

**EXPLANATORY MEMORANDUM TO**  
**THE EDUCATION (STUDENT FEES, AWARDS AND SUPPORT) (AMENDMENT)**  
**REGULATIONS 2016**

**2016 No. 584**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills (BIS) 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 This instrument creates a new eligibility category to enable certain students to qualify for student support for tuition, living and other costs where applicable, by amending the Education (Student Support) Regulations 2011 (S.I. 2011/1986) which set out the basis upon which financial support for students in Higher Education is provided and the Further Education Loans Regulations 2012 (S.I. 2012/1818) which set out the requirements for students eligible for support for tuition costs for taking designated further education courses. This instrument will also entitle persons who meet the new eligibility category to home fee status under the Education (Fees and Awards) (England) Regulations 2007 (S.I. 2007/779). Further, they will be able to benefit from fee controls under the Student Fees (Qualifying Courses and Persons) (England) Regulations 2007 (S.I. 2007/778).

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 This instrument corrects an error from earlier regulations. In accordance with SIP paragraph 3.4.13, the Department has discussed whether to use the free issue procedure with the SI Registrar. The SI Registrar has advised that the free issue procedure should be applied in the interests of transparency. The Department has decided to follow this advice.

*Other matters of interest to the House of Commons*

- 3.2 This entire instrument applies only to England.
- 3.3 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

**4. Legislative Context**

- 4.1 The Supreme Court judgment in the case of R (Beaurish Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57, given on 29 July 2015, declared that it was unlawful to refuse Ms Tigere a student loan solely on the basis that she was not settled in the United Kingdom. She had been granted discretionary leave to

remain outside the Immigration Rules on the basis of an established family life. The Court's judgment effectively required the Secretary of State to consider adopting a more tailored criteria for eligibility for student support which would avoid breaching the European Convention of Human Rights of other applicants in a similar situation to Ms Tigere. Following this judgment Ms Tigere has been able to access student support for the academic year 2015/16.

- 4.2 This instrument amends the Education (Student Support) Regulations 2011 (S.I. 2011/1986) which set out the basis upon which financial support for students in Higher Education is provided. Such regulations provide support to eligible students in connection with their undertaking designated higher education courses. Specifically, these regulations define the categories of eligible students who qualify for support.
- 4.3 This instrument also amends a number of regulations to ensure the new eligibility category is replicated across the series of statutory instruments that impact on students accessing higher and further education. These include the Education (Fees and Awards) (England) Regulations 2007 (S.I. 2007/779) to enable this new category of persons to be entitled to home fee status; the Student Fees (Qualifying Courses and Persons) (England) Regulations 2007 (S.I. 2007/778) which recognises the students as qualifying persons who benefit from fee controls and the Further Education Loans Regulations 2012 (S.I. 2012/1818) which set out the requirements for students eligible for support for tuition costs for taking designated further education courses.
- 4.4 This instrument also introduces a new category of existing students to whom the Education (Student Support) (Amendment) Regulations 2016 (S.I. 2016/270), which introduced a 5 year ordinary residence requirement for access to living costs support for EU nationals, do not apply. These are students who would have met the previous 3 year ordinary residence requirement had they applied for support in relation to an academic year beginning before 1 August 2016.
- 4.5 This instrument also makes a correction to the typographical error in the first column of the table in the Schedule as it relates to regulation 77 of the Education (Student Support) Regulations 2011. What should appear as specific paragraph and sub-paragraph numbers of regulation 77 have instead been replaced by figures. This has been corrected by inserting the correct figures into regulation 77 of the Education (Student Support) Regulations 2011 (S.I. 2011/1986).

## **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England only.

## **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### *What is being done and why*

- 7.1 For a substantial period of time the Secretary of State has considered that the requirement that an individual be settled (that is, has no restriction on their leave or

stay in the UK in accordance with immigration law) is the most effective way for individuals to demonstrate a fundamental connection to the UK and to suggest that they are likely to remain here and make a long-term contribution to the UK economy and society.

