

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT)
(No. 2) REGULATIONS 2013

2013 No. 3032

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 amend the Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003, as amended) ('the 2006 Regulations') which transpose into UK law Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States ('the Directive').

2.2 The Regulations make a number of changes to the 2006 Regulations relating to the procedural requirements for admission to the UK of some non-EEA residents of certain EEA States, the circumstances in which jobseekers and involuntarily unemployed workers are entitled to a right to reside, and introduce a number of measures to tackle the abuse of rights of residence conferred by the Directive. The Regulations also address issues arising from the implementation of certain judgments of the Court of Justice in the European Union ('the CJEU'). They make a number of other amendments to address some transposition issues, to provide procedural consistency with some aspects of the UK's domestic immigration system, and to reflect the expiration of the transitional controls on workers who are nationals of Bulgaria and Romania on 31st December 2013.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 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 Switzerland¹ ('the Switzerland Agreement'). The 2006 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 European Economic Area ('EEA') and Switzerland (defined in the 2006

¹ The Agreement between the European Community and its member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons signed at Luxembourg on 21st June 1999 and which came into force on 1st June 2002.

Regulations as ‘EEA nationals’), their family members and those with derivative rights of residence, to be admitted to, and reside in, the UK. The 2006 Regulations also make provision for the granting, denial and revocation of residence documentation issued by the UK, and for removal or deportation from the United Kingdom in certain circumstances.

4.2 Section 97A of the Nationality, Immigration and Asylum Act 2002 (‘the 2002 Act’), as amended by the Crime and Courts Act 2013, allows the Secretary of State to certify that certain appeals against deportation orders made under the domestic immigration regime may be heard while the appellant is outside the UK without breaching the UK’s obligations under the European Convention on Human Rights. These Regulations apply section 97A to certain appeals against decisions made under the 2006 Regulations.

4.3 A number of consequential amendments are required in relation to the Accession (Immigration and Worker Authorisation) Regulations 2006 (as amended) which established a regime of transitional controls on the rights of workers who are Bulgarian and Romanian nationals to reside and work in the UK. Those controls expire on 31st December 2013.

5. Territorial Extent and Application

5.1 This instrument extends and applies throughout 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. Qualifying EEA State residence cards

7.1 Paragraphs 1 and 6 and of Schedule 1 to the Regulations (‘the Schedule’) amend the 2006 Regulations to allow non-EEA family members of EEA nationals to be admitted to the UK if they present a ‘qualifying EEA State residence card’, in addition to presenting a valid passport, provided they are accompanying or joining an EEA national with a right to reside in the UK. The amendments are primarily to regulation 11 of the 2006 Regulations, which govern admission to the UK, and there are certain other consequential amendments. A ‘qualifying EEA State residence card’ is a residence card issued under Article 10 of the Directive by certain listed EEA States to the non-EEA family member of an EEA national exercising free movement rights in that member State. Other EEA States are required by Article 5(2) of the Directive to accept all such residence cards for entry.

7.2 Consequential amendments have been made to reflect the fact that qualifying EEA State residence cards will now be sufficient for entry to the UK. Paragraph 25 of the Schedule amends the 2006 Regulations to provide that a qualifying EEA State residence card is a ‘visa of the required kind’ for the purposes of the carriers’ liability regime contained in the Immigration and Asylum Act 1999. Section 40 of that Act exposes carriers to a civil penalty regime in respect of persons conveyed to the UK

later found to be without the required documentation. The effect of paragraph 25 of the Schedule is to enable carriers to accept qualifying EEA State residence cards as a 'visa of the required kind'. Paragraphs 1 and 2 of Schedule 2 to the Regulations further amend the Channel Tunnel (International Arrangements) Order 1993 and the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003 to enable presentation of qualifying EEA State residence cards at juxtaposed control points, for example at the Eurostar terminal in Brussels.

