

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT)
(No. 2) REGULATIONS 2014

2014 No. 1976

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

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 effect of appeals brought from within the United Kingdom against decisions taken to restrict rights of residence enjoyed under the 2006 Regulations. Subject to certain safeguards and exceptions, appeals brought against deportation decisions will no longer have the automatic effect of suspending removal directions pending resolution of the appeals process.

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

3.1 This instrument breaches the "21-day rule". The Department apologises for this breach, which has occurred because the Department wished to avoid delay to the coming into force of this instrument. This is to ensure that the regime for those with rights of residence under the 2006 Regulations is consistent with that which is to be introduced by the Immigration Act 2014 (c. 22) ('the 2014 Act') and the Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820) ('the 2014 Order') with effect from 28th July 2014. The changes introduced by section 17(3) of the 2014 Act, and the transitory provision made by the 2014 Order (see article 4), allow a person who requires leave to enter or remain in the United Kingdom to be deported from the United Kingdom, despite the appeals process not having been begun or not having been exhausted.

3.2 In particular, section 17(3) of the 2014 Act inserts section 94B into the Nationality, Immigration and Asylum Act 2002 (c. 41), which enables the Secretary of State to certify, in the case of a human rights claim made by a person liable to deportation, that removal to the country or territory in question would not be unlawful under section 6 of the Human Rights Act 1998 (c. 42). Transitory provision made by

the 2014 Order prevents appeals against deportation decisions made in relation to those who require leave to enter or remain in the United Kingdom from being brought from within the United Kingdom.

3.3 These Regulations make equivalent provision, within the procedural framework of the Directive, for those who enjoy rights of residence under the 2006 Regulations. Without corresponding amendments to the 2006 Regulations coming into force on the same date as the changes made by the 2014 Act and the 2014 Order, the regime to be established by those instruments would be less effective, and the immigration appeals regime would vary significantly depending on the nature of the right of residence under consideration.

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 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.

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. Effect of appeals to the First Tier Tribunal or Upper Tribunal

7.1 These Regulations transpose and give effect to Article 31(4) of the Directive, which states that member States, '*may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial*

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.

review concerns a denial of entry to the territory. Paragraphs 7 and 8 of the Schedule to the Regulations give effect to this provision.

7.2 The amendments to regulation 29 of the 2006 Regulations (paragraph 7 of the Schedule) have the effect that an appeal brought from within the United Kingdom by a person, irrespective of nationality, against a decision to deport him or her from the UK under regulation 19(3)(b) of the 2006 Regulations, or a decision to refuse him or her admission to the UK under regulations 19(1), 19(1A) or 19(1B) of the 2006 Regulations when he is in the UK, will not prevent the Secretary of State from giving, or executing removal directions.

7.3 Paragraph 8 of Schedule inserts a new regulation 29AA into the 2006 Regulations which applies when a person has been deported from the UK pursuant to regulation 19(3)(b), has brought an appeal against that decision from within the UK, a date for the appeal has been set by the relevant Tribunal, and the person wants to make submissions before the relevant Tribunal in person. The new regulation 29AA provides that a person who meets these criteria may apply to the Secretary of State for permission to be temporarily admitted to the UK in order to make submissions in person at his or her appeal.

7.4 The new regulation 29AA requires the Secretary of State to grant such permission, except where to do so would cause serious troubles to public policy or public security. This is pursuant to Article 31(4) of the Directive which permits member States to refuse a person permission to make submissions in person if his or her appearance may cause serious troubles to public policy or public security.

7.5 Where the Secretary of State grants permission for a person to make submissions in person at his or her appeal, the new regulation 29AA (paragraph 8 of the Schedule) also establishes the conditions under which the person will be permitted to re-enter the UK, the factors to which the Secretary of State must have regard when determining entitlement to be given permission, and the duration of that permission.

7.6 Article 31(4) of the Directive provides that a person may not submit their case in person in relation to a decision to exclude, rather than deport, from the host Member State. Consequently, the new regulation 29AA applies only to appeals against deportation decisions taken when the individual was in the United Kingdom, rather than to exclusion decisions (which, by definition, are taken in relation to those who are not in the UK), or decisions regarding the refusal of entry to the UK.

7.7 The Government is concerned to have an effective and efficient appeals system which provides an opportunity for a person to challenge a decision made by the Secretary of State to limit or restrict their right to reside in the UK under the 2006 Regulations, but which cannot be abused or manipulated to delay the removal of a person who, pursuant to Articles 27 and 28 of the Directive, has no basis to remain in the UK.

B. Human Rights considerations and interim orders to suspend removal

7.8 Paragraph 6 of the Schedule to the Regulations inserts a new regulation 24AA into the 2006 Regulations. This new regulation 24AA applies when the Secretary of State intends to give directions for the removal of a person to whom regulation 24(3) of the 2006 Regulations applies (that is to say, where a decision to deport the person

has been taken), and in circumstances where the person has not appealed against the decision but would be entitled to do so from within the UK or where the person has appealed against the decision but the appeal has not been finally determined.

7.9 When a person is within the scope of new regulation 24AA, then the new regulation requires that before proceeding to give, or execute, removal directions, the Secretary of State must certify that the person's removal to the country or territory to which it is proposed to remove him or her, pending the outcome of the appeal, would not be unlawful under section 6 of the Human Rights Act 1998, in particular, on the grounds that the person would not face a real risk of serious irreversible harm if removed. This regulation replicates, within the framework of the 2006 Regulations, section 94B of the 2002 Act, as inserted by section 17(3) of the 2014 Act. Further information on the amendments made by the Immigration Act 2014 to section 94B of the 2002 Act is available at this link:

<http://www.legislation.gov.uk/ukpga/2014/22/notes/division/3/2>

7.10 Pursuant to the requirements of Article 31(2) of the Directive, the new regulation 24AA provides that where an application is made to the appropriate court or tribunal for an interim order to suspend enforcement of the removal decision, the person concerned may not be removed from the UK until such time as a decision on the interim application has been taken. The new regulation also transposes the exceptions, listed in Article 31(2) of the Directive, where an application for an interim order will not suspend removal proceedings.

C. Other amendments

7.11 The remainder of the Regulations makes minor and consequential amendments.

8. Consultation outcome

8.1 No external consultation was undertaken as these changes address the implementation of Directive 2004/38/EC 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:

<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.

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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

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.