

**EXPLANATORY MEMORANDUM TO**

**THE IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) ACT 2020 (CONSEQUENTIAL, SAVING, TRANSITIONAL AND TRANSITORY PROVISIONS) (EU EXIT) REGULATIONS 2020**

**2020 No. 1309**

**1. Introduction**

- 1.1 This Explanatory Memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This Explanatory Memorandum refers to “EEA citizens” to mean citizens of the European Union (EU) countries and of other constituent countries of the European Economic Area (EEA) (Iceland, Liechtenstein and Norway) and of Switzerland.

**2. Purpose of the instrument**

- 2.1 The purpose of the instrument is to amend a range of domestic primary and secondary legislation as a consequence of, or in connection with, measures in Part 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 that repeals free movement law at the end of the transition period on 31 December 2020, and makes provision for the protection of Irish citizens. The legislation being amended relates to immigration, nationality and benefits and services. The effect is broadly to align EEA citizens with non-EEA citizens in the UK’s immigration system while making protections for Irish citizens and for EEA citizens and their family members granted status under the EU Settlement Scheme.

**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 8 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020) 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 England and Wales, Scotland and Northern Ireland.
- 4.3 In addition, by virtue of section 8(5) of the Act, the amendments to the British Nationality Act 1981 extend to the Crown Dependencies and the British Overseas Territories.

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

- 5.1 Kevin Foster MP, Minister for Future Borders and Immigration at the Home Office, has made the following statement regarding Human Rights:

“In my view the provisions of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

## **6. Legislative Context**

- 6.1 Parliament has passed the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (“the Act”) and EU free movement in the UK will end at 11pm on 31 December 2020. Part 1 of the Act repeals the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”), which give effect to the UK’s obligations in the field of immigration arising from its earlier membership of the EU. Part 1 also makes provision for Irish citizens. Section 2 of the Act, which inserts new section 3ZA into the Immigration Act 1971, will come into force immediately before commencement of this instrument. This is relevant because provisions in this instrument making changes that are consequential on the new section 3ZA will therefore come into force once section 3ZA of the Immigration Act 1971 is already in force.
- 6.2 This instrument is made under the powers in sections 5 and 8(5) of the Act to make amendments as a consequence of, or in connection with, the provisions in Part 1 of the Act. This includes amendments to EU-derived legislation that has been retained by the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020 (“the Withdrawal Agreement Act 2020”) at the end of the transition period.
- 6.3 Once free movement has ended, newly arriving EEA citizens will be subject to the same UK immigration law as non-EEA citizens. They will need to meet the requirements of the new points-based immigration system set out in the Immigration Rules made under the Immigration Act 1971.
- 6.4 The Government has legislated through the Withdrawal Agreement Act 2020 to protect the rights of EEA citizens resident in the UK by the end of the transition period on 31 December 2020 and their family members. The Government has established the EU Settlement Scheme (“the EUSS”) in Appendix EU to the Immigration Rules to provide the means for them to obtain the UK immigration status they need to remain in the UK. This instrument provides further protections for those who have status under the EUSS and for Irish citizens.
- 6.5 This instrument should be read alongside the Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (“the grace period SI”), made under section 7 of the Withdrawal Agreement Act 2020.<sup>1</sup> The grace period SI saves temporarily the existing free movement rights held at the end of the transition period by those lawfully resident in the UK under EU free movement law who do not have status under the EUSS at that point. It saves those rights for the duration of the grace period (31 December 2020 to 30 June 2021) or, where an application to the EUSS is made by the deadline of 30 June 2021, until that application is finally determined.

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<sup>1</sup> <https://www.legislation.gov.uk/ukxi/2020/1209/contents/made>

