ILPA Briefing for House of Commons Consideration of the Immigration and Nationality (Fees) Order 2016 2 February 2016

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

Fees order http://www.legislation.gov.uk/ukdsi/2016/9780111142691/contents
Government indicative fees https://www.gov.uk/government/publications/indicative-visa-charges-for-2015-to-2016

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Powers for the Secretary of State to set fees for immigration and nationality applications were altered by s 68 of, and Schedule 9 to, the Immigration Act 2014. It continues to be the case that the structure for charging is set out in an order and then regulations are made setting specific fees. The Secretary of State has published the fees she intends to charge (see link above).

Under the Act fees can be set with reference to particular times and places and arrangements, raising the interesting prospect of "special offers". It allows fees for entry clearance applications, transit visas and certificates of entitlement to the right of abode to be set "so as to reflect costs referable to the exercise of" any function specified in an order.

Section 68 empowers the Secretary of State to make a fees order setting out the functions in respect of which fees are to be charged; how fees are to be calculated including whether they will be fixed or an hourly or other rate. In the case of rates the Order must specify a maximum and may specify a minimum. This is that order. The section then empowers the Secretary of State to make "fees regulations" subject to the negative procedure setting out the amounts of fees.

Fees can be charged not only for applications but for services more generally. The Explanatory Notes to the Bill said and the Explanatory Notes to the Act (at paragraph 432) say

> "*Functions can be delivered overseas, at the border or within the UK. They can be delivered by the Secretary of State, her officers, agents, commercial partners or any person acting on her behalf.*"

There was no discussion in parliament of the circumstances in which there would be charges for functions in connection with an enactment of a jurisdiction outside the UK and there is no explanation in the literature. Section 70 of the Act makes provision for attendance services. These appear to resemble "super premium" services, but be applicable outside the UK. The Explanatory Notes to the Bill (para 421) and to the Act (paragraph 446) describe them as

"optional and bespoke" services. A fee can be charged for the "attendance" separately from the fee for the service itself.

The Secretary of State has published the fees for which she intends to make provision in April 2016 in regulations. The maxima set out in the Order are higher, because it is intended to cover the next four years, although nothing prevents a new order from being made before the end of that period.

The greatest interest is likely to be in the specific fees proposed for this year. Given that the instrument setting them out is subject to the negative procedure, it is worth attempting to raise questions of concern now. Some concerns are raised below. Perhaps the greatest of these is that fees do not correlate to applicants' ability to pay and this is not identified as a factor taken into consideration when setting fees. ILPA is aware of instances where an adult has applied for settlement and has deliberately not applied for a child or children at the same time because they cannot afford the fee.

Under section 55 of the Borders, Citizenship and Immigration Act 2009 the Secretary of State must have regard to the need to safeguard and promote the welfare of children who are in the UK in carrying out any function in relation to immigration, asylum or nationality. This duty entails making it affordable for children and their families who meet the criteria to make immigration applications for a secure status.

Proposed fees for 2016-2017

Applications rejected as invalid

A £25 fee for processing invalid applications is proposed. At the moment, any fee paid for an application rejected as invalid is refunded. The rejection of applications as invalid is not always well-founded. In 2015, the Supreme Court gave judgment in *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 about the interpretation and application of the Home Office's Points Based System evidential flexibility policy. The applicant in *Mandalia* was required to show that he had held funds in his bank account for 28 days. He had the funds, but omitted one of his bank statements from his evidence. Instead of acting in accordance with the evidential flexibility policy and asking for the missing document, the Home Office refused him. On appeal the Home Office presenting officer did not draw attention to the policy and the immigration judge could not admit the missing statement of his/er own motion because of the prohibition on this set out in the Nationality, Immigration and Asylum Act 2002 at s 85A. On appeal he was legally represented and raised the evidential flexibility policy but was not given permission to appeal on this ground until the case reached the Court of Appeal. The Secretary of State argued that while she could use the evidential flexibility policy, she was under no obligation to do so. The Supreme Court disagreed. It held that the policy imposed an obligation. Lord Wilson declared testily

> *Speaking for myself, I consider the Secretary of State's submission to be misplaced even at the high level of pedantry on which it has been set.*

Will these sorts of spurious applications become more frequent now that the Secretary of State can charge for them?

