

## EXPLANATORY MEMORANDUM TO

### THE IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016

2016 No. 1052

#### 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 Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') revoke and replace the Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003, as amended) ('the 2006 Regulations'). The 2016 Regulations consolidate the transposition into domestic law of Council Directive 2004/38/EC of the 29th April 2004 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 2016 Regulations in large part consolidate and clarify the provisions under the 2006 Regulations, modernising the language used and simplifying terms where possible in line with current drafting practice. They also make changes to give effect to certain judgments of the Court of Justice of the European Union ('CJEU') and address issues concerning the practical application of the Directive within the UK.
- 2.3 This includes setting out in detail the factors that should be taken into account when considering an application from a family member of a British citizen for a right to reside in the UK under the Directive, in order to tackle the high levels of abuse and prevent the circumvention of the domestic immigration system.
- 2.4 The 2016 Regulations also clarify the basis on which restrictive measures may be taken to restrict the free movement rights of people who pose a threat to the UK by setting out a non-exhaustive list of the 'fundamental interests of society'. This is a statement about a range of the circumstances in which the government will seek to restrict a person's free movement rights by removing or excluding them from the UK because of the threat their conduct poses. The 2016 Regulations require courts or tribunals to take into account these interests when considering, for example, an EU nationals appeal against a deportation decision.

#### 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 the 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 EU referendum took place and the people of the UK voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union 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 Directive sets out the right of Union citizens and their family members to move and reside within the territory of the Member States. It has been applied by the European Economic Area ('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').
- 4.2 The 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 a derivative right to reside, to be admitted to, and reside in, the UK. The 2016 Regulations also make provision for the issue, refusal and revocation of residence documentation and for exclusion or removal from, or refusal of admission to, the UK in certain circumstances.
- 4.3 The 2016 Regulations revoke and replace the 2006 Regulations, which themselves had been subject to amendment in 2009, 2011, 2012, 2013, 2014, and 2015 respectively, to reflect developments in immigration policy and to give effect to certain CJEU and Upper Tribunal judgments. This has resulted in a legislative framework that is fragmented and complex. These Regulations consolidate the effect of all this legislation, modernising the language used and simplifying terms where possible in line with current drafting practice as well as making other substantive changes.
- 4.4 The 2016 Regulations are similar in form and approach to the 2006 Regulations. Schedule 7 contains a table of equivalences outlining the way in which provisions of the 2006 Regulations correspond to the provisions of the 2016 Regulations.
- 4.5 Part 1 (interpretation etc.) defines the scope of the 2016 Regulations and the terms used throughout. A new definition of civil partnerships, marriages and durable partnerships of convenience features in regulation 2(1) (general interpretation). These terms were not defined in the 2006 Regulations.
- 4.6 Regulation 9 in the 2016 Regulations contains a similar provision to the 2006 Regulations 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 certain circumstances, this confers a right to reside on those family members upon their return to the UK with the British citizen under EU law which is different to any family reunification right they may have to reside under the domestic law which would otherwise apply. This provision in the 2006 Regulations is being fraudulently used by third country nationals with the specific intention of doing so to bypass UK immigration rules. Therefore the new regulation 9 contains a requirement for such residence in another EEA State to be "genuine" in order for the 2016 Regulations to apply to a British citizen and any family members upon return to the UK. Regulation 9(3) contains indicative criteria as to the factors to be considered by the Secretary of State when determining whether residence in another EEA State was "genuine". Regulation 9(4)

provides that the regulation is of no application in circumstances where the purpose of the residence of the British citizen in the other EEA State was as a route to circumvent any applicable requirement for any non-EEA family members to have leave to enter or remain in the UK under the Immigration Act 1971. This gives further effect to the CJEU's judgment in Case C-456/12 *O & B* (ECLI:EU:C:2014:135). Regulation 9(7) applies necessary adjustments to the conditions for being a qualified person where, for the purposes of regulation 9(1), it is a British citizen (rather than an EEA national) who needs to satisfy those conditions.

