EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (COLLECTION, USE AND RETENTION OF BIOMETRIC INFORMATION AND RELATED AMENDMENTS) REGULATIONS 2021

2021 No. 772

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument provides that the Secretary of State can take photographs (facial images) of foreign nationals who claim asylum, arrive at the border undocumented, are arrested or detained under immigration powers, are granted immigration bail, or are subject to removal and deportation, and the dependants of individuals in these categories.

2.2 It provides that the Secretary of State can reuse previously enrolled biometrics, reset the retention period from the date of the application for which they are reused and retain fingerprints for up to 15 years.

2.3 It provides that the Secretary of State can issue biometric immigration documents in physical and/or digital form.

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.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is to the whole of the UK.

5. European Convention on Human Rights

5.1 The Minister for Future Borders and Immigration has made the following statement regarding Human Rights:

"In my view the provisions of the Immigration (Collection, Use and Retention of Biometric Information and Related Amendments) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 These Regulations are being made in order to more closely align certain aspects of the biometrics legislative regime, for example relating to retention and reuse, that cover the provision of biometric information in a variety of contexts. For example, certain

applications under the British Nationality Act 1981, Nationality, Immigration and Asylum Act 2002 and the UK Borders Act 2007 all require the provision of biometric information.

6.2 These Regulations also implement biometric powers contained in the Immigration Act 2014 ("the 2014 Act") which amended the Immigration and Asylum Act 1999 to make it clear that the Secretary of State can retain biometrics, including photographs and fingerprints, on the basis of section 8 of the UK Borders Act 2007. This allows the Secretary of State to retain biometric information if she thinks that it is necessary to retain it for use in connection with the exercise of a function in relation to nationality or by virtue of the Immigration Acts.

7. Policy background

What is being done and why?

7.1 The Immigration and Asylum Act 1999 ("the 1999 Act") enabled the Secretary of State to make Regulations to allow additional physical characteristics of foreign nationals to be taken. Photographs are now considered to be a form of biometric information and these Regulations make it clear that photographs can be taken, used and retained in the same way as fingerprints are taken under section 141 of the 1999 Act.

7.2 We have used powers provided by the 2014 Act to make Regulations to enable the Secretary of State to require biometric information taken for immigration and nationality purposes by virtue of section 141 of the 1999 Act to be retained for as long as she thinks that it is necessary to retain them for use in connection with the exercise of a function in relation to nationality or by virtue of the Immigration Acts. This means that fingerprints will normally be retained for up to 15 years except in circumstances specified by these Regulations and facial photographs will be retained until the person obtains a United Kingdom passport, which is the same as is provided for in the Regulations made under the British Nationality Act 1981 ("the 1981 Act"), Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and the UK Borders Act 2007 ("the 2007 Act").

7.3 The Regulations build on the Statement of Intent that was provided to Parliament as part of the committee debates in the House of Commons on the 2014 Act and set out how biometric information provided to the Secretary of State may be used and retained and reflects the other Regulations concerning biometric information made under the 2014 Act. (Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254848/SoI_Biometrics.pdf)

7.4 The Secretary of State has the power to make Regulations under the 1981, 2002 and the 2007 Acts about the use and retention of biometric information provided for the purposes of an application under those Regulations. These Regulations align the process for immigration applications under the 1981, 2002 and 2007 Acts by allowing the Secretary of State to use biometric information already in her possession for the purpose of considering applications under each of those statutory schemes.

7.5 The Regulations increase the standard retention period for fingerprints collected under the 1981, 2002 and 2007 Acts from 10 to 15 years. The Regulations also provide for the retention period to begin when biometrics are enrolled and also enable the biometric retention period to be restarted from the date a person makes a further

application if the Secretary of State decides to reuse previously enrolled biometrics instead of requiring the applicant to enrol their biometrics again. This means the fingerprints could be retained for up to 15 years from the last time the individual made an application, unless there are other reasons for retaining the fingerprints for longer, such as the applicant has settled status that has not lapsed or they fall within one of the other criteria that enable fingerprints to be retained for longer periods, such as when the person is subject to a Deportation or Exclusion Order. This will benefit customer convenience because fewer repeat applicants will need to travel to a biometric enrolment location to enrol their fingerprints. Extending the 10-year fingerprint retention period to 15 years will also enable the easier identification of foreign nationals who fail to comply with Immigration Rules by overstaying their leave to stay in the UK and seek to avoid encounter with Home Office officials.

7.6 Regulations made under the 2007 Act enable the Secretary of State to issue a biometric immigration document. They also specify that where the information on a biometric immigration document in digital form differs from the information on one in physical form, the information on the digital product takes precedence. The Regulations also provide the Secretary of State with the power to prevent the use of a biometric immigration document in digital form where the holder's leave has been varied, cancelled or invalidated.

7.7 Regulations made under the 2007 Act require a holder of a biometric immigration document to provide it to a prospective employer or employer as part of right to work checks. The requirement to provide a biometric immigration document for right to work checks is removed by these Regulations, because right to work requirements are set out in the Immigration (Restrictions on Employment) Order 2007, which includes biometric immigration documents in the list of accepted documents.

7.8 Regulations made under the 2007 Act set out the information that a biometric immigration document may contain. These Regulations provide that other information may also be included on a biometric immigration document but is limited to information connected with the holder's immigration status or nationality.

7.9 Regulations made under the 2007 Act introduced the concept of a short-term biometric immigration document, known as a short stay permit, as evidence of leave of 6 months or less to comply with the EU regulation of the uniform format for residence permits. These Regulations remove the concept of short-term biometric immigration documents because it is no longer required to issue biometric immigration documents for shorter durations.

7.10 Regulations made under the 2007 Act required the Secretary of State to consider imposing sanctions in every case of non-compliance with the regulations. These Regulations provide the Secretary of State with discretion to not consider imposing sanctions. This will allow the Secretary of State to refine the circumstances where it is likely to be appropriate to issue a sanction.

7.11 These Regulations are intended to improve the customer experience by reusing previously enrolled fingerprint biometrics, so migrants do not have to attend an office to enrol a new set of fingerprints each time they make an application.

7.12 These Regulations are intended to support the development of a border and immigration system which is digital by default for all applicants, which over time means we will increasingly replace physical and paper-based products with accessible, easy to use online and digital services.

7.13 These Regulations are intended to improve our levels of assurance about the identities of all people seeking to travel through or come to the UK through the use and retention of biometric information obtained by the Secretary of State for immigration and nationality purposes.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate.

10. Consultation outcome

10.1 There is no legal requirement for the Home Office to undertake a full public consultation, but the policy has been discussed with its internal and external partners on an informal basis.

11. Guidance

11.1 We will publish guidance and continue to liaise with our corporate partnership groups and organisations representing foreign nationals through stakeholder events and communications and publications on the Gov.uk website.

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, as 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 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 the Home Office will monitor the impact of the Regulations against its delivery targets and the impact of the policy.

15. Contact

15.1 John Allen at the Home Office Telephone: 020 7035 5551 or email: john.allen@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Nigel Farminer, Deputy Director for Border, Immigration and Citizenship biometrics policy, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kevin Foster, Minister for Future Borders and Immigration at the Home Office can confirm that this Explanatory Memorandum meets the required standard.