

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION, NATIONALITY AND ASYLUM (EU EXIT) REGULATIONS
2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to ensure that our immigration, nationality and asylum laws will continue to operate effectively after the United Kingdom leaves the European Union, until new legislation on these matters is approved by Parliament and implemented, including in a ‘no deal’ scenario.
- 2.2 It will address deficiencies that arise, as a result of the UK leaving the EU, in retained EU law in relation to immigration, nationality and asylum (including domestic primary and secondary legislation), which will be retained in UK law for the time being by the European Union (Withdrawal) Act 2018.
- 2.3 The effect of the amendments made by this instrument in relation to the law relating to immigration and nationality is to maintain the current legal position (with limited exceptions which are discussed below).
- 2.4 In relation to asylum, changes are being made to reflect the fact that the UK will, on withdrawal, no longer participate in certain information sharing and co-operation mechanisms under EU law.

Explanations

What did any relevant EU law do before exit day?

- 2.5 The UK’s legislation in relation to immigration, nationality and asylum reflects its membership of the EU. Domestic legislation includes references to the European Union and the European Economic Area (EEA), as well as reflecting the incorporation of EU law. There are several pieces of legislation that describe the UK in terms of its membership of the European Union or the European Economic Area.
- 2.6 In addition, much of the relevant domestic law to which this instrument applies has given effect to the UK’s obligations in the field of asylum arising from membership of the EU. This includes, for example, arrangements for determining which Member State is responsible for examining an asylum application lodged by a third country national in its territory, mechanisms for sharing finger prints and monitoring and reporting, and priorities for refugee funding (regulation 55 refers).

Why is it being changed?

- 2.7 Aspects of the UK’s immigration, national and asylum law and system are based on EU law, or are otherwise derived from or connected to obligations arising from EU membership. Parliament has chosen to retain applicable EU law via the European Union (Withdrawal) Act 2018, in the knowledge that, as Parliament returns to the

relevant issues after the UK's withdrawal from the EU, some of this law will continue to be retained by way of domestic legislation and some will not. The UK intends to develop a new skills-based immigration system, as discussed in the immigration white paper, published on 19 December 2018.¹ The process of developing this new system will involve decisions about whether to continue to retain law enacted whilst the UK was a member of the EU.

- 2.8 Whilst that system is in development, the Government is charged with ensuring that there is a functioning statute book. This instrument is designed to discharge that responsibility with regard to immigration, nationality and asylum law. It amends provisions in domestic legislation that relate to immigration, nationality and asylum to reflect that the UK will no longer be a member of the European Union or European Economic Area. Where free movement is concerned, it does so pending the passage and implementation of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill that is currently being considered by Parliament. If enacted, that Bill would end free movement and other retained EU law on immigration, which would otherwise be retained in UK law by the European Union (Withdrawal) Act 2018.
- 2.9 Other particular examples of where this instrument will ensure that there is a functioning statute book after the UK withdraws from the EU, pending further domestic legislation on future UK arrangements, are set out in section 7, below.

What will it now do?

- 2.10 This instrument amends and revokes the relevant legislation only in so far as this is appropriate to prevent, remedy or mitigate deficiencies in law arising from the UK's exit from the EU. It thereby ensures that, where required, the legislation may continue to operate effectively or, in certain cases, revokes legislation which would not operate effectively. This instrument also contains transitional, transitory and savings provisions to ensure fairness and consistency in relation to certain things done before the UK leaves the EU.

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 to England and Wales, Scotland and Northern Ireland.

¹ <https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system>

4.2 The territorial application of this instrument is the same within England and Wales, Scotland and Northern Ireland as the enactments to which the provisions relate.

5. European Convention on Human Rights

5.1 Rt. Hon. Caroline Nokes MP, 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, Nationality and Asylum (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 Since the United Kingdom joined the European Union, domestic law has given effect to the UK’s obligations in the fields of immigration, nationality and asylum arising from membership of the EU. In addition, the UK has been subject to directly applicable EU law. When the UK leaves the EU, aspects of domestic legislation that concern immigration, nationality and asylum, and retained EU law (within the meaning of the European Union (Withdrawal) Act 2018), will fail to operate effectively and will contain deficiencies if they are not modified or revoked.

6.2 This instrument is being made under powers in the European Union (Withdrawal) Act 2018 to prevent, remedy or mitigate these deficiencies.

7. Policy background

What is being done and why?

7.1 This instrument makes modifications to domestic legislation, necessitated by the United Kingdom’s withdrawal from the European Union. It also provides for the scenario in which free movement continues to operate beyond the UK’s exit from the EU, until Parliament has passed the primary legislation needed to end free movement (see the Immigration and Social Security Co-ordination (EU Withdrawal) Bill) and this has been implemented.

