EXPLANATORY MEMORANDUM TO

THE ALLOCATION OF HOUSING AND HOMELESSNESS (ELIGIBILITY) (ENGLAND) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 861

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Housing, Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (S.I. 2006/1294) ("the Eligibility Regulations"). The 2006 Regulations prescribe the eligibility criteria for an allocation of housing accommodation under Part 6 of the Housing Act 1996 (c. 52) or housing assistance under Part 7 of that Act.

2.2 The purpose of the legislation is to clarify that the eligibility rules continue to apply as at present to persons who are granted limited leave to enter or remain (also referred to as 'pre-settled status') in the United Kingdom under the EU Settlement Scheme[1].

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 England and Wales.

4.2 The territorial application of this instrument is England only.

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 Housing Act 1996 ("the 1996 Act") provides that a local housing authority shall not allocate social housing or give homelessness assistance to persons who are subject

[1] Pursuant to Appendix EU of the Immigration rules, made in accordance with section 3 of the Immigration Act 1971 (c.77).

to immigration control unless they come within a class of persons prescribed in regulations made by the Secretary of State (sections 160ZA(2) and 185(2) of the 1996 Act). Under sections 160ZA(4) and 185(3) of the 1996 Act, a person who is not subject to immigration control may be made ineligible by regulations prescribed by the Secretary of State.

6.2 For these purposes, 'person subject to immigration control' has the meaning given in section 13(2) of the Asylum and Immigration Act 1996 (c. 49)[2]. A person from abroad with a right to reside derived from EU law is not a person subject to immigration control.

6.3 Regulations 4 and 6 of the Eligibility Regulations prescribe the classes of persons who are not subject to immigration control but who are ineligible for an allocation of social housing or for homelessness assistance respectively. This includes persons with rights to reside derived from EU law if their only right to reside in the United Kingdom, or in the Channel Islands, the Isle of Man or the Republic of Ireland is because they are a new EEA[3] jobseeker, an EEA national in their initial three months' residence, or a non-United Kingdom and non-EEA national who is the primary carer of a British citizen child/dependent adult where such child/dependent would be forced to leave the EEA if their carer left the UK ("a Zambrano right"). These rights to reside will remain applicable following the UK's withdrawal from the EU as the relevant provisions form part of retained EU law within the meaning of section 6 of the European Union (Withdrawal) Act 2018 (c. 16).

6.4 Regulations 3(a) and 4(a) of this instrument amend those provisions. The effect of the amendments is to clarify that the existing rules on access to social housing, including supported housing, and homelessness assistance remain in place for those residing in the UK with the above rights, even if they also hold pre-settled status granted under the EU Settlement Scheme.

6.5 Regulations 3(b) and 4(b) in this instrument simply correct an erroneous cross-reference to the EEA Regulations which occurs in the Eligibility Regulations.

7. Policy background

What is being done and why?

7.1 The EU Settlement Scheme provides the means for EU[4], EEA, EFTA and Swiss (hereafter referred to as EEA) nationals, and their family members, to obtain the UK immigration status they will require in order to remain in the UK following the UK's withdrawal from the European Union. This includes those with a derivative EU right to reside[5].

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[2] According to section 13(2) of the Asylum and Immigration Act 1996: a person is subject to immigration control if he is "*a person who under [the Immigration Act 1971] requires leave to enter or remain in the United Kingdom (whether or not such leave has been given)*".

[3] European Economic Area nationals are nationals of any EU member state (except the UK), and nationals of Iceland, Norway, Liechtenstein and Switzerland.

[4] Irish citizens do not need to apply to the EU Settlement Scheme to protect their rights in the UK, though they are able to do so if they wish. Non-Irish family members of Irish citizens will need to apply to the EU Settlement Scheme if they wish to remain in the UK after 31 December 2020.

[5] A "derivative right to reside" applies when refusal to allow a right to remain in an EU Member State to someone who has a child/dependent would impact on the child/dependent's ability to exercise their free movement rights, or would affect a child/dependent from effective enjoyment of their right of EU citizenship and force the child/dependent to leave the member state of their birth.

7.2 Under the EU Settlement Scheme all EEA nationals in the UK before a specified date must apply in order to regularise their immigration status in the UK. A person with a derivative right to reside, such as a Zambrano carer, will also need to apply, to be granted their UK immigration status and have their rights protected. Those with less than 5 years' continuous residence in the UK will be granted limited leave to enter or remain (also referred to as pre-settled status). Those with 5 or more years' continuous residence will be granted indefinite leave to enter or remain (also referred to as settled status). More information on the EUSS can be found on GOV.UK at: https://www.gov.uk/government/collections/eu-settlement-scheme-applicant-information.

