EXPLANATORY MEMORANDUM TO

THE IMMIGRATION AND NATIONALITY (FEES) (AMENDMENT NO.3) REGULATIONS 2008

2008 No. [DRAFT]

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

2. Description

2.1 These Regulations amend the Immigration and Nationality (Fees) Regulations 2007 (as amended by the Immigration and Nationality (Fees) (Amendment) Regulations 2008 and the Immigration and Nationality (Fees) (Amendment No. 2) Regulations 2008) (the "2007 Regulations").

2.2 These Regulations:

a) set the fees for certain new applications being introduced under the Points Based System;

b) remove certain exemptions from the requirement to pay a fee in respect of nationals from states who have ratified the Council of Europe Social Charter[1] (CESC) and the Council of Europe Revised Social Charter[2] (CERSC) and introduce new reduced rate fees for certain existing applications in respect of nationals from states who have ratified the CESC;

c) delete the fees for certain application routes that have been replaced by the Points Based System.

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

3.1 None.

[1] Signed in Turin on 18th October 1961 (CETS NO. 035) "The table also shows the fee charged for the equivalent route prior to the introduction of the Points Based System:"

[2] Signed in Strasbourg on 3 May 1996 (CETS NO. 163)

4. Legislative Background

4.1 Section 51(3) of the Immigration, Asylum and Nationality Act 2006 (the "2006 Act") provides that where an order under that section provides for a fee to be charged, regulations made by the Secretary of State shall specify the amount of the fee.

4.2 Section 51(3) of the 2006 Act enables the Secretary of State to, amongst other things, provide for exceptions and make provision about the consequences of failure to pay a fee and section 52(3) also enables the Secretary of State, amongst other things, to make different provision for different cases or circumstances.

4.3 Section 42(1) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the "2004 Act") enables the Secretary of State, when prescribing a fee under section 51 of the 2006 Act, to prescribe an amount which is intended to:
(a) exceed the administrative costs of determining the application or undertaking the process; and
(b) reflect benefits that the Secretary of State thinks are likely to accrue to the person who makes the application, to whom the application relates or by or for whom the process is undertaken, if the application is successful or the process is completed.

4.4 Section 42(2A) of the 2004 Act (as inserted by section 20 of the UK Borders Act 2007 (the "2007 Act") enables the Secretary of State to cross subsidise between applications made for entry clearance, leave to remain, transit visas, certificates of entitlement to the right of abode in the UK, or other claims, services, applications processes set out in an order made under section 51 of the 2006 Act.

4.5 These Regulations specify fees in respect of certain applications for which the Secretary of State has previously stated in the Immigration and Nationality (Fees) Order 2007 (as amended by the Immigration and Nationality (Fees) (Amendment) Order 2008), (the "Fees Order 2007") that she intends to charge a fee. The fees specified in these regulations are in respect of those matters for which:

(a) the fee will be set at an amount above the administrative cost of making the application, in reliance of section 42(1) of 2004 Act; or for which:

(b) the fee will contain an element of cross subsidisation of other applications which are to be charged below the administrative cost, in reliance of section 42(2A) of the 2004 Act.

4.6 The Secretary of State has, in prescribing the fee for leave to remain as a Tier 1 (Post Study) Migrant made in-person at a public enquiry office of the UK Border Agency, in reliance of section 42(1) of the 2004 Act, prescribed an amount intended to exceed the normal administrative costs of determining an application and reflect the benefits that she thinks are likely to accrue to the applicant or the person to whom the application relates, if the application is successful.

4.7 In prescribing the above fees for entry clearance and sponsorship licences, the Secretary of State has, in reliance of section 42(2A) of the 2004 Act, prescribed an amount that is intended to cross subsidise:
(a) in the case of entry clearance applications, other applications for entry clearance;
(b) in the case of sponsorship licences, other applications for sponsorship licences;
that are to be set at levels below the administrative cost of such applications.

