**EXPLANATORY MEMORANDUM TO**

**THE ALLOCATION OF HOUSING AND HOMELESSNESS (AMENDMENT) (ENGLAND) REGULATIONS 2006**

**2006 No. 1093**

**1.** This explanatory memorandum has been prepared by the Office of the Deputy Prime Minister and is laid before Parliament by Command of Her Majesty.

## 2. Description

2.1 These Regulations amend the classes of persons from abroad who are eligible for an allocation of housing accommodation under Part 6 of the Housing Act 1996 ("the Act") and for homelessness assistance under Part 7 of the Act. In particular, they revoke a number of the classes by which a person subject to immigration control may be eligible for social housing or homelessness assistance.

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These Regulations come into force two days after they are laid, in breach of the "21-day rule".

3.2 The Regulations have been made as soon as possible in response to the decision of the Court of Appeal of 6 April 2006 in the case of *London Borough of Barnet v Ismail and Another*[1]. The Court of Appeal's judgment concerns the classes of persons from abroad who are eligible for homelessness assistance. The effect of the decision is that persons from states in the European Economic Area[2] ("EEA") who have no right to reside under European Union law, and were therefore never intended to be eligible for a social housing allocation or for homelessness assistance, may in fact be eligible persons.

3.3 The First Secretary of State considers that it is necessary to take immediate action to ensure that local housing authorities and registered social landlords do not have to provide accommodation to persons who have no right to reside in the United Kingdom. As a matter of policy, the Government considers that such persons should not be able to access benefits or homelessness assistance and social housing, and that this loophole should be closed as soon as possible. In practical terms, the Government is also very concerned about the pressures that applications from such persons could place on local housing authorities. EEA nationals without a right to reside will usually be ineligible for housing benefit (eligibility for housing benefit is not affected by this judgment), and are likely to have inadequate financial means to meet any rent obligation. In particular, the provision of homelessness assistance to persons unable to pay their rent could be a considerable financial burden on local authorities. The nature of social housing allocated by local authorities is to provide settled accommodation for those established in the United Kingdom, and demand for such housing already significantly outstrips supply in many parts of the country. As EEA nationals, the

[1] [2006] EWCA Civ 383.
[2] I.e. The European Union plus Norway, Liechtenstein, Iceland and, for these purposes, Switzerland.

persons affected by this judgment are able to enter the United Kingdom without requiring leave to do so, and it is therefore difficult to assess the numbers of people who could now come forward.

3.4 The principal effect of the Regulations is to put local authority decision-makers back in the position as it was generally understood prior to the Court of Appeal's decision, and to ensure that eligibility for homelessness assistance and social housing mirrors eligibility for housing benefit. Local authorities were provided with a draft copy of these Regulations last week to alert them to the Government's intended course of action, and will therefore have had some notice of the effect of the Regulations before they come into force.

3.5 In the light of the concerns set out above, the Regulations have been laid as soon as possible after Parliament's return from recess, and come into force two days later. The Office of the Deputy Prime Minister recognises that the Committee is unlikely to have time to scrutinise the Regulations before they come into force, and apologises to the Committee for the fact that it has broken the "21-day rule". The Government considers that the breach was necessary to maintain a consistent policy position and to safeguard local authorities from a potential new burden.

## 4. Legislative Background

4.1 Part 6 of the Act makes provision about the procedures and principles which local housing authorities must follow in allocating housing accommodation (i.e. in selecting tenants for their own housing stock and nominating tenants of registered social landlords). Part 7 of the Act concerns the functions of such authorities as respects persons who are homeless or threatened with homelessness.

4.2 A housing authority cannot allocate housing accommodation or provide homelessness assistance to a person from abroad who is not eligible. There are two types of persons from abroad for these purposes. Firstly, persons who are subject to immigration control will not be eligible for social housing or homelessness assistance unless they come within a class of persons prescribed in regulations by the Secretary of State (sections 160A(1) and (3) and 185(2) of the Act). The term 'person subject to immigration control' means a person who requires leave to enter or remain in the United Kingdom, whether or not such leave has been given (section 13(2) of the Asylum and Immigration Act 1996). Secondly, a person who is not subject to immigration control will be eligible for an allocation of social housing or homelessness assistance unless he comes within a class of persons who are to be treated as persons from abroad by virtue of regulations made by the Secretary of State (sections 160A(1) and (5) and 185(3) of the Act).

4.3 The classes of persons from abroad who will be eligible or ineligible for social housing or homelessness assistance are set out in the Allocation of Housing (England) Regulations 2002[3] ("the Allocation Regulations") and the Homelessness (England) Regulations 2000[4] ("the Homelessness Regulations"). These Regulations were amended by the Allocation of Housing and Homelessness (Amendment) (England) Regulations 2004[5] to take account of changes to Government policy in relation to EEA nationals (see paragraph 7.1).

[3] S.I. 2002/3264.
[4] S.I. 2000/701.
[5] S.I. 2004/1235.

4.4 Regulation 5 of the Allocation Regulations and regulation 4 of the Homelessness Regulations concern persons who are not subject to immigration control but who are to be treated as persons from abroad who are ineligible for social housing or homelessness assistance. These regulations were intended to apply to all EEA nationals, on the basis that they were not subject to immigration control. Broadly speaking, these regulations provide that in order to be eligible for assistance an EEA national or British national must be habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland ("the Common Travel Area"). In order to be habitually resident for the purposes of these regulations, a person must have a right to reside in the Common Travel Area.