Administrative review

The Order sets out that the maximum fee for review of a decision in connection with immigration or nationality will be £400. Currently, £80 is charged for an administrative review. The fee is refunded if the application is successful. It is not refunded where the refusal stands, but on some other ground, the original decision having indeed been found to have been flawed as the person asking for the review contended. There is provision for those exempt from paying the original fee to be exempt from paying for the fee for the administrative review. The fee may be waived if the applicant is able to demonstrate that, as a result of exceptional circumstances, they are unable to pay the fee. This is not usually possible for the types of application for which an administrative review is payable, these being applications under the Points-based system, for which a person is required to demonstrate that they are in receipt of funds.

The government contended during the passage of the Immigration Act 2014 that administrative review would be cheaper than bringing an appeal but the proposed maximum suggests that it has abandoned that.

In his written statement on 26 February 2015[1], the Minister, James Brokenshire MP, described appeals as "costly and time-consuming". Appeals provided independent scrutiny of home Office decision making. They provided review beyond the department. The Home Office success rate was not impressive.

		Managed Migration	Entry Clearance
2012/13	Determined at hearing / papers	21,669	12,815
	Allowed/Granted %	49%	50%
	Dismissed/Refused %	51%	50%
2013/14	Determined at hearing / papers	28,720	14,291
	Allowed/Granted %	49%	48%
	Dismissed/Refused %	51%	52%
2014/15[r]	Determined at hearing / papers	38,084	11,631
	Allowed/Granted %	42%	42%
	Dismissed/Refused %	58%	58%

Administrative review is an internal review within the Home Office. There are significant restrictions on what evidence may be included, what issues may be considered and what outcome may be reached. The Immigration Rules limit the circumstances in which new evidence may be submitted. The 'Administrative review' guidance purports to go further in limiting, where new evidence is permitted by the rules, the purpose to which that new evidence may be put. Moreover, in a review, there will not be consideration of whether the applicant is

[1] HCWS311.

entitled to leave on any other basis but the basis on which the refused application, now under review, was made. An application for administrative review cannot be used to make an application for leave on any new grounds (including human rights or asylum grounds).

Fees as (dis) incentives

Fee rises are uneven and suggest that fees are being used as a means to encourage or deter would be applicants from particular making applications. On the encouragement side, a two year visit visa for a Chinese national will cost £85. On the deterrent side, family fees are rising by some 25%. Partners now have to apply for an initial visa, which may be granted for 30 months, then for an extension of stay for a further 30 months, then for settlement. Persons who have been granted leave to remain in the UK on the basis of their family life may have to apply for four 30-month periods, to reach ten years before they can qualify for settlement,

It is already the case that the fee is a barrier to persons making applications they would otherwise make. ILPA's experience is that to secure waiver of a fee requires an investment of time from a legal representative, something likely to be beyond the means of immigration applicants as there is no legal aid in England and Wales for immigration cases. It is a cumbersome and insecure procedure[2] and persons cannot place any reliance on when they may qualify under it. Where legal aid is available, it covers fees. When immigration applications went out of scope of legal aid, many persons experienced this as a hard bar on making an application. Even if they were prepared to muddle through without legal assistance, they simply could not pay the fee.

Applications for indefinite leave to remain are not covered by the fee waiver. The Home Office has set out its belief that those who cannot afford the fee can remain in receipt of limited leave – see the guidance to fee waivers[3] on form Appendix 1 FLR(O) and Chapter 1A of the Immigration Directorate Instructions at paragraph 1.2.3. Yet the Home Office's own charging structure reflects its view that indefinite leave to remain confers significant benefits on an applicant.

