EXPLANATORY MEMORANDUM TO

THE COMMUNITY LEGAL SERVICE (ASYLUM AND IMMIGRATION APPEALS) (AMENDMENT) REGULATIONS 2007

2007 No. xxxx

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty

   This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 This instrument amends the procedures to be followed by the Asylum and Immigration Tribunal (AIT) when retrospectively awarding legal aid for challenges to decisions of the Tribunal. It extends the power of the AIT to make an order for costs out of the Community Legal Service Fund for work that representatives have done preparing for a reconsideration that has been ordered but in the event does not take place. It also specifies the circumstances in which an order of this kind can be made. The other amendments clarify the scope of the review procedure where the AIT has decided not to award costs; and extend the requirement for the Tribunal to give reasons where it decides to exclude either counsel's or solicitor's fees from costs.

2.2 The regulations are subject to affirmative resolution, pursuant to section 112(6) of the Nationality, Immigration and Asylum Act 2002 (the NIAA Act 2002), and are intended to come into force on 30 April 2007.

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3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

4. Legislative Background

4.1. The Regulations are made by the Secretary of State for Constitutional Affairs under s.103D of the NIAA Act 2002. Section 103D provides for legal aid for applications and reconsiderations under section 103A to be awarded retrospectively by the AIT and the High Court. S.103D was inserted by section 26 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (the AI(TC) Act 2004). This provision established the AIT as a single tier Tribunal. It also introduced a system of higher court oversight for decisions of the AIT and retrospective legal aid arrangements in England and Wales.

4.2. Section 8 of the Immigration, Asylum and Nationality Act 2006 (IAN Act 2006) amends section 103D of the NIAA Act 2002 to allow representatives to be granted Community Legal Service funding by the AIT or the High Court for work done in preparation for a reconsideration hearing that does not then proceed because the Home Office concedes the appeal, the appeal has to be treated as abandoned or where the appellant withdraws the appeal. The current wording of section 103D does not cater for the situation where an appeal is withdrawn, abandoned or conceded after reconsideration has been ordered but before it takes place, and the appellant's representative has already carried out some preparatory work for the reconsideration.

4.3. Section 8 of the IAN Act 2006 is to be commenced to coincide with the coming into force of this instrument.

4.4. Section 26 of the AI (TC) Act 2004 was not commenced in Northern Ireland as it was in England and Wales in April 2005. It is intended that the retrospective funding scheme will be introduced in Northern Ireland to coincide with the coming into force of this instrument. A commencement order will be made to give effect to this, and two instruments will be laid – the Legal Aid (Asylum and Immigration Appeals) (Northern Ireland) Regulations 2007 and the Legal Aid (Scope) Regulations (Northern Ireland) 2007. These will introduce the scheme in Northern Ireland and will also mirror the changes in England and Wales.

5. Extent

5.1. This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1. The Parliamentary Under Secretary of State has made the following statement regarding human rights:

"In my view the provisions of the Community Legal Service (Asylum and Immigration Appeals) (Amendment) Regulations 2007 are compatible with the Convention rights".

7. Policy Background

7.1. The AI(TC) Act 2004 and IAN Act 2006 both contained measures to support the Government's proposals on asylum reform. The AI (TC) Act 2004 contained measures to unify the immigration and asylum appeals system into a single tier of appeal with limited onward review or appeal. To reduce exploitation of the system, the AI(TC) Act 2004 also introduced retrospective legal aid arrangements for the onward review stage of the appeal process to discourage weak applications and help ensure the AIT and High Court were not overloaded

with unmeritorious cases and that public money was focused on applicants with genuine claims.

7.2. Section 8 of the IAN Act 2006 amends the legal aid arrangements introduced by the AI(TC) Act 2004 for the review and reconsideration of a decision made by the AIT, so that once the Tribunal has been ordered to reconsider its decision, it may order that legal aid costs are paid to legal representatives, even though the reconsideration has not taken place. This was to allow representatives to be paid for work they have done in preparing for a reconsideration, even where that reconsideration has been ordered, but does not then proceed. At present, the AIT's powers to award costs are only triggered once the reconsideration has taken place which is problematical in cases withdrawn or conceded after a reconsideration is ordered, but before it takes place.

7.3. This instrument therefore amends the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 to give effect to section 8 of the IAN Act 2006. This instrument also inserts a provision to extend the requirement for the Tribunal to give reasons where it decides in special circumstances to make an order covering only counsel's or solicitor's costs. This is simply for reasons of consistency and so that there is the same obligation in all types of order. A requirement already exists to give reasons where the Tribunal refuses to make any order.

7.4. Consultation on this instrument took place between 21 December 2006 and 26 January 2007. Under section 103D(7) the Secretary of State is obliged to consult such persons as he thinks appropriate. This is a specialised area and the amendments proposed are minor and reflect requirements of primary legislation. Therefore DCA did not undertake a full public consultation, but instead consulted the following specialist organisations:

- the Legal Aid Practitioners Group;
- the Law Society;
- the Bar Council; and
- the Immigration Law Practitioners Association (ILPA).

7.5 Responses were received from the Law Society and ILPA.

7.6 There were no major objections raised by the respondents. ILPA raised one concern about the potential for cost claim delays in discontinued cases due to the involvement of the AIT in their determination, but as there are currently so few reconsiderations a month, DCA advised that judicial resources would not be an issue.

8. Impact

8.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities, or voluntary bodies.

9. Contact

9.1. Karen Finlay, at the Department for Constitutional Affairs, can answer any queries regarding this instrument. Tel 020 7210 1490 or Email: Karen.Finlay@dca.gsi.gov.uk.