EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (EUROPEAN ECONOMIC AREA NATIONALS) (EU EXIT) ORDER 2019

2019 No. 686

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 This Order makes provision concerning the immigration of European Economic Area (EEA) nationals to the United Kingdom. These changes are being made as a result of the United Kingdom's planned withdrawal from the European Union, whether under a 'deal' or 'no deal' scenario, and, following that withdrawal, the ending of free movement of EEA nationals to the UK.

2.2 The Order provides the mechanism by which those EEA nationals who will require leave to enter the UK once free movement is brought to an end will be granted entry at the border.[1] It will not apply to those EEA nationals who were resident in the UK prior to the UK's departure from the EU who will have their rights of admission and residence protected (subject to a successful application for status under the EU Settlement Scheme). The Order also makes provision to support the EU Settlement Scheme, which is already in operation and which enables EEA nationals and their family members who are already resident in the UK to obtain leave to remain here.

2.3 This explanatory memorandum refers to 'EEA nationals' to mean EU citizens and citizens of the other EEA countries (Iceland, Liechtenstein and Norway) and of Switzerland.

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 The powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is not limited either by the enabling Acts or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

[1] Irish citizens will continue to be able to enter the UK freely under the Common Travel Area arrangements.

5. European Convention on Human Rights

5.1 Rt. Hon. Caroline Nokes MP, the Minister of State for Immigration at the Home Office, has made the following statement regarding Human Rights:

"In my view the provisions of the Immigration (European Economic Area Nationals) (EU Exit) Order 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 The Order is made in exercise of a range of powers in connection with immigration and the operation of the border of the United Kingdom.

6.2 The measures in the Order which support the EU Settlement Scheme, in a 'deal' or 'no deal' scenario, will come into force on 30 March 2019, or the day after the day on which the Order is made, whichever is the later. The other measures in the Order will come into force when the Immigration (European Economic Area) Regulations 2016 are revoked and free movement is brought to an end.

7. Policy background

7.1 Following the UK's withdrawal from the EU, free movement will be brought to an end, subject to Parliamentary approval of the Immigration and Social Security Co-operation (EU Withdrawal) Bill currently before Parliament. However, appropriate provision needs to be made to ensure that that EEA nationals who are resident here before the UK's exit (or, under a 'deal' scenario, before the end of an agreed implementation period) will have their rights protected and will continue to be able to reside in the UK (subject to a successful application for status under the EU Settlement Scheme). There will also be EEA nationals who will wish to come to the UK after free movement has ended and who will require leave to enter. Changes are therefore required to facilitate the effective operation of the UK border.

7.2 This instrument makes changes to support the EU Settlement Scheme, but is not the means to protect the rights of EEA nationals resident here before exit. In a 'no deal' scenario, the Government intends to protect these rights by making regulations under clause 4 of the Immigration and Social Security Co-operation (EU Withdrawal) Bill, once enacted.

7.3 Under a 'deal' scenario, Appendix EU to the Immigration Rules provides the basis for the EU Settlement Scheme for resident EU citizens and their family members to apply for the UK immigration status that they will need in order to remain in the UK permanently, after the end of the planned post-exit implementation period on 31 December 2020. This is consistent with Articles 18 and 19 of the draft Withdrawal Agreement with the European Union, published on 14 November 2018.[2]

7.4 Under a 'no deal' scenario, the EU Settlement Scheme will also be the basis on which EU citizens resident in the UK by 29 March 2019 and their family members will be able to obtain UK immigration status in order to remain in the UK permanently. This

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2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756374/14_November_Draft_Agreement_on_the_Withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union.pdf

was set out in the policy paper on citizens' rights in a 'no deal' scenario, published by the Government on 6 December 2018.[3]

7.5 From 21 January 2019, the EU Settlement Scheme has been available to resident EU citizens with a valid passport, and to their non-EU citizen family members with a valid biometric residence card, as specified in the Statement of Changes in Immigration Rules HC 1849.[4] The full implementation of the scheme will be secured through the Statement of Changes in Immigration Rules HC 1919 laid before Parliament on 7 March 2019, so that the scheme will be fully open to resident EU citizens and their family members by 30 March 2019.

7.6 The agreements on citizens' rights negotiated with the other EEA countries (Iceland, Liechtenstein and Norway)[5] and with Switzerland[6] mean that the scheme will also be open to their citizens and family members from 30 March 2019.

What is being done and why?

7.7 The Order makes changes to maintain the effective operation of the UK border in a 'no deal' scenario once free movement comes to an end following the UK's withdrawal from the EU, and to support the operation of the EU Settlement Scheme ("the scheme") in both 'deal' and 'no deal' scenarios.

