

## EXPLANATORY MEMORANDUM TO

### THE SOCIAL SECURITY, CHILD BENEFIT AND CHILD TAX CREDIT (AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. 1505

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC), on behalf of Her Majesty's Treasury and the Department for Work and Pensions (DWP) and is laid before Parliament by Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 This instrument makes changes to social security, Child Benefit and tax credit regulations. Further to the Social Security, Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019 (the 2019 regulations) (S.I. 2019/1431) these changes will ensure that at the end of the transition period the rights of certain non-European Economic Area (EEA) nationals lawfully living and working in the United Kingdom (UK) are protected or removed as appropriate for the purposes of determining entitlement to certain benefits and tax credits.
- 2.2 This instrument amends the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 (S.I. 2000/636) to remove, for the purposes of accessing Universal Credit, the exception from being a person subject to immigration control for nationals from the European Union (EU) and European Economic Areas (EEA), in addition to Turkey and North Macedonia, who have ratified either the European Convention on Social and Medical Assistance and the European Social Charter.

#### 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 As the instrument is subject to the negative resolution procedure, there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

#### 4. Extent and Territorial Application

- 4.1 The provisions amending the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 extend and apply to Great Britain with the exception of changes to child benefit where the provisions also extend and apply to Northern Ireland. The provisions extend and apply to Great Britain in relation to regulation 2. In relation to regulation 3 they extend and apply to Northern Ireland, and in relation to regulations 1, 4, 5 and 6 the provisions extend and apply to the United Kingdom.

## **5. European Convention on Human Rights**

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

## **6. Legislative Context**

- 6.1 This instrument makes changes to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, and in so far as it relates to Child Benefit makes changes to the Social Security (Immigration and Asylum) Consequential Amendments Regulations (Northern Ireland) 2000 (S.I. 2000/71), the Tax Credits (Immigration) Regulations 2003 (S.I. 2003/653), the Tax Credits (Residence) Regulations 2003 (S.I. 2003/654) and the Child Benefit (General) Regulations 2006 (S.I. 2006/223).
- 6.2 Under existing legislation, persons who are subject to immigration control (PSICs) are generally not entitled to HMRC and DWP benefits. This policy is reflected in legislation in the Immigration and Asylum Act 1999 (the 1999 Act) and under the Tax Credits Act 2002. However, there are some exceptions to this general approach. A person who is lawfully working in the UK whilst subject to immigration control as set out in section 115(9) of the Immigration and Asylum Act 1999 or section 42 of the Tax Credits Act 2002, and their family members, can be treated as not being subject to immigration control for the purposes of accessing certain benefits if:
- a) they are a national of a state which has concluded an agreement with the EU providing, in the field of social security, for the equal treatment of workers, and their families
  - b) with respect to family benefits only, a national of a state which has concluded an agreement with the EU which makes provision for receipt of family benefits for eligible members of their family who are legally resident.
- 6.3 The 2019 regulations also makes provision for non-EEA individuals currently in scope of one of the EU agreements referred to in paragraph 6.2(a) above to maintain access to benefits in the UK on the same terms once the agreement no longer applies in the UK if they are in scope of a new UK Trade and Continuity Agreement (TCA).
- 6.4 Part II of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 and the Social Security (Immigration and Asylum) Consequential Amendments Regulations (Northern Ireland) 2000 set out the persons not excluded from accessing certain benefits under section 115 of the 1999 Act. Paragraph 2 of Part II of the Schedule to each instrument provides that a person who is lawfully working in either Great Britain or Northern Ireland and is a national of a state with which the EU has concluded an agreement under Article 217 of the Treaty on the Functioning of the European Union (TFEU), which provides for equal treatment in the field of social security, is not excluded from accessing Child Benefit and certain disability and carer's benefits, and social fund payments.
- 6.5 Regulation 3 of the Tax Credit (Immigration) Regulations 2003 sets out that PSICs are not entitled to Child Tax Credit or Working Tax Credit, except in certain cases as set out in those regulations. The exception set out in Case 5, which relates to Child Tax Credit, is a person lawfully working in the UK who is a national of a state with which the EU has an agreement providing for the equal treatment of workers in the field of social security.

