

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT)
REGULATIONS 2019

2019 No. 1155

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 There are matters of special interest for the Joint Committee on Statutory Instruments to consider, which are outlined within section 3.1 of this explanatory memorandum.
- 1.3 This explanatory memorandum refers to ‘EEA nationals’ to mean citizens of the European Union (EU) other than the UK, citizens of the other constituent countries of the European Economic Area (Iceland, Liechtenstein and Norway), and citizens of Switzerland. This is in accordance with the definition used within the instrument being amended.¹

2. Purpose of the instrument

- 2.1 This instrument amends secondary legislation concerning the entry and residence of European Economic Area (EEA) nationals in the UK under EU free movement law.
- 2.2 These Regulations amend the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”), which is the instrument governing the right of EEA nationals and their family members to move and reside freely within the territory of the Member States. The purpose of these changes is to:
 - ensure that the rights of EEA nationals and their family members under EU free movement law remain consistent with the UK’s obligations as a Member State of the EU;
 - reflect current case law from both the Court of Justice of the European Union (CJEU) and the UK domestic courts; and
 - provide clarifications where needed to aid understanding of the requirements of the 2016 Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 These amendments rectify the defective drafting of the sub-paragraph inserted in regulation 36(6) of the 2016 Regulations by regulation 3(7)(c) of the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019 (S.I. 2019/468) (“the 2019 Regulations”), on which the Joint Committee reported in its 56th Report of Session 2017-19.

¹ See the definitions of “EEA national” and “EEA State” within regulation 2(1) of the Immigration (European Economic Area) Regulations 2016 (S.I. 2016/1052).

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 The territorial application of this instrument is all of the United Kingdom.

4. Extent and Territorial Application

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5. European Convention on Human Rights

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

6. Legislative Context

6.1 The Regulations are made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and by section 109 of the Nationality, Immigration and Asylum Act 2009.

6.2 The Regulations amend the 2016 Regulations, which set out the rights of the beneficiaries of the Free Movement Directive 2004/38/EC and the EU Treaties for those resident in the UK, and the documentation which may be issued to such individuals.

7. Policy background

What is being done and why?

7.1 This instrument makes changes to the 2016 Regulations necessary to reflect the latest CJEU case law alongside that of the UK domestic courts. It makes other amendments to ensure the 2016 Regulations continue to reflect accurately the current interpretation of the law governing free movement of persons.

7.2 The first change made by this instrument is to amend the provisions controlling access to a right of appeal in relation to extended family members², to give practical effect to the judgment of the CJEU in *Banger* (Case C-89/17). While regulation 3 of the 2019 Regulations reintroduced a right of appeal for extended family members, as required by *Banger*, it erroneously left in place conditions that made access to that right of appeal by an extended family member all but impossible in certain cases. Regulations 36(4) and 36(6) are amended to remove those conditions and allow extended family members to exercise their right of appeal as originally intended.

7.3 The second change made by this instrument is to amend the definition of what constitutes an extended family member of an EEA national. These changes are being made as a result of the judgments of both the UK Supreme Court³ and the CJEU in *SM (Algeria)* (Case C-129/18). They include extending the scope of the definition of “extended family member” to include some individuals who are not biologically related, for example including children subject to non-adoptive legal guardianship arrangements. The change in the definition of “extended family member” is made by regulation 2(5) of these Regulations in the following ways:

² Those falling within scope of Article 3(2) of Directive 2004/38/EC.

³ [2018] UKSC 9.

- the insertion of paragraph (1A) into regulation 8 of the 2016 Regulations, to set out the criteria that must be met for a child subject to legal guardianship arrangements to be considered an extended family member of an EEA national;
- the amendment of regulations 8(2), 8(3) and 8(5) of the 2016 Regulations to reflect how extended family members may be related to an EEA national; and
- the insertion of paragraph (8) into regulation 8 of the 2016 Regulations to outline how an “extensive examination” is to be carried out. (The requirement extensively to examine applications from extended family members is not new and has always been required by EU law. This amendment simply clarifies how that should be conducted).

- 7.4 The third and final part of the changes made by this instrument are administrative amendments to other provisions within the 2016 Regulations, either to implement domestic case law or to make clarifications to ensure consistent application of those provisions. Where not required by domestic case law, these amendments represent clarifications and do not alter established policy. The next three paragraphs explain these changes in more detail.
- 7.5 Regulation 2(6) of these Regulations amends regulation 9 of the 2016 Regulations, to implement the Court of Appeal judgment in *Christy*.⁴ This change clarifies the residence requirements of extended family members of British citizens returning to the UK after having exercised their free movement rights in another Member State. The clarification is that the extended family member must have resided lawfully in the host Member State, reflecting the requirement set by the Court of Appeal.
- 7.6 Regulation 2(7) of these Regulations amends regulation 10(5) of the 2016 Regulations, to implement the Court of Appeal judgment in *Baigazieva*.⁵ This change inserts the evidential requirement set by the Court of Appeal for retention of a right of residence following the dissolution of a marriage or civil partnership with an EEA national. It requires that the former family member provides evidence that the EEA national was a qualified person (or a person with a right of permanent residence) up to the point that proceedings for that dissolution were initiated.
- 7.7 Regulation 2(8) of these Regulations amends regulation 21(4) of the 2016 Regulations to clarify the Home Office’s response to invalid application. This could be, for example, in instances where an inappropriate application form is used or no fee is paid. The amendment includes a specific provision requiring such applications to be rejected rather than refused (with the former being an administrative practice, and the latter a formal, adverse decision with the potential to impact on an individual’s residence in the UK). This reflects the current operational practice in other areas and is not a change in policy.

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 2018.

⁴ [2018] EWCA Civ 2378

⁵ [2018] EWCA Civ 1088

9. Consolidation

- 9.1 It is not intended to consolidate the subordinate legislation amended by this instrument.

10. Consultation outcome

- 10.1 The Home Office has not undertaken a public consultation on these measures, which relate to the rights of those EEA nationals and their family members resident in the UK in accordance with the rights provided by EU law. The changes being made are primarily required by both CJEU and domestic case law and the Home Office is legally obliged to make the amendments to ensure the 2016 Regulations remain compliant with the prevailing law.

11. Guidance

- 11.1 The Government has published guidance on the operation of the Immigration (European Economic Area) Regulations 2016 and will update this in line with the implementation of this instrument.

12. Impact

- 12.1 The provisions introducing the right of facilitation for extended family members of EEA nationals who are neither in a durable partnership with, nor biologically related to, that EEA national, specifically those inserted at regulations 8(1A), 8(2), 8(3) and 8(5) of the 2016 Regulations, may lead to an increase in the number of applications for documentation on this basis.
- 12.2 The new qualifying criteria for children subject to legal guardianship arrangements, at regulation 8(1A) of the 2016 Regulations, are a direct implementation of CJEU case law. Owing to limited data availability it has not been possible to estimate the magnitude of this impact, but it is expected to be limited.

13. Regulating small business

- 13.1 The legislation will have no, or no significant, impact on the regulation of small businesses.

14. Monitoring and review

- 14.1 The operation of the Immigration (European Economic Area) Regulations 2016 and the impact of the changes made by this instrument will be monitored by the Home Office and kept under review.

15. Contact

- 15.1 Adam Lamont at the Home Office, telephone: 020 7035 8374 or email: adam.lamont@homeoffice.gov.uk, may be contacted regarding the instrument.
- 15.2 Clive Peckover at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Rt. Hon. Caroline Nokes MP, Minister of State for Immigration at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.