7.3 The requirements of Article 5(2) have not previously been implemented in the United Kingdom because of the potential for fraud and abuse, given the absence of minimum standards for such residence cards in the Directive. This derogation is in reliance upon Article 35 of the Directive (abuse of rights) and Protocol No. (20) to the Treaties (which provides that the United Kingdom and Ireland may exercise such controls at their borders they deem necessary for verifying rights conferred by EU law). These amendments now give effect to the requirement of Article 5(2) by accepting residence cards which are deemed to comply with the requisite international security requirements, currently those issued by Germany and Estonia.

B. Qualified Person

7.4 Paragraph 3 of the Schedule amends regulation 6 of the 2006 Regulations, which governs who is entitled to enjoy the status of a 'qualified person' under the 2006 Regulations. Under regulation 14 of the 2006 Regulations, a qualified person enjoys a right of residence in the UK for longer than 3 months. These Regulations make amendments to the definition of 'jobseeker' and 'worker', each a type of qualified person, relating to the circumstances under which a right to reside as a jobseeker, or a worker who is involuntarily employed, may be enjoyed.

7.5 The amendments relating to jobseekers impose a requirement for any person seeking to reside in the UK while looking for work to provide, from the outset, evidence that they are seeking work and have a genuine chance of being engaged. Under Article 7 of the Directive, a person who had a right to reside as a worker may continue to be treated as a worker in the event that they are involuntarily unemployed ('a retained worker'). The amendments require those seeking to enjoy the status of a retained worker to provide, from the outset, evidence that they are seeking employment and have a genuine chance of being engaged. A new paragraph (7) of regulation 6 of the 2006 Regulations provides that a person may not enjoy the status of jobseeker or retained worker for longer than 6 months unless they provide 'compelling evidence' that they have a genuine chance of being engaged. In the case of a retained worker who had worked for less than 12 months before becoming involuntarily unemployed, there is an absolute limit of six months for the retention of worker status. These changes are better to reflect the requirements of *Antonissen* case C-292/89, which governs the protection from expulsion enjoyed by EU jobseekers who otherwise do not have a right to reside.

C. Transitional provision for Bulgarian and Romanian nationals

7.6 Paragraph 4 of the Schedule inserts a new regulation 7B into the 2006 Regulations, containing transitional provisions relating to expiration of the transitional controls on the right workers who are of nationals of Romania and Bulgaria to work in the United Kingdom on 31st December 2013.

7.7 Under the treaty signed in Luxembourg on 25th April 2005 ('the Accession Treaty'), Romania and the Republic of Bulgaria acceded to the European Union on 1st January 2007. The Accession Treaty provides, in derogation from the general free movement of worker rights of European Union nationals, that the existing member States can apply national measures regulating access to their labour market by nationals of the accession States. Under the Accession Treaty these national measures can be applied for a maximum period of seven years following the date of accession, that is, until 31st December 2013.

7.8 The Accession (Immigration and Worker Authorisation) Regulations 2006 (S.I. 2006/3317) (as amended) ('the EU2 Regulations') contain the national measures applied by the United Kingdom to workers from the relevant accession States in accordance with the derogation contained in the Accession Treaty. Under the EU2 Regulations workers from Bulgaria and Romania are generally required to apply, before commencing work, for an accession worker authorisation document and to work in accordance with the conditions in that document. The obligation to obtain an accession worker authorisation document is found in regulation 9(1) of the EU2 Regulations. This obligation comes to an end on 31st December 2013 as regulation 9(1) is time limited by reference to the 'accession period'. Regulation 1(2)(c) defines the 'accession period' as the period beginning on 1st January 2007 and ending on 31st December 2013.

7.9 Paragraph 4 of the Schedule inserts a new regulation 7B into the 2006 Regulations which has four main purposes as follows:

- The new regulation 7B(4) provides that periods of involuntary unemployment must only be treated as periods of activity under regulation 5(7)(c) of the 2006 Regulations for accession State nationals subject to worker authorisations where such unemployment began after the accession period;
- The new regulation 7B(5) provides that an accession State national subject to worker authorisation can only retain worker status under regulation 6(2) of the 2006 Regulations if the accession State national subject to worker authorisation became unable to work, became unemployed or ceased to work after the accession period;
- Regulation 7B(6) provides that accession State nationals subject to worker authorisation are entitled to count time spent legally working in the UK during the accession period when calculating periods of residence under regulation 15 of the 2006 Regulations; and
- Regulation 7B(7) provides that an accession worker card issued under the EU2 Regulations, to the extent it has not expired, will be treated as if it were a registration certificate under the 2006 Regulations.