7.2 All the provisions in this instrument will commence on exit day in a ‘no deal’ scenario, or in a ‘deal’ scenario from the end of the planned implementation on 31 December 2020, as set out in the draft Withdrawal Agreement with the European Union published on 14 November 2018. This is so that the UK’s statute book and current arrangements can continue to operate effectively, until free movement is ended. This instrument also contains provisions that delay the effect of some of the measures until the “appointed day”, which is the day on which new immigration rules providing for the new skills-based immigration system come into force. The provisions of this instrument can be divided into seven groups.

7.3 The first group, in Part 1, Chapters 1 and 2, comprises technical changes required to correct wording in primary and secondary legislation in relation to immigration and nationality, which describes the United Kingdom in terms of its membership of the European Union or European Economic Area. These amendments allow the legislation to operate effectively and do not alter its effect. Examples of such amendments are:

- Section 25 and 25C of the Immigration Act 1971. The amendment ensures that the offence of facilitating illegal immigration continues to operate as previously. The instrument contains consequential amendments to the

following legislation which all refer to the offence: Schedule 8B to the Police Act 1997, paragraph 11 of Schedule 3 to the Serious Crime Act 2007 and paragraph 16 of Schedule 4 to the Modern Slavery Act 2015;

- The Police Regulations 2003, the Police Reserve Trainee Regulations (Northern Ireland) 2004, the Police Service of Northern Ireland Regulations 2005 and the Police Service of Scotland (Special Constables) Regulations 2013. The amendments have the effect of ensuring the continuing eligibility of UK nationals as well as EEA citizens to be employed and trained as reserve/special constables and police officers in England, Wales, Northern Ireland and Scotland;
- The Nationality, Immigration and Asylum (Juxtaposed Controls) Order 2003. The provision made by this instrument ensures that the relevant Treaty with France continues to implement ‘control zones’ in certain ports where immigration officers conduct reciprocal checks; and
- Section 1(5) of the Aliens’ Employment Act 1955. This relates to employment in the UK civil service. This instrument preserves the status quo for EU, EEA and Swiss, Turkish nationals and their families (who arrive before or after exit) prior to the specified date.

7.4 The second group of provisions in this instrument are technical amendments to domestic primary and secondary legislation that refer to EU rights. These rights will be retained by the European Union (Withdrawal) Act 2018. The amendments change references to “enforceable EU rights” to “retained enforceable EU rights”, in line with that legislation. Examples of where this modification is made by this instrument include the Immigration Act 1988, the Criminal Justice and Immigration Act 2008, the Borders, Citizenship and Immigration Act 2009, the Immigration (Leave to Enter and Remain) Order 2000 and the Immigration (Biometric Registration) Regulations 2008.

7.5 The third group of provisions in this instrument comprises revocations of the retained EU legislation relating to immigration, as set out in Schedule 1. This includes legislation concerning the specification of documentation, notably the uniform format for residence permits for third country nationals (such as information and security features they must contain). Given the absence of ongoing reciprocal arrangements with EU Member States in these areas, it is not appropriate to retain these measures.

7.6 The fourth group of provisions in this instrument comprises revocations of a number of EU instruments and one domestic instrument which give effect to the UK’s membership of the EU asylum acquis, which the UK will cease to be a part of on exit from the EU. This instrument revokes a number of EU Regulations (which would otherwise become retained EU law under the European Union (Withdrawal) Act 2018) in relation to asylum, and related Council Decisions and Regulations that implement these measures (see Schedule 1, parts 1 and 2). The legislation is being revoked because it will be inoperable when the UK is outside the EU asylum acquis. The Regulations being revoked include:

- The ‘Dublin III Regulation’ which contains rules to establish the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged, in one of the Member States, by a third country national or stateless person, and the legal framework for returning and accepting asylum seekers to and from the EU;