7.8 The Order:

- provides that EEA nationals arriving in the UK following the end of free movement in a 'no deal' scenario will, where specified circumstances are met, be granted leave to enter for a limited period automatically, i.e. by operation of law by virtue of the Order;
- extends the period of absence from the UK and Islands (Jersey, Guernsey and the Isle of Man) permitted before leave granted under the EU Settlement Scheme lapses;
- prevents scheme leave lapsing by reason of an overseas posting undertaken by a Crown servant or permanent member of the British Council who is an EEA national, or by a member of HM Forces, and in respect of a person accompanying them (or accompanying a British citizen on such a posting);
- confirms that those applying for scheme leave are exempt from paying the Immigration Health Charge; and
- allows the Secretary of State to grant leave to enter under the scheme to a person who is overseas and to require applicants for such leave to enrol their biometrics.

<u>Automatic granting of leave to enter for three months to EEA nationals</u>

7.9 Chapter 1 of Part 2 of the Order makes provision for leave to enter to be granted automatically to new arrivals who are EEA nationals. This would be brought into force in a 'no deal' scenario when the Immigration (European Economic Area) Regulations 2016 would be revoked to end free movement to the UK. Provision for

[3] https://www.gov.uk/government/publications/policy-paper-on-citizens-rights-in-the-event-of-a-no-deal-brexit
[4] https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc-1849-20-december-2018
[5] https://www.gov.uk/government/publications/eea-efta-separation-agreement-and-explainer
[6] https://www.gov.uk/government/publications/swiss-citizens-rights-agreement-and-explainer

this revocation is made by the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

7.10 The provisions in the Order will, in a 'no deal' scenario, enable EEA nationals:

- seeking to come to the UK after the end of free movement; and
- who do not have an existing right of admission or leave to enter or remain and who are not within scope of the EU Settlement Scheme; and
- who therefore require leave,

to be granted leave to enter automatically for a period of three months. There will be no restriction on the activities that such a person can undertake, which means that they may work, study or visit whilst in the UK. If they wish to stay longer than three months, they will be required to apply for further leave to remain.

7.11 There are some categories of individual to whom it would not be appropriate to grant leave to enter automatically, such as those subject to a deportation order. The Order expressly does not apply to such individuals. Additionally, where leave to enter is granted automatically by virtue of the order, a Border Force officer will have the power to cancel such leave where it is deemed undesirable to admit that person to the UK.

7.12 As part of Common Travel Area (CTA) arrangements, the UK does not operate routine immigration controls on journeys from within the CTA to the UK. However, those EEA nationals entering from Ireland will still benefit from the automatic leave provisions, while those entering from the Crown Dependencies will already have leave granted by the Islands and recognised by the UK under our integrated legal framework.

Measures supporting the EU Settlement Scheme

7.13 The Order also makes changes to protect the rights of those who are or will be eligible to obtain UK immigration status under the EU Settlement Scheme, in a 'deal' or 'no deal' scenario, by making the following changes.

Extending absence period before leave lapses

7.14 The Order amends the Immigration (Leave to Enter and Remain) Order 2000 to extend the period of absence from the UK and Islands (Jersey, Guernsey and the Isle of Man) permitted before 'settled status' (indefinite leave to remain granted under the scheme) lapses. This will mean that EEA nationals and their family members granted that status can be absent from the UK and Islands for up to five consecutive years (rather than up to two consecutive years as is otherwise the case) before their indefinite leave to remain lapses. For Swiss citizens and their family members, this period will be up to four consecutive years, in line with the citizens' rights agreement negotiated with Switzerland.

Overseas postings by Crown servants and members of HM Forces

7.15 Crown servants and members of HM Forces have made a strong commitment to the UK by working for the UK Government or by serving in HM Forces. They often have less personal choice than others working overseas, or none in the case of members of HM Forces, in where, when and for how long they are posted overseas. Their commitment and service should not disadvantage them, or a person accompanying them on an overseas posting, in terms of impact on leave granted to them under the scheme.

7.16 The Order therefore provides that scheme leave granted to a Crown servant[7] or permanent member of the British Council who is an EEA national, or to a member of HM Forces,[8] will not lapse because of an overseas posting. The Order also provides that scheme leave will not lapse in respect of a person accompanying them on an overseas posting (or accompanying a British citizen on such a posting).

Immigration Health Charge

7.17 The amendments made by the Order to the Immigration (Health Charge) Order 2015 confirm that relevant applications under the scheme will not be required to pay the Immigration Health Charge.

