

## EXPLANATORY MEMORANDUM TO

### THE IMMIGRATION (CITIZENS' RIGHTS ETC) (EU EXIT) REGULATIONS 2020

2020 No. 1372

#### 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 Switzerland.

#### 2. Purpose of the instrument

- 2.1 This instrument comes into force, with the exception of regulation 7, on 31 December 2020. It gives effect to aspects of the EU Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement (“the agreements”). For those seeking to enter the UK for a planned course of healthcare, it provides a statutory right of appeal and more flexible statutory permission to enter (“deemed leave”) provisions when entering via Ireland. It also adds additional cohorts to provisions that restrict eligibility for statutory permission to enter in certain circumstances, and it aligns some conditions of entry via Ireland with those for direct entry to the UK from a country outside the Common Travel Area.
- 2.2 In addition, the instrument amends various regulations in relation to access to benefits, services and support for holders of an EU Settlement Scheme family permit and EU citizens who apply for asylum in the UK. It also makes a technical change to regulations for frontier workers under the agreements to maintain retained worker status.

#### 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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

#### 4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is the whole 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 Government has legislated through the European Union (Withdrawal Agreement) Act 2020 to protect those EEA citizens and their family members who are subject to the agreements and the UK's implementation of the agreements. The EU Settlement Scheme (EUSS) has been established in Appendix EU to the Immigration Rules to provide a means by which they may obtain the UK immigration status they need to remain in the UK. Appendix EU (Family Permit) provides a family permit for relevant family members to accompany or join EEA citizens with status under the EUSS.
- 6.2 In accordance with the agreements, the Government has also established a planned healthcare route to the UK in Appendix S2 Healthcare Visitor to the Immigration Rules. This enables those who have applied for a planned course of medical treatment before the end of the transition period to enter the UK to receive that treatment. The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("Appeals Regulations 2020")<sup>1</sup> provide a right of appeal in relation to citizens' rights immigration decisions, including the EUSS.
- 6.3 The Government has used the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 ("Frontier Workers Regulations 2020")<sup>2</sup> to establish a frontier workers' permit scheme under which a protected frontier worker can apply for and be issued with a permit certifying their rights to continue to enter and work in the UK.
- 6.4 The inadmissibility rules regarding asylum claims made by EU citizens are set out in paragraphs 326E and 326F of the Immigration Rules. The Asylum Support Regulations 2000 contain the categories of persons excluded from receipt of asylum support under sections 95 and 98 of the Immigration and Asylum Act 1999.
- 6.5 The Common Travel Area (CTA) is an administrative arrangement which facilitates free movement between the UK, Ireland and the Crown Dependencies (Isle of Man, the Bailiwick of Guernsey and the Bailiwick of Jersey). Section 1(3) of the Immigration Act 1971 provides that there shall be no controls on local journeys within the CTA. The Immigration (Control of entry through Republic of Ireland) Order 1972 ("the 1972 Order") creates a system of statutory permission to enter, known as "deemed leave", for eligible individuals arriving in the UK from Ireland. This ensures that, in the absence of routine immigration controls on journeys between Ireland and the UK, and none whatsoever on the land border, individuals are not unwittingly in the UK without immigration leave.
- 6.6 Article 4 of the 1972 Order sets out the nature of deemed leave, specifically the journeys to which it applies; the length of permitted stay, including on subsequent visits where the individual has returned to Ireland before travelling back to the UK without having left the CTA; and the restrictions on activities permitted whilst in the UK on deemed leave. It also sets out who is not eligible for deemed leave on the grounds of their nationality or immigration status. This includes, for example, British citizens, those who already have leave to enter or remain and those who require a visit visa.
- 6.7 An individual is not eligible for statutory permission under the 1972 Order if they are subject to certain exemptions as provided in section 9(4) of the Immigration Act 1971

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<sup>1</sup> SI 2020/61

<sup>2</sup> SI 2020/1213

and Article 3 of the 1972 Order. They will instead need to make an application to the immigration authorities either before they travel or on arrival. These exemptions are largely based on an individual's previous conduct and the resulting decision or action taken by the UK's immigration authorities. Examples include where they are subject to a deportation order or exclusion decision; where they have been refused leave and have not subsequently been granted any further immigration status; or where they have not been granted permission to be in Ireland by the Irish immigration authorities. Those authorities are able to refuse entry to Ireland if they suspect an individual is seeking to travel via Ireland in order to abuse the absence of routine immigration controls on intra-CTA journeys.