## 7. Policy background

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

- 7.1 The end of free movement constitutes a significant change to UK immigration law. There are references to free movement and related matters across the UK statute book in both primary and secondary legislation, which will no longer function correctly or appropriately once free movement has ended.
- 7.2 This instrument amends primary and secondary legislation as a consequence of, or in connection with, the ending of free movement by Part 1 of the Act and the arrangements in Part 1 for the status of Irish citizens. The Regulations amend legislation in the areas of immigration and nationality, as well as in the areas of benefits and services and devolved matters where changes are required for an immigration purpose to reflect the end of free movement.
- 7.3 The instrument makes changes for the following four purposes:
- to align the treatment of EEA citizens who are not protected by the withdrawal agreements<sup>2</sup> and the UK's implementation of those agreements, with non-EEA citizens in the immigration system from 1 January 2021;
  - to make some savings and transitional provisions, including for those with status under the EUSS (in addition to those made by and under the Withdrawal Agreement Act 2020);
  - to amend provisions relating to retained EU law; and
  - to reflect the Act's provisions to protect the rights of Irish citizens.
- 7.4 Part 1 of the instrument includes provisions relating to its commencement and interpretation. The majority of the provisions will take effect when the EEA Regulations are revoked, with the following exceptions:
- Regulations 47 and 48 will come into force immediately before the EEA Regulations are revoked. This is because they omit provisions made as a contingency in the event of a no deal exit, which are no longer required. Regulation 49, which amends the grace period SI, also comes into force immediately before the EEA Regulations are revoked, so that the grace period SI comes into force as amended.
  - Regulations 20(7) and (8) will come into force on 1 December 2020. These provisions bring EEA citizens into scope of the immigration skills charge and commence when the skilled worker route opens under the points-based immigration system for those EEA citizens who arrive in the UK from 1 January 2021.
  - All the provisions that bring EEA citizens within the scope of the sham marriage and civil partnership referral and investigation scheme will come into force on 1 July 2021, after the end of the grace period and the deadline for applications to the EUSS.
- 7.5 Part 2 of the instrument contains amendments to immigration legislation. Chapter 1 contains amendments to primary legislation and chapter 2 contains amendments to secondary legislation. This includes the following:

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<sup>2</sup> The EU Withdrawal Agreement, the EEA European Free Trade Association Separation Agreement and the Swiss Citizens' Rights Agreement.

### Aligning newly arriving EEA citizens with non-EEA citizens

- The Aliens Employment Act 1955 is amended so that newly arriving EEA citizens from 1 January 2021 will no longer be eligible to work in the civil service on the basis of exercising free movement rights. The instrument protects those with status under the EUSS, those eligible to apply to the EUSS at the end of the transition period who have other immigration status and therefore do not need to apply, and Turkish citizens in specified circumstances under the EC Association Agreement with Turkey.
- The Immigration and Asylum Act 1999, section 115, is amended to align EEA citizens with non-EEA citizens by making them persons subject to immigration control for the purposes of accessing benefits. Those granted status under the EUSS will continue to be able to access benefits and services as they do now.<sup>3</sup>
- The Immigration Act 2014, section 70A, is amended to remove the exemption that EEA citizens have from the immigration skills charge. Irish citizens and those with status under the EUSS will continue to be exempt.
- A wide range of legislation is amended to apply the sham marriage and civil partnership referral and investigation scheme established under the Immigration Act 2014 to EEA citizens. Irish citizens and individuals with status under the EUSS (or who have a pending application under the EUSS submitted by the deadline of 30 June 2021) will continue to be exempt, in line with British citizens.

### Removing references to EU law and EU membership

- The Immigration Act 1971, section 25B, which sets out the offence of assisting unlawful immigration of a person subject to an exclusion or deportation order under the EEA Regulations, which will no longer apply, is omitted. Section 25, which sets out the offence of facilitating unlawful immigration to a member state of the EU, is amended to reflect that the UK is no longer a member state.
- The Immigration and Asylum Act 1999, section 82, and the Immigration and Asylum Act 1999 (Part V Exemption: Relevant Employers) Order 2003 are amended with regard to the regulation of immigration advice. The changes remove the current exemption for EEA citizens, since they will require leave in the same way as non-EEA citizens, and matters of EU law will no longer be relevant.
- The First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 and the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 setting out procedures and fees for immigration appeals, are amended to reflect that there will no longer be applications under EU law once free movement has ended in the UK. This amendment does not affect any appeal that has been brought in relation to a decision taken before this instrument comes into force or that may be brought in future by virtue of the EEA Regulations as they continue in effect in certain circumstances.
- Amendments to biometrics legislation reflect that documentation of an EU law right to reside contained in Part 3 of the EEA Regulations will no longer be

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<sup>3</sup> Including as a result of savings made in the grace period SI.

issued once free movement has ended, except where an application was made before the end of the transition period. The Immigration (Biometric Registration) Regulations 2008 are amended to ensure that EEA citizens and their family members who are granted status under the EUSS are exempt from the requirement to apply for a biometric immigration document.