Legal aid exceptional case funding is not the answer. An application for exceptional case funding is time-consuming (and costly) to make and there have been huge difficulties with obtaining exceptional case funding, with the challenge to the way it is operating, *Gudanaviciene* et *ors v Director of Legal Aid Casework* [2014] EWCA Civ 1622. on the way to the Supreme Court.

Within the first nine months of the exceptional funding scheme a total of 1,151 applications (909 new applications and 242 applications for review of a refusal) were received. One hundred and eighty seven were in immigration. Thirty-five resulted in grants, three of these in immigration, a success rate in immigration of 1.6%, lower than the overall average of 3.2%[4]. As of 1 July 2013, a mere six grants of exceptional funding had been made of which one was in immigration. None had been made to persons who were unrepresented. As of 6 September 2013, that figure was 11 grants, with no details of how many were in immigration. Also of concern, only 270 applications for exceptional funding had been made as of 1 July 2013. That would extrapolate to 1080 in the course of a year, far below the original estimate of 70,000. By 6 September, the number of applications had increased only to 624, which extrapolates to some 1497.

[2] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf

[3] *Ibid*.

[4] Ad hoc statistical release: Legal Aid Exceptional Case Funding application and determination statistics - April 2013 to December 2013, Ministry of Justice Statistical release, 13 March 2014.

An application for exceptional funding involves completing three forms[5]: the usual "means" and "merits" forums and the exceptional cases form[6] which runs to 14 pages plus an 11-page *Exceptional Cases Funding – Provider Information Pack*[7].

ILPA members in England and Wales comment:

> *"…we cannot afford to take the time to fill in the application- and client cannot afford to pay our fees for the drafting and submission of an exceptional funding application. Exceptional funding applications require time and legal knowledge. Clients do not have the necessary legal knowledge. Exceptional funding applications have to be done properly. …an exceptional funding application requires several hours of work. We cannot do them on a pro bono basis. …Our fees for making an exceptional funding application will not be much lower than the fees charged for a visa/leave to remain application. In view of the low rate of grant of exceptional funding applications why would a client run the risk of nearly doubling their costs (which will only be refunded if successful)?"*
>
> *"It takes me much longer than two hours to do an exceptional funding application, plus factor in the amount of time spent seeking a review"*
>
> *"…In our case we have done everything at risk* [while waiting for an exceptional funding decision] *including our client's substantive application; I could not allow a client to suffer delay especially when it is refugee family reunion or a really compelling Article 8 case"*
>
> *"... I have not attempted to make any applications for exceptional funding, as the whole process seems pointless, given how hard you have to work to make a successful application, and for so little reward, the fixed fee. It is not financially viable."*

The fee for an adult dependant relative is set at £2676. Among those trying to use this route will be British citizens and settled persons with adult relatives who are refugees, because the rules on refugee family reunion do not apply in cases of British and settled persons.

Fees for adults to naturalize as British citizen naturalisation fees for adults will increase to £1,156 and it will cost £936 to register a child as a British citizen, including in cases where the child has an entitlement to be so registered.

Expedition

Table six of the order makes provision for fees for expedited processing. It is already the case that premium service centres are offered by the Home Office and these generate considerable revenue for it. But what has developed is a twin track system where insufficient attention is paid to ensuring that "ordinary" applications are processed in a timely manner because those who are rich, or desperate, can pay for the premium service. The concern that more premium services will mean a second class service for everyone else is widespread, see for example "Immigration Fast Track plans a "Ryan Air" approach to raising cash" in The Telegraph on 13 November 2013: http://www.telegraph.co.uk/travel/travelnews/10446682/Immigration-fast-track-plans-a-Ryanair-approach-to-raising-cash.html

[5] Form CIV ECF 1.See http://www.justice.gov.uk/legal-aid/funding/exceptional-cases-funding
[6] Available at http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/ecf1.pdf
[7] Available at http://www.justice.gov.uk/downloads/legal-aid/funding-code/ecf-provider-pack.pdf

Many of the benefits associated with the fee for premium sponsors are no more than sponsors were promised at the outset of the Points-Based System. People pay premium fees for same day service at the Public Enquiry Office, or use the premium postal services, because if they do not then they have no idea how long it will take to deal with their applications