## **7. Policy background**

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

- 7.1 Regulation 2 amends the Appeals Regulations 2020 to make provision for appeals in connection with decisions about entry clearance or leave to enter or remain in the UK in relation to a right of entry under the agreements for a planned course of healthcare treatment. Regulations 3 to 5 make consequential amendments to various specialist tribunal rules to facilitate the appeal rights granted by regulation 2.
- 7.2 The amendments provide that a person will have a right of appeal against a decision to:
- refuse an application for entry clearance or permission to enter or stay under Appendix S2 Healthcare Visitor;
  - cancel or vary permission to enter or stay granted under Appendix S2 Healthcare Visitor;
  - cancel or revoke entry clearance granted under Appendix S2 Healthcare Visitor;
  - refuse permission to enter to a person with valid entry clearance granted under Appendix S2 Healthcare Visitor;
  - refuse permission to enter sought on arrival by a person who does not require entry clearance under Appendix S2 Healthcare Visitor;
  - vary, including by cancelling, deemed leave which a person has by virtue of entering the UK through the CTA where they are an S2 healthcare visitor;
  - deport someone with permission to enter or stay granted under Appendix S2 Healthcare Visitor;
  - deport someone with deemed leave (having entered the UK through the CTA) where they are an S2 healthcare visitor.
- 7.3 Any decision that can be appealed under this instrument can be appealed on the grounds that the decision breaches any rights the person has under the agreements, or was not in accordance with the relevant Immigration Rules or other legislation under which it was made.
- 7.4 Appeals will be to the Immigration and Asylum Chamber of the First-tier Tribunal, with an onward right of appeal to the Upper Tribunal with permission and on a point of law. The only exception is where the appeal is certified on the grounds of national security or in the interests of a relationship between the UK and another country, or taken (wholly or partly) relying on information that the Secretary of State considers

should not be disclosed on those grounds, or otherwise in the public interest. In these circumstances, the appeal will be to the Special Immigration Appeals Commission.

- 7.5 Regulation 6 amends the 1972 Order to further facilitate legitimate travel via Ireland by those wishing to come to the UK for short periods of time - for example, for a visit – on the basis of deemed leave. Individuals will be entitled to a six-month period of deemed leave on their first visit, rather than the current three months. The period of deemed leave received on subsequent visits to the UK via Ireland, where the individual has not left the CTA in the meantime, will also be increased from seven days to two months. Increasing the length of time an individual can spend in the UK on the basis of deemed leave provides them with more flexibility, whilst still preventing them from remaining in the UK for long periods of time using short subsequent visits.
- 7.6 The current restriction which prevents individuals carrying out “employment or occupation for reward” on the basis of deemed leave is also amended, to clarify that activities for business visit purposes currently permitted on non-CTA journeys under Appendix Visitor: Permitted Activities to the Immigration Rules will also be permitted under deemed leave. Individuals wishing to undertake a Permitted Paid Engagement activity will be entitled to a period of one month’s deemed leave followed by further periods of seven days on subsequent visits.
- 7.7 Taken together, these changes will mean that what a visitor can do in the UK, and for how long, will be more aligned, regardless of from where they entered the UK.
- 7.8 Further amendments are made to the 1972 Order to ensure those with a right of entry under the agreements for a planned course of healthcare treatment, and accompanying persons, will have the maximum flexibility to be able to complete that treatment if they enter the UK via Ireland. This amendment will allow them to receive six months’ deemed leave on arrival in the UK from Ireland, with subsequent visits of six months also permitted even where the individual has not left the CTA before returning to the UK.
- 7.9 Regulation 6 also broadens the exemptions from deemed leave in Article 3 of the 1972 Order. The effect is to include:
- those who have been the subject to a previous refusal of admission under regulations 23(1), 23(3) or 23(4) of the Immigration (European Economic Area) Regulations 2016 (“EEA Regulations”) on the grounds of conduct or misuse of the right to reside, or as a family member who is not entitled to be admitted; and those who have been subject to a removal decision under regulation 23(6)(a) or 23(6)(c) of the EEA Regulations on the grounds that they no longer have a right to reside or are misusing their rights under those Regulations; and
  - those who have previously been refused admission under regulation 12(1)(a) of the Frontier Workers Regulations 2020 for reasons of specific adverse conduct, including the misuse of rights; or under regulation 12(1)(c) because an immigration officer was not satisfied that they were a frontier worker. Also, those who have been the subject of a removal decision under regulation 15(1)(a) or 15(1)(c) of those Regulations because they are no longer a frontier worker or are misusing their rights under the frontier worker provisions. (Deportation decisions made under 15(1)(b) have not been included as those