4.8 A draft of these Regulations must by virtue of section 42(7) of the 2004 Act be laid before and approved by a resolution of each house of Parliament.

4.9 Fees for other applications specified in the 2007 Order which will be charged at or below the administrative cost are specified in other regulations made which are subject to annulment in pursuance of a resolution of either House of Parliament.

5. Territorial Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Minister of State for Borders and Immigration has made the following statement regarding Human Rights:

In my view the provisions of the Immigration and Nationality (Fees) (Amendment No. 3) Regulations 2008 are compatible with the Convention Rights.

7. Policy Background

7.1 The fees contained in these fees are set above the administrative cost of an application or process in line with the Government's charging model. By charging above the administrative cost of delivery on the application types referred to in this instrument, the Home Office is able to set fees for other application types at or below cost recovery in support of wider Government objectives, particularly where it is believed that a cost recovery fee would be so high as to damage international competitiveness in this area (e.g. for student applications).

7.2 During the course of 2003/04, following consultation, the Home Office introduced charges for a range of immigration applications to ensure that those who use and benefit from the UK's immigration system met the costs of delivering the administrative service provided.

7.3 A further public consultation exercise on charging for immigration and nationality applications was undertaken from 30 October to 22 December 2006, supported by the publication of *A consultation on a new charging regime for immigration & nationality fees*. The consultation document was made available on the Home Office website and also sent to 3000 people and organisations. The formal Government response to the public consultation was published on 7 March 2007, and established the principle that those who benefit most from the immigration system should pay proportionately more towards the true end to end costs of the system, rather than seeking to fund improvements wholly via general taxation.

7.4 A further, targeted consultation exercise on fees and charges to support the Points Based System and for biometric identity documents was held from 24 October to 9 November 2007. We consulted key stakeholders, based around – but not limited to – the membership of the UK Border Agency's existing stakeholder taskforces which include representative bodies and umbrella organisations. We set out a number of proposals in a letter sent to 493 bodies and individuals which received 132 written responses. We met with 119 individuals at consultation meetings.

7.5 The majority of respondents including most of those from business supported the proposal to continue to set some fees above cost recovery levels including Tier 1,

Tier 2 and sponsor licence application fees. Ernst & Young stated that "We feel that it is acceptable that Tier 1 and Tier 2 applicants should pay slightly higher fees as they are the applicants that will potentially earn greater money". Hodson-Wren Associates agreed that fees for applications for entry clearance or leave to remain under Tier 1 and Tier 2 should be set at above normal cost recovery levels.

7.6 There was widespread agreement that the fees should be offered at a concessionary rate to small businesses, and we have reflected this in our fees model by setting sponsor licence fees for larger businesses at a higher rate, to be able to subsidise reduced fees for sponsor licences for small businesses and charities.

New Applications

7.7 These Regulations set the fees for two new types of applications that will be implemented under the Points Based System from 27 November 2008. The table also shows the fee charged for the equivalent route prior to the introduction of the Points Based System:

Table A (New Applications):

Application Type	**Comparative Fee (£)**	**New Fee (£)**
Leave to remain as a Tier 1 (Post Study) Migrant. Application made in-person at a public enquiry office of the UK Border Agency.	595	600[3]
Application for a Tier 2 sponsorship licence where the sponsor is not a small sponsor and previously held a Tier 4 and/or a Tier 5 licence.	N/A[4]	600

Council of Europe Social Charter

7.8 The Immigration and Nationality (Fees) (Amendment No. 2) Regulations 2008 introduced a new exemption from the requirement to pay a fee for Tier 1 (General) and Tier 2 entry clearance applications where the application was in respect of a national who had ratified either the CESC or the CERSC. These Regulations remove

[3] New fee is increased in line with inflation.
[4] No comparative fee as sponsor licences are a new service provided under the Points Based System.

these exemptions. For nationals of CESC[5] states, the exemptions are replaced with reduced rate fees for entry clearance as a Tier 1 (General), a Tier 1 (Entrepreneur) and a Tier 2 migrant.

