EXPLANATORY MEMORANDUM TO

THE ALLOCATION OF HOUSING AND HOMELESSNESS (ELIGIBILITY) (ENGLAND) AND PERSONS SUBJECT TO IMMIGRATION CONTROL (HOUSING AUTHORITY ACCOMMODATION AND HOMELESSNESS) (AMENDMENT) REGULATIONS 2021

2021 No. 1045

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Levelling Up, Housing and Communities and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Instrument makes amendments to the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 and to the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000.

2.2 It enables local authorities in England, Scotland and Northern Ireland to treat persons who have come to the UK from Afghanistan under specified Home Office resettlement schemes, and certain of those who are not covered by one of the listed schemes but who left Afghanistan in connection with the collapse of the Afghan government on 15 August 2021, as eligible for housing and homelessness support. It also, in relation to England and Scotland, exempts such persons from the Habitual Residence Test.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument breaches the 21 day rule. The Secretary of State believes that this is necessary because of the sudden and unexpected nature of the situation in Afghanistan and the immediate need to provide support to those arriving from Afghanistan. Delay in the legislation coming into force will cause potential delays in access to housing allocations and homelessness assistance.

4. Extent and Territorial Application

4.1 The territorial extent of regulation 2 is England and Wales. The territorial application of this provision is England.

4.2 The territorial extent of regulation 3 is England and Wales, Scotland and Northern Ireland.

4.3 The territorial application of regulation 3(1) and 3(2) is England, Scotland and Northern Ireland. The territorial application of regulation 3(3) is Scotland and Northern Ireland.

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 This Instrument makes amendments to the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 ("the Eligibility Regulations"), and the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000 ("PSIC order").

6.2 Sections 160ZA(2) and 185(2) of the Housing Act 1996 ("the 1996 Act") provide that a local housing authority shall not allocate housing accommodation under Part 6 of the Act, or give homelessness assistance under Part 7 of the Act, to persons from abroad who are subject to immigration control unless they come within a class of persons prescribed in regulations made by the Secretary of State.

6.3 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.

6.4 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).

6.5 Regulations 3 and 5 of the Eligibility Regulations prescribe the classes of persons who, although subject to immigration control, are to be treated as persons from abroad who are eligible for an allocation of housing accommodation or for homelessness assistance respectively.

6.6 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.

6.7 Many of the classes prescribed under regulations 3 to 6 include the requirement that the person in question has been habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. To establish 'habitual residence' an applicant must demonstrate a degree of permanence in their residence in one of those places. Habitual residence implies an association between the individual and the place of residence and relies substantially on fact.

6.8 Regulations 2(2) and 2(4) of this instrument amend regulations 3 and 5(1) of the Eligibility Regulations respectively. They make the following persons eligible for allocation of housing accommodation and homelessness assistance without application of the Habitual Residence Test: persons with leave to enter or remain under the Afghan Relocations and Assistance Policy and the previous scheme for locally-employed staff in Afghanistan (sometimes referred to as the ex-gratia scheme). It also makes the same provision for other persons with leave to enter or remain in the United Kingdom who are not covered by one of the listed schemes, but who left Afghanistan in connection with the collapse of the Afghan government 2021, excluding persons who are subject to a condition requiring them to maintain and accommodate themselves, and any dependent, without recourse to public funds and persons whose immigration status was given upon an undertaking by a sponsor (unless their sponsor(s) have died).

6.9 Regulations 2(3) and 2(5) of this instrument amend regulations 4(2) and 6(2) of the Eligibility Regulations respectively. They make persons not subject to immigration control who left Afghanistan in connection with the collapse of the Afghan government eligible for allocation of housing accommodation and homelessness assistance without application of the Habitual Residence Test.

6.10 Under section 118(1) and 119(1) of the Immigration and Asylum Act 1999 housing authorities in the United Kingdom may not provide housing accommodation or homelessness assistance under defined housing provisions (other than in accordance with Part 6 of the 1996 Act) unless the person to which the accommodation or assistance is provided is within a class specified by order (or another exception, not relevant to this instrument, applies).

6.11 Regulation 3 amends the PSIC Order to permit the provision of housing accommodation and assistance to the cohorts of persons leaving Afghanistan described above.

7. Policy background

What is being done and why?

7.1 The UK Government has established three schemes to relocate and resettle those living in Afghanistan to the UK:

(a) The Afghan Relocations and Assistance Policy (ARAP). This scheme was set up to assist Afghan citizens who worked with the British armed forces, and their family members.

