

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT)
REGULATIONS 2018

2018 No. 801

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 These Regulations update the UK's application of the European Union Free Movement Directive to take account of a range of changes in EU case law. They also contain a provision to allow non-hard copy family permits to be issued, and make a number of minor, technical amendments.
- 2.2 Specifically, these Regulations amend the Immigration (European Economic Area) Regulations 2016 (S.I. 2016/1052), as amended ('the 2016 Regulations') which transpose into UK law Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States ('the Directive').
- 2.3 These Regulations make a number of changes to the 2016 Regulations to give effect to certain judgments of the Court of Justice of the European Union (CJEU). These Regulations also facilitate modernisation through developments in operational practices by (i) allowing European Economic Area (EEA) family permits to be issued electronically instead of in hard-copy format, and (ii) make a small number of minor technical amendments to provide greater clarity to the practical application of the Directive in the UK.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 On 23 June 2016, the European Union (EU) referendum took place and the people of the UK voted to leave the EU. Until the UK leaves the EU on 29 March 2019 the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of the exit negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

- 4.2 The Directive sets out the right of Union citizens and their family members to move and reside freely within the territory of the Member States. It has been applied by the EEA Agreement to the remaining non-EU EEA States (Iceland, Norway and Liechtenstein). An agreement between the EU, its Member States and Switzerland provides similar rights to nationals of Switzerland ('the Switzerland Agreement').
- 4.3 The UK's 2016 Regulations, which transpose the Directive and implement the requirements of the EEA Agreement and the Switzerland Agreement, set out the rights of nationals of the EEA and Switzerland (defined in the 2016 Regulations as 'EEA nationals'), their family members and those with certain other EU rights of residence, to be admitted to, and reside in, the UK. The 2016 Regulations also make provision for the granting, denial and revocation of residence documentation issued by the UK, and for exclusion or removal from, or refusal of admission to, the UK in certain circumstances.
- 4.4 These Regulations amend the 2016 Regulations for the second time, following the Immigration (European Economic Area) (Amendment) Regulations 2017 (S.I. 2017/1).

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the whole of the United Kingdom.
- 5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

A. CJEU judgments

- 7.1 The majority of the amendments in this measure update the UK's 2016 Regulations to take account of judgments of the CJEU.
- 7.2 In accordance with Article 3(1) of the Directive, EU citizens are not generally beneficiaries of the Directive when they reside in a Member State of which they are a national. In respect of the UK therefore, regulation 2(1) of the 2016 Regulations defines an "EEA national" as "a national of an EEA State who is not also a British citizen".
- 7.3 The CJEU judgment in Case C-165/16 *Lounes* (ECLI:EU:C2017:862) found that, in certain circumstances, a third country national spouse is eligible for a derived right of residence under Article 21(1) of the Treaty on the Functioning of the European Union where their family member is a Union citizen who has exercised their Treaty rights before acquiring the nationality of the host Member State, whilst retaining their nationality of origin.
- 7.4 In line with the *Lounes* judgment, paragraphs 1 and 4 of the Schedule to these Regulations (the Schedule) amend the 2016 Regulations to ensure that a national of an EEA State who is also a British citizen, where British citizenship was acquired after

the EEA citizenship and after free movement rights had been exercised in the UK, may continue to be treated as an EEA national, in certain circumstances. It does so by amending the definition of “EEA national” in regulation 2(1) of the 2016 Regulations and inserting a new regulation 9A which sets out the conditions to be met for a national of an EEA State who is also a British citizen to be treated as a qualifying EEA national (as per regulation 6 of the 2016 Regulations) or as an EEA national with a right of permanent residence (as per regulation 15 of the 2016 Regulations), in order to sponsor the admission to and/or residence in the UK of their family members under EU law. A transitional provision is provided at regulation 3 of these Regulations to ensure that the new definition of “EEA national” at regulation 2(1) of the 2016 Regulations is read as if the amendment made to that definition by paragraph 1 of the Schedule was in force at all relevant times.

- 7.5 The CJEU judgment in Case C-442/16 *Gusa* (ECLI:EU:C:2017:1004) allows EEA nationals who are no longer working in a self-employed capacity to retain their status as a ‘qualified person’ in an equivalent way to a person who has ceased to be employed as a worker. Paragraph 2 of the Schedule gives effect to this judgment by amending regulation 6 of the 2016 Regulations to provide that EEA nationals who are no longer working in a self-employed capacity retain their self-employed status, thus ensuring that they remain lawfully resident.
- 7.6 The CJEU judgment in Case-133/15 *Chavez-Vilchez and others* (ECLI:EU:C:2017:354) builds on the approach in Case C-34/09 *Ruiz Zambrano*, which concerned the derivative right to enter and reside for the primary carer of an EU citizen who is living in their own country, where a refusal to confer such a right would compel the EU citizen to leave the territory of the EU. In the UK, the *Ruiz Zambrano* judgment therefore enables the primary carer of a British citizen (usually a child) to acquire a right to enter and reside in the UK whilst they remain the primary carer of that British citizen, where refusal of such a right would compel the British citizen to leave the EU.
- 7.7 The judgment in *Chavez Vilchez* held that, where there is another person who is able and willing to assume or continue primary care, this is a relevant factor in whether or not a relevant person would be compelled to leave their own country or the territory of the EU, but it is not determinative of that. In the UK therefore, a case-by-case consideration should be given to determine whether a British citizen’s dependence on a third country national carer is such that refusing the third country national a right of residence in the UK would compel the British citizen to leave the territory of the EU, even if there is another person who could care for them.
- 7.8 In line with *Chavez Vilchez*, paragraph 10 of the Schedule amends regulation 16(8)(b) of the 2016 Regulations to allow a person to be recognised as a “primary carer” if they are the sole carer or if they share equally the care with another person, regardless of whether that person is an “exempt person” within the meaning of regulation 16(7)(c). This will ensure that the British citizen’s best interests and individual circumstances are properly considered.
- 7.9 Regulation 27(4)(a) of the 2016 Regulations provides that where an EEA national has been resident in the UK for a continuous period of at least 10 years they cannot be deported except on imperative grounds of public security. The CJEU judgment in Case C-426/16 *Vomero* found that the acquisition of a right of permanent residence was a prerequisite to that enhanced protection from deportation. Therefore, in line with *Vomero*, paragraph 13 of the Schedule amends regulation 27(4)(a) of the 2016