Overseas applications and enrolment of biometrics

7.18 The Order provides the basis, in a 'deal' or 'no deal' scenario, for applications to be made under the EU Settlement Scheme from outside the UK, for example from EEA nationals currently working or studying overseas but who have maintained their continuity of residence in the UK for the purposes of eligibility under the scheme.

7.19 The Order provides for the Secretary of State to be able to grant or refuse EEA nationals and their family members indefinite or limited leave to enter the UK under the scheme following a valid application made under the Immigration Rules for the scheme set out in Appendix EU to the Rules. This supplements the power in section 4 of the Immigration Act 1971 for the Secretary of State to give leave to remain in the UK and the power of immigration officers to give leave to enter. This will enable EEA nationals and their family members to apply from overseas, as well as from within the UK, although, in either case, applicants will have to show that they, or the relevant family member, were previously resident in the UK in line with the eligibility requirements for the scheme. Such applications are provided for by the new Appendix EU, substituted by the Statement of Changes in Immigration Rules HC 1919 laid before Parliament on 7 March 2019, to come into effect on 9 April 2019.

7.20 The Order also amends the Immigration (Provision of Physical Data) Regulations 2006 to enable the Secretary of State to require overseas applicants to the scheme to enrol their biometrics overseas (which would be a facial photograph and, in the case of non-EEA national family members, could also be their fingerprints).

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 supports the implementation of the EU Settlement Scheme. It also supports continued immigration of EEA nationals to the UK from the point at which, following withdrawal and subject to Parliamentary approval of the Immigration and Social Security Co-operation (EU Withdrawal) Bill, free movement of persons ceases to operate in UK law.

[7] Whether they work for a UK Government department or one of the Devolved Administrations. For consistency, the Order applies the same definition of Crown service to the existing provision made by article 13B of the Immigration (Leave to Enter and Remain) Order 2000 in respect of leave granted to certain family members accompanying on an overseas posting a Crown servant who is a British citizen or settled in the UK.
[8] Irish and Commonwealth citizens can serve in HM Forces. Irish citizens living in the UK are not required to apply for status under the scheme, but they may do so if they wish. Commonwealth citizens may be eligible for the scheme as an EEA national (Cyprus, Malta) or as their family member.

9. Consolidation

9.1 It is not intended to consolidate the various subordinate legislation amended by this instrument.

10. Consultation outcome

10.1 The automatic leave to enter provisions would enable EEA nationals to continue to cross the border much as they do now. The Home Office has committed to a 12-month engagement programme, following the launch of the UK's Future Skills Based Immigration System White Paper,[9] with stakeholders in every nation of the UK to help inform the detailed design of the future immigration system.

10.2 The Home Office has not undertaken a public consultation on the EU Settlement Scheme. However, on 21 June 2018 the Government published a Statement of Intent on the scheme and has since undertaken engagement with internal and external stakeholders, such as groups representing EU citizens in the UK, Consulates and community organisations, and account has been taken of those discussions.

11. Guidance

11.1 No guidance is proposed specifically on the content of this Order. The Government has published guidance on the EU Settlement Scheme, both for applicants and for Home Office officials who make decisions on applications to the scheme, and will update this ahead of the full opening of the scheme by 30 March 2019. That guidance will, where appropriate, reflect the content of this Order. The Government will continue to liaise with its partnership groups and organisations representing EU citizens and their family members through stakeholder events and communications and publications, including on Gov.UK

11.2 Guidance will be published in a 'no deal' scenario on the automatic leave to enter provisions to ensure that EEA nationals arriving in the UK following the end of free movement know whether they require leave to enter the UK and, if so, whether that leave to enter will be granted automatically. To avoid confusion, this guidance will not be published until it is clear whether or when the changes will take effect.

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 (IA) has not been prepared for this instrument because the measures are not expected to impact business negatively. An IA on the EU Settlement Scheme was published on 20 July 2018 to support the Immigration and Nationality (Fees) (Amendment) (EU Exit) Regulations 2018. This was updated and published on 7 March 2019 to support the Immigration and Nationality (Fees) (Refund, Waiver and Amendment) (EU Exit) Regulations 2019, and is available alongside that measure on the legislative.gov.uk website.

12.4 The automatic leave to enter provisions would enable EEA nationals to continue to cross the border much as they do now.

[9] https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system

13. Regulating small business

13.1 The legislation will have no, or no significant, impact on the regulation of small businesses.

14. Monitoring & review

14.1 The impact of the changes made by this instrument will be monitored internally by the Home Office.

15. Contact

15.1 Fiona Cameron at the Home Office (telephone: 020 7035 6041 or email: fiona.cameron@homeoffice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Nicola Smith at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt. Hon. Caroline Nokes MP, Minister of State for Immigration at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.