# THE IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016: A COMMENTARY

*12 February 2017.*

The Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) come into force on 1 February 2017, save for Schedule 5 of the 2016 Regulations, which took effect on 25 November 2016 and amended Regulation 9 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).

Set out below is a commentary on the main differences between the 2016 Regulations and the 2006 Regulations, as follows:

Part 1 *Preliminary* and Schedule 5 *Transitory Provisions,* Katie Dilger And Jonathan Kingham
Part 2 *EEA Rights,* Professor Bernard Ryan
Part 3: *Residence Documentation,* Colin Yeo
Part 4 *Refusal of Admission and Removal etc.* and Schedule 1 *Considerations Of Public Policy Public Security and the Fundamental Interests Of Society*
Expulsion and Removal - Professor Elspeth Guild and Maeve Keenan
Entry Bans – Alison Harvey
Part 5 *Procedure in relation to EEA Decisions,* Kim Vowden
Part 6 *Appeals Under These Regulations* And Schedule 2 *Appeals To The First-Tier Tribunal,* Bojana Asanovic
Part 7 *General*
For Schedule 5 see under Part 1 above.
There are no comments on Schedule 4 *Revocations and Savings* or on Schedule 7 *Consequential Modifications.*
Schedule 6: *Transitional Provisions* - Firuza Ahmed

## PART 1 *PRELIMINARY* AND SCHEDULE 5 *TRANSITORY PROVISIONS*

***Katie Dilger and Jonathan Kingham***

| Provision of the 2016 regulations | Main Changes |
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| 1. Citation and commencement | ➢ Changes not relevant to this note. |
| 2. General interpretation | ➢ Introduction of definitions of civil partnership, durable partnership and marriage of convenience;[1] |

[1]For example, the 2016 regulations state:
*"'civil partnership of convenience" includes a civil partnership entered into for the purpose of using these Regulations, or any other right conferred by the EU Treaties, as a means to circumvent—*

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| | ➢ Introduction of a definition of 'right to reside';[2]<br>➢ Introduction of definitions of Common Travel Area', 'indefinite leave to remain' and 'immigration laws', all referring to the meanings given in the Immigration Act 1971;<br>➢ Amendment of definition of an 'EEA decision'. The following are not 'EEA decisions':<br>o decisions on residence documentation applications if the application is invalid;<br>o decisions on residence documentation applications by extended family members (unless the person has been issued an EEA family permit, registration certificate or residence card that remains in force);[3] [***query re pending applications for renewal where document expires***]<br>o decisions on applications under regulation 26(4) to return during the 12 months 'misuse of rights' exclusion period.<br>➢ Deletion of definitions of '2014 Act' and 'Accession Regulations.' |
| 3. Continuity of residence | ➢ Change to the scope of the provisions on calculating continuous residence:<br>o regulation 3 of the 2006 Regulations only applied to the calculation of continuous residence for the purposes of regulation 5(1) (Worker or self-employer person who has ceased activity) and regulation 15 (Permanent residence);<br>o regulation 3 of the 2016 regulations applies for the purpose of calculating periods of continuous residence under the whole of the 2016 regulations. It may therefore apply to:<br>▪ workers who have ceased activity (regulation 5)<br>▪ permanent residence (regulation 15) ;<br>▪ jobseekers who have spent time outside the United Kingdom (regulation 6(8));<br>▪ extended family members who fall within the transitional provisions for the relatives of spouses and civil partners (regulation 8(7));<br>▪ restrictions on decisions taken on public |

*(a) immigration rules applying to non-EEA nationals (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or*

*(b) any other criteria that the party to the civil partnership of convenience would otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU Treaties;'*

Cf. *European Commission Handbook,* (COM 2014/604):

'*the notion of* ***marriage of convenience for the purposes of the free movement rules and of this Handbook*** *refers to a marriage contracted for the sole purpose of conferring a right of free movement and residence under EU law on free movement of EU citizens to a spouse who would otherwise not have such a right*'.

[2] *'"Right to reside" means a right to reside in the United Kingdom under these Regulations (or where so specified, a right to