- 7.6 Part 3 of the instrument contains amendments to legislation governing access to benefits and services, to reflect that EEA citizens will be persons subject to immigration control for these purposes as a result of changes to section 115 of the Immigration and Asylum Act 1999. This includes, where necessary, changes to devolved legislation which are required to reflect immigration changes. The relevant legislation is amended to remove references to EU legislation which will no longer have effect in the UK, and to make provision, where required, to ensure continued access to benefits and housing as now, for those with status under the EUSS and frontier workers protected under the withdrawal agreements.
- 7.7 Part 4 of the instrument contains amendments to nationality legislation. Chapter 1 contains amendments to primary legislation and chapter 2 contains amendments to secondary legislation:
- The British Nationality Act 1981 is amended to reflect the immigration status of Irish citizens as set out in the Act. The changes confirm that, for the purposes of specific elements of nationality law, an Irish citizen is not to be considered as being in the UK in breach of immigration law, but instead has qualifying immigration status by virtue of their rights under clause 3ZA of the Immigration Act 1971.
  - The British Nationality (General) Regulations 2003 are amended to reflect that documents confirming permanent residence in the UK under the EEA Regulations will no longer be required as part of a citizenship application, given the document relates to an EU right that will no longer exist. This will not affect applications made before commencement of the instrument.<sup>4</sup>
- 7.8 Part 5 and Schedule 2 make provision to ensure that applications under the European Community Association Agreement with Turkey (“the ECAA”) that are submitted before commencement of the instrument, and consideration of conduct committed before the end of the transition period, can continue to be considered in accordance with the ECAA.
- 7.9 Part 6 and Schedule 3 make savings provisions in relation to the EEA Regulations. The provisions continue the effect of deportation and exclusion orders made under the EEA Regulations and ensure applications made under the EEA Regulations before the end of the transition period can continue to be processed, including any related appeal.
- 7.10 Part 7 and Schedule 4 contain savings provisions in relation to access to benefits and services. The provisions ensure those with pre-settled status under the EUSS are treated in the same way after the end of the transition period as they are now for the

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<sup>4</sup> By virtue of savings in the grace period SI, it will also not affect the requirement for those who benefit from those savings to provide the document in an application made during the grace period. After the grace period, and during the grace period for those who are not covered by the grace period savings, those who had previously acquired permanent residence under EU law will continue to be able to use it alongside their EUSS status for the purpose of a nationality application, and where it would be beneficial to do so, but with no requirement to provide the document, unless they wish to.

purposes of accessing benefits and services. They also save relevant provisions of the Immigration Act 1988 and the Asylum and Immigration Act 1996 so that EEA citizens protected by the withdrawal agreements continue to be considered as ‘persons not subject to immigration control’ in the instances where they would previously have been eligible for the allocation of social housing and homelessness assistance.

- 7.11 Part 8 and Schedule 5 contain transitional and savings provisions, including with the effect that, unless the Secretary of State directs otherwise, an Irish citizen who is subject to an exclusion order immediately before the commencement of the instrument is to be treated as if the Secretary of State has issued exclusion directions in respect of them, under the new section 3ZA of the Immigration Act 1971. Provision is also made for transitional provision in relation to giving of notice of marriage or civil partnership.

## **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 but relates to the withdrawal of the United Kingdom from the European Union because it makes changes as a consequence of, or in connection with, the end of free movement as enacted by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. The instrument makes changes to a range of domestic primary and secondary legislation to reflect the end of EU free movement arrangements in the UK.

## **9. Consolidation**

- 9.1 This is a consequential instrument and consolidation is therefore not applicable. There is no intention to consolidate the instruments being amended.

## **10. Consultation outcome**

- 10.1 A public consultation has not been conducted in the preparation of the instrument, given that it contains measures required to reflect the end of free movement in domestic legislation. The Devolved Administrations were engaged in respect of the relevant provisions of the instrument.

## **11. Guidance**

- 11.1 Relevant existing guidance will be updated to reflect the changes made by this instrument. This will be done ahead of commencement of the relevant provisions.

## **12. Impact**

- 12.1 There are no significant impacts on business, charities or voluntary bodies. Relatively small impacts falling to these groups are discussed in the accompanying Impact Assessment.
- 12.2 There are relatively small impacts on the public sector. These are discussed in the accompanying Impact Assessment.
- 12.3 An Impact Assessment has been produced in respect of these regulations and has been published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.

#### **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is that this will be conducted internally by the Home Office.
- 14.2 The instrument does not include a statutory review clause because the changes are required to ensure coherence of domestic legislation following the end of free movement.

#### **15. Contact**

- 15.1 Fiona Cameron at the Home Office, telephone: 07551 674926 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 Kevin Foster MP at the Home Office can confirm that this Explanatory Memorandum meets the required standard.