

2003 No. 549

IMMIGRATION

**The Immigration (European Economic Area) (Amendment)
Regulations 2003**

<i>Made</i> - - - -	<i>6th March 2003</i>
<i>Laid before Parliament</i>	<i>11th March 2003</i>
<i>Coming into force</i>	<i>1st April 2003</i>

The Secretary of State, being a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to measures relating to rights of entry into, and residence in, the United Kingdom, in exercise of the powers conferred on him by the said section 2(2), and of the powers conferred on him by section 109 of the Nationality, Immigration and Asylum Act 2002^(c), hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Immigration (European Economic Area) (Amendment) Regulations 2003 and shall come into force on 1st April 2003.

Amendment of Immigration (European Economic Area) Regulations 2000

2.—(1) The Immigration (European Economic Area) Regulations 2000^(d) are amended as follows.

(2) In regulation 2(1) (general interpretation)—

- (a) after the definition of “the 1999 Act” there is inserted ““the 2002 Act” means the Nationality, Immigration and Asylum Act 2002”;
- (b) after the definition of “decision-maker” there is inserted ““EEA decision” means a decision under these Regulations, or under Regulation 1251/70^(e), which concerns a person’s—
 - (a) removal from the United Kingdom;
 - (b) entitlement to be admitted to the United Kingdom; or
 - (c) entitlement to be issued with or to have renewed, or not to have revoked, a residence permit or residence document;”.

(3) After regulation 6(2) (“family member”) there is inserted—

“(2A) If the other person has divorced his spouse, the person is his divorced spouse provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom.

(a) S.I. 2000/1813.

(b) 1972 c.68.

(c) 2002 c.41.

(d) S.I. 2000/2326, amended by S.I. 2001/865.

(e) Commission Regulation (EEC) No. 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ No. L 142, 30.6.70, p.24); “Regulation 1251/70” is defined in regulation 2(1) of the Immigration (European Economic Area) Regulations 2000.

(2B) If the other person has ceased to be a qualified person on ceasing to reside in the United Kingdom, the persons are—

- (a) his spouse or his divorced spouse, provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom; and
- (b) descendants of his or of his spouse who are under 21 or are their dependants, provided that they—
 - (i) are attending an educational course in the United Kingdom;
 - (ii) resided with him in the United Kingdom when he was a qualified person; and
 - (iii) are not able to attend an equivalent educational course outside the United Kingdom.

(2C) For the purposes of paragraphs (2A) and (2B), “educational course” means a course within the scope of Article 12 of Regulation (EEC) No. 1612/68 of the Council of the European Communities on freedom of movement for workers within the Community^(a).

(2D) For the purposes of these Regulations, a person to whom paragraph (2B) applies shall be treated as the family member of a qualified person, notwithstanding that the other person has ceased to be a qualified person.”.

(4) In regulation 9, for “and 28” there is substituted “, 28 and 33”.

(5) In regulation 20 (duration and renewal of residence permit or residence document granted to a family member)—

- (a) before “The family member of an EEA national” there is inserted “(1) Subject to paragraph (2),”;
- (b) at the end of that regulation there is inserted—

“(2) In the case of a family member of an EEA national to whom regulation 6(2A) or 6(2B)(a) applies, the validity of the residence permit or residence document may be limited to the period during which the family member is the primary carer of the dependent child who is under 19 and attending an educational course in the United Kingdom.”.

(6) In regulation 25 (persons refused admission), paragraph (3)(c) is omitted.

(7) After regulation 26 there is inserted—

“Requirement to state grounds under section 120 of the 2002 Act

26A. Section 120 of the 2002 Act shall apply to a person if an EEA decision has been taken or may be taken in respect of him and, accordingly, the Secretary of State or an immigration officer may require a statement from that person under subsection (2) of that section.”.

(8) For Part VII there is substituted—

“PART VII

APPEALS UNDER THESE REGULATIONS

Interpretation of Part VII

27.—(1) In this Part—

“adjudicator” has the same meaning as in the 2002 Act;

“Commission” has the same meaning as in the Special Immigration Appeals Commission Act 1997^(b);

“the Human Rights Convention” has the same meaning as “the Convention” in the Human Rights Act 1998^(c); and

^(a) OJ No. L 257, 19.10.68, p.2 (OJ/SE 1st series 1968, vol. II, p.475).

