EXPLANATORY MEMORANDUM TO

THE BRITISH NATIONALITY ACT 1981 (IMMIGRATION RULES APPENDIX EU) (AMENDMENT) REGULATIONS 2021

2021 No. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Home Office and is laid in Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument seeks to prevent certain children born after 30th June 2021 (the end of the grace period) from failing to acquire British citizenship as a result of their parents not having settled status at the time of their birth. The grace period is the six-month period from 31st December 2020 (the end of the Transition Period) until 30th June 2021 (the deadline for an application for UK immigration status under the EU Settlement Scheme by those EEA citizens and their family members resident in the UK by the end of the Transition Period).

2.2 In particular, this instrument amends the British Nationality Act 1981 to address the position where a parent is granted Indefinite Leave under the EU Settlement Scheme after their child's birth, and there has been a gap in the parent's immigration status from the end of the grace period, meaning that they were not considered settled for the purposes of nationality law when the child was born. Such a grant of Indefinite Leave might occur when an application to the EU Settlement Scheme is submitted after 30th June but where there are reasonable grounds for not meeting the deadline; or when an application submitted by 30th June is only resolved after that date. As a result, this instrument comes into force on 1st July.

2.3 For those parents who are granted Indefinite Leave in such circumstances, this instrument amends the British Nationality Act 1981 to introduce a new provision which will enable the child to acquire British citizenship from the date on which the grant of Indefinite Leave to their parent is made, provided that the parent can demonstrate that they would have met the requirements to be settled at the ending of the grace period (for a late application); or that the application was made in time.

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 Regulations made under section 5 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 may provide that an amendment, repeal or revocation made by those regulations has the same extent of the provision amended, repealed or revoked.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales, Scotland, Northern Ireland, the Channel Islands, the Isle of Man, and the British Overseas Territories.

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5. European Convention on Human Rights

5.1 Kevin Foster MP, Parliamentary Under Secretary of State for Future Borders and Immigration at the Home Office, has made the following statement regarding Human Rights:

"In my view the provisions of the British Nationality Act 1981 (Immigration Rules Appendix EU) (Amendment) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 This Explanatory Memorandum refers to "EEA citizens" to mean citizens of the European Union (EU) countries and other constituent countries of the European Economic Area (EEA) (Iceland, Liechtenstein and Norway) and of the European Free Trade Association (EFTA) (the EEA countries and Switzerland); and also their family members, who may not themselves be a citizen of such countries, but who also benefit from Citizens' Rights Agreements protections.[1]

6.2 The British Nationality Act 1981 (BNA) sets out the conditions under which a child, born in the United Kingdom or the Overseas Territories, acquires British citizenship automatically. Under s.50(1) of the BNA, the United Kingdom includes "the Islands", which is further defined as comprising the Channel Islands and the Isle of Man. Section 1(1) of the BNA states that such a child will be a British citizen from birth where, at the time of their birth, at least one parent is either British or settled. Settled refers to a person being both ordinarily resident and without being subject under the immigration laws to any restriction on the period for which they may remain.

6.3 The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ended the ability to commence free movement after 31st December 2020, revoking the Immigration (European Economic Area) Regulations 2016 which gave effect to the UK's obligations in the field of immigration arising from membership of the EU. Since that date, newly arriving EEA citizens and their family members who are not protected by the Citizens' Rights Agreements are subject to UK immigration controls and their entry to, and stay in, the UK falls within the global points-based immigration system set out in the Immigration Rules made under the Immigration Act 1971.

6.4 The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 also provides, at section 5, a power to make changes to primary legislation as a consequence of, or in connection with, measures in Part 1 of that Act that repeal free movement law.

[1] The EU Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement.

7. Policy background

What is being done and why?

7.1 The Government has established the EU Settlement Scheme, under Appendix EU to the Immigration Rules, and through which EEA citizens resident in the UK by the end of the Transition Period and their family members can obtain the UK immigration status they need to continue living and working in the UK. Under the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 a deadline of 30th June 2021 has been set for an application by them for such status. It also saved relevant rights for those lawfully resident in the UK at the end of the Transition Period by virtue of the EEA Regulations (and for their relevant family members), until an application under the Scheme made by them by the deadline has been finally determined.

7.2 For many EEA citizens and their family members there will therefore be a smooth transition between rights under the EEA Regulations and rights under the Citizens' Rights Agreements based on UK immigration status granted under the EU Settlement Scheme. However, it is also recognised that there may be people who have reasonable grounds for missing the deadline of 30th June 2021 so the Government has also, in line with Citizens' Rights Agreements commitments, introduced changes through Immigration Rules and guidance to provide for an application submitted to the EU Settlement Scheme after 30th June 2021 deadline to still be granted. However, while an EEA citizen applicant and their family members may nevertheless be granted Indefinite Leave under the Scheme in such circumstances, that leave only takes effect from the date on which it is granted.

7.3 This means that such a person will, after 30th June 2021, be residing in the UK without immigration leave, until such time as their application to the EU Settlement Scheme is successful. Should any child be born in the UK to them in the meantime, the parent would not be able to meet the definition of 'settled' required under the BNA and the child would not automatically become a British citizen. This should be contrasted with the position had the child been born before the grace period ended (and assuming their parent would have met the eligibility requirements for Indefinite Leave under the EU Settlement Scheme at that time), or if they were born after a grant of Indefinite Leave.

7.4 This instrument amends the British Nationality Act 1981 so that:

- Where a child is born after the end of the grace period and is not automatically British, then they may be considered British from the date on which their parent is granted Indefinite Leave on the basis of a late application to the EU Settlement Scheme, provided that their parent would have met the eligibility requirements of paragraph EU11 or EU12 of the Immigration Rules at the end of the grace period and had they made an application (and regardless of whether they were then exempt from control); and
- Similar protection is given to a child born after the grace period ends who is not automatically British, but where their parent submitted an application to the EU Settlement Scheme by 30th June 2021 which was not resolved by the date of birth, and is then granted Indefinite Leave under the Scheme.

7.5 The provisions take effect in relation to applications made under the UK's EU Settlement Scheme and the equivalent scheme implemented in the Isle of Man. Gibraltar introduced a declaratory residence scheme for EEA citizens. The Channel

Islands have made local provisions to avoid any gap in immigration status from having a similar impact on the nationality of children born there.

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 Agreement) Act 2020.

9. Consolidation

9.1 It is not intended to consolidate this instrument with the other instruments previously made under the powers contained in section 5 of The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.

10. Consultation outcome

10.1 A public consultation has not been conducted in the preparation of this instrument. It is assumed that the numbers affected are limited and will be minimised further by ongoing communications activity about the EU Settlement Scheme deadline, and therefore extensive consultation is not necessary.

11. Guidance

11.1 Guidance issued to Home Office officials will be revised to reflect the measures contained within the instrument. It will be available by 1 July 2021, the date the instrument comes into force, at: https://www.gov.uk/government/collections/british-citizenship-nationality-guidance

12. Impact

12.1 There is no, or no significant, impact on 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 no, or no significant, impact on business is foreseen. The changes made by this instrument affect individuals and do not generate any foreseeable costs to business.

13. Regulating small businesses

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

14. Monitoring & review

14.1 The monitoring and review of this instrument will be conducted internally by the Home Office.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Al Darlow at the Home Office (Alan.Darlow@homeoffice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Kristian Armstrong, Deputy Director for Nationality and Passport policy at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kevin Foster, Parliamentary Under Secretary of State (Minister for Future Borders and Immigration) at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.