EXPLANATORY MEMORANDUM TO

THE JUDICIAL PENSIONS (FEE-PAID JUDGES) (AMENDMENT) REGULATIONS 2021

2021 No. 444

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.

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

2. Purpose of the instrument

2.1 The instrument amends the Judicial Pensions (Fee-Paid Judges) Regulations 2017 (the FPJPS Regulations) which established the Fee-Paid Judicial Pension Scheme (FPJPS). This is in order to add specified judicial offices to the list of offices eligible for pension provision under FPJPS and, where relevant, clarify the date (the service limitation date) from which reckonable service is taken into account for the accrual of pension benefits under FPJPS.

2.2 It is necessary to make these changes to ensure that: the service limitation date is explicitly listed for some judicial offices already covered by the FPJPS Regulations; and to ensure that a FPJPS pension can be accrued and pension contributions deducted in respect of new judicial offices that are being added to the FPJPS Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Some of the judicial offices being added to FPJPS through these regulations have service limitation dates. These are the same dates as those from which the relevant salaried office holder could accrue judicial pension benefits under JUPRA[1] and are therefore the dates from which the fee-paid office holder should be able to accrue judicial pension benefits. By including the limitation dates we are adhering to the principle that fee-paid judicial office holders should not be treated less favourably than their salaried counterparts.

3.2 For service before the limitation date, the Ministry of Justice will make provision for these fee-paid offices to reflect the non-judicial pension arrangements that the relevant salaried judge would have benefitted from at that time.

3.3 An earlier iteration of these regulations was laid before Parliament on 29 November 2017, but was withdrawn prior to debates because the service limitation dates for two judicial offices were incorrect by one day. This instrument now provides for the correct dates and includes additional offices that need to be added to the FPJPS Regulations. The procedure for free issue of this instrument has been applied and these regulations are being issued free of charge to all known recipients of S.I. 2017/522.

3.4 We acknowledge that there has been a delay in updating these regulations, due in part to awaiting the conclusion of ongoing litigation. In the interim we have ensured that retiring judges in the affected offices have received payments in lieu of pension.

[1] The scheme established by the Judicial Pensions and Retirement Act 1993 and the regulations made under it.

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)

3.5 Not applicable, as the territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

4.1 This instrument extends to the whole of the United Kingdom.

4.2 The territorial application of this instrument is to the United Kingdom.

5. European Convention on Human Rights

5.1 Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice, has made the following statement regarding Human Rights:

"In my view the provisions of the Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2021 are compatible with the Convention Rights."

5.2 As part of the 2015 judicial pension reforms, most judges were moved to the new Judicial Pension Scheme 2015. The transitional provisions meant that older judges were exempt from these reforms and could remain in FPJPS in respect of their fee-paid service. In *McCloud v Ministry of Justice [2018] EWCA Civ 2844*, the Court of Appeal held that the transitional protections provided to older judges constituted unlawful direct age discrimination. As a result claimant judges, and non-litigants in the same legal and factual position as the *McCloud* claimants, are entitled to membership of the pre-reform salaried scheme, JUPRA, and FPJPS (as applicable) from 1 April 2015 until the introduction of a reformed judicial pension scheme, which the Ministry of Justice intends to introduce for all judges from 1 April 2022. The provisions of this current instrument do not therefore result in any potential discrimination as a result of including additional office holders in FPJPS.

6. Legislative Context

6.1 The FPJPS Regulations established FPJPS to provide eligible fee-paid judicial office holders with pension benefits comparable to the pension benefits available for salaried judges under the JUPRA scheme. The Schedule to the FPJPS Regulations lists the judicial offices that have been determined as eligible for pension rights in FPJPS in decisions of the Employment Tribunal (and subsequent appeals) or by consent. The associated annual divisor values for judicial offices (which are used to 'gross-up' some values associated with fee-paid service) are included in the Schedule. Some offices in the Schedule have a specified service limitation date which reflects the date from which the relevant salaried judge could join JUPRA. Service credit values in FPJPS for service before the limitation date will be included in future provision made by the Ministry of Justice to reflect the non-judicial pension scheme that the relevant salaried judge would have been in at that time.

7. Policy background

7.1 The FPJPS Regulations came into force in April 2017 to provide a remedy following the judgments in the case of *O'Brien v Ministry of Justice [2013] UKSC 6* and related cases. This litigation determined that the absence of pension and other specified benefits for fee-paid judges amounted to less favourable treatment on the grounds of their part-time status and was unlawful. The Ministry of Justice introduced the FPJPS Regulations as the main remedy to that litigation to provide pension benefits for eligible current and former

judicial office holders in respect of their eligible service from 7 April 2000[2] to 31 March 2015 and for service after that date in respect of those entitled to transitional protection (see paragraph 5.2 above).

7.2 This instrument makes the following changes to the FPJPS Regulations in respect of judicial offices whose office holders are entitled to a FPJPS pension:

- It sets out eight judicial offices for which a service limitation date applies. Although these limitation dates could be inferred from the purpose of the existing legislative provisions, litigation decisions and the policy intention set out in the relevant consultations, we consider it preferable to specify them clearly in the FPJPS Regulations.
- It makes minor amendments to correct existing limitation dates for three judicial offices listed in the Schedule to the FPJPS Regulations.
- It adds a further thirteen eligible judicial offices to the Schedule.
- It adds the new names for two judicial offices already listed in the Schedule: Deputy Insolvency and Companies Court Judge (previously Deputy Bankruptcy Registrar) and Deputy Master of the Senior Courts (previously Deputy Supreme Court Master).
- Through modifying the FPJPS Regulations in respect of new judicial offices added to the scheme (see Part 3) it ensures that (subject to limitation dates where applicable) eligible service in these offices prior to the commencement date for these Regulations (being 1 April 2021), counts as pensionable service. The modifications also ensure that these new members can complete certain actions in the scheme (e.g. purchase of additional benefits) from their date of admission.
- It makes provision for payment of members' contributions in respect of judicial service in the new offices added to the scheme prior to the commencement date for these Regulations (see the tables in the Schedule). This reflects provisions in the FPJPS Regulations that applied to existing scheme members.