Regulations to provide that this enhanced protection from deportation only applies to a person who, as well as residing in the UK for a continuous period of at least 10 years, has acquired a right of permanent residence under regulation 15 of the 2016 Regulations.

B. Amendments to enable future developments in operational practices

- 7.10 Paragraph 6 of the Schedule inserts a new paragraph (5A) in regulation 12 of the 2016 Regulations to allow, but not compel, EEA family permits under the 2016 Regulations to be issued in an electronic form as an alternative to a hard-copy form. This is to facilitate future modernisation of operational practices and is desirable because it is often quicker, more secure and more cost effective to provide applicants with a digital product. It also ensures consistency with provisions in the Immigration Rules (HC 395 (as amended)) for issuing entry clearance in electronic form. Paragraphs 12 and 14 of the Schedule make consequential amendments to take account of the fact that, when an entry clearance officer or immigration officer revokes a family permit, or where an appellant is required to produce a family permit when giving notice of an appeal, the family permit may have been issued in an electronic form.

C. Miscellaneous minor, clarificatory amendments

- 7.11 Regulation 9 of the 2016 Regulations contains a provision whereby a British citizen may be treated as an EEA national, in certain circumstances, when they have previously exercised any rights under the Directive to reside in another EEA State with a family member who is not a citizen of an EEA State. Where a British citizen is treated as an EEA national, in accordance with regulation 9, this confers a right to reside under EU law on those family members, upon their return to the UK with the British citizen, which is different to any family reunification right they may have to reside under the domestic law which would otherwise apply. Paragraph 3 of the Schedule amends regulation 9 of the 2016 Regulations to make clear that, to be eligible for a derived right of residence, the third country national must have had the status of ‘family member’ within the meaning of Article 2(2) of the Directive for at least part of their residence in a non-UK EEA State with a British citizen exercising Treaty rights, and that genuine family life must have been created or strengthened during that joint residence. This clarifies existing policy and is in line with the CJEU’s judgment of 12 March 2014 in *O and B* (C-456/12).
- 7.12 Paragraphs 5, 7, 8 and 9 of the Schedule amend respectively regulation 11, 13, 14 and 15 of the 2016 Regulations to make it clear that a person does not have a right of admission to the UK, or an initial right of residence, an extended right of residence or a right of permanent residence in the UK, if they are subject to a valid deportation order or exclusion order. Similarly, paragraph 11(b) of the Schedule inserts a new paragraph (4A) in regulation 21 of the 2016 Regulations (Procedure for applications for documentation) to provide that an application for an EEA family permit or residence documentation is invalid if submitted whilst the applicant is subject to a removal decision, a deportation order or an exclusion order. This is because the applicant cannot be lawfully resident in the UK when subject to such an order or decision. This clarifies existing policy and is consistent with the CJEU’s judgment in *Petrea* (C-184/16).

- 7.13 Paragraphs 11(a) and (c) of the Schedule amend regulation 21(2)(a) and (5) of the 2016 Regulations (Procedure for applications for documentation) to clarify that where a family member applies for an EEA family permit or residence documentation, the EEA national sponsor's valid national identity card or valid passport must accompany the application, as otherwise the application is invalid. This clarifies existing policy that an application must be complete to be considered valid.
- 7.14 Paragraph 15 of the Schedule amends regulation 37(2) of the 2016 Regulations to clarify the circumstances in which an appellant must be outside the UK to bring an appeal against an EEA decision as defined at regulation 2(1) of the 2016 Regulations. A related saving provision is provided at regulation 4 of these Regulations to ensure that any appeal brought before the coming into force of these Regulations can continue as before. This is not a change in policy.
- 8. Consultation outcome**
- 8.1 No external consultation was undertaken as these changes address the implementation of Directive 2004/38/EC and the decisions of the CJEU to which the UK is required to give effect.
- 9. Guidance**
- 9.1 The Home Office will publish guidance on the effect of these changes on the following website: <https://www.gov.uk/government/organisations/uk-visas-and-immigration>.
- 10. Impact**
- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.
- 11. Regulating small business**
- 11.1 The legislation does not apply to small business.
- 12. Monitoring & review**
- 12.1 The Home Office will closely monitor the impact of these amendment regulations.
- 13. Contact**
- 13.1 Paul Howarth, European Migration and Migrant Criminality Unit, Home Office. Telephone: (020) 7035 0265 or email: paul.howarth2@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.