7.10 Paragraph 3 of Schedule 2 consequentially amends the EU2 Regulations reflecting the fact that the transitional controls on Romanian and Bulgarian workers in the United Kingdom will expire on 31st December 2013 in accordance with the terms of the Accession Treaty.

D. Family members of British Citizens

7.11 Paragraph 5 of the Schedule to the Regulations addresses the transposition of the judgment of the CJEU in case C-370/90 *Singh*. The Directive, and by extension the 2006 Regulations, does not normally govern the legal situation of citizens living in their own country of nationality (which is an internal situation). One exception to this rule was established by *Singh*, and applied in case C-291/05 *Eind*. Those cases provide that non EU family members of EU nationals who have worked in another member State, may retain their free movement rights upon return to the EU citizen's member State of nationality. These Regulations amend the relevant qualifying criteria in the 2006 Regulations which give effect to this judgment. The new regulation 9 of the 2006 Regulations introduces a requirement that the British citizen must have transferred the 'centre of their life' to another member State before their family members can benefit from the *Singh* provisions. Whether or not a British citizen has transferred the centre of their life to another member State will be assessed by reference to a number of criteria, including the length of residence, the degree of integration and whether or not the British citizen has moved their principal residence to that other member State.

7.12 These changes have been made to ensure that there has been a genuine and effective use of free movement rights in the other member State before such rights may apply by analogy upon return to the UK. The *Singh* judgment sought to prevent a possible deterrent to the exercise of free movement rights; such a deterrent can only occur if the British citizen intends to exercise rights genuinely and effectively in another member State. This paragraph will also have the effect of preventing abuse by those British citizens who move temporarily to another member State in order to circumvent the requirements of the usual immigration rules for their family members upon return to the UK.

E. Verification of a right of residence

7.13 Paragraph 16 of the Schedule inserts a new regulation 20B into the 2006 Regulations, which applies when the Secretary of State has reasonable doubt as to whether a person has a right to reside under the Regulations, or wants to verify the eligibility of a person to apply for documentation issued under Part 3 of the Regulation. This is pursuant to Article 14 of the Directive, which provides that in cases where there is reasonable doubt about whether a person satisfies the criteria for residence under the Directive, member States may verify whether the criteria are fulfilled.

7.14 The new regulation 20B will allow the Secretary of State to invite a person to whom the regulation applies to provide evidence or to attend an interview to support an application for documentation under the 2006 Regulations, or to support the existence of a right to reside they purport to have. If a person purports to be entitled to a right to reside on the basis of their relationship with another person, such as their spouse, the Secretary of State may invite that other person to attend an interview. If, without good reason, the information requested is not supplied, or, on at least two occasions, that person fails to attend an interview, the Secretary of State may draw such factual inferences about that person's right to reside as appear appropriate in the circumstances. Following such an inference, the Secretary of State may decide that the person in question does not have a right to reside, but may not take such a decision

on the sole basis that that person failed to comply with the request to attend interview or to provide further information. The power may not be used systematically.

F. Abuse of a right to reside

7.15 These Regulations transpose and give effect to Article 35 of the Directive, which states that member States, *'may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud...'* Paragraphs 16 and 18 of the Schedule to the Regulations give effect to this provision. The new Regulation 21B (paragraph 18 of the Schedule) contains a non-exhaustive definition of an abuse of the right to reside under the 2006 Regulations and establishes that the Secretary of State may take a decision about a person's right to reside under the 2006 Regulations on the grounds of abuse of rights or fraud where there are reasonable grounds to suspect such abuse and where it is proportionate to do so.

