EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (PERSONS FROM ABROAD) AMENDMENT (NO 2) REGULATIONS 2006

2006 No. 2528

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This instrument makes amendments to the following income-related benefit regulations:

- the Income Support (General) Regulations 1987
- the Jobseeker's Allowance Regulations 1996
- the State Pension Credit Regulations 2002
- the Housing Benefit Regulations 2006
- the Housing Benefit (Persons who have attained the qualifying age for state pension credit)Regulations 2006
- the Council Tax Benefit Regulations 2006
- the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit)Regulations 2006

2.2 This instrument amends the income-related benefit regulations in consequence of the Home Office's transposition of Council Directive 2004/83/EC ("Directive") on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

2.3 The Regulations on 9th October 2006 insert a new category into the list of persons who are exempt from the habitual residence test for income-related benefits. The additional category exempts persons who have humanitarian protection granted under the Immigration Rules. This instrument also amends the existing exceptional leave category so that that exemption does not refer to the person who grants the leave to enter or remain.

3. Matters of special interest to the [Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments]

3.1 None.

4. Legislative Background

4.1 The habitual residence test was introduced into the income-related benefit regulations by the Income-related Benefits Schemes (Miscellaneous Amendments) (No.3) Regulations 1994. There have been a number of modifications to the test over time.

4.2 Amendments are made in light of the new Directive which must be transposed by 10th October 2006. The Home Office is responsible for transposing the Directive. Amongst other things, the Directive introduces a new category of protection known as subsidiary protection. The Home Office intend to align as far as possible the definition of the existing category of humanitarian protection with the definition of subsidiary protection in the Directive. Presently, humanitarian protection is leave granted outside the Immigration Rules, which are rules made under section 3(2) of the Immigration Act 1971. To implement the Directive, from 9th October 2006, humanitarian protection will be granted under the Immigration Rules.

4.3 The Home Office is making the legislative changes necessary for the transposition by the Refugee or Person in need of International Protection (Qualification) Regulations 2006 which will come into force on 9th October 2006.

5. Extent

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 A claimant is required to satisfy the habitual residence test to be eligible for Income Support, income-based Jobseeker's Allowance, State Pension Credit, Housing Benefit and Council Tax Benefit ("income-related benefits"). It was introduced to prevent "benefit tourism" by people who come here from abroad and immediately claim income-related benefits. Its purpose is to ensure that income-related benefits are paid to people with reasonably close ties to the UK and an intention to settle here. From 1st May 2004, a claimant also had to have a right to reside in order to satisfy the habitual residence test**.** The right to reside part of the test was further modified from 30th April 2006 so that certain rights to reside do not satisfy that aspect of the test.

7.2 There are a number of categories of person who are exempt from the test:

- workers, self-employed persons, persons who retain either status and their family members for the purposes of Council Directive No. 2004/38/EC;
- people with a right to reside permanently in the UK by virtue of Article 17 of that Directive;
- nationals from one of eight of the member States that acceded to the European Union on 1st May 2004 who are workers by virtue of the Home Office Worker Registration Scheme;
- those who have been granted refugee status;
- persons who have been granted exceptional leave to enter the United Kingdom by an immigration officer, or to remain in the United Kingdom by the Secretary of State;

- those who have been deported or otherwise compulsorily removed from another country to the UK;
- people who have left Montserrat since November 1995 because of the volcanic eruption; and
- people who have left Lebanon on or after 12th July 2006 because of the armed conflict there (this exemption will cease on 31st January 2007).

7.3 People in these categories are exempt from the habitual residence test. They therefore become able to access income-related benefits immediately if they meet the other conditions of entitlement. In particular, people granted humanitarian protection – presently a form of leave given exceptionally outside the Immigration Rules- are able to qualify immediately for income-related benefits because of the exemption mentioned in the fifth bullet point in paragraph 7.2. This exemption has existed since the introduction of the habitual residence test. It was never the intention that refugees and those granted a form of exceptional leave should be affected by the test.

7.4 As mentioned in paragraph 4.2, following transposition of the Directive on 9th October 2006, humanitarian protection will be granted under the Immigration Rules. This instrument thus adds a further category of persons to the list of exemptions from that date so that people who have been granted humanitarian protection under the Immigration Rules qualify immediately for income-related benefits by being exempt from the habitual residence test.

7.5 The exemption from the habitual residence test for persons who have been granted exceptional leave outside the Immigration Rules is retained for other categories of leave granted outside those rules. However, this instrument makes minor amendments to that category. The amended exemption defines exceptional leave by reference to it being leave to enter or remain granted outside the Immigration Rules. It no longer refers to the person granting the leave.

7.6 This instrument does not alter the effect of section 115 of the Immigration and Asylum Act 1999. Subject to prescribed exceptions, no person is entitled to an income-related benefit if section 115 applies to him or her. The section applies to persons subject to immigration control. The definition of "a person subject to immigration control" in section 115 does not include, amongst others, those with certain types of leave to enter or remain in the UK such as humanitarian protection or exceptional leave to enter or remain granted outside the Immigration Rules.

7.7 Guidance will be issued to decision makers to ensure that they are aware of the changes to the regulations and how to apply them.

7.8 Although there are no plans immediately to consolidate the income-related benefit regulations, the public will have access to this information at no cost through the internet. The Regulations will be published in the Department's Blue Volumes (http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/pdf/c_0031.pdf) and also at www.opsi.gov.uk.

Consultation

7.9 The Social Security Advisory Committee agreed that the regulations should not be referred to it for formal consultation. The local authority associations have also been consulted in relation to Housing Benefit and Council Tax Benefit. They have confirmed that they are content with the instrument as it relates to those benefits.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 There is no impact on the public sector, as there are no costs associated with the changes.

9. Contact

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