who are subject to deportation orders are already excluded from the deemed leave provisions by virtue of section 9(4) of the Immigration Act 1971.)

- 7.10 The amendments in regulation 6 to the exemptions from deemed leave are required because the existing restriction in the CTA legislation does not include adverse decisions made under the EEA Regulations or the Frontier Workers Regulations. The amendments will enable consideration of the circumstances of each case, including an individual's previous conduct, because they will be required to apply for leave to enter, rather than receiving deemed leave automatically on entry. The above exemptions from deemed leave fall away if the individual is subsequently granted admission or leave to enter or remain in the UK.
- 7.11 Regulation 7 amends the Frontier Workers Regulations to clarify that a worker or self-employed person who becomes involuntarily unemployed and begins seeking work in the UK is required to register at a relevant employment office to retain their worker status. This is an update to reflect current practice under the EEA Regulations. An amendment is also made to provisions for appeals of frontier worker decisions to reflect the fact that provision for the repeal of the EEA Regulations was made after the Frontier Workers Regulations.
- 7.12 Regulations 8 to 11 and 13 to 27 amend various Regulations, including on behalf of the Devolved Administrations, that govern access to benefits and services. Under existing legislation, EEA citizens and their family members who wish to claim benefits or access services must have a right to reside and be habitually or ordinarily resident in the UK or CTA. The effect of the amendments is to maintain the status quo, so that where a person who is a family member of an EEA citizen has limited leave to enter the UK deriving from an entry clearance that was granted under Appendix EU (Family Permit) to the Immigration Rules, this, in itself, does not affect eligibility. Holders of an EUSS family permit may, in certain circumstances, still be able to establish habitual residence or ordinary residence for the purpose of accessing benefits and services by providing evidence of a qualifying right to reside.
- 7.13 Regulation 12 amends the Asylum Support Regulations 2000 to maintain the position that EU citizens who claim asylum are generally ineligible to receive asylum support for either themselves or their dependants. Asylum applications from EU citizens are held to be inadmissible under the Immigration Rules unless there are exceptional circumstances, as they are deemed to come from a safe country to which they should be able to return safely. This amendment does not exclude support to individual applicants whose asylum claim is accepted as admissible under the Immigration Rules.

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

- 8.1 This instrument is not being made to address a deficiency in retained EU law but relates to the withdrawal of the United Kingdom from the European Union.

## **9. Consolidation**

- 9.1 It is not intended to consolidate the various legislation to which the instrument relates.

## **10. Consultation outcome**

- 10.1 A public consultation has not been conducted in the preparation of the instrument, given that it contains measures required by the agreements to protect citizens' rights and in relation to the end of free movement. The Devolved Administrations were engaged in respect of the relevant provisions of the instrument.

## **11. Guidance**

- 11.1 Guidance issued to officials in the Home Office and other government departments will be revised to reflect these changes.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because of the low impact on business.

## **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 approach to monitoring of this instrument is that this will be conducted internally by the Home Office.

## **15. Contact**

- 15.1 Sam Murray at the Home Office Telephone: 07825 532266 or email: sam.murray@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.