

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT) (No.2)
REGULATIONS 2012

2012 No. 2560

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 ('the 2006 Regulations') which transpose into UK law Directive 2004/38/EC ('the Directive') on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

- 2.2 These Regulations give effect to the judgments delivered by the Court of Justice of the European Union ('the ECJ') in the cases of **C-83/11 *Rahman*** and **C-34/09 *Ruiz Zambrano***; and make a number of other amendments to address some transposition issues and to provide clarity and consistency in the 2006 Regulations.

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

- 3.1 These Regulations have been made in reliance on the powers contained in section 2(2) of the European Communities Act 1972 and section 109 of Nationality, Immigration and Asylum Act 2002, and are subject to the negative resolution procedure. The negative resolution procedure is considered appropriate as the Regulations which they amend (the 2006 Regulations) were themselves subject to the negative resolution procedure and the amending Regulations do not alter the substance of Acts of Parliament, impose or increase financial burdens, or concern provisions of particular importance such as might justify reliance on the affirmative resolution procedure.

4. **Legislative Context**

- 4.1 The Directive sets out the rights of Union citizens and their family members to move and reside freely within the territory of the Member States. The 2006 Regulations, which transpose the Directive, set out the rights of EEA nationals and their family members to be admitted to, and reside in, the UK. The 2006 Regulations also make provision for denial and revocation of documentation as well as provision for removal or deportation from the United Kingdom in certain circumstances.

- 4.2 These Regulations give effect to the judgments of the ECJ in the cases of *Rahman* and *Ruiz Zambrano*.

4.3 The Regulations also address certain issues in relation to the UK's transposition of the Directive and reflect operational practice which has emerged in light of observations from key stakeholders.

5. Territorial Extent and Application

5.1 This instrument applies throughout the United Kingdom

6. European Convention on Human Rights

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. Implementing new derivative rights of residence

7.1 In July 2012 amendments to the 2006 Regulations were made in order to reflect rights of residence derived directly from the European Treaties and outside of the scope of Directive 2004/38/EC (the Free Movement Directive) (so called 'derivative rights'). This included implementation of judgments in the cases of *Chen (C-200/02)* and *Ibrahim (C-310/08)* and *Teixeira (C-480/08)*. New regulation 15A was inserted to establish the circumstances in which such a derivative right of residence will arise and defined the category of primary carer who could potentially benefit from the rights identified in these three judgments. Other amendments to the regulations were made in relation to rights of entry, rights to permanent residence, rights to protection against removal and rights to documentation. These amendments reflect the Government's interpretation of the relevant ECJ judgments.

7.2 Further amendment to the 2006 Regulations is now required in order to give effect to the ECJ judgment of *Ruiz Zambrano*. That judgment created a further derivative right to enter and reside for the primary carer of an EU citizen who is living in his/her own country and where a refusal to confer such a right would force the EU citizen to leave the EEA. In the United Kingdom, the judgment therefore enables the primary carer of a British citizen to acquire a right to enter and reside in the UK whilst they remain the primary carer of that British citizen and where the refusal of such a right would force the British citizen to leave the EEA.

7.3 Paragraph 3(b) of the Schedule to the Regulations gives effect to the ECJ's decision in *Zambrano* by inserting a new paragraph (4A) into regulation 15A of the 2006 Regulations in order to confer a derivative right of residence in the circumstances set out in paragraph 7.2 above. By virtue of the existing terms of the 2006 Regulations, the creation of this new category of derivative rights will also enable someone who is entitled to such a right to seek documentation evidencing that fact.

7.4 In addition, the effect of the changes made by paragraphs 2, 3 and 4 of Schedule 1 to the Regulations is that the following provisions of the 2006 Regulations will apply to *Zambrano* cases:

- i. The definition of primary carer in regulation 15A(7);
- ii. Regulation 15A(9), which stipulates the circumstances in which a person who otherwise meets the criterion set out in paragraph 7.2 above can be denied a derivative right of residence;
- iii. Regulation 15A(5), which establishes a right of residence for any other children who are dependants of the primary carer;
- iv. Regulation 16 which specifies that residence in the UK in exercise of a derivative right of residence does not count for the purpose of establishing a permanent right of residence under the Regulations;
- v. Regulation 11 which stipulates the circumstances in which a person claiming a derivative right to reside, or the dependant child of which they are a primary carer and with whom they are travelling, can be admitted to the UK.
- vi. Regulation 18A which provides for documentation to be issued to those with a derivative right of residence.
- vii. Regulation 21A which provides that those with a derivative right of residence do not benefit from the same levels of protection given to those exercising rights established under the Directive and can instead be deported from the UK if their deportation would be conducive to the public good.