- 7.2 Over the years it has been necessary to include within the definition of eligible students certain additional categories of persons including those with refugee status and those granted humanitarian protection in order to ensure that the UK is compliant with its international obligations. The categories also include EU Nationals, EEA migrant workers and those who have acquired a right of permanent residence.
- 7.3 On 29 July 2015 the Supreme Court issued a judgment in the case of *Beaurish Tigere (R (Beaurish Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57)*. This ruled that it would be unlawful to refuse Ms Tigere a student loan solely on the basis of her inability to meet the settled status criterion. Ms Tigere had entered the UK aged 6 and subsequently overstayed. Her immigration status was not formalised until she was 16 years old and had attended school here. She was granted discretionary leave to remain by the Home Office outside the Immigration Rules on the basis of an established family life. A consequence of the Court finding in Ms Tigere's favour is that the Secretary of State has been required to consider adopting a more tailored criterion for eligibility for student support which will avoid breaching the Convention rights of other similar applicants.
- 7.4 On 16 September 2015 the Department published an interim policy for handling applications from children and young people in a similar position to Ms Tigere. Under this policy, students who, like Ms Tigere, did not have settled status but who had been in the UK for a long period of time could apply for student support. Individual cases have been considered against this interim policy.
- 7.5 The interim policy was adapted from Immigration Rule 276ADE(1) which recognises periods of long residence when the Home Office considers granting limited leave to remain. This was suggested by Lord Hughes when giving his judgment in *Tigere* in the Supreme Court as a possible template that might be adopted.
- 7.6 The Department consulted on the regulatory change and after careful consideration of the responses the Department decided that the new long residency eligibility criteria should be:
- Applicants under 18 years of age are required to have lived in the UK for at least 7 years preceding the first day of the first academic year of the course; and
  - Applicants aged 18 years and above are required to have either spent at least half their life in the UK or at least 20 years in the UK preceding the first day of the first academic year of the course.
- 7.7 Rules governing student support need to be clear and transparent so that individuals, institutions and the Student Loans Company can understand them and that they are easy to apply
- 7.8 Students will also need to satisfy the requirement for three years' ordinary lawful residence which has been in place since the 1960s, in line with most other applicants for student support. The Supreme Court in the *Tigere* case unanimously upheld the lawfulness of this requirement. It requires that an applicant for student support has been lawfully and ordinarily resident in the United Kingdom and Islands (Channel

Islands and Isle of Man) throughout the three-year period preceding the first day of the first academic year of the course.

- 7.9 This instrument will apply to students who are assessed for support on or after these Regulations come into force in relation to an academic year or a designated further education course beginning on or after 1<sup>st</sup> August 2016.
- 7.10 Data limitations mean it is not possible to provide robust figures of students who are likely to qualify for support as a result of the new eligibility criteria as there is no requirement to capture this information. Responses to the Consultation did not provide any statistical data on the numbers who were likely to qualify for student support.
- 7.11 We estimate that the changes could lead to an additional 2,400 claims for student support in the first year after the changes take effect. This estimate was derived from information on those people who had non-asylum discretionary leave to remain and had applied for student support in 2010/11. However, we do not have information on the length of time these individuals have been in the UK or their age. It is therefore not possible to determine exactly how many of these individuals would meet the criteria in the new rules.
- 7.12 From 2016/17, the average student loan outlay for each additional student eligible for student finance is estimated to be between £15,000 and £17,000 depending on the household income of the students. Students could also be eligible for an average of £300 of support for allowances such as the Disabled Students Allowance. An additional 2,400 students, as estimated, could lead to around £40m in loan outlay and £0.7m in allowances annually. In RAB terms, the annual costs for 2,400 students could be £10m.
- 7.13 This instrument also introduces a new category of existing students to whom the Education (Student Support) (Amendment) Regulations 2016 (S.I. 2016/270), which introduced a 5 year ordinary residence requirement for access to living costs support for EU nationals, do not apply. These are students who would have met the previous 3 year ordinary residence requirement had they applied for support in relation to an academic year beginning before 1 August 2016. For example, they may be students who did not apply for student support at the start of their course but their family and financial circumstances have now changed and they now seek support even though it is part way through their studies.

#### *Consolidation*

- 7.14 The Department is currently considering the feasibility of consolidating the relevant legislation.

### **8. Consultation outcome**

- 8.1 A public consultation on what regulatory changes may be required was published in December 2015 and closed in January 2016.
- 8.2 There were 136 responses to the consultation with the majority from individuals. There was general support for the proposal that a new long residency category should be introduced for young people aged 24 and under. There was also agreement that some sort of measure should be put in place to assess long residency but there was no consensus on what the measure should be. The alternative options proposed were wide ranging.

8.3 The consultation also asked whether we should extend support to those aged 25 and over who had lived in the UK for 20 years. Many respondents were concerned about the marked difference in treatment under the consultation proposals between those aged 24 or just under and those aged 25 years or just over. Consequently, the new category has adopted a single requirement for those aged 18 and over.

8.4 A Government Consultation Response and Equality Analysis covering this change was published on 26 April 2016 on Gov.uk, the link is <https://www.gov.uk/government/consultations/student-support-for-non-uk-nationals-who-have-lived-in-the-uk-for-a-long-time>

## **9. Guidance**

9.1 The Minister of State has announced the change in a Written Ministerial Statement to Parliament on 26 April 2016. The Government Consultation Response and Equality Analysis have been published alongside.

9.2 Information setting out these changes has been circulated to Higher Education representative bodies, Devolved Administrations and other HE stakeholders when the announcement was made.

9.3 Guidance materials are being produced by Student Finance England for students intending to apply for support in the academic year 2016/17.

## **10. Impact**

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation does not apply to activities that are undertaken by small businesses.

## **12. Monitoring & review**

12.1 The Regulations will be kept under review and in particular we will be monitoring the views of stakeholders. We will be monitoring the number of students who qualify for support under this new eligibility category.

## **13. Contact**

13.1 Glenna Pryor at the Department for Business, Innovation and Skills [Tel: 0114 207 5227](tel:01142075227) or email: [Glenna.pryor@bis.gsi.gov.uk](mailto:Glenna.pryor@bis.gsi.gov.uk) can answer queries regarding the instrument.