EXPLANATORY MEMORANDUM TO

THE FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) FEES ORDER 2011

2011 No. [XXXX]

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

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

2. Purpose of the instrument

2.1 The First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 ("the Order") prescribes fees to be paid by a person who has given, or who proposes to give, a notice of appeal to the Immigration and Asylum Chamber of the First-tier Tribunal ("FtTIAC"). Such appeals are brought against an adverse decision by the UK Border Agency (UKBA) in a matter of immigration, asylum or nationality. The order also sets out the circumstances in which exemptions will apply, where payment of a fee may be deferred, reduced or remitted and where a refund may or must be made.

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

3.1 Appeals to the FtTIAC have until now been free of charge at the point of delivery although a contribution to the Tribunal's running costs is received from UKBA which imposes fees on an application for a visa. In 2010/11 that accounted for roughly 12% of the Tribunal's costs. Appeal fees are being introduced now because the Government considers that it is not reasonable for the state to continue to fund the remaining cost of the appeals system. The Government believes that it is appropriate that users of the Tribunal contribute towards the cost of their appeal where they can afford to do so.

4. Legislative Context

4.1 Under section 42 of the Tribunals, Courts and Enforcement Act 2007, the Lord Chancellor may by order prescribe fees payable in respect of anything dealt with by the First-tier Tribunal. The power to impose fees in Tribunals has previously been exercised in the areas of gambling and land although this is the first instance of fees being imposed in an instance involving action by the state against individuals.

4.2 In order to facilitate the new fee regime, amendments are also required to the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) ("the

FtTIAC Rules"), which apply in the FtTIAC. Those Rules, if made, are to be made by the Tribunal Procedure Committee. They will be brought forward later, but the effect of the relevant provisions is explained here to help the Committee.

4.3 It is proposed that amendments to the FtTIAC Rules will provide that a notice of appeal to the Tribunal must be accompanied by an application to the Lord Chancellor for a certificate of fee satisfaction. The Rules will provide that the Tribunal will not be able to accept an appeal where the Lord Chancellor has refused to issue a certificate. The Rules will also make provision for automatic strike out of an appeal where a certificate of fee satisfaction is revoked e.g. where a fee is not paid and provision for re-instatement if a fee is subsequently paid. Following responses to the consultation on the introduction of fees it is proposed that FtTIAC Rules allow the Tribunal the power to award costs against the UKBA up to the value of any fee paid where an appeal is successful (and see paragraphs 8.7 and 8.8 below). If the appellant consents to his appeal being heard without a hearing and pays the lower fee under the Order, the FtTIAC Rules will continue to provide that a hearing need not take place.

4.4 The instrument making amendments to the FtTIAC Rules– which are subject to the negative resolution procedure - will be accompanied by a separate Explanatory Memorandum.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

The Justice Secretary has made the following statement regarding Human Rights:

In my view the provisions of the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 The Government believes that it is reasonable to ask non-UK citizens appealing against some categories of immigration and asylum decisions to contribute to the costs of the administration of appeals where they are able to. This is particularly the case, given that some two thirds of appeal cases are dismissed each year.

7.2 Currently, the immigration and asylum jurisdictions administered by the Tribunals Service charge no appeal fees. Costs are met partly by the Ministry of Justice and in part from fees levied on visa applicants by the UKBA. However, the sums collected by UKBA are only a small proportion of the costs of providing the appeal system. For 2009/10 the joint budget of the Immigration and Asylum Chambers of the First-tier and Upper Tribunals was £114.7m, of which

approximately £85m was spent on judicial and administrative costs, £13.5m on estates and buildings and £15m on overheads. UKBA did not contribute towards the Tribunal's costs in 2009/10. The first contribution came in the financial year 2010/11 and totalled £14m.

7.3 The proposals are based on three central points, namely that:

- those who use the appeals system, and can afford to pay, should pay a fee as a contribution towards the cost of administering their appeal;
- fee levels are set at no more than 25% of the average cost to the Tribunal for administering an appeal;
- the fee charging process should be simple to understand and administer.

7.4 There is no fee for an appeal against a decision where action was initiated by the state. Article 5 of the Fees Order excludes those appeals types. Article 5 also provides for an individual's exemption where he or she is in receipt of certain types of support from the Government.