^(b) 1997 c.68; amended by paragraphs 20 to 26 of Schedule 7 to the Nationality, Immigration and Asylum Act 2002.

^(c) 1998 c.42.

“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol.

(2) For the purposes of this Part, and subject to paragraphs (3) and (4), an appeal is to be treated as pending during the period beginning when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned.

(3) An appeal is not to be treated as finally determined while a further appeal may be brought; and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned.

(4) A pending appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

Scope of Part VII

28. This Part applies to persons who have, or who claim to have, rights under these Regulations or under Regulation 1251/70.

Appeal rights

29.—(1) Subject to paragraphs (2) to (4), a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces—

- (a) a valid national identity card; or
- (b) a valid passport, issued by an EEA State.

(3) If a person claims to be the family member of another person, he may not appeal under these Regulations unless he produces—

- (a) an EEA family permit; or
- (b) other proof that he is related as claimed to that other person.

(4) For the purposes of paragraphs (2) and (3), a document—

- (a) is to be regarded as being what it purports to be provided that this is reasonably apparent; and
- (b) is to be regarded as relating to the person producing it unless it is reasonably apparent that it relates to another person.

(5) A person may not rely on a ground in an appeal under these Regulations if the Secretary of State or an immigration officer certifies that the ground was considered in a previous appeal brought by that person under these Regulations or under section 82(1) of the 2002 Act.

(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to an adjudicator.

(7) The sections of the 2002 Act set out in Schedule 2 shall have effect for the purposes of appeals under these Regulations to an adjudicator in accordance with that Schedule.

Out-of-country appeals

30.—(1) Regulation 29 does not entitle a person to appeal while he is in the United Kingdom against an EEA decision—

- (a) to refuse to admit him to the United Kingdom;
- (b) to refuse to revoke a deportation order made against him;
- (c) to refuse to issue him with an EEA family permit.

(2) Paragraph (1) also applies to a decision to remove someone from the United Kingdom which is consequent upon a refusal to admit him.

(3) But paragraphs (1)(a) and (2) do not apply—

- (a) where the right of appeal is to the Commission;
- (b) where a ground of the appeal is that, in taking the decision, the decision-maker acted in breach of the appellant’s rights under the Human Rights Convention or the Refugee Convention; or

- (c) where the person held an EEA family permit, or a residence permit or residence document, on his arrival in the United Kingdom.

Appeals to the Commission

31.—(1) An appeal against an EEA decision lies to the Commission where paragraphs (2) and (4) applies.

(2) This paragraph applies if the Secretary of State certifies that the EEA decision was taken—

- (a) by the Secretary of State wholly or partly on a ground listed in paragraph (3), or
- (b) in accordance with a direction of the Secretary of State which identifies the person to whom the decision relates and which is given wholly or partly on a ground listed in paragraph (3).

(3) The grounds mentioned in paragraph (2) are that the person's exclusion or removal from the United Kingdom is—

- (a) in the interests of national security, or
- (b) in the interests of the relationship between the United Kingdom and another country.

(4) This paragraph applies if the Secretary of State certifies that the EEA decision was taken wholly or partly in reliance on information which in his opinion should not be made public—

- (a) in the interests of national security,
- (b) in the interests of the relationship between the United Kingdom and another country, or
- (c) otherwise in the public interest.

(5) In paragraphs (2) and (4) a reference to the Secretary of State is to the Secretary of State acting in person.

(6) Where a certificate is issued under paragraph (2) or (3) in respect of a pending appeal to an adjudicator the appeal shall lapse.

(7) An appeal against an EEA decision lies to the Commission where an appeal lapses by virtue of paragraph (6).

(8) The Special Immigration Appeals Commission Act 1997 shall apply to an appeal to the Commission under these Regulations as it applies to an appeal under section 2 of that Act to which subsection (2) of that section applies (appeals against an immigration decision) but paragraph (i) of that subsection shall not apply in relation to such an appeal.

Effect of appeals to an adjudicator

32.—(1) If a person in the United Kingdom appeals under these Regulations against an EEA decision to refuse to admit him to the United Kingdom, any directions previously given by virtue of the refusal for his removal from the United Kingdom cease to have effect, except in so far as they have already been carried out, and no directions may be so given while the appeal is pending.

