EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (LEAVE TO ENTER AND REMAIN) (AMENDMENT) ORDER 2024

2024 No. [XXXX]

1. Introduction

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

2. Declaration

2.1 Tom Pursglove MP, Minister of State for Legal Migration and the Border at the Home Office, confirms that this Explanatory Memorandum meets the required standard.

2.2 Nicola Smith, Head of the EEA Citizens' Rights & Hong Kong Unit at the Home Office, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Sarah North at the Home Office, telephone: +44 7721096766 or email EEACR_EUSS_PolicyEnquiries@homeoffice.gov.uk can be contacted with any queries regarding the Order.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This Order amends the Immigration (Leave to Enter and Remain) Order 2000 (the "2000 Order").[1] Currently, limited leave to enter or remain (also known as pre-settled status) granted under Appendix EU to the Immigration Rules (which implements the EU Settlement Scheme[2]) lapses by operation of law where the holder is absent from the UK and Islands[3] for a continuous period of more than two years. Indefinite leave (also known as settled status) lapses after more than five years' absence.[4] The amendments will allow all those granted leave under Appendix EU, whether limited leave or indefinite leave, to benefit from the longer absence period of five years before their immigration permission lapses. This change follows a High Court judgment, further explained in paragraph 5.5 below.

Where does the legislation extend to, and apply?

4.2 The extent of this Order (that is, the jurisdiction(s) which the Order forms part of the law of) is England and Wales, Scotland and Northern Ireland.

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[1] S.I. 2000/1161.

[2] The EU Settlement Scheme enables European Economic Area (EEA) and Swiss citizens resident in the UK before the end of the post-EU exit transition period at 11pm GMT on 31 December 2020, and their family members, to obtain a UK immigration status. The legal framework for the EU Settlement Scheme is in Appendix EU to the Immigration Rules (Immigration Rules - Immigration Rules Appendix EU - Guidance - GOV.UK (www.gov.uk)).

[3] Bailiwick of Guernsey, Bailiwick of Jersey and the Isle of Man.

[4] Four years in the case of Swiss nationals and their family members. In this memorandum, for simplicity, we will refer only to five years.

4.3 The territorial application of this Order (that is, where the Order produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The Order makes changes to secondary legislation - the 2000 Order - which provides for an EU Settlement Scheme status holder automatically to lose their immigration permission in the UK after a specified period of absence from the UK. The changes follow the findings of a High Court judgment (see paragraph 5.5 below) which mean that a pre-settled status holder can automatically acquire permanent residence and benefit from a longer period of absence (five years) than that for which the 2000 Order currently provides (two years). This Order remedies the inconsistency between the judgment and the 2000 Order by allowing holders of all immigration permission under the EU Settlement Scheme to be absent from the UK for five years before their permission lapses.

5.2 As part of the arrangements for the UK's exit from the EU, the UK entered into agreements governing, amongst other matters, citizens' rights, namely the Withdrawal Agreement with the EU,[5] the separation agreement with the other EEA states[6] (Iceland, Liechtenstein and Norway) and the agreement with Switzerland on citizens' rights[7] (the "Agreements"). The Agreements serve to ensure that citizens resident in the host state before the end of the transition period, and their family members, can access broadly the same rights to live, work, study and travel that they had before the UK left the EU. Those rights are available in the UK to those who obtain pre-settled or settled status under the EU Settlement Scheme.

5.3 The Agreements set out periods of "permitted absence" which may be taken from the host state without the person's rights of residence being lost. Different periods of permitted absence apply depending on whether a person has pre-permanent or permanent residence rights. Those provisions are reflected in the EU Settlement Scheme, where pre-permanent residence rights broadly equate to pre-settled status and permanent residence rights to settled status.

5.4 Article 13 of the 2000 Order makes provision for a person's leave to remain to lapse if they are absent from the UK and Islands for longer than prescribed periods. Currently, pre-settled status lapses if the holder is continuously absent from the UK and Islands for more than two years; and settled status lapses after a continuous absence exceeding five years. A person will automatically lose their immigration permission in the UK if they exceed the permitted period of absence. Those provisions were drafted to align with the UK's obligations under the Agreements, and with domestic policy applicable across the wider immigration system.

