaen_20230037_en.pdf

[9] Page 2 of https://assets.publishing.service.gov.uk/media/6515797a6a423b0014f4c57d/legal-aid-fees-ima-consultation-impact-assessment.pdf

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf; https://www.gov.uk/government/collections/illegal-migration-bill

available as part of the consultation, and the Government's response thereon, on such fees[11].

12.4 The economic Impact Assessment (dated 26 June 2023) on what was then the Illegal Migration Bill also contains information on the general estimated legal aid impact of the Bill's provisions (see paragraphs 69, 79, 121, 131 and table 9 (at p. 36) of the Impact Assessment on the Bill[12]).

12.5 The Equality Impact Assessment published with the consultation on increasing the legal aid fees[13] for IMA work suggests that most legal aid clients in this area are likely to have an ethnic minority background, and to be males; the top five nationalities from small boats arrivals in 2022 were: Albanian, Afghan, Iranian, Iraqi, and Syrian[14]. An updated Equality Impact Assessment has also been published as part of the Government's response to the consultation[15].

13. Regulating small business

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

14. Monitoring & review

14.1 The Legal Aid Agency and the Ministry of Justice will monitor the implementation of this instrument as part of the ongoing monitoring of the provision of legal aid across England and Wales.

14.2 The instrument does not include a statutory review clause because the proposed changes are expected to have a low level impact on business, and because the Government has already committed to a post implementation review of the increase in the fees for IMA legal aid work within two years of implementation.

14.3 In line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Parliamentary Under Secretary of State at the Ministry of Justice, Lord Bellamy KC, has made the following statement: "It would not be appropriate in the circumstances to make provision for a review of this instrument, given the relatively low impact on business. However, the Government has committed to conduct a post implementation review of the increase in the fees for legal aid work related to removal notices under the Illegal Migration Act 2023 within two years of implementation".

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[11] https://consult.justice.gov.uk/digital-communications/legal-aid-fees-in-the-illegal-migration-bill/; https://www.gov.uk/government/consultations/legal-aid-fees-in-the-illegal-migration-bill/legal-aid-fees-in-the-illegal-migration-bill; Page 2 of https://assets.publishing.service.gov.uk/media/6515797a6a423b0014f4c57d/legal-aid-fees-ima-consultation-impact-assessment.pdf

[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf; https://www.gov.uk/government/collections/illegal-migration-bill

[13] https://www.gov.uk/government/consultations/legal-aid-fees-in-the-illegal-migration-bill/legal-aid-fees-in-the-illegal-migration-bill#equalities-impact-assessment

[14] Page 9 of https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1155534/2023-05-03_Illegal_Migration_Bill_-_Overarching_EIA_FINAL.pdf

[15] Paragraphs 125-168 of https://www.gov.uk/government/consultations/legal-aid-fees-in-the-illegal-migration-bill/outcome/legal-aid-fees-in-the-illegal-migration-act-government-response#equalities-impact-assessment-1

15. Contact

15.1 Tony Rafter at the Ministry of Justice, email: IMBLegalAid@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Claire Cooper and Lizzie Checkley, Joint Deputy Directors for Legal Aid Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Bellamy KC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.