

**EXPLANATORY MEMORANDUM TO**  
**THE IMMIGRATION (EUROPEAN ECONOMIC AREA NATIONALS) (EU EXIT)**  
**REGULATIONS 2019**

**2019 No. 468**

**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 negative procedure measure amends secondary legislation, concerning the immigration of European Economic Area (EEA) nationals, to reflect arrangements required to cater for the United Kingdom's withdrawal from the European Union, whether on the basis of, or in the absence of, a withdrawal agreement with the EU.
- 2.2 In particular, the changes made by this measure reflect the EU law rights in the UK of EEA nationals and their family members until free movement is brought to an end, and reflect the operation of the EU Settlement Scheme, which enables them to obtain the UK immigration status which they will require in order to remain here thereafter. This explanatory memorandum refers to 'EEA nationals' to mean EU citizens and citizens of the other EEA countries (Iceland, Liechtenstein and Norway) and of Switzerland.

**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.

**4. Extent and Territorial Application**

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

**5. European Convention on Human Rights**

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

**6. Legislative Context**

- 6.1 The Regulations are made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972, section 109 of the Nationality, Immigration and Asylum Act 2002 and those conferred by section 9(2) and (6) of the Immigration Act 1971.

- 6.2 The Regulations amend the Immigration (Control of Entry through Republic of Ireland) Order 1972, which governs entry to the United Kingdom from Ireland, including where an individual does so having come from a place outside the Common Travel Area.
- 6.3 The Regulations also amend the Immigration (European Economic Area) Regulations 2016, which set out the rights of the beneficiaries of Directive 2004/38/EC and the EU Treaties resident in the UK while EU law on free movement of persons continues to operate, and the documentation which may be issued to these individuals.

## 7. Policy background

### *What is being done and why?*

- 7.1 The EU Settlement Scheme enables EU citizens who are resident in the UK by 31 December 2020 in a ‘deal’ scenario (or by 29 March 2019 in a ‘no deal’ scenario), and their family members, to obtain UK immigration status, which they will require in order to remain in the UK once free movement ends. This instrument makes changes required to reflect the operation of the scheme and to reflect the EU law rights in the UK of EEA nationals and their family members until free movement is brought to an end.
- 7.2 The measures relate to:
- entry to the UK from Ireland;
  - extended family members, including in light of the judgment of the Court of Justice of the European Union (“CJEU”) in the case of *Banger* (C-89/17) ; and
  - ensuring that immigration status granted under the EU Settlement Scheme does not affect a person’s right to reside in the UK, where this is derived from wider EU law rather than from the Free Movement Directive (2004/38/EC).
- 7.3 People from countries outside the Common Travel Area, who enter the UK from the Republic of Ireland, currently have permission to enter for a defined period without the right to work (article 4 of the Control of Entry through Republic of Ireland Order 1972; “the 1972 Order”). Regulation 2 in this instrument amends the 1972 Order such that it does not apply to EEA nationals or their family members who have been granted, or may be granted, immigration leave under the EU Settlement Scheme.
- 7.4 In addition, the 1972 Order is amended to the effect that an individual who is excluded under international obligations is not entitled to enter the UK from Ireland without leave under Common Travel Area legislation.
- 7.5 Regulation 3 concerns the rights of appeal for extended family members of EEA nationals. It amends the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”). It does this by making provision for a right of appeal against a decision to refuse to issue an EEA family permit (under regulation 12(4)), a registration certificate (under regulation 17(5)) or a residence card (under regulation 18(4)) to an extended family member of an EEA national.<sup>1</sup> Extended family members previously had a right of appeal under the Immigration (European Economic Area) Regulations 2006. The 2016 Regulations did not give extended family members a

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<sup>1</sup> An ‘extended family member’, under regulation 8 of the 2016 Regulations, is a durable partner of an EEA national, or a relative of an EEA national (but not a ‘family member’, e.g. spouse, child, parent, as defined by regulation 7) who is their dependant, is a member of their household or strictly requires their personal care on serious health grounds.

right of appeal owing to the reasoning in the Upper Tribunal’s 2016 decision in *Sala* (EFMs: Right of Appeal: Albania) [2016] UKUT 411 (IAC), which was later overturned by *Khan v Secretary of State for the Home Department & Anor* [2017] EWCA Civ 1755 and *SM (Algeria) v Entry Clearance Officer, UK Visa Section* [2018] UKSC 9.