7.16 The effect of these amendments will be that the Secretary of State can remove a person subject to the 2006 Regulations if that person has participated in, attempted to participate in or facilitated a marriage of convenience, or if that person has fraudulently acquired, attempted to fraudulently acquire or facilitated the fraudulent acquisition of a right to reside under the 2006 Regulations, or has attempted to circumvent the requirement to be a qualified person under the 2006 Regulations.

7.17 The amendments will also permit the Secretary of State to refuse entry to a person who meets the criteria in the preceding paragraph, or who has been otherwise removed from the UK under regulation 19(3)(a) of the 2006 Regulations, where the person seeking re-entry cannot demonstrate that they will be a qualified person under regulation 6 of the 2006 regulations upon re-entry to the UK, and where there are grounds to suspect abuse, and where it is proportionate to do so.

7.18 The abuse of free movement rights, such as through marriages of convenience, fraudulent applications for documentation, misuse of the free movement provisions without any genuine intention to fulfil the requirements of the Directive, is a growing problem in the United Kingdom. Such abuse, by a minority, is not compatible with either the wording or the principle of free movement as set out in the Directive, rather it undermines the principle of free movement and the genuine and effective use of these rights by the vast majority of EU citizens and their family members.

7.19 These Regulations transpose and give effect to the relevant provisions of the Directive to enable the United Kingdom to better address this abuse.

G. National security: EEA decisions

7.20 Paragraph 24 of the Schedule to the Regulations inserts a new regulation 28A into the 2006 Regulations. The new regulation will apply where the Secretary of State has certified that a decision under the 2006 Regulations was taken on grounds of national security, and will have the effect of preventing any appeal against that decision from being conducted within the UK, providing the appellant may be removed pending the appeal without breaching the UK's obligations under the European Convention on Human Rights ('the Convention'). This is achieved by applying section 97A of the 2002 Act to appeals against decisions taken under the 2006 Regulations. Section 97A, as amended by the Crime and Courts Act 2013,

provides that a person may not bring or continue an appeal to the Special Immigration Appeals Commission ('SIAC') from within the UK unless that person has made a human rights claim from within the UK. By definition, appeals against decisions under the 2006 Regulations which were certified to have been taken on grounds of national security will be heard before SIAC: see regulation 28 of the 2006 Regulations. In relation to such an appeal, the Secretary of State may certify under section 97A(2B) of the 2002 Act that removal pending the appeal would not breach the UK's obligations under the Convention. In order for section 97A of the 2002 Act to apply to appeals brought under the 2006 Regulations it must apply with certain modifications; these are contained in the new regulation 28A(2).

7.21 The purpose of these amendments is to apply to the 2006 Regulations the equivalent regime for those without EU law rights contained in section 97A of the 2002 Act as amended earlier this year by the Crime and Courts Act 2013. Article 31(4) of the Directive provides that member States may exclude the individual concerned pending the appeal. Further information on the amendments made by the Crime and Courts Act to section 97A of the 2002 Act is available at this link: <http://www.legislation.gov.uk/ukpga/2013/22/notes/division/3/3/4>.

H. Other amendments

7.22 Paragraphs 14(b) and 17 of the Schedule to the Regulations make technical amendments, first to make explicit the ability of the Secretary of State to revoke documentation erroneously issued under the 2006 Regulations to an individual who never qualified for a right of residence, and secondly in the case of paragraph 21 to remove a set of quotation marks from Regulation 21A of the 2006 Regulations which had caused ambiguity about the effect (though not the intention) of that regulation.

8. Consultation outcome

8.1 Consultation has been undertaken with other government departments. 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 United Kingdom is required to give effect.

9. Guidance

9.1 The Home Office will publish guidance on the effect of these changes. The primary source of such guidance will be on the following website: <http://www.ukba.homeoffice.gov.uk/>

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 has no impact on small business.

12. Monitoring & review

12.1 The Home Office will closely monitor the impact of these Regulations.

13. Contact

13.1 Deborah Morrison, European Union Free Movement Policy Team, Home Office, Tel: 0207 035 0655 or email: deborah.morrison@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.