- The Eurodac Regulation. This concerns the use and operation of the Eurodac biometric database, which provides evidence for the operation of the Dublin Regulation. Eurodac notifies participating Member States of a match if a person has been fingerprinted as an asylum seeker in connection with an illegal crossing into a country participating in the Dublin Regulation;
 - The European Asylum Support Office Regulation. The UK will no longer be a member of this institution or its successor, the EU Asylum Agency, on exit; and
 - The Displaced Persons (Temporary Protection) Regulations 2005. These Regulations implemented the Temporary Protection Directive. The Regulations set out the process of centralised EU control of distribution and treatment of asylum seekers in periods of acute crisis.
- 7.7 The fifth group of provisions in this instrument, in Chapter 5, makes clear that EU rights, powers, liabilities, restrictions, remedies and procedures that would otherwise be retained in UK law by virtue of the European Union (Withdrawal) Act 2018 will continue to apply where they are consistent with domestic legislation, and disapplied where they are not.
- 7.8 The only exception is in relation to the Turkish European Communities Association Agreement (ECAA) and a change to the criminality threshold for Turkish workers and business persons in respect of conduct after exit. Under the ECAA, which is retained EU law until Parliament has passed the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, any such criminality is considered against the EU test of public policy or public security. This will be replaced, for post-exit conduct, by the UK's sentence-based criminality thresholds and by provision for exclusion and deportation from the UK where it is conducive to the public good. It aligns treatment of Turkish workers and business persons with the treatment of EEA nationals described in paragraph 7.10, below.
- 7.9 The sixth group of provisions in this instrument makes a number of transitional and savings provisions in relation to the immigration, nationality and asylum measures being amended by this instrument. The intention is to ensure that those amendments do not have an inappropriate effect in respect of decisions or other action taken before the commencement of the amendment. For example:
- The amendments to section 5 of the British Nationality Act 1981 will not affect the determination of an application for registration as a British citizen made under section 5 before exit day;
 - Section 84(2)(c) of the Immigration and Asylum Act 1999 is saved until the appointed day (defined in regulation 1(5)), so that registered European lawyers continue to be exempt from registering with the Office of the Immigration Services Commissioner;
 - Three provisions of the Eurodac Regulation are saved in relation to data obtained from Eurodac by the UK before this instrument comes into force.
- 7.10 The seventh group of provisions in this instrument changes the grounds on which a decision is made to restrict admission or residence in the UK of an EEA national or their family member. This instrument amends the Immigration (European Economic Area) Regulations 2016 so that EEA nationals (and their family members), coming to the UK for the first time after exit day, will be subject to UK rules on criminality. These include requirements which provide for the refusal of admission or leave to

remain based on clear sentence-based thresholds, for exclusion or deportation from the UK where it is conducive to the public good, and for a presumption of deportation where a person has received a custodial sentence of at least 12 months. For EEA nationals (and their family members) who are resident in the UK before exit day, these tests will also apply to conduct committed after the commencement of this instrument. This will replace the EU test of public policy or public security, which will continue to apply to their conduct before the commencement of this instrument.

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

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018, in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. This instrument is also made under paragraph 23(1) and paragraph 21 of Schedule 7 to that Act. In accordance with the requirements of that Act, the Minister has made the relevant statements, as detailed in Part 2 of the Annex to this explanatory memorandum.

9. Consolidation

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

10. Consultation outcome

10.1 No public consultation was conducted. This is because it was not considered to be appropriate in light of the nature of the amendments made by this instrument, which are limited to correcting deficiencies in retained EU law.

11. Guidance

11.1 Guidance for caseworkers on the application of the EU public policy and public security test will be amended and published when this instrument comes into force.

11.2 As this instrument is largely about maintaining the status quo on exit day, including in the event that the UK withdraws from the EU without an agreement and free movement has not yet come to an end, new guidance will not generally be needed. The Home Office will publish guidance, if and when it is necessary, and it will keep this under review if so.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 This instrument, which revokes EU Regulations in relation to asylum, may have a small impact on net asylum transfers. In 2017, there were 461 transfers into the UK from another Member State and 314 returns from the UK to another Member State under the Dublin III Regulation.²

² Volume 5 <https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2018/how-many-people-do-we-grant-asylum-or-protection-to>

12.4 The instrument, which applies UK rules on criminality to EEA nationals for offences committed after the commencement of this instrument, may have an impact on the number of EEA nationals eligible for deportation from the UK. However, the impact will depend on the rate of offending and the seriousness of the offences committed, which are uncertain and difficult to predict.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses and therefore 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.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Charlotte Dickin at the Home Office Telephone: 0207 035 6041 or email: charlotte.dickin@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 The Rt. Hon. Caroline Nokes MP, Minister of State for Immigration at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Minister of State for Immigration, the Rt. Hon. Caroline Nokes MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 do no more than is appropriate”.

- 1.2 This is the case because the instrument does no more than is appropriate in amending the relevant immigration-related legislation to reflect the UK’s exit from the EU.

2. Good reasons

- 2.1 The Minister of State for Immigration, the Rt. Hon. Caroline Nokes MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 This is because the amendments made by this instrument ensure that, where required, the immigration-related legislation may continue to operate effectively, or, in the case of EU legislation, to which the UK is no longer subject, this is revoked.

3. Equalities

- 3.1 The Minister of State for Immigration, the Rt. Hon. Caroline Nokes MP has made the following statement(s):

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”