Accepting a claim other than at the Home Office

Provision is made for this in table 6. The Minister should be pressed on when it will be used. It is potentially an advantage to those at a distance from a Home Office office to be able to have their claim processed close to home but it would be regrettable if this led to Home Office operations being centralized so that when travel was necessary people from different parts of the country had to travel long distances. It is already the case that the Home Office centralizes the processing of applications for asylum in Croydon and for further submissions in Liverpool and that this acts as a deterrent to applications being made and entails impecunious applicants making arduous journeys that may put them at risk. Lawyers who wish their clients' asylum applications to be accepted, and the client to be "screened" other than in London have to
It is our intention to reduce taxpayer contributions towards the Border, Immigration and Citizenship system and ensure that by 2019-2020 the system is self-funded by those who access services. This intention was outlined in the Government's recent Spending Review.

The Home Office has given careful consideration to striking the right balance in revising fee levels. We must balance our aims of supporting growth in the UK through delivery of a visa system that attracts visitors to the UK and welcomes the 'brightest and best' migrants from around the world to do business and invest in the UK, whilst ensuring that those who directly benefit from accessing services within the system make an appropriate contribution to the costs.

Premium rate telephone lines

New premium rate phone lines for status checks are proposed. MPs should ask what these are for. Are they for employers? For landlords and landladies?

Premium rate telephone lines would be a further incentive for landlords and landladies to stick with tenants with British passports. The Minister, the Rt Hon James Brokenshire MP, suggested that the Home Office evaluation of the operation of the right to rent scheme in the West Midlands found "no hard evidence of discrimination[8], but it is unclear what he meant by "hard". The report states that 'verbatim comments… suggest that there were a small number of instances of potentially discriminatory behaviour'. These results are largely based on a mystery shopper exercise which looked only at discrimination 'on the grounds of race'. The evaluation found that the Black and Minority Ethnic "mystery shoppers" were less likely to receive a prompt response, were asked to provide more information and received discriminatory comments even though overall they appeared to secure property. Landlords and landladies, agents and tenants, identified discrimination including a tenant refused when they had time-limited leave; preference for tenants where their 'right to rent' was easy to check; and preference for tenants with local accents or who did not appear to them foreign. The independent evaluation conducted by JCWI[9] found evidence of discrimination due to having a foreign accent or name, or not having a British passport. (for landlords and employers, presumably) are also to be introduced costing as much as £1.23 per minute.

[8]Home Office, *Evaluation of the Right to Rent Scheme: Full evaluation report of phase one*, October 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf

[9] http://www.jcwi.org.uk/blog/2015/09/03/right-rent-checks-result-discrimination-against-those-who-appear-%E2%80%98foreign%E2%80%99

The situation of persons seeking asylum deserves particular attention. It is not addressed in the response to the evaluation, although it was raised by Lord Avebury in the debates on the Bill that became the 2014 Act, and although ILPA has raised it repeatedly in formal responses and at meetings with the Home Office ever since. Lord Avebury explained the problem succinctly in 2014:

> ***Lord Avebury (LD):*** *.. Can my noble friend elucidate what provisions are being made for documents to be produced by those who are occupying rooms in private houses because they are not covered by the provisions of Schedule 3, to which he has referred? They deal only with the accommodation that is provided to most asylum seekers under the 1999 Act when they cannot afford to pay for accommodation of their own. However, there is still an important residual group of people who find space in private houses. They will need documentary proof that they are allowed to live in those houses and thus ensure that landlords are not breaching the conditions by taking them in.*[10]

The problem arises because the definitions in the Act work on the basis of having leave, whereas persons seeking asylum are on temporary admission. If the Bill is enacted, these persons would be classed as being on 'immigration bail'. They do not have leave to stay in the UK. Without leave, they would not have the 'right to rent'.

