

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (PROVISION OF PHYSICAL DATA) (AMENDMENT) (EU EXIT) REGULATIONS 2018

2018 No. 928

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument makes provision for fingerprint and facial photograph biometrics to be enrolled and retained to support introduction of the UK's intended EU Settlement Scheme.
- 2.2 These measures would expand the types of immigration applications where the Secretary of State may require applicants to provide biometric information to include applications for leave to remain under Appendix EU to the Immigration Rules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Appendix EU to the Immigration Rules will provide a basis on which resident EU citizens and their family members, and the family members of certain British citizens, can apply for leave under UK immigration law. Where resident EU citizens and their family members are concerned, this will be in line with the draft Withdrawal Agreement with the European Union published on 19 March 2018.¹
- 3.2 A draft of Appendix EU was published on 21 June 2018 as part of a Statement of Intent on the EU Settlement Scheme.² This scheme will provide the mechanism for resident EU citizens and their family members, and the family members of certain British citizens, to apply on a voluntary basis for the UK immigration status which they will require to remain in the UK beyond the end of the planned post-exit implementation period on 31 December 2020. This is consistent with Articles 17 and 17a of the draft Withdrawal Agreement. Where such a person chooses to apply for leave to remain under Appendix EU, the changes made by these Regulations will require them to provide their biometric information.
- 3.3 The Government is laying this affirmative procedure measure now to permit time for debate. Appendix EU to the Immigration Rules will be laid before Parliament under section 3(2) of the Immigration Act 1971 so that it can take effect from the date on which these Regulations come into force. Once Appendix EU is in effect, it will be available at: <https://www.gov.uk/guidance/immigration-rules>.

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf

² <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>

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)

- 3.4 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.5 The powers under which this instrument is made cover the entire United Kingdom (see section 163(3) of the Nationality, Immigration and Asylum Act 2002) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is to the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is to the whole of the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Minister of State for Immigration has made the following statement regarding Human Rights:
- 5.2 “In my view the provisions of the Immigration (Provision Of Physical Data) (Amendment) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 These Regulations amend the Immigration (Provision of Physical Data) Regulations 2006 to expand the types of immigration applications where the Secretary of State may require applicants to provide biometric information to include applications for leave to remain under Appendix EU to the Immigration Rules.

7. Policy background

What is being done and why?

- 7.1 These Regulations will permit an authorised person to require biometric information to be supplied – by EU citizens, their family members, and the family members of certain British citizens³ – when such people apply for leave to remain under Appendix EU to the Immigration Rules. This will enable the Secretary of State to provide secure evidence of status, linked to biometric records, for people granted indefinite or limited leave to remain under Appendix EU. The Secretary of State may include other cohorts of foreign nationals within the scope of Appendix EU.
- 7.2 As with The Immigration (Provision of Physical Data) (Amendment) Regulations 2015, these Regulations are intended to improve levels of assurance about the identity of all people seeking to travel to and stay in the UK.
- 7.3 Biometric information taken under these Regulations for immigration and nationality purposes will be retained for as long as the Secretary of State thinks that it is necessary to retain that information for use in connection with the exercise of a function in relation to nationality, or by virtue of the Immigration Acts.

³ A family member who genuinely resided with the British citizen in another EU Member State while the British citizen was exercising free movement rights there before returning to the UK, and a family member of a dual British / EU citizen where the EU citizen exercised free movement rights in the UK before naturalising as a British citizen.

- 7.4 This means that fingerprints will normally be retained for up to 10 years, except in circumstances specified by the Immigration (Provision of Physical Data) Regulations 2006, for example, national security or someone who is subject to a Deportation Order.
- 7.5 If this instrument is approved, the Secretary of State intends that fingerprints will be required to be enrolled by non-EU citizen family members applying for leave to remain under Appendix EU, where they have not previously enrolled them for the purposes of being issued a biometric residence card under the Immigration (Provision of Physical Data) (Amendment) Regulations 2015.⁴
- 7.6 If this instrument is approved, the Secretary of State intends that facial photographs will be required to be enrolled by all those applying for leave to remain under Appendix EU, so that this can be compared with the photograph in their identity document to confirm that they are one and the same person.⁵ Facial photographs will be retained until the person obtained a British passport.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act. It relates to the withdrawal of the United Kingdom from the European Union because this instrument is intended to support implementation of the EU Settlement Scheme.

9. Consolidation

- 9.1 These Regulations contain provisions about the use and retention of biometric information in consequence of the Nationality, Immigration and Asylum Act 2002. We will give active consideration, once these changes can be implemented, to consolidation of all of the disparate immigration and nationality instruments regarding use and retention of biometric information.

10. Consultation outcome

- 10.1 The Home Office has not undertaken a full public consultation, but the policy has been discussed with its internal and external stakeholders, such as groups representing EU citizens in the UK, Consulates, the Department for Work and Pensions and similar organisations, and account has been taken of those discussions.

11. Guidance

- 11.1 We will publish guidance on the EU Settlement Scheme and continue to liaise with our partnership groups and organisations representing EU citizens and their family members through stakeholder events and communications and publications on Gov.UK.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is expected to be minimal as these Regulations only affect individuals.

⁴ See paragraph 4.10 of the Statement of Intent on the EU Settlement Scheme at footnote 2.

⁵ See paragraph 4.10 of the Statement of Intent on the EU Settlement Scheme at footnote 2.

12.2 The impact on the public sector is minimal as these Regulations only affect individuals.

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

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 Home Office will monitor the impact of these Regulations and the impact of the policy on EU citizens and family members.

15. Contact

15.1 John Allen at the Home Office Tel: 02070355551 or email: john.allen@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.

15.2 Alison Samedi at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt Hon Caroline Nokes MP, Minister of State for Immigration at the Home Office can confirm that this Explanatory Memorandum meets the required standard.