

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (AMENDMENT) (EU EXIT) REGULATIONS 2019
2019 No. 1383

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 The purpose of the instrument is to ensure that, in the event that the United Kingdom leaves the European Union without a deal, EU free movement law (which, for the time being, will be retained in UK law by the European Union (Withdrawal) Act 2018) will operate effectively. Most of the changes come into force on exit day.

2.2 The instrument addresses deficiencies that arise in retained EU free movement law from exit. It makes changes relating to:

- The documentation acceptable for entry to the UK;
- The grounds on which a decision can be made to restrict admission to or residence in the UK of a European Economic Area (EEA) citizen or their family member;
- The scope to acquire permanent residence in the UK under EU law; and
- The scope for UK nationals returning to the UK from an EEA Member State or Switzerland to be accompanied by their family members under EU law.

2.3 The changes affect EEA and Swiss citizens, and their family members. This Explanatory Memorandum uses ‘EEA citizens’ to refer also to Swiss citizens, except where stated otherwise.

Explanations

What did any relevant EU law do before exit day?

2.4 The UK’s legislation in relation to immigration reflects its membership of the EU. Parliament has already provided for the initial retention after a no deal exit of EU law in UK law, through the European Union (Withdrawal) Act 2018. It has also already made changes to a variety of domestic immigration, nationality and asylum law, which would otherwise become defective after exit, to ensure the continued effective functioning of the UK statute book. These changes are contained in the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (S.I. 2019/745).

Why is it being changed?

2.5 Once the UK leaves the EU, it will no longer be obliged to give effect to EU law or other obligations arising out of EU membership and, in particular in the sphere of immigration law, free movement in its current form will end. Until Parliament passes primary legislation to repeal the Immigration (European Economic Area) Regulations 2016, it has provided that much of the free movement framework will remain in place under the European Union (Withdrawal) Act 2018. In the meantime, further to the deficiencies already resolved by the Immigration, Nationality and Asylum (EU Exit)

Regulations 2019 (S.I. 2019/745), the Government will introduce some specific changes, through this instrument, to reflect the end of the mutual arrangements for free movement, to increase security and better protect the UK public.

What will it now do?

- 2.6 The instrument amends relevant legislation, to make changes that are appropriate once the UK leaves the EU. In particular, it makes changes to the Immigration (European Economic Area) Regulations 2016, pending the repeal of those regulations. It also makes certain savings provisions.
- 2.7 In particular, the instrument makes changes to apply the UK's rules on criminality, when considering the refusal of admission to, the deportation of, or the exclusion of an EEA citizen or their family member, in appropriate circumstances. It makes changes to restrict the documents that can be relied upon for the purposes of entering the UK: from 6 January 2020 or exit day, whichever is later, non-EEA national family members of EEA citizens¹ will no longer be able to rely on residence cards issued by another Member State, and EEA citizens and their family members will no longer be able to show 'by other means' (i.e. in the absence of specified documentation) that they are entitled to enter the UK under free movement arrangements. The instrument also prevents those EEA citizens moving to the UK after exit from acquiring permanent residence here under EU law and, for UK nationals moving to an EEA Member State after exit, ceases arrangements that currently allow UK nationals to return here after exercising Treaty rights in an EEA Member State and be accompanied by a family member without meeting the UK family Immigration Rules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the European Union (Withdrawal) Act 2018) 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 England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument is the same within England and Wales, Scotland and Northern Ireland as the enactments to which the provisions relate.

¹ This reference does not include Swiss citizens. The definition of "qualifying EEA State residence card" in the Immigration (European Economic Area) Regulations 2016 excludes Switzerland, as it does not issue Article 10 or 20 residence cards and the UK has no obligations to accept equivalent residence cards issued by Switzerland.

5. European Convention on Human Rights

- 5.1 Rt. Hon. Brandon Lewis MP, Minister of State for Security and Deputy for EU Exit and No Deal Preparation at the Home Office, has made the following statement regarding Human Rights:

“In my view the provisions of the Immigration (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Since the UK joined the EU, domestic law has given effect to the UK’s obligations in the field of immigration arising from membership of the EU. In addition, the UK has been subject to directly applicable EU law. When the UK leaves the EU, aspects of retained EU law in relation to free movement of people will fail to operate effectively and will contain deficiencies if they are not modified or revoked. This instrument is made under powers in the European Union (Withdrawal) Act 2018 to prevent, remedy or mitigate these deficiencies. The instrument makes changes that are appropriate to reflect the UK no longer being subject to EU law, including that free movement in its current form will end.

7. Policy background

What is being done and why?