The Minister's reply in 2014 evidences that he did not understand the question, for he refers to "failed asylum seekers", not the cohort under discussion. He went on to say "the Home Office will provide the necessary documentation to show that they have a right to accommodation.[11]" But subsequently the Home Office declined to do this, citing concerns about the potential for fraud. Instead, it requires landlords and landladies to telephone the helpline. But why should they do this? They have been told a person needs leave to have a right to rent; the person before them does not have such a right. If I do not turn up with my British citizen passport (and photocopies of same) in my hand, there is a strong chance I shall not get offered the property. But even if I overcome this, why should the landlady/landlord pick up the helpline when all the available evidence is not ambiguous but points clearly to my not having a right to rent? Premium rate charges are a further disincentive.

The all clear from the helpline, without a clear rationale to back it up being explained to the landlord/landlady and at odds with what is said in the guidance (which will all point to the person's not having a right to rent) is unlikely to reassure a landlord/landlady. The duration of the right to rent for example will be unclear, there will be worries that the reply is an error; in short it will look too risky to take the person on as a tenant.

The Government communication about the new fees describes

> "*Up to 25% increases for settlement and nationality fees. These products deliver the most benefits to successful applicants, for example indefinite leave to remain in the UK, full access to free healthcare and other public services, and unrestricted access to the labour market.* "

This appears to treat citizenship and naturalization as products to be bought and sold in the market. While the most obvious manifestations of this are economic citizenship packages, such as the controversial scheme launched in Malta, a visa such as the Tier 1 (Investor) visa in the UK

[10] 12 March 2015, col 1800.
[11] *Ibid.*

is increasingly perceived by potential applicants as part of a "citizenship package", with the UK "offer," despite its residence requirement, comparing favourably to the Maltese "offer."

Quality

The Home Office publicity says

> ***Improving our services***
> *We have significantly improved the range and quality of services to meet the needs of applicants and partners, both in the UK and overseas. This work will continue as we look to develop additional services that improve the customer experience.*
> *Already 95% of visit visa applications are decided within 15 working days and we are extending the range of premium services offering an even faster and more flexible service. Our Premium Service Centre opening hours have been extended and we offer a personalised account management service for sponsors. We have also recently achieved customer excellence accreditation right across UK Visas and Immigration.*
>
> *All of this will continue as we seek to improve and develop our services, ensuring our offering is both competitive with other countries and attractive to customers.*

We suggest that this is rather sanguine. The success rates on appeal, set out above, illustrate that the basic criterion on which UK Visas and Immigration will be judged, that of the quality of its decision making, is one where it will be found wanting.

To delay must be added unpredictability: when an application is sent to the Home Office it is not possible to feel confident of when it will be returned.

Communication is not good enough. Precious documents may be sent back in second class post rather than by a secure method of delivery, unless the applicant encloses pre-paid recorded delivery postage. Despite repeated acknowledgement to ILPA and to the Law Society that there is a problem in this regard, the Home Office continues to get in touch with clients directly or post documents to them and not to the legal representative they have nominated to receive correspondence and documents. Applicants are paying high fees; they should receive a commensurate standard of service.

Not only should there be a refund or partial refund when the Home Office does not meet its publicised service standards, but the fee should be set with regard to the level of service being provided. In particular:

- Timely processing of applications
- Essential documents such as passports being returned promptly.
- Certainty and predictability in timescales
- Clear information
- Communication with a legal representative where a matter appears unclear or where additional information is needed.
- An ability to obtain information on the progress of a case
- Rapid response to enquiries.
- The ability to travel while an application is pending.

Fees where an application is withdrawn pre appeal

The Home Office should use this opportunity to make provision to refund appeal fees when it withdraws a refusal decision before the case goes to an appeal before an immigration judge. Since 19 December 2011, fees have been payable when certain immigration appeals are lodged. If an immigration judge allows the appeal, he or she may make an award to refund all or part of the appeal fee paid.
The President of the Tribunal has issued guidance to immigration judges on deciding on fee awards. This includes:

> *"If an appellant has been obliged to appeal to establish their claim, which could and should have been accepted by the decision-maker, then the appellant should be able to recover the whole fee they paid to bring the appeal."*

This guidance has been followed, and the practice has generally been that when an appeal is allowed because of new evidence submitted after the refusal, or to the judge, the fee will not be refunded, or only be partially refunded.