- 4.7 Part 2 (EEA rights) sets out the rights to admission and to reside conferred on EEA nationals, their family members and those with derivative rights to reside.
- 4.8 Part 3 (residence documentation) provides for the issue of residence documentation to those who satisfy the conditions in Part 2. A new regulation 21 permits the Secretary of State to require applications for residence documentation under the 2016 Regulations to be made using a specified application form, or pursuant to a particular process. Regulation 21(3) requires an applicant for a residence card or derivative residence card to make the application from within the UK.
- 4.9 Part 4 (refusal of admission and removal etc.) provides for the exclusion and removal of EEA nationals and their family members. It is based on the approach adopted by Part 4 of the 2006 Regulations with the addition of a requirement in regulation 27(8) for a court or tribunal to have regard to the considerations set out in Schedule 1 when they consider whether the requirements of regulation 27 are met. Paragraph 1 of Schedule 1 reflects the margin of appreciation enjoyed by Member States to determine their own requirements of public policy and public security, tailored to their own purposes, from time to time (Case 41/74 *Van Duyn* ECLI:EU:C:1974:133). Paragraph 2 onwards of Schedule 1 defines, in terms specific to the UK, considerations applying to a court or tribunal's consideration of whether there are grounds of public policy or public security in an individual case, or whether one of the fundamental interests of society (as defined in paragraph 8 of Schedule 1) are affected.
- 4.10 Part 5 makes provision for the admission and control of those seeking to enter or reside in the UK under the 2016 Regulations.
- 4.11 Parts 6 and 7 are based upon the corresponding Parts of the 2006 Regulations and concern appeals under the 2016 Regulations and general matters respectively. Schedule 2 deals with the effect of appeals made under Part 6.
- 4.12 The further provisions of the 2016 regulations give effect to certain CJEU and Upper Tribunal judgments set out below and clarify the UK's transposition of the Directive.

## **5. Extent and Territorial Application**

- 5.1 This instrument extends and applies to all of the UK.

## **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*

- 7.1 The 2016 Regulations in large part consolidate the provisions of the 2006 Regulations, simplify the language and clarify the UK's implementation of the Directive and relevant Court judgments.
- 7.2 The policy background for any substantive changes made in addition to the pure consolidation work revoking and replacing the 2006 Regulations with the 2016 Regulations are set out below.

### **Family members of British Citizens**

- 7.3 The Directive and CJEU case law is clear that Member States can take action to tackle the abuse of free movement. Regulation 9 of the 2016 Regulations builds on the provisions of regulation 9 of the 2006 Regulations, concerning the CJEU judgment in Case C-370/90 *Surinder Singh* (ECLI:EU:C:1992:296), which was applied in case C-291/05 *Eind* (ECLI:EU:C:2007:771). The case of *Surinder Singh* relates to the rights of direct family members of EEA nationals who return to their home Member State after exercising Treaty rights in another Member State. Drawing on the approach of the CJEU in Case C-456/12 *O and B*, regulation 9(2) requires an assessment of whether residence in another Member State was genuine, and regulation 9(3) sets out factors that should be taken into account. In addition, under the 2006 Regulations, regulation 9 only applied to those British citizens who had worked or were self-employed in another Member State. But in the 2016 Regulations, in accordance the judgment in Case C-456/12 *O & B*, regulation 9 also applies to British citizens who have studied or been self-sufficient in another Member State. Regulation 9(4) dis-applies regulation 9 of the 2016 Regulations to those individuals whose purpose is to circumvent national immigration rules applying to third country nationals in the UK. Regulation 9(7) clarifies how regulation 9(1) functions in certain situations where it is necessary to treat a British citizen under the 2016 Regulations as though the British citizen were an EEA national.
- 7.4 Schedule 5 to the 2016 Regulations replaces regulation 9 (family members of British citizens) of the 2006 Regulations with a new regulation 9 that mirrors regulation 9 of the 2016 Regulations. This will have effect from 25 November 2016 and will allow the approach towards family members of British citizens proposed above to have effect as soon as possible. The 2016 Regulations come into force, in full, on 1 February 2017.
- 7.5 Despite the measures in place to prevent abuse, the *Surinder Singh* judgment is increasingly being fraudulently used by third country nationals as a means to bypass UK immigration rules. This issue is subject to public and parliamentary interest.