(b) The Afghan Citizens Resettlement Scheme (ACRS). This scheme was set up for those considered particularly vulnerable. The government has announced that the scheme will resettle 20,000 individuals over 5 years, with a focus on women, girls and minority groups

(c) The Afghan Locally Employed Staff ex-gratia scheme (ALES). This scheme was announced in December 2012 and was set up to support locally employed staff who have worked for the British forces. This scheme is set to close in November 2022.

7.2 The Home Office has announced that those arriving in the UK under all three schemes will be granted Indefinite Leave to Remain, with the exception of initial arrivals under the ACRS who have been initially granted 6 months Leave Outside the Rules ahead of being granted Indefinite Leave to Remain. Granting Indefinite Leave to Remain provides certainty and stability to those resettling in the UK. It provides the right to work and recourse to public funds, including eligibility for the allocation of social housing and homelessness assistance.

7.3 Under current eligibility rules, those granted Indefinite Leave to Remain under the Immigration Rules need to meet the Habitual Residence Test before they can be eligible for the allocation of social housing or homelessness assistance. This test may also apply to UK nationals who have recently returned to the UK. This means that local authorities may require these individuals to be residing in the UK for around 1-3 months after their arrival before they consider them as eligible for support.

7.4 These Regulations will exempt those arriving from Afghanistan due to the collapse of the Afghan government from the Habitual Residence Test in England and Scotland.

Separate provision will be made to disapply the habitual residence test in Northern Ireland.

Explanations

What did any law do before the changes to be made by this instrument?

7.5 A person is generally required to meet the Habitual Residence Test to be eligible for the allocation of social housing and homelessness assistance. Its purpose is to ensure that social housing and homelessness assistance are offered to people with reasonably close ties to the UK and an intention to settle here.

7.6 Case law has established that, to establish habitual residence, a person must (i) have a settled intention to reside, and (ii) have been resident for an "appreciable period of time".

7.7 Before the changes to be made by this instrument the Habitual Residence Test would have applied to persons with indefinite leave to remain under ARAP, ALES, and other persons who left Afghanistan in connection with the collapse of the Afghan government on 15th August 2021 (both those with leave to enter or remain and those not subject to immigration control).

7.8 The ACRS is not mentioned in this instrument because under that scheme leave to enter or remain is given outside the Immigration Rules. Both the Eligibility Regulations and the PSIC order already give eligibility to persons with such leave that is unqualified by the Habitual Residence Test.

Why is it being changed?

7.9 The law is being changed to align with the policy intention of the resettlement schemes, and to ensure those arriving in the UK from Afghanistan due to the current situation do not have to satisfy the Habitual Residence Test to be eligible for social housing allocation and homelessness assistance.

What will it now do?

7.10 These Regulations will exempt persons who have come to the UK from Afghanistan under the Home Office resettlement schemes mentioned above, and those who are not covered by one of the listed schemes but who left Afghanistan in connection with the collapse of the Afghan government, from the Habitual Residence Test in England and Scotland. This will mean they are eligible for the allocation of social housing and homelessness assistance.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 No consultation has been carried out and the instrument has not been scrutinised by Local Authority Associations due to the urgency with which it needed to be made.

Letters have been exchanged with Local Authorities and members of relevant Parliamentary committees to inform them of these changes.

10.2 Drafts have been shared with the Welsh and Scottish Governments, as well as the Northern Ireland Executive.

11. Guidance

11.1 Guidance will be issued to local authority staff and Local Authority decision makers to ensure that they are aware of this new exception and how to apply them.

12. Impact

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

12.2 The impact of this Instrument on the public sector is expected to be positive in operational and financial terms. The Instrument will help to speed up the process by which Local Authorities can deliver housing assistance, meaning that people exempted from the Habitual Residence Test by this Instrument can be moved from more expensive emergency accommodation to less expensive long-term accommodation more quickly. Regardless, it is not expected that everyone fleeing the Afghan crisis will require housing support in the long term.

12.3 A full Regulatory Impact Assessment has not been prepared for this instrument because the impact on business is not likely to be significant.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This legislation will be reviewed at an appropriate point in the next year to determine whether its effect is still required and proportionate.

15. Contact

15.1 Simon Denison at the Department for Levelling Up, Housing and Communities email: simon.denison@communities.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jane Everton, Deputy Director for Social Housing, at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.

15.3 Michael Gove, Secretary of State at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.