(2) If a person appeals under these Regulations against an EEA decision to remove him from the United Kingdom, any directions given under section 10 of the 1999 Act or Schedule 3 to the 1971 Act^(a) for his removal from the United Kingdom are to have no effect, except in so far as they have already been carried out, while the appeal is pending.

(3) But the provisions of Part I of Schedule 2, or as the case may be, Schedule 3 to the 1971 Act with respect to detention and persons liable to detention apply to a person appealing under these Regulations against a refusal to admit him or a decision to remove him as if there were in force directions for his removal from the United Kingdom, except that he may not be detained on board a ship or aircraft so as to compel him to leave the United Kingdom while the appeal is pending.

(4) In calculating the period of two months limited by paragraph 8(2) of Schedule 2 to the 1971 Act for—

^(a) Schedule 3 has been amended by the Criminal Justice Act 1982 (c.48); the Immigration Act 1988 (c.14); the Asylum and Immigration Act 1996 (c.49); and the 1999 Act.

(a) the giving of directions under that paragraph for the removal of a person from the United Kingdom, and

(b) the giving of a notice of intention to give such directions,

any period during which there is pending an appeal by him under these Regulations is to be disregarded.

(5) If a person appeals under these Regulations against an EEA decision to remove him from the United Kingdom, a deportation order is not to be made against him under section 5 of the 1971 Act^(a) while the appeal is pending.

(6) Paragraph 29 of Schedule 2 to the 1971 Act (grant of bail pending appeal) applies to a person who has an appeal pending under these Regulations as it applies to a person who has an appeal pending under section 82(1) of the 2002 Act.

(7) This regulation does not apply to an appeal which lies to the Commission.”.

(9) After Part VII there is inserted—

“PART VIII

APPEALS UNDER THE 2002 ACT

Appeals under the 2002 Act

33.—(1) A person may appeal to an adjudicator under section 83(2) of the 2002 Act against the rejection of his asylum claim where that claim has been rejected but he has a right to be admitted to and reside in the United Kingdom under these Regulations.

(2) In addition to the national of a State which is a contracting party to the Agreement referred to in section 84(2) of the 2002 Act, the national of a State which is a contracting party to any other agreement forming part of the Community Treaties which confers rights of entry to or residence in the United Kingdom shall also be treated as an EEA national for the purposes of section 84(1)(d) of that Act.

(3) An appeal under these Regulations against an EEA decision made on or after 1st April 2003 shall be treated as an appeal under section 82(1) of the 2002 Act against an immigration decision for the purposes of sections 96(1)(a), (2)(a) and (2)(c) of the 2002 Act and such an EEA decision shall be treated as an immigration decision for the purposes of section 96(2)(b) of that Act.

(4) A ground considered in an appeal under these Regulations against an EEA decision made on or after 1st April 2003 shall be treated as a ground considered in an appeal under section 82(1) of the 2002 Act for the purposes of section 96(3) of that Act.”.

(10) For Schedule 2 (appeals to the adjudicator) there is substituted—

“SCHEDULE 2

APPEALS TO AN ADJUDICATOR

The following sections of the 2002 Act have effect in relation to an appeal under these Regulations to an adjudicator as if it were an appeal against an immigration decision under section 82(1) of that Act:

section 84(1) (except paragraphs (a) and (f) and (2));

sections 85 to 87; and

sections 101 to 103.”.

Transitional provisions

3.—(1) Regulation 2(8) and (10) shall not have effect in relation to an EEA decision made before 1st April 2003 and, accordingly, Part VII of and Schedule 2 to the EEA Regulations^(b), as enacted immediately before the coming into force of these Regulations, shall continue to apply for the purpose of an appeal against such a decision.

(2) For the purpose of the application of Part VII of and Schedule 2 to the EEA Regulations in accordance with paragraph (1), the references in that Part and that Schedule to the Immigration

^(a) Section 5 has been amended by the British Nationality Act 1981 (c.61); the Immigration Act 1988 (c.14); and the Asylum and Immigration Act 1996 (c.49).

^(b) Part VII and Schedule 2 were amended by S.I. 2001/865.

and Asylum Act 1999^(a) shall continue to refer to that Act as enacted immediately before the coming into force of these Regulations and that Act shall continue in force as so enacted for the purpose of such application.