### **Measures taken on grounds of public policy and public security**

- 7.6 The Directive states that Member States may take measures to restrict the freedom of movement and residence of EU nationals and their family members on grounds of public policy, public security or public health.
- 7.7 The CJEU judgment in Case 41/74 *Van Duyn* is clear that Member States enjoy a margin of appreciation to determine their own standards of public policy and public security, tailored to their own contexts.

- 7.8 Part 4 of the 2016 Regulations builds on the provisions of Part 4 of the 2006 Regulations on the exclusion or removal from, or refusal of admission to, the UK in certain circumstances. Schedule 1 to the 2016 Regulations reflects the margin of appreciation enjoyed by Member States to determine their own requirements of public policy and public security, for their own purposes, from time to time.
- 7.9 Taken together, the 2016 Regulations set out a non-exhaustive list of the fundamental interests of society in the UK, and clarify the basis on which restrictive measures may be taken in order to protect the UK from threats to these interests. The UK considers public policy or public security to include, for example, the abuse of free movement rights to circumvent and undermine the UK's domestic immigration control system. Public confidence in the UK's ability to protect the public from such threats is important, and these issues are of public and parliamentary interest.
- 7.10 Part 4 of the 2016 Regulations preserves the safeguards and protections in the 2006 Regulations and goes further by creating time-limited deportation orders (regulation 23(8)(b)). This will ensure that those who pose a threat to the UK or abuse free movement can be excluded for periods that are proportionate to the threat that they pose.
- 7.11 Regulation 26 of the 2016 Regulations (misuse of a right to reside) is based on the approach taken in regulation 21B of the 2006 Regulations when tackling the misuse of free movement rights by those who are removed from the UK as a result of not exercising EU Treaty rights.

#### **Other amendments**

- 7.12 The definition of "EEA decision" in regulation 2(1) of the 2016 Regulations largely replicates the definition in the 2006 Regulations. However, it makes it clear that an EEA decision does not include a decision to refuse to issue to an extended family member of an EEA national an EEA family permit, registration certificate or residence card as found in the judgment of the Upper Tribunal (Immigration and Asylum Chamber) in *Sala (EFMs: Right of Appeal)* [2016] UKUT 411 (IAC).
- 7.13 Regulation 3 of the 2016 Regulations largely replicates the provisions in the 2006 Regulations. In addition, this regulation gives effect to the CJEU judgments in Case C-378/12 *Onuekwere* (ECLI:EU:C:2014:13) and in case C-400/12 *MG* (ECLI:EU:C:2014:9) in UK law to clarify that continuity of residence is broken when a person serves a sentence of imprisonment.
- 7.14 Regulation 8 of the 2016 Regulations largely replicates the provisions in regulation 8 of the 2006 Regulations. In line with the definition in the Directive, an extended family member is defined with reference to an EEA national only.
- 7.15 Regulation 16 of the 2016 Regulations largely replicates the provisions in regulation 15A of the 2006 Regulations. In addition, this regulation gives effect to the judgment of the CJEU in C-115/15 *NA (Pakistan)* (ECLI:EU:C:2016:259) by ensuring that, where a child of an EEA national has a derivative right to reside because they are in education in the UK, the EEA national parent does not have to have been resident when the child first entered education. It also gives effect to the Upper Tribunal's judgment in *Shabani (EEA –nursery education)* [2013] UKUT 315 (IAC) by ensuring in regulation 16(7)(a) that a primary carer of the child of an EEA national who has been employed in the host Member State is entitled to a derivative right to reside once that child has entered into reception class education.