- 7.1 In a no deal scenario, free movement as it currently stands under EU law will end when the UK leaves the EU. However, Parliament has provided that much of the free movement framework will remain in place under the European Union (Withdrawal) Act 2018 until Parliament passes primary legislation to repeal it. Ahead of that, the Government will introduce some appropriate changes, reflecting the fact that the UK is no longer part of the EU, to increase security and better protect the public. The instrument is being used to make these changes.
- 7.2 Most of the provisions in the instrument will commence on exit day in a no deal scenario or, in a deal scenario, from the end of the planned implementation period on 31 December 2020, as set out in the draft Withdrawal Agreement with the EU reached on 17 October 2019. The exception is that the amendments made by the instrument to the Immigration, Asylum and Nationality (EU Exit) Regulations 2019 will come into force immediately before exit day, because those Regulations will come into force on exit day and the intention is that they will come into force as amended by the instrument. The amendments made by regulation 2(5), (10) and (12) will come into force on 6 January 2020 or exit day, whichever is later.
- 7.3 The Government has today also laid before Parliament a Statement of Changes to the Immigration Rules (HC 170). After a no deal exit, these changes will establish, in Appendix EU to the Immigration Rules, the European Temporary Leave to Remain Scheme. This will enable EEA citizens moving to the UK after exit, and before the implementation from January 2021 of the new points-based immigration system, to obtain a temporary UK immigration status (36 months’ limited leave to remain) allowing them to remain in the UK after the end of 2020 once the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) have been repealed.
- 7.4 The instrument makes the following particular changes:

UK nationals returning to the UK after exercising Treaty rights

- For those UK nationals moving to an EEA Member State after exit, it is appropriate that the current arrangements for UK nationals returning here after exercising Treaty rights in the EEA to be accompanied by an EEA or non-EEA citizen family member under EU law will no longer apply.
- Regulation 2(4) removes the right of UK nationals moving to an EEA Member State after exit and later returning to the UK to be accompanied here by their non-British family members without meeting the UK's family Immigration Rules, as they can now after exercising Treaty rights in another EEA Member State. Regulation 4 provides that this will not affect the position of those who qualified under this route before this change comes into effect, nor does it affect the ability for UK nationals residing in an EEA Member State at exit to be accompanied here by their family members on the current basis, where the relationship existed at the point the UK national returns. This means that UK nationals residing in an EEA Member State at exit will continue to be able to return to the UK with their family members, as set out in the policy paper published on 4 April 2019² and reflected in Appendix EU to the Immigration Rules from 1 October 2019. It will also not affect Irish citizen family members, who have the right to reside in the UK under Common Travel Area arrangements. Where a UK national moves to an EEA Member State after exit, their family members who resided there with them will be able to return to the UK with them where they meet the UK's family Immigration Rules.

Admission to the UK – documentary evidence

- After exit in a no deal scenario, it is appropriate that non-EEA family members of EEA citizens seeking to enter the UK on the basis of that relationship have documentation issued by the UK. The instrument makes changes to that effect, which are intended to increase security at the border and which will take effect on the later of 6 January 2020 or exit day.
- Regulation 2(5) removes the scope for non-EEA national family members of EEA citizens³ to enter the UK on the basis of a qualifying EEA State residence card. This is a residence card issued under article 10 or article 20 of the Free Movement Directive (2004/38/EC). It is issued to a non-EEA national family member of an EEA citizen living in an EEA Member State other than that of their nationality. Non-EEA national family members accompanying or joining EEA citizens will need to cross the UK border with a valid passport and a valid UK-issued EEA family permit or biometric residence card or biometric residence permit.
- Regulation 2(5) also removes the part of the 2016 Regulations which currently requires Border Force officers, where a person seeks admission without the relevant document, (i) to provide every reasonable opportunity for the relevant document to be obtained by, or brought to, the person, and (ii) to permit EEA citizens and their family members to prove “by other means” that they are entitled to enter the UK under free movement arrangements. This would be by means other than an EEA passport or national identity card or, in the case of

² <https://www.gov.uk/government/publications/policy-paper-on-the-rights-of-uk-nationals-in-the-eu>

³ This reference does not include Swiss citizens. The definition of “qualifying EEA State residence card” in the Immigration (European Economic Area) Regulations 2016 excludes Switzerland, as it does not issue Article 10 or 20 residence cards and the UK has no obligations to accept equivalent residence cards issued by Switzerland.

family members, a valid passport and a valid EEA family permit or biometric residence card or permit. After commencement of Regulation 2(5), (10) and (12) on the later of 6 January 2020 or exit day, EEA citizens and their family members will not ordinarily be admitted to the UK without such documentation. Separately, the Government intends to phase out the use of EEA national identity cards for the purposes of entering the UK. This will be implemented in separate legislation and is not part of the measures contained within the instrument.

- Regulation 2(12) and 2(13) make technical, consequential changes to reflect these amendments and the omission of regulation 9 (Family members of British citizens) of the 2016 Regulations.

Acquiring permanent residence in the UK under EU law

- Regulation 2(6) makes changes relating to the scope for EEA citizens, and their family members, to acquire permanent residence under the 2016 Regulations. The effect of the amendments is that those moving to the UK after exit will not be able to acquire permanent residence under EU law.
- Those who had the requisite continuity of residence in the UK immediately before exit, but were outside the UK on exit day, and their family members, and those who have immigration status under the EU Settlement Scheme, will continue to be able to acquire permanent residence under the 2016 Regulations.