The refund is made by HM Courts and Tribunals Service, as this is the body to which the fee was paid, but HM Courts and Tribunals Service recoups the money monthly from the Home Office. The Fees Order makes no provision for refunds when the immigration decision appealed against is withdrawn and the case never goes to hearing. Lord Avebury raised this omission in the debate on the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 in the House of Lords on 12 October 2011[12]

> *"Where the UKBA decides to revoke the decision that it has made before the appeal has been heard, presumably on the basis that it cannot justify the refusal, it would be manifestly unfair not to refund the fee that has been paid, and in any case the administrative costs in these cases must be even less than in the cases that are determined on paper alone."*

The Lord McNally's response did not fully address this issue:

> *"...the order provides that the tribunal may instruct UKBA to refund the fees of successful appellants, thus ensuring that they do not have to pay to correct the errors of the agency. That in itself will incentivise the agency to improve its initial decision-making - I take the point made by my noble friend Lord Avebury about that - and will reduce the rate of successful appeals to the tribunal."*

The Home Office has consistently refused to refund appeal fees in cases where it has concluded, without the case going before the Tribunal, that its decision is wrong. Official correspondence has set out[13] the view that

> *"…fee awards are not payable when a decision is withdrawn. If a decision is taken to withdraw a case, it is not an acknowledgement that the case could and should have been accepted by the initial decision-maker. It does not follow that the initial decision was incorrect. Decisions may well have been taken correctly at the time of the original decision but been rendered unsustainable because new information has been received which was not available to the original decision maker. In situations where new evidence has been made available by the*

[12] HL Deb 12 October 2011, cols. 1796 - 1808.
[13] E.g. in a letter to Fiona Mactaggart MP of 2 October 2013.

applicant, it is appropriate to withdraw the case so as to avoid the unnecessary public expense. It is for these reasons that it would not be reasonable for us to adopt a policy of refunding fees where a decision has been withdrawn."

When the appellant or sponsor provides new information later, this refusal to refund the fee may be justified. But when the grounds of appeal reiterate the information and evidence which was submitted with the application but not properly considered or understood, it is not. An example is that of a wife who was refused entry clearance because she had provided evidence of her English language exams showing that she had passed the relevant listening and speaking and reading tests but not the writing test. Reading and writing were not required under the rules and she had achieved more than was required by the rules. She was refused because she had failed the writing test. After she lodged an appeal, and following repeated representations from her legal representatives, the entry clearance manager realised the mistake and withdrew the refusal. But the Home Office has refused a refund of the fee because the case had not gone before an immigration judge.

Currency conversion

Applicants paying online or overseas should always have the option of paying in sterling or in the local currency. We have raised with the Home Office that it all too frequently fails to update currency conversions. We tracked these for a period in 2010 and 2011 and demonstrated that rates were changed more rapidly when this was to the advantage of the Home Office, and less frequently when this was to the advantage of applicants. We received the following reply:

Visa fees are payable in local currency. The principles for conversion are set by the Consular Fee Regulations (1981) which allow for the rate of exchange to be adjusted in the interests of administrative efficiency. This is mainly to avoid frequent changes in fees, and to help in giving change, and is the agreed way of translating fees set in sterling by Parliament into local currency. The Consular Rate of Exchange is based on the Foreign & Commonwealth Office's Corporate Exchange Rate, from which it may vary by up to 10%, and it is kept under regular review to ensure that it stays within the required range.

As we roll out online payments more generally we will review whether this is still an appropriate policy

We urge MPs to ask UK Visas and Immigration to produce a table showing when it altered exchange rates for different currencies, comparing these dates with the changes in the baseline exchange rate, whether the Foreign and Commonwealth's Corporate Exchange Rate or any dates that has come to supplant it.