

**The draft Immigration and Nationality (Fees) (Amendment) Order 2013
Second Delegated Legislation Committee, 4.30 pm, 27 January 2014**

The Immigration Law Practitioners' Association (ILPA) is a charity and a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established nearly 30 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on many government, including Home Office, and other consultative and advisory groups.

ILPA was among those consulted by the Home Office in its limited consultation on fees and charging in late 2013, which addressed both the processes for which charges could be levied and on fee levels¹. There has been no published response to the consultation but the results appear to have informed the draft order and government amendments 45 to 53² and New Clause 12 providing powers to charge for additional Home Office immigration and nationality functions. These have been tabled for Report stage of the Immigration Bill in the House of Commons, to be considered in the short time allowed for debate on 30 January 2014. The original fees clauses in the Bill passed through the Public Bill Committee on 12 November 2013³ with very little debate.

Paragraph 3(b)(w) concerns charges for applications under European Union free movement law. The Home Office has since July 2013 charged a fee of £55 for applications made by European Union nationals for registration certificates and permanent residence certificates, and for applications made by their family members for residence cards and permanent residence cards. The legal basis for the fees is questionable: Article 25(2) of *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, provides that such documents should be issued free of charge or for a charge not exceeding that imposed on nationals for similar documents. As the UK does not have identity cards, the Home Office suggested that the charge for a UK passport would be appropriate. Extracts from the European Commission's response were released in response to a Freedom of Information request⁴. The Commission said

Compliance of your plans with EU law can be assessed only on the basis of proper justification and in-depth analysis addressing [that 'the UK policy on passport charges may have been set up to reflect certain aspects which are relevant for passports but may not be relevant for residence documents']"

The Committee should ask whether this was done and for sight of it. The Commission also asked the Home Office "which charges would cover the genuine

¹ For ILPA's response, see <http://www.ilpa.org.uk/resources.php/25513/ilpa-response-to-home-office-consultation-for-fees-and-charging-immigration-and-visas-3-december-2013>

² Amending Clause 60 of the Immigration Bill HC Bill 128, as amended in the Public Bill Committee.

³ Ninth sitting, 12 November 2013, cols 349-352.

⁴ Reference 29002, published 26 November 2013, see <https://www.gov.uk/government/publications/eu-advice-on-charging-for-residence-cards>

administrative costs the UK incurs in issuing these documents”? **The Committee should pose that same question to the Minister.**

The Committee may also wish to ask the Minister for sight of the whole of Commission’s advice.

Finally the Committee may wish to ask the Minister to explain the basis on which the charges have been levied from July 2013 until now and the reason for including them in this instrument.

Paragraph 2(5)(d) introduces a charge for asking the Home Office to review a refusal decision. Since November 2012, the Home Office reconsideration policy for refusals⁵ of applicants within the UK has been restricted as follows:

“...we will accept one reconsideration request if you submitted your application in the UK and the request:

- is about the grant of leave for an approved application; or*
- the request relates to a decision directly affected by the Alvi judgment and was made within 3 months of the date we make a decision on your application; or*
- relates to an application that was refused and you are providing new evidence to prove the date of application, providing new evidence that documents submitted with the application are genuine, or identifying relevant material which was not available to the caseworker but was received by the Home Office before the decision date.⁶*

In all other circumstances, persons are expected to make new, charged, applications instead. Where the applicant is outside the UK and the application carries a right of appeal, the current official procedure is for the decision to be reviewed by an Entry Clearance Manager prior to the appeal documents being prepared. In our experience, this review rarely results in a changed decision. Clause 11 of the Immigration Bill⁷ would remove rights of appeal, on all except asylum or human rights grounds. The Home Office proposes instead that people may request an administrative review of the decision, to the same authority which initially refused it. Administrative reviews have been used since 2006 in entry clearance cases where rights of appeal are limited to human rights and race discrimination grounds. They are no substitute for a review by an independent appellate authority. Where the Home Office has concluded, for example, that a person would not leave at the end of their stay, or has used deception in the past, it is in our experience most rare that a decision is changed. Factual mistakes are the most likely to be overturned on review and in some cases errors in following guidance on evidence, but then only when a careful lawyer has pointed out exactly what is wrong. **The Committee should ask for details of how these charged reviews will be carried out.** In the consultation the Home Office proposed that the fee for reconsiderations would be refunded if the decision were overturned on review; **the Minister should be asked to confirm this.**

⁵ This is different from the pre-refusal “evidential flexibility” policy for minor errors, for which see Points-Based System, Evidential Flexibility, version 5, 7 November 2013:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/cross-cut/pbs-flexibility/pbs-flexibility?view=Binary>

⁶See <http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/reconsider/>. The reference to “the Alvi judgment” is to *R(Alvi) v SSHD* [2011] UKSC 182, in which the Supreme Court held that a ground for a mandatory refusal should be set out in the immigration rules laid before parliament and not left to guidance.

⁷ Bill 128.

The Committee should ask who or what is envisaged by the definition of ‘contractor’ in paragraph 2(2)(b) and for which services it is intended that they be able to charge. Is the term intended to be broad enough to cover

- the ‘commercial partners’ at whose offices in different countries entry clearance applications are submitted
- Home Office-approved language testing establishments
- Other organisations?

The existing ‘commercial partners’ already charge for a range of services, from photocopying to refreshments etc. in their premises and have also used premium rate telephone lines. Their function is to accept applications and they should not be playing any wider role. ILPA has seen and brought to the Home Office’s attention in the past cases where they have attempted to do more than that. In some cases staff acted wrongly but in good faith, for example advising persons on whether they should submit all the documents they have brought to a Visa Application Centre, or refused to take in applications they considered misguided, and these actions prejudiced applicants. In other cases we asked the Home Office to investigate possible fraud, where additional “assistance” was being offered for payment. We consider that it is necessary to ensure that the services for which commercial partners can charge are clearly delineated so that opportunities for at best confusion, at worst corruption, are minimised.

Contractors providing for example, approved English language tests derive a commercial advantage for being so approved. For this they should pay.

It is increasingly the case that applicants have to pay premium fees to receive a level of service that is no more than adequate. For example, many of the benefits associated with the £25,000 fee for premium sponsors are no more than those which sponsors were promised at the outset of the Points-Based System:

Sponsors will be at the heart of the new system and will have a formal role in the process. Trustworthy sponsors will find the system easier and less bureaucratic. They will also benefit from a close and customer-focused relationship with the Home Office.⁸

People pay premium fees for same-day service at the Public Enquiry Office because if they do not then they have no idea how long it will take to deal with their applications and they are unable to obtain progress reports. It has taken quite simply years of advocacy by ILPA to supplement the Public Enquiry Office with a premium postal service, to address the problem of demand for premium appointments outstripping supply. We advocated for a premium postal service because clients were desperate for it. But we consider that persons should not be forced to use premium services simply because the ordinary service is so poor and so uncertain. The Home Office new service standards announced from 1 January 2014, if complied with, may help to improve the service received but it will take some considerable time to establish trust. **The Committee should ask what is being done to improve the service for all.**

ILPA, 26 January 2014

For further information please get in touch with Alison Harvey, Legal Director, 0207 490 1553, alison.harvey@ilpa.org.uk

⁸ *A Points-Based System: making migration work for Britain* Cm 6741, Home Office, March 2006, paragraph 20.