- 7.6 Regulation 3 also amends regulations 7 and 9 to implement the CJEU judgment in the case of *Banger* and allow extended family members, who meet certain conditions, to benefit from the CJEU ruling in the case of *Surinder Singh* (C-370/90). The *Banger* judgment established that the extended family members of a British citizen had the right to enter and reside in the UK when accompanying that British citizen returning to the UK after exercising treaty rights in another Member State, in the same way as other family members, such as a spouse or child, under the *Surinder Singh* ruling.
- 7.7 A person who does not qualify for a right of residence under the Free Movement Directive 2004/38/EC (“the Directive”) may qualify, as under *Banger* and *Surinder Singh*, for another right of residence under EU law. These are known as ‘derivative rights’ as they are derived directly from wider EU law rather than the Directive.
- 7.8 Regulation 3 provides scope for individuals with a ‘derivative right’ to reside in the UK under regulation 16 of the 2016 Regulations to be granted leave under the EU Settlement Scheme without losing their derivative right to reside. This is to ensure compliance with the draft Withdrawal Agreement with the European Union, which requires an individual’s EU law rights to run parallel to any scheme leave during the planned implementation period from exit to 31 December 2020.
- 7.9 Regulation 4 makes transitional provisions to the effect that, for any decision taken on or after the measures come into force, the amendments to requirements under the 2016 Regulations in relation to whether a person is a family member or extended family member are to be treated as being in force at all times relevant to that decision.

## **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 2018, but relates to the withdrawal of the United Kingdom from the European Union, because it supports the operation of the EU Settlement Scheme.

## **9. Consolidation**

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

## **10. Consultation outcome**

- 10.1 The Home Office has not undertaken a public consultation on these measures, which relate to the rights of those granted leave under the EU Settlement Scheme. However, on 21 June 2018 the Government published a Statement of Intent on the scheme and has since undertaken engagement with internal and external stakeholders, such as groups representing EU citizens in the UK, Consulates and community organisations, and account has been taken of those discussions.

## **11. Guidance**

- 11.1 The Government has published guidance on the EU Settlement Scheme and on the operation of the Immigration (European Economic Area) Regulations 2016, and will update this in line with the implementation of this instrument. The Government will continue to liaise with 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 There is no impact on business, charities or voluntary bodies. The provision allowing those who have or may be granted leave under the EU Settlement Scheme to enter the UK from Ireland maintains the status quo for the group to which it applies (who currently enter under free movement) and is therefore not expected to have any direct impact.
- 12.2 The impact on the public sector is expected to be limited. The provision that re-introduces the right of appeal, against a decision to refuse residence documentation, for extended family members of EEA nationals, will lead to an increase in the number of appeal cases. This effect may, however, displace other litigation, in the form of judicial review. Due to limited data availability it has not been possible to estimate the magnitude of this impact, albeit, it is expected to be limited.
- 12.3 In light of the above, an Impact Assessment has not been prepared for this instrument.

## **13. Regulating small business**

- 13.1 The legislation will have no, or no significant, impact on the regulation of small businesses.

## **14. Monitoring & review**

- 14.1 The operation of the EU Settlement Scheme and the impact of the changes made by this instrument will be monitored by the Home Office and kept under review.

## **15. Contact**

- 15.1 Fiona Cameron at the Home Office Telephone: 0207 035 8599 or email: [Fiona.cameron@homeoffice.gov.uk](mailto: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. Caroline Nokes MP, Minister of State for Immigration at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.