- 6.6 The Tax Credits (Residence) Regulations 2003 and the Child Benefit (General) Regulations 2006 provide that a person relying on a right to reside in the UK under regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 (S.I. 2016/1052), is treated as being in the UK for the purposes of claiming Child Tax Credit or Child Benefit. This only applies if they are lawfully working in the UK and are covered by an agreement made between the EU and a non-European Economic Area (EEA) country under Article 217 of the TFEU, which provides for the equal treatment in the field of social security.
- 6.7 This instrument is also being passed to make changes to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 (the 2000 regulations), which provide a number of exemptions to section 115 of the 1999 Act which excludes PSICs from access to specified benefits. The UK gives effect to its obligations under ECSMA and the 1961 ESC through domestic legislation, including to Article 13 paragraph 4 of the 1961 ESC in part through the 2000 regulations. Specifically, regulation 2 and paragraph 4 of Part I of the Schedule specify that a person who is a national of a country that has ratified ECSMA or the 1961 ESC and who is “lawfully present” in the UK is not excluded under section 115 from certain income-related benefits, including Universal Credit. This means that currently, notwithstanding their PSIC conditions, nationals from countries that have ratified ECSMA or the 1961 ESC may be eligible to access Universal Credit as long as they are lawfully present and also meet the eligibility requirements of the relevant benefits legislation.
- 6.8 At present, under section 115(9) of the 1999 Act, PSICs do not currently include EEA nationals, meaning the ECSMA/ESC provisions, as set out in the 2000 regulations currently only impact nationals of Turkey and Macedonia. This will change after the end of the transition period (31 December 2020, 11:00 PM GMT), when EEA nationals not covered by the Withdrawal Agreement will no longer automatically be exempt from being PSIC under section 115(9) of the 1999 Act and will have equivalent status to other third country nationals entering the UK. Unless the regulations are amended, after the transition period has ended, in addition to Turkish and North Macedonian nationals, nationals of the EEA member states which have ratified ECSMA or the 1961 ESC may be eligible for Universal Credit, contrary to the manifesto commitment that EEA nationals arriving under the new points based immigration system will have the same access to benefits as non-EEA migrants currently do.

## 7. Policy background

### *What is being done and why?*

#### Access to benefits under EU agreements

- 7.1 The EU has a number of association agreements (EUAAAs) with non-EEA countries, which are currently directly applicable in the UK but which will cease to apply from the end of the transition period. The Department for International Trade have been undertaking a programme to replicate, through new UK Trade and Continuity Agreements (TCAs), the effects of existing EU trade agreements with trading partners to ensure continuity for UK businesses and consumers following the end of the transition period.

- 7.2 Some EUAAs contain provisions on access to benefits in the UK, either by providing for the equal treatment of nationals who are subject to immigration control but lawfully working in the UK (equal treatment EUAAs) or making specific provision for access to family benefits (non-equal treatment EUAAs). In all but one case, Algeria, it is expected that there will be UK TCAs in place to succeed the EUAAs which contain access to benefits provisions. Engagement with the government of Algeria is continuing but a TCA is not expected to be in place for 1 January 2021.
- 7.3 The 2019 regulations have already made provisions to ensure that individuals in scope of equal treatment EUAAs which have been transitioned to TCAs will maintain their access to benefits after the transition period. These benefits include Child Benefit and Child Tax Credit administered by HMRC, and Attendance Allowance, Personal Independence Payment, Disability Living Allowance, Carers Allowance administered by DWP.
- 7.4 Although EUAAs will cease to have direct effect in the UK at the end of 2020, the existing provisions in domestic legislation mean that individuals who are subject to immigration control and in scope of an equal treatment EUAA would continue to be able to access certain HMRC and DWP administered benefits after the end of the transition period even if a new TCA covering these countries has not been agreed. As the UK has now left the EU the government intends to complete the transition from EUAAs to TCAs for access to benefits and stop paying new claims to benefits under EUAAs from that point. Consequently, individuals covered by an EUAA will no longer be entitled to make new claims to benefits in the UK from the 1 January 2021. However, individuals already in receipt of benefits at the end of the transition period will continue to receive those benefits under the existing EUAA exception until they no longer need it, for example, because they receive leave to remain with recourse to public funds, or they no longer meet the relevant entitlement conditions for that benefit.

#### Access to Universal Credit

- 7.5 There is a clear government manifesto commitment that EEA citizens arriving in the UK from 1 January 2021 will have the same access to benefits as non-EEA migrants. Those future EEA migrants will need to apply for and obtain relevant leave under the new points based immigration system, which for most will be subject to a no recourse to public funds condition for five years. This means that there will be no access to benefits until such time as these EEA migrants obtain indefinite leave to remain (or otherwise have the no recourse condition lifted). However, domestic legislation has been identified that may prevent the government's policy from being fulfilled.
- 7.6 The European Convention on Social and Medical Assistance (ECSMA) and the European Social Charter (ESC) are treaties of the Council of Europe. ECSMA was ratified by the UK in 1954 and extends cooperation in the field of social security between signatories. Article 1 effectively provides that nationals of the Contracting Parties who are "lawfully present" in another Contracting Party's territory and who are without sufficient resources, are entitled equally and on the same conditions as the Contracting Party's own nationals to "social and medical assistance". The UK government lists its laws and regulations to which ECSMA applies in Annex I of this document.
- 7.7 The UK has also ratified the 1961 ESC (but not a revised charter of 1996) and has accepted many of its paragraphs, including Part II, Article 13 paragraph 4. With the

exception of Bulgaria, Lithuania, Romania, Slovenia and Liechtenstein, all EEA countries have ratified either ECSMA, the 1961 ESC, or both. In addition, Turkey is a signatory to both treaties and North Macedonia is a signatory to ESC.

