

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (CITIZENS' RIGHTS APPEALS) (EU EXIT) REGULATIONS
2020

2020 No. 61

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 purpose of the instrument is to establish, from exit day, a right of appeal for EU, other European Economic Area (EEA) and Swiss citizens and their family members against decisions affecting their entitlement to enter and remain in the UK under the EU Settlement Scheme (EUSS) or decisions in relation to EUSS family permits or travel permits. Details of these Regulations and the changes they make to legislation are included in section 7 of this Explanatory Memorandum.
- 2.2 These Regulations apply to people who have made an application for, or have been granted, leave under the EUSS or entry clearance in the form of an EUSS family permit or travel permit. This Explanatory Memorandum uses 'EEA citizens' to refer also to Swiss citizens.

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 extent of this instrument includes Scotland and Northern Ireland.
- 3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 42 (1) of the European Union (Withdrawal Agreement) Act 2020) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is all of the United Kingdom.
- 4.2 The territorial application of this instrument is all of the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Rt. Hon. Brandon Lewis MP, Minister of State for Security and Deputy for EU Exit Preparation at the Home Office, has made the following statement regarding Human Rights:

“In my view the provisions of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is made under section 11(1) and (4) of, and paragraph 12 of Schedule 4 to, the European Union (Withdrawal Agreement) Act 2020. It is necessary in order to meet the UK's obligations under the Withdrawal Agreement, the EEA EFTA Separation Agreement, and the Swiss Citizens' Rights Agreement ("the Agreements"). The Agreements require that, where the UK operates, from exit, a scheme for EEA citizens and their family members protected by the Agreements to apply for residence status in the UK, the UK must also provide, from exit, judicial redress against any decision refusing to grant such EEA citizens and their family members residence status or any decision otherwise restricting their entry and residence rights under the Agreements.
- 6.2 The Agreements also specify that the redress procedures must allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the decision is based.

7. Policy background

What is being done and why?

- 7.1 As required by the Agreements, this instrument establishes a range of appeal rights for those who apply under the EUSS and those whose rights under the scheme are restricted (for example, where their status is curtailed or revoked). It also establishes rights of appeal for those who are required to apply for entry clearance in the form of an EUSS family permit before they can apply in the UK for leave under the EUSS or who apply for entry clearance in the form of an EUSS travel permit.
- 7.2 This instrument provides that, where a person makes a valid application for leave under the EUSS, or for an EUSS family or travel permit, on or after exit day, they will have a right of appeal against a decision to:
- refuse the application;
 - in the case of an application under the EUSS, grant limited leave to enter or remain (pre-settled status under the scheme) where they believe they should have been granted indefinite leave to enter or remain (settled status under the scheme).
- 7.3 This instrument also provides that, where a person has been granted status under the EUSS, or an EUSS family permit or travel permit, they will have a right of appeal against a decision which is made on or after exit day to:
- vary their leave to enter or remain so that they have no leave (pre-settled status);
 - revoke their indefinite leave to enter or remain (settled status);
 - cancel their leave to enter or remain (settled or pre-settled status);
 - cancel or revoke their EUSS family permit or travel permit;
 - refuse them leave to enter the UK under Article 7(1) of the Immigration (Leave to Enter and Remain) Order 2000 when they have a valid EUSS family permit or travel permit;
 - vary or cancel leave to enter which they have by virtue of having entered the UK with a valid EUSS family permit;

- deport them, where they have EUSS leave (settled or pre-settled status) or are in the UK having arrived with an EUSS family permit.
- 7.4 Any decision that can be appealed under this instrument can be appealed on the grounds that the decision:
- breaches any rights the person has under the Agreements; or
 - was not in accordance with the relevant immigration rule or legislation under which it was made.
- 7.5 Appeals under this instrument will be to the Immigration and Asylum Chamber of the First-tier Tribunal with an onward right of appeal to the Upper Tribunal with permission and on a point of law. The only exception is where the appeal is certified on the grounds of national security in the interests of a relationship between the UK and another country, or otherwise in the public interest, in which case the appeal will be to the Special Immigration Appeals Commission (SIAC)
- 7.6 The time limits to appeal are set out in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Where a person applies for administrative review of a decision and is unsuccessful and has not already appealed, the time limits for appealing the original decision will start again from the date the decision on the administrative review is sent (if they are in the UK) or received (if they are outside the UK). This is to allow people who wish to pursue an administrative review to do so without losing their right of appeal. Decisions notifying right of appeal must be served in accordance with the Immigration (Notices) Regulations 2003.
- 7.7 Appeals under this instrument can be brought from either inside or outside the UK. In addition, leaving the UK does not cause an appeal to be abandoned. This reflects the position under the Immigration (European Economic Area) Regulations 2016 and recognises that people can continue to exercise any free movement rights they may have until those rights end.
- 7.8 An appeal will be abandoned if, whilst the appeal is ongoing, the person is granted pre-settled status or settled status, unless they give notice that they wish to continue the appeal. A person may wish to continue an appeal where they have been granted pre-settled status whilst their appeal is ongoing but believe they should have been granted settled status. Additionally, where a person is appealing against a decision to revoke settled status and they are granted pre-settled status they may wish to continue the appeal on the ground that settled status should be restored.
- 7.9 Appeals under this instrument will suspend removal unless the appealable decision has been certified on the basis that the person is liable to deportation.
- 7.10 Where a decision is certified on the basis the person is liable to deportation, a person in an appeal to the First-tier Tribunal has a right to return to the UK in order to attend their appeal hearing in person, unless their return may cause serious troubles to public policy or public security. Where a person is permitted to return to the UK to attend their appeal hearing, they will be admitted on immigration bail for the duration of their time in the UK. This provision complies with the procedural protections required by the Agreements and reflects the existing position for deportation appeals under the Immigration (European Economic Area) Regulations 2016.
- 7.11 This instrument amends two pieces of primary legislation. The first is section 3C of the Immigration Act 1971, which is amended so that it applies to appeals against

decisions to vary pre-settled status under this instrument. This is so that, where a person applies under the EUSS for a variation of their leave, their leave is extended whilst their appeal is pending. The second is section 2C of the Special Immigration Appeals Commission Act 1997, which is amended so that an exclusion direction in relation to an EEA citizen protected by the Agreements or by the UK's domestic implementation of the Agreements can be certified where the relevant grounds are met so that it is reviewable by SIAC.

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. It is being made under the power set out in section 11 (1) and (4) of, and paragraph 12 of Schedule 4 to, the European Union (Withdrawal Agreement) Act 2020

9. Consolidation

9.1 This is the first instrument being made under these powers and establishes new appeal rights. Therefore, consolidation is not applicable.

10. Consultation outcome

10.1 This instrument has not been the subject of a formal public consultation but, in respect of the EUSS, the policy has been discussed with the Home Office's 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. The rights of appeal reflect the international obligations the United Kingdom has entered into in exiting the European Union.

11. Guidance

11.1 Guidance relating to this instrument will be placed on the GOV.UK website.

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 An Impact Assessment has not been prepared for this instrument because no significant impact on business is foreseen.

13. Regulating small business

13.1 The instrument does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This instrument will be reviewed before the end of the implementation period under the Agreements.

15. Contact

15.1 Kirsan Ferguson at the Home Office Telephone: 07774 420751 or email: Kirsan.ferguson@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 Sally Weston at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt. Hon. Brandon Lewis MP, Minister of State for Security and Deputy for EU Exit Preparation at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.