Refusal of admission, deportation or exclusion on conducive grounds

- It is appropriate that once we leave the EU, we better protect the public by applying UK law in decisions to refuse admission to the UK to, and consideration of deportation and exclusion of, EEA citizens and their family members.
- Regulation 2(9) makes changes to the effect that, from commencement of this instrument, the tougher UK rules on criminality for refusal of admission, deportation and exclusion (on the grounds the decision is conducive to the public good) will apply instead of the EU test of public policy or public security in respect of EEA citizens and their family members, in appropriate circumstances. Regulation 3 of the instrument reflects this change in the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 in relation to the rights of Turkish nationals derived from the European Community Association Agreement⁴ (“the ECAA”).
- The UK test may be applied to all conduct (pre- and post-exit conduct) of those EEA citizens moving to the UK after exit. In respect of EU citizens resident in the UK before exit and their family members, those who have immigration status under the EU Settlement Scheme, and Turkish workers and their family members with leave here under the ECAA before exit, the UK criminality test will only be applied to pre-exit conduct where the individual has been convicted of an offence that relates to post-exit conduct and results in a sentence of imprisonment.
- Citizens of other EEA countries (Iceland, Liechtenstein and Norway) and Switzerland resident in the UK before exit, and their family members, are

⁴ The Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963.

covered by the reciprocal citizens' rights agreements the UK has signed with those countries. Those agreements provide that, regardless of whether the UK leaves the EU with or without a deal, pre-exit conduct will be considered only against the EU test of public policy or public security.

Other

- Regulation 2(2) amends the 2016 Regulations to insert a definition of residence scheme immigration rules. Those rules relate to the EU Settlement Scheme, which enables EEA citizens resident in the UK before exit in a no deal scenario, and by 31 December 2020 in a deal scenario, and their family members, to apply for UK immigration status. The definition is required here in connection with the changes made in relation to acquisition of permanent residence and the application of the UK rules on criminality explained above.
- Regulation 2(8) amends the 2016 Regulations to remove the prohibition on 'systematic verification' of a right to reside in the UK under free movement rules, which currently prevents the verification of such a right to reside on a systematic basis as opposed to on an individual, case-by-case basis when there is good reason to do so (for example by Immigration Enforcement officers). It is appropriate to remove this prohibition when we leave the EU, including because such a prohibition may impede the scope to check the basis on which EEA citizens and their family members are resident in the UK and, where appropriate, assist them in applying for appropriate UK immigration status, which they will require in order to remain here after the end of 2020 once the 2016 Regulations have been revoked.

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

- 8.1 The instrument is being made using the powers in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively after exit. The instrument is also made under paragraph 21 of Schedule 7 to that Act. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 It is not intended to consolidate the various primary and subordinate legislation amended by the instrument.

10. Consultation outcome

- 10.1 A public consultation has not been conducted in the preparation of the instrument, given that it contains measures taken urgently in preparation for the possibility of the UK's departure from the EU on 31 October 2019 without a deal.

11. Guidance

- 11.1 Guidance issued to Home Office officials will be revised to reflect the measures contained within the instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There may be an impact on the Home Office in the implementation and administration of these changes, but the scale of this impact is uncertain.

12.3 An Impact Assessment has not been prepared for the instrument because no significant impact on business is expected.

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 impact of the changes made by the instrument will be monitored internally by the Home Office.

14.2 As the instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Fiona Cameron at the Home Office, telephone: 0207 035 8599 or email: Fiona.cameron@homeoffice.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Nicola Smith at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt. Hon Brandon Lewis MP, the Minister of State for Security and Deputy for EU Exit and No Deal Preparation at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees.
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 Rt. Hon. Brandon Lewis MP, Minister of State for Security and Deputy for EU Exit and No Deal Preparation, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Immigration (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 1.2 This is the case because the instrument makes changes to reflect that the UK is no longer a Member State of the EU and is therefore no longer subject to EU law.

2. Good reasons

- 2.1 Rt. Hon. Brandon Lewis MP, Minister of State for Security and Deputy for EU Exit and No Deal Preparation, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 This is because the amendments made by this instrument are appropriate to reflect that, on exit, the UK is no longer a Member State of the EU and is therefore no longer bound by EU law. The instrument makes important changes in the interests of public safety and border security.

3. Equalities

- 3.1 Rt. Hon. Brandon Lewis MP, Minister of State for Security and Deputy for EU Exit and No Deal Preparation, has made the following statement:

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

- 3.2 The Minister of State for Security, the Rt Hon Brandon Lewis MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, the Minister of State for Security, the Rt Hon Brandon Lewis MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.

5. Urgency

5.1 Rt. Hon. Brandon Lewis MP, Minister of State for Security and Deputy for EU Exit and No Deal Preparation, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view by reason of urgency, it is necessary to make the Immigration (Amendment) (EU Exit) Regulations 2019, without a draft of the instrument containing the regulations being laid before, and approved by a resolution of, each House of Parliament.”

5.2 This is because the measures to reflect the UK’s withdrawal from the EU must be made on exit day, and include important changes in the interests of public safety.