7.3 Having acquired leave under the EU Settlement Scheme, an EEA national or a person with a derivative right to reside, such as a Zambrano right, will have both a right to reside under domestic immigration rules (under the EU Settlement Scheme) and a right to reside pursuant to their existing rights under EU law.

7.4 The Government's agreed policy intent is that those granted pre-settled status under the EU Settlement Scheme will be subject to the existing eligibility rules for accessing benefits and services broadly on the same basis as now. This includes the rules in relation to the allocation of social housing and homelessness assistance:

"*EU citizens arriving before the specified date, who do not have five years' residence at the time of the UK's exit but who remain legally in the UK on a pathway to settled status will continue to be able to access the same benefits that they can access now – broadly equal access for workers/the self-employed and limited access for those not working. It is our intention that this benefits regime – which is not the regime UK nationals and those with settled status will be subject to – will remain in place for those on the pathway until they achieve settled status but no element of this will be more generous than the approach taken for those EU nationals with settled status. If these individuals go on to acquire settled status, they will then be able to access benefits on the same terms as comparable UK residents*."

Para 41, Policy Paper – The United Kingdom's exit from the European Union: safeguarding the position of EU citizens living in the UK and UK nationals living in the EU

7.5 The changes made by this instrument will amend the existing Eligibility Regulations in order to clarify that the current rules on access to social housing, including supported housing, and homelessness assistance remain in place for EEA nationals and Zambrano carers granted pre-settled status under the EU Settlement Scheme. They will also maintain the restrictions on access to social housing, including supported housing, and homelessness assistance for those residing in the UK on the basis of rights as a Zambrano carer, whilst they hold pre-settled status. As such it will not alter a person's EU law based rights.

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 relates to the EU Settlement Scheme.

9. Consolidation

9.1 There are no current plans to consolidate the Eligibility Regulations which these Regulations amend, although the Department will keep this under review.

10. Consultation outcome

10.1 The Government has not consulted on these amending Regulations because they do not reflect a change in the Government's overall policy regarding eligibility to access social housing and homelessness assistance.

11. Guidance

11.1 The Government will write to local housing authorities with advice on the purpose and effect of the Regulations. This letter will be published on the GOV.UK website. We will revise current statutory guidance to reflect the amending Regulations when time allows.

12. Impact

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

12.2 The impact on the public sector is not expected to be significant as this statutory instrument will maintain the current rules on access to social housing and homelessness assistance for those persons who have been granted pre-settled status under the EU Settlement Scheme.

12.3 In 2017/18, 4.1 per cent of all new social housing lettings were made to households led by EEA nationals[6], compared to 91.6 per cent of new lettings to United Kingdom nationals; 0.5 per cent to Irish nationals; and 3.9 per cent to non-EEA nationals[7].

12.4 In 2017/18, EEA nationals accounted for 7.7 per cent (4,350) of all acceptances for the main homelessness duty. By way of comparison, non-EEA nationals accounted for 9.6 per cent (5,430).

12.5 An Impact Assessment has not been prepared for this instrument for the reasons set out above.

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 legislation is as follows: the Department collects data on new social housing lettings to households headed by a foreign national through CORE (the Continuous Recording of lettings) This information is published on the GOV.UK website. We also plan to use data on homelessness decisions in relation to applications by foreign nationals through the quarterly Homelessness Case Level Information Collection (H-CLIC) return. H-CLIC is a new data collection and currently published as Experimental. This means nationality information may not be available in the near future and any conclusions drawn from the information will have to be made with caution. We will review the operation of these Regulations as appropriate.

[6] Excluding nationals of the Republic of Ireland and the United Kingdom.

[7] Source: CORE social housing lettings in England 2017/18. This data includes social and affordable rent, general needs and supported housing lettings made by private registered providers and local authorities.

15. Contact

15.1 Begoña Vilaplana, at the Ministry of Housing, Communities and Local Government, Telephone: 0303 44 41699 or email: begona.vilaplana@communities.gov.uk can be contacted with any queries regarding the instrument.

15.2 Lizzie Clifford, Deputy Director for Social Housing, at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kit Malthouse MP at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.