(3) In this regulation “EEA Regulations” means the Immigration (European Economic Area) Regulations 2000 and “EEA decision” has the meaning given by regulation 27(2) of those Regulations, as enacted immediately before the coming into force of these Regulations.

Home Office
6th March 2003

Beverley Hughes
Minister of State

^(a) 1999 c.33.

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. These Regulations amend the Immigration (European Economic Area) Regulations 2000 (“the 2000 Regulations”). They extend the definition of “family member” for the purpose of those Regulations and replace Part VII of and Schedule 2 to the 2000 Regulations, which deal with appeals, to take account of changes made by the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

2. Family members of EEA nationals have ancillary rights to enter and remain in the UK. *Regulation 2(3)* amends regulation 6 of the 2000 Regulations by extending the definition of “family member” to take account of judgments of the European Court of Justice in Case C-413/99 *R v Baumbast and “R”, ex parte Secretary of State for the Home Department* [2002] 3 CMLR 599 and Cases C-389, 390/87 *Echternach and Moritz v Minister van Onderwijs* [1989] ECR 723. The divorced spouse of an EEA national is included within the definition of “family member” if he or she is the primary carer of their dependent child who is under 19 and attending an education course in the UK. The spouse or divorced spouse of an EEA national who is the primary carer of such a child is also included within this definition where the EEA national has left the UK and so is no longer exercising free movement rights in relation to the UK, as are their dependent children in certain circumstances. *Regulation 2(5)* makes a consequential amendment to the provisions of the 2000 Regulations on the duration and renewal of resident permits and documents.

3. *Regulation 2(8)* substitutes Part VII (Appeals) of the 2000 Regulations with a new Part VII. As previously, Part VII sets out the right to appeal against a decision under the 2000 Regulations, setting out when such a right arises, when an appeal is to be made to an adjudicator or to the Special Immigration Appeals Commission and when it can be made in the UK or outside of the UK. The main change is that the procedure to be followed in relation to appeals under the 2000 Regulations will be the appeals procedure set out in Part V of the 2002 Act, with some modifications. The sections of Part V of that Act that will apply for these purposes, with the modifications, are set out in a new Schedule 2 to the 2000 Regulations, which is substituted for the existing Schedule by *regulation 2(10)*. *Regulation 2(2)* contains two consequential amendments to the definitions regulation in the 2000 Regulations.

4. *Regulation 2(7)* applies section 120 of the 2002 Act to the situation where a decision under the 2000 Regulations has been taken or may be taken. Section 120 enables the Secretary of State or an immigration officer to require a person to provide a statement setting out his reasons for wishing to enter or remain in the UK, any grounds on which he should be permitted to enter or remain and any grounds on which he should not be removed. *Regulation 2(6)* deletes a reference to provisions in the Immigration and Asylum Act 1999 that will be repealed by the 2002 Act.

5. *Regulation 2(9)* inserts a new regulation 33 into the 2000 Regulations. New regulation 33 adapts provisions of the appeals system in the 2002 Act so that it takes account of appeals under the 2000 Regulations (new regulation 33(3) and (4)). New regulation 33(1) extends the right of appeal under section 83(2) of the 2002 Act to include a person whose asylum claim has been rejected but who has a right to reside in the UK under the 2000 Regulations (and so who would not otherwise be able to appeal against the rejection). New regulation 33(2) provides for nationals of a State, which is not a party to the European Economic Area Agreement but which is party to another European Community agreement which also confers free movement rights, to be treated as an EEA national for the purpose of section 84(1)(d) of the 2002 Act. This will mean that such a national will be able to raise any breach of the free movement rights conferred by such an agreement as a ground of appeal under the 2002 Act or under the 2000 Regulations. This will cover Swiss nationals who have free movement rights under the Agreement between the European Community and the Swiss Confederation signed on 21st June 1999 (Cm 4904). *Regulation 2(4)* contains a consequential amendment and inserts a reference to new regulation 33 into regulation 9 of the 2000 Regulations.

6. *Regulation 3* sets out the transitional provisions for the introduction of the new appeals system in new Part VII of the 2000 Regulations. That system will not apply to appeals against decisions made before the coming into force of these Regulations, which will continue to be dealt with under the old appeals system.

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