- 7.8 As part of the Universal Credit (Consequential, Supplementary, Incidental and Miscellaneous Provisions) Regulations 2013, an amendment was made to the 2000 Regulations, which added Universal Credit as a benefit which ECSMA/ESC nationals were able to access notwithstanding their PSIC status. Universal Credit is not listed in Annex I of ECSMA and is not deemed to fall within the definition of social assistance for the purposes of compliance with ECSMA, or ESC Article 13.4. The exception to PSIC status for ECSMA/ESC nationals applying for Universal Credit is not required by the treaties. Therefore, the 2013 amendment to the 2000 Regulations went beyond the requirements of ECSMA and ESC.
- 7.9 Nationals of countries which have ratified the ECSMA or the 1961 ESC are currently able to claim Universal Credit, notwithstanding their PSIC status. To address this matter, DWP are intending to amend the relevant legislation so that for Universal Credit claims made on or after 1 January 2021, nationals of countries that have ratified ECSMA or the 1961 ESC are no longer able to access Universal Credit simply as a result of their being lawfully present in the UK. Otherwise, this would contradict a clear manifesto pledge in which the government committed to bring EEA citizens' access to benefits in line with those of non-EEA citizens after freedom of movement ends on 31 December 2020.
- 7.10 Therefore nationals of signatories to the ECSMA and ESC will be put on an equal footing to that of other nationals arriving in the UK on or after 1 January 2021. This includes nationals from Turkey and North Macedonia, who previously were able to access Universal Credit as a result of the 2000 Regulations. The proposed changes ensure that existing Universal Credit claims from these nationals will not be affected.
- 7.11 Universal Credit is an income based, means tested benefit which replaces housing benefit, income-related Employment and Support Allowance, income-based Jobseeker's Allowance, Child Tax Credit, Working Tax Credit and Income Support. Claimants are provided with a single monthly payment which takes into account their household circumstances. It is available for people whether or not they are working.

## **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 but relates to the withdrawal of the United Kingdom from the European Union as the existing EUAs will cease to have legal effect in the UK at the end of the transition period.

## **9. Consolidation**

- 9.1 There are no plans to consolidate any of the regulations which are amended by these regulations.

## **10. Consultation outcome**

- 10.1 No separate consultation exercise was conducted as this instrument makes changes to protect or remove as appropriate access to benefits in response to the fact that the UK is no longer part of the EU, including the new UK TCAs. DWP has not consulted on

the amendments made to remove the exemption from PSIC status for ECSMA/ESC nationals for the purposes of accessing Universal Credit, as this is the continuation of a well-established policy, and manifesto commitment to ensure that EEA nationals are provided with an equivalent level of access to benefits as non-EEA nationals.

- 10.2 The Social Security Advisory Committee (SSAC), who is an advisory non-departmental public body, have been consulted on the proposed regulations.

## **11. Guidance**

- 11.1 Guidance for staff and claimants about these changes will be made available before this instrument enters into force.

## **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 there is no significant impact on 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 There are no plans to monitor or review this instrument as it provides for continuity of access to benefits by individuals in scope of TCAs. It also provides for continued payment of benefits where a TCAs is not in place and makes a technical change relating to access to benefits for EU nationals.
- 14.2 The regulation does not include a statutory review clause as this regulation does not make regulatory provision in respect of a business.

## **15. Contact**

- 15.1 Denise Newman at Her Majesty's Revenue and Customs Telephone: 03000 579698 or email: denise.newman@hmrc.gov.uk can be contacted with queries regarding the instrument.
- 15.2 Martin Blatchford at the Department for Work and Pensions Telephone: 07552759636 or email: martin.blatchford@dwp.gov.uk can be contacted with queries regarding the instrument.
- 15.3 James Knipe, Deputy Director for International Social Security Coordination policy, at Her Majesty's Revenue and Customs can confirm that this Explanatory Memorandum meets the required standard.
- 15.4 The Rt Hon Steve Barclay MP, Chief Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.