- 7.16 Regulation 21 of the 2016 Regulations sets out procedural requirements for making a valid application for EEA documentation. Regulation 21(4) provides that an application will be invalid where it is not submitted in accordance with the requirements set out in Part 3, including where any application is not accompanied or joined by the necessary proof or identity documents required by that Part. Applications by extended family members for registration certificates (regulation 17(5)) and residence cards (regulation 18(4)) are largely the same but it is now clear that applications for these documents must be accompanied or joined by valid identity documents. These requirements are subject to the safeguard that where there are circumstances beyond the control of the applicant that mean the applicant cannot apply in accordance with the process in regulation 21(1), the Secretary of State may exercise discretion over whether to accept the application or not (regulation 21(6)).
- 7.17 Regulation 28 largely replicates regulation 21A of the 2006 Regulations. However, regulation 28 departs from regulation 21A in so far as it gives effect to the CJEU’s judgment in C-304/14 CS (ECLI:EU:C:2016:674) by removing the exception that an individual who resides in the UK on the basis of a derivative right to reside can be removed from or refused admission to the UK where that individual is deemed not conducive to the public good. This type of case will now be considered as a matter of public security, public policy or public health.
- 7.18 Regulation 33 of the 2016 Regulations replicates regulation 24AA of the 2006 Regulations. An appeal brought from within the UK under the 2016 Regulations by a person, irrespective of nationality, against a deportation decision will not prevent the Secretary of State from giving, or executing removal directions. Paragraph 2 of Schedule 2 to the 2016 Regulations has the effect that where a deportation decision is certified under regulation 33 of the 2016 Regulations, this is replicated where an appeal could also be brought under the Nationality, Immigration and Asylum Act 2002.
- 7.19 Regulation 15B of the 2006 Regulations has not been replicated in the 2016 Regulations. This means that a decision taken to cancel an individual’s right to reside is effective from the date of decision (see regulation 23(9) of the 2016 Regulations). However, if such a decision is set aside or no longer has effect, an individual will have a right to reside if they satisfy the conditions in Part 2.
- 7.20 Regulation 42(1) of the 2016 Regulations largely replicates regulation 29AA(1) of the 2006 Regulations. It has been amended slightly to make it clear that a person can apply for temporary admission where, following a removal decision, they leave the UK of their own volition. This ensures that the provision better reflects Article 31(4) of the Directive.
- 7.21 Other differences between the 2016 Regulations and 2006 Regulations are minor or relate to transitional matters or consequential amendments. For example, the 2016 Regulations refer only to a “right of permanent residence” as opposed to both a “permanent right of residence” and a “right of permanent residence” to ensure that there is no risk of inconsistent application of these synonymous terms.
- 7.22 To assist the users of the legislation in this area, Schedule 7 contains a table of equivalences outlining the way in which provisions of the 2006 Regulations correspond to the provisions of the 2016 Regulations.

### ***Consolidation***

- 7.23 The 2016 Regulations consolidate the 2006 Regulations as amended. The UK Government has taken this opportunity to simplify the language and clarify terms and provisions where possible.

### **8. Consultation outcome**

- 8.1 The 2016 Regulations in large part consolidate and clarify the provisions under the 2006 Regulations, modernising the language used and simplifying terms where possible in line with current drafting practice. Therefore, no external consultation has been undertaken.

### **9. Guidance**

- 9.1 The Home Office will publish guidance which gives effect to these changes when the 2016 Regulations come into force. 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.

### **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 the 2016 Regulations.  
12.2 Amendments to the 2016 Regulations will be required in due course as relevant provisions of the Immigration Act 2016 are brought into force.

### **13. Contact**

- 13.1 Isla Scott, Free Movement and Migrant Criminality Unit, Home Office, Tel: 020 7035 4979 or email: [isla.scott1@homeoffice.gsi.gov.uk](mailto:isla.scott1@homeoffice.gsi.gov.uk) can answer any queries regarding the instrument.