5.5 On 21 December 2022, the High Court handed down a judgment[8] which found that a pre-settled status holder acquires the right of permanent residence under the

[5] Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community.
[6] Agreement on arrangements between Iceland, Liechtenstein, Norway and the UK following withdrawal of the UK from the EU.
[7] Agreement between the UK and Swiss Confederation on citizens' rights following withdrawal of the UK from the EU.
[8] The Independent Monitoring Authority for the Citizens' Rights Agreements, R. (On the Application Of) v Secretary of State for the Home Department [2022] EWHC 3274 (Admin) (21 December 2022).

Agreements[9] automatically once the conditions for it are met – a second application to the EU Settlement Scheme, for settled status, is not required to obtain it.

5.6 The effect of that finding is that a holder of pre-settled status who acquires the right of permanent residence is entitled to the same permitted absence as if they had settled status. This will, broadly, apply to a pre-settled status holder who can show they have spent a continuous period of five years in the UK working, being self-employed, studying or being self-sufficient, or being the family member of such a person.

5.7 The 2000 Order does not currently make provision for a pre-settled status holder who has acquired the right of permanent residence under the Agreements and in that respect the 2000 Order is inconsistent with the legal position following the judgment. This Order addresses that inconsistency by amending the 2000 Order to clarify that a pre-settled status holder who has automatically acquired the right of permanent residence can benefit from a five-year period of permitted absence before their leave lapses. It does so by allowing all holders of leave under Appendix EU to benefit from a five-year period of permitted absence before their leave lapses, whether they hold pre-settled or settled status.

5.8 The change does not affect the scope for the Home Office to cancel or curtail pre-settled status where a person who has not acquired the right of permanent residence has ceased to remain eligible for pre-settled status by exceeding the absence(s) the Agreements permit.[10] This scope will remain available by decision under Appendix EU, rather than by the lapsing of leave under the 2000 Order.[11]

What was the previous policy, how is this different?

5.9 Paragraphs 5.2 to 5.8 set out previous policy and why the changes were made.

6. Legislative and Legal Context

How has the law changed?

6.1 Currently, the 2000 Order provides for the leave of a pre-settled status holder to lapse if the holder has been absent from the UK and Islands for more than two years. This Order amends the 2000 Order so that all leave under Appendix EU benefits from a five-year period of permitted absence from the UK and Islands before the leave lapses.

Why was this approach taken to change the law?

6.2 This approach was taken to ensure the High Court judgment is clearly implemented. The Order remedies, in the simplest way, the inconsistency between the 2000 Order and the High Court judgment.

[9] This part of the judgment does not apply to pre-settled status holders who have rights only under the agreement with Switzerland on citizens' rights. Under that agreement, permanent residence status is largely a matter of national law – see Article 14.
[10] After absence(s) from the UK of more than six months in any 12-month period, subject to certain exceptions.
[11] Paragraphs A3.3 and A3.4 of Annex 3 to Appendix EU: Immigration Rules - Immigration Rules Appendix EU - Guidance - GOV.UK (www.gov.uk).

7. Consultation

Summary of consultation outcome and methodology

7.1 No consultation was required for this Order. This is because it amends the 2000 Order following the High Court judgment described in paragraph 5.5 above; moreover, the changes do not disadvantage any individual or group.

8. Applicable Guidance

8.1 Existing published customer and operational guidance will be amended to reflect the provisions in this Order. It will be published on GOV.UK on the date this Order comes into force.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this Order because no, or no significant, impact on the private, voluntary or public sector is foreseen.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on businesses, charities or voluntary bodies, and the changes do not disadvantage any individual or group.

9.3 The legislation does not impact small or micro businesses because it does not apply to activities that are undertaken by small businesses.

9.4 There is no, or no significant, impact on the public sector because the legislation does not apply to activities undertaken by the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is that it will be conducted internally by the Home Office.

10.2 The Order does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Minister of State for Legal Migration and the Border at the Home Office has made the following statement regarding Human Rights:

"In my view the provisions of the Immigration (Leave to Enter and Remain) (Amendment) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This Order is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts"). It does however relate to

the withdrawal of the United Kingdom from the European Union because it amends provisions of the 2000 Order which were inserted to implement the Agreements.