Under Article 18(2) of the CESC, the UK has an obligation to abolish or reduce fees in respect of "workers" who are nationals of states who have ratified the CESC. The Regulations do not specify a reduced fee for workers who are nationals of states who have ratified the CERSC[6]: the UK is not bound by the obligations under this later Treaty since it has not ratified it.

7.9 This change is made in support of our wider charging policy that those who benefit from the services provided by UKBA should contribute to the cost of providing those services, whilst still meeting our obligations under the CESC. The change is also to discourage the speculative applications that would result if the fee exemption was left in place.

Table B shows the new fees for entry clearance applications that will be implemented for nationals of countries who have ratified the CESC from November 27[7]:

Table B (CESC Reduced fees):

Entry Clearance Route	**Standard Fee**	**Fee for CESC national**
Tier 1 (General) and Tier 1 (Entrepreneurs)	£600	£540
Tier 1 (Transition)[8]	£200	£180
Tier 2 (all categories)	£205	£185

7.10 The Immigration and Nationality (Fees) (Amendment No. 2) Regulations 2008 also introduced a fee exemption for all Tier 1 and Tier 2 leave to remain applications in respect of a national of a state which has ratified the CESC or the CERSC. These

[5] The CESC states that are not members of the European Economic Area are Croatia, FYR Macedonia and Turkey. (Nationals of states who are members of the European Economic Area are not subject to immigration control when exercising EC Treaty rights).

[6] The CERSC states that are not members of the European Economic Area and have not ratified the CESC are Albania, Andorra, Armenia, Azerbaijan, Georgia, Moldova, and Ukraine.

[7] New fees are set at a 10% reduction of the price normally charged for this type of application, in line with the UK's obligation to reduce fees under Article 18(2) of the CESC.

[8] A transitional route offered to those migrants that had been issued an Immigration Employment Document under the Highly Skilled Migrant Programme, but had still to apply for Entry Clearance as a Tier 1 (General) migrant when the Points Based System replaced the Highly Skilled Migrant Programme.

Regulations remove the exemption from the requirement to pay a fee for *all* Tier 1 applications and replaces it with a targeted exemption for Tier 1 (General) and Tier 1 (Entrepreneur) leave to remain applications when they are made in respect of either CESC or CERSC nationals. The Regulations maintain the exemption in respect of Tier 2 leave to remain applications in respect of a national of a state which has ratified the CESC or the CERSC.

7.11 This change is made to more closely reflect the exemptions in respect of nationals of countries that had ratified either the CESC or the CERSC that were in place prior to the introduction of the Points Based System, and to align leave to remain exemptions with the categories for which reduced fee rates apply for entry clearance applications.

7.12 This change is also made in support of our wider charging policy that those who benefit from the services provided by UKBA should contribute to the cost of providing those services and also to discourage the speculative applications that would result if the fee exemption was left in place. We will review whether we wish to continue to offer the exemption to CERSC nationals before the implementation of new leave to remain fees in 2009.

Deletions

7.13 The regulations also delete the fee for an immigration employment document made by a work permit holder. This fee is no longer required, having been incorporated into the five-tier Points Based System:

7.14 Full guidance for customers on all application routes and the applicable fees is available via www.ukba.gov.uk

7.15 We plan to consolidate the current fees Regulations and the three subsequent amendments when making new Statutory Instruments that will cover fees for the Financial year 2009/2010.

8. Impact

8.1 Full impact assessments have already been published in respect of both the wider policy and the application fees for migrants and sponsors applying under the Points Based System[9].

9. Contact

9.1 Chris Nickson at the UK Border Agency of the Home Office (e-mail: Chris.Nickson2@homeoffice.gsi.gov.uk or tel: 01142072446) can answer any queries regarding the instrument.

[9] published at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/pbsdocs/.