7.3 It is possible for holders of the new offices being added to FPJPS to opt-out of the scheme and re-join at a future point in time providing they still meet the eligibility criteria. If an office holder has already retired and they wish to opt-out from the scheme then they will be treated as always having been an opted-out member.

7.4 When it comes to giving operational effect to these changes, it is worth bearing in mind that, while the Ministry of Justice has an overarching responsibility for the judicial pension schemes, administrative responsibility for the pension provision in respect of the eligible offices being added to FPJPS falls to various bodies, as applicable: the Ministry of Justice, the Welsh Government, the Department of Justice Northern Ireland, the Department of Health and Social Care, the Department for Business, Energy and Industrial Strategy, the Competition Appeal Tribunal and the Intellectual Property Office.

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 and does not trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Ministry of Justice has no plans to consolidate the legislation at this time.

[2] This is pending proposed amendments to extend the provisions of FPJPS back to March 1995, as outlined in the Ministry of Justice's consultation: *Amendments to the Fee-Paid Judicial Pension Scheme*. The consultation also contains details of the proposed treatment of service prior to March 1995.

10. Consultation outcome

10.1 The Ministry of Justice has undertaken various consultation exercises that have referred to the addition of eligible judicial offices to the FPJPS Regulations:

- A public consultation on the draft FPJPS Regulations in 2016[3]. Responses were reflected in the final version of the FPJPS Regulations.
- A targeted consultation from 19 February to 9 March 2018 for Judges of the First-tier Tribunal (Residential Property) Agricultural Land and Drainage, as this office was not expressly mentioned in the 2016 consultation. We received four responses to the consultations. Two of the respondents made representations on the provisions relating to them, which we considered carefully.
- A public consultation on *Amendments to the Fee-Paid Pension Scheme*[4] which ran from 26 June until 18 October 2020. This consultation listed the offices that we proposed to add to FPJPS. We received a number of responses on the additional offices including representations that other offices should be entitled to a judicial pension and representations with regard to the pension provision of certain fee-paid judges prior to the service limitation dates. Our position on these points is set out in the government response[5] to the consultation published on 10 December 2020.

10.2 Following these consultations, the only subsequent additions have been: Chairman of the National Security Certificate Tribunal (Northern Ireland); a fee-paid office which is already listed as an eligible judicial office for the purposes of the Judicial Pension Scheme 2015; and three Welsh Tribunals offices[6].

10.3 We have liaised with officials from the devolved administrations in Wales and Northern Ireland in relation to the offices whose jurisdictions are in those countries and their views have been reflected accordingly.

11. Guidance

11.1 The Judicial Pensions Board (JPB), established under Part 3 (Governance) of the Judicial Pensions Regulations 2015, has oversight of the overall Judicial Pension Scheme including FPJPS. The JPB is responsible for assisting the Lord Chancellor as the scheme manager to administer the Judicial Pension Scheme. A scheme guide for FPJPS is available on the Judicial Pension Board website: https://www.gov.uk/government/groups/judicial-pension-board#publications.

11.2 The Ministry of Justice will communicate with relevant office holders to inform them of the changes.

12. Impact

12.1 An impact assessment has not been prepared for this instrument. There is no economic impact on business, charities or voluntary bodies.

12.2 It is not currently possible to ascertain the exact budgetary implications that will arise as a result of adding the eligible offices to the schemes. However, there will be incremental costs to the Ministry of Justice and other departments (as applicable) and to the Judicial Pension Scheme. It is important to note that these changes are required as part of the

[3] https://consult.justice.gov.uk/digital-communications/fee-paid-judicial-pension-scheme-draft-regulations/supporting_documents/consultationpaper.pdf
[4] https://www.gov.uk/government/consultations/fee-paid-judicial-pension-scheme-amendments
[5] https://www.gov.uk/government/consultations/fee-paid-judicial-pension-scheme-amendments
[6] The President of the Mental Health Review Tribunal for Wales is already eligible to be in FPJPS through being a specified office in Schedule 1 to JUPRA (see regulation 3(1)(a) FPJPS). Specific inclusion in FPJPS is to set the annual divisor for fee-paid service in this office.

remedy in the *O'Brien v Ministry of Justice [2013] UKSC 6* (and related *Miller v Ministry of Justice [2019] UKSC 60*) litigation and the total liability is likely to be small in the context of the overall *O'Brien* and *Miller* liabilities relating to fee-paid office holders' entitlements to judicial pensions.

12.3 Whilst the numbers of office holders involved are small there will be an ongoing cost as the Ministry of Justice (and other affected departments) will need to start paying employer contributions for current office holders (the office holders themselves will also need to pay member contributions).

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 JPB oversees the governance of FPJPS and keeps this under review as part of the overall Judicial Pension Scheme.

15. Contact

15.1 Mariam Conway at the Ministry of Justice (email: Mariam.Conway@justice.gov.uk) can answer any queries regarding the instrument.

15.2 Simon Masterson at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.