4.5 Many EEA nationals will have a right to reside in the United Kingdom under EU law, for example as workers, self-employed persons or students. Such persons will be 'qualified persons' for the purposes of the Immigration (European Economic Area) Regulations 2000[6]. However, EEA nationals who are economically inactive and do not have sufficient resources to support themselves or their families during their stay will not have a right to reside in the United Kingdom. Under the Allocation Regulations and the Homelessness Regulations, certain groups of EEA nationals are exempted from the requirement to be habitually resident (e.g. workers), and a person whose only right to reside is as a self-sufficient person who is economically inactive will not be eligible.

4.6 Regulation 4 of the Allocation Regulations and regulation 3 of the Homelessness Regulations set out the classes of persons subject to immigration control who will be eligible for social housing or homelessness assistance. Among other things, these make provision for persons subject to immigration control to be eligible if they are nationals of a country that has ratified the European Social Charter or the European Convention on Social and Medical Assistance, provided they are lawfully present and habitually resident (Class D of regulation 4 of the Allocation Regulations and Class E of regulation 3 of the Homelessness Regulations). Most countries within the EEA have ratified one or both of these treaties. The Homelessness Regulations also make provision about the eligibility of persons who are on income support or in receipt of income-based jobseeker's allowance (Class I of regulation 3). Some EEA nationals without a right to reside will receive these benefits because they were already entitled to them prior to the changes to benefits regulations in May 2004.

4.7 These amending Regulations remove Class D of regulation 4 of the Allocation Regulations and Classes E and I of regulation 3 of the Homelessness Regulations. As set out in paragraph 3.2, these amendments are made in response to a decision of the Court of Appeal. The ODPM had previously considered that EEA nationals were not subject to immigration control, irrespective of whether or not they had a right to reside in the United Kingdom. The Allocation Regulations and the Homelessness Regulations were drafted on that basis. The Court of Appeal judgment establishes that EEA nationals who do not have a right to reside in the United Kingdom are subject to immigration control. Consequently, EEA nationals who are not economically active and who do not have sufficient resources to support themselves or their family members will be subject to immigration control. The classes of eligibility for persons subject to immigration control which are revoked by these Regulations are likely to be of particular application to EEA nationals with no right to reside. Other than EEA

[6] S.I. 2000/2326; those regulations are shortly to be revoked by the Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003).

nationals, relatively few persons subject to immigration control are likely to come within these classes. The Government had intended to remove the classes when a suitable opportunity arose. The Court of Appeal's decision has made the need to do this much more urgent.

## 5. Extent

5.1 This instrument applies to England.

## 6. European Convention on Human Rights

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

## 7. Policy background

7.1 As outlined in paragraph 3.3, the Government's policy is that nationals of EEA states who come to the United Kingdom and who do not have a right to reside here should not be eligible to access benefits or social housing or homelessness assistance. In 2004, an additional ten countries acceded to the European Union. Following concern about the potential impact of economic migrants from eight of the new accession countries, the Government decided to strengthen the provisions on eligibility for benefits and for social housing and homelessness assistance for all EEA nationals who were not economically active. The Allocation Regulations and the Homelessness Regulations were amended in May 2004, as part of this co-ordinated policy.

7.2 Prior to the recent decision of the Court of Appeal, the ODPM had taken the view that EEA nationals without a right to reside did not fall within the definition of persons subject to immigration control, and guidance to this effect was given to housing authorities by the ODPM on 30 April 2004. However, the Court of Appeal has held that EEA nationals who are not 'qualified persons', and therefore have no right to reside, are subject to immigration control. Therefore, EEA nationals with no right to reside will be eligible for social housing or homelessness assistance if they fall within the classes of exception for such persons, even if they have no right to reside under EU law. This means that the Allocation Regulations and the Homelessness Regulations as currently drafted do not deliver the Government's policy.

7.3 These amending Regulations remove the classes of eligibility for persons subject to immigration control which would enable EEA nationals with no right to reside to access social housing or homelessness assistance. Only a small number of non-EEA nationals would be eligible for social housing or homelessness assistance under the provisions that are revoked. Persons who applied for social housing or homelessness assistance before these Regulations come into force are subject to transitional arrangements in regulation 2(3).

7.4 It has not been possible to consult on these amending Regulations in the time available. As set out at paragraph 3, these Regulations have been made under considerable time pressure in response to a court judgment. The Government considers the consequence of the judgment, which enables EEA nationals with no right to reside to access social housing and homelessness assistance, to be

unacceptable. The amending regulations essentially return eligibility to the position the Government had understood it to be prior to the Court of Appeal's decision.

7.5 There has been some interest in the Court of Appeal decision in the news media. In particular, news reports have suggested that significant numbers of EEA nationals, including many who were originally from outside the EEA, but who have been given asylum and citizenship by an EEA state, could come to the UK with no intention of supporting themselves and claim social housing. The ODPM does not have figures as to the number of EEA nationals who would be likely to become eligible for social housing or homelessness assistance as a result of the Court's decision.

7.6 The relevant provisions of the Housing Act 1996 extend to England and Wales, but housing matters are devolved to Wales. The ODPM has alerted the devolved administrations to the decision of the Court of Appeal.

## 8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 These Regulations are intended to reduce the impact on the public sector of the Court of Appeal judgment. As intended when the Allocation Regulations and Homelessness Regulations were amended in May 2004, EEA nationals without a right to reside will not be eligible for social housing and homelessness assistance.

## 9. Contact

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