7.5 Regulation **15A**(1) of the 2006 Regulations has also been amended to make it clear that someone will not be entitled to a derivative right of residence:

- i. where they have a right to reside under another provision of the 2006 Regulations;
- ii. where they have a right of abode in the UK;
- iii. where they are someone to whom section 8 of the Immigration Act 1971, or an order made under subsection (2) of that section, applies; or
- iv. where they have indefinite leave to enter or remain.

7.6 Paragraph 2 of the Schedule to the Regulations also inserts new paragraphs (7A) and (7B) into regulation 15A of the 2006 Regulations in order to clarify how cases involving joint primary carers should be considered.

B. Other Changes

7.7 Paragraph 1 of the Schedule to these Regulations amends regulation 8(2)(a) of the 2006 Regulations in order to give effect to the ECJ judgment in the case of ***Rahman***. It does so by removing the requirement that a person must have been living in the same country as an EEA national prior to arriving in the UK in order to argue that their dependency on that EEA national entitles them to rely on the provisions of the 2006 Regulations concerning extended family members.

7.8 Paragraph 5 of the Schedule to the Regulations amend regulation 26 of the 2006 Regulations in order to ensure that those claiming a right to reside as the durable partner of an EEA national (and who must in turn satisfy the more rigorous test at regulation 8 in order to be granted a right of entry or residence under the 2006 Regulations) are only able to exercise a right of appeal when they have provided sufficient evidence to satisfy the Secretary of State that a relationship exists. This will prevent people spuriously claiming to be a durable partner of an EEA national and bringing an appeal on that basis in order to frustrate their removal or deportation from the United Kingdom.

7.9 Paragraph 5 also amends regulation 26(3A) of the 2006 Regulations in order to extend the provisions concerning derivative rights cases to *Zambrano* cases and to clarify the availability of rights of appeal in cases concerning derivative rights of entry. Regulation 26(3) of the 2006 Regulations is also amended to make it clear that these provisions apply only to persons to whom regulation 26(2) does not apply.

7.10 Paragraph 7 of the Schedule to the Regulations amends the reference in the 2006 Regulations to "UK nationals" so that they refer instead to "British citizens". An amendment was made to the EEA Regulations in July 2012 to implement the ECJ's judgment in the case of *McCarthy (C-434/09)* in order to make clear that dual nationals are not normally able to exercise free movement rights in the countries of their citizenship. In the process of drafting guidance on these changes it became clear that this amendment- and the 2006 Regulations in general- should refer to "British citizens" rather than to "UK nationals" since only the former have the right of abode in the UK.

7.11 The 2006 Regulations are also amended to allow the Secretary of State for the Home Department to accept alternative evidence of nationality and identity when dealing with applications for documentation under those Regulations in cases where, due to circumstances beyond their control, a person is unable to provide an ID card or passport.

8. Consultation outcome

8.1 Consultation has been undertaken with other government departments. No external consultation was undertaken as most of these changes implement decisions of the European Court of Justice to which the United Kingdom is required to give effect.

9. Guidance

9.1 The UK Border Agency will publish guidance on the effect of these changes.

The primary source of such guidance will be in the European Casework Instructions on the UK Border Agency website.

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 UK Border Agency will continue to take account of developments in case-law and any further guidelines that the European Commission may produce to offer assistance to Member States on the implementation of the Directive. The UK Border Agency will also take account of any independent reports on how we operate our casework business.

13. Contact

13.1 Serena Bryant, Operational Policy Manager at the UK Border Agency Tel: 0151 213 4443 or email: Serena.Bryant@ukba.gsi.gov.uk can answer any queries regarding the instrument.