7.5 Article 6 of the Order gives the power for the Lord Chancellor to defer a payment that is due if the appeal relies on grounds related to the Refugee Convention or humanitarian protection. Article 7 of the Order allows for an appellant who does not fall into any of the existing exemption criteria, but believes there are exceptional circumstances indicating that they ought not to pay, to apply for the Lord Chancellor to reduce or remit their fee. Article 8 makes provision for the Lord Chancellor to issue a certificate of fee satisfaction and article 9 makes provision for refunds to be made in circumstances where it might not otherwise be clear that a refund were possible.

8. Consultation outcome

8.1 A public consultation on the introduction of immigration and asylum appeal fees ran from 21 October 2010 to 21 January 2011. A copy of the consultation paper entitled "*Introducing Fee Charges for Appeals in the Immigration and Asylum Chambers of the First –Tier Tribunal and the Upper Tribunal"*, summary of responses, and the Government's official response can be found at: http://www.justice.gov.uk/consultations/consultations-CP10-10.htm

8.2 A total of 27 responses to the consultation paper were received. Of these, approximately two thirds of responses were from groups who work in the immigration and asylum field; other replies came from interested members of the judiciary, groups representing lawyers, from the Administrative Justice and Tribunals Council and private individuals. Respondents to the consultation were generally opposed to the introduction of fees. The Government identified the following significant issues, and has taken action as outlined:

- *Charging in the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC")*

8.3 Respondents were unanimous in their view that appellants should not pay a fee to access UTIAC. They argued that the function of UTIAC is to determine whether the FtTIAC has made an error of law and it is unreasonable to expect an appellant to pay the tribunal system to correct its own errors. It was also suggested that fees in UTIAC may complicate and delay consideration of cases where a speedy throughput is a priority.

8.4 Taking into account the views of respondents and the additional administrative burden that introducing fees in the UTIAC would bring, the Government decided to withdraw the proposal to charge a further fee for bringing an appeal to the UTIAC for the present. The Fees Order therefore provides for a single fee paid only to the FtTIAC, with no separate fees for appeals to UTIAC.

- *Award of costs*

8.5 The Government proposed in the Consultation Paper that appellants whose appeals were successful should receive neither a refund of their fee from the Tribunal, nor be able to seek the award of costs against UKBA to recoup their fee. There was a considerable weight of opinion expressed in responses to the Consultation Paper that it was unfair that appellants had to pay one arm of the state to rectify an incorrect decision by another. Respondents noted that in other courts a successful litigant could expect to recover at least the cost of the court fee from the other party, and that adding to the costs an applicant already faces in the immigration context would create access to justice issues.

8.6 The Government has amended the policy accordingly. Proposed amendments to procedure rules will give the FtTIAC discretion to make an award of costs limited to the amount of any fee paid in cases where they consider that it is reasonable to do so. Those costs will be paid by UKBA.

- *Exemptions and remissions*

8.7 Following consultation responses, the Government has decided to widen the range of exemptions from that originally proposed in the consultation document to now include:

- exemption for appeals against decisions to remove
- exemption for certain appeals brought by EEA nationals
- remission for individuals in receipt of certain asylum support funding
- remission for individuals for whose benefit services are provided under s.17 of the Children Act 1989.

9. Guidance

9.1 Each notice of decision issued by UKBA with an appeal right will be accompanied by the appropriate appeal form and guidance. Contained within guidance will be information on:

- Types of appeal attracting a fee
- Information about where to find details on the level of fee for paper vs. oral
- Methods by which payment can be made
- Who can pay for the appeal (third parties/sponsors allowed etc)
- Web details for payment/submitting appeal online
- How to apply for exemption
- Warning about submitting duplicate appeals
- Details of websites where further information can be located

9.2 Appeal form and guidance will also be available from the Tribunal Service website.

10. Impact

10.1 The impact on business, charities or voluntary bodies is included in the attached Impact Assessment.

10.2 The impact on the public sector is included in the attached Impact Assessment.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the website www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Government has committed to setting regular review periods to monitor fee levels and the impact of the implementation of fees, and policy will be revised and amended accordingly. We will identify any further evidence available about the impact of the introduction of fees on the vulnerable groups identified in the consultation response, and remain aware that the impact of any proposed policy changes from MoJ or other departments will need to be carefully considered when conducting any review. Any significant changes to current proposals will involve further consultation if appropriate.

13. Contact

Mr Tom Matley at the Ministry of Justice Tel: 0161 234 2055 or email: tom.matley@hmcts.gsi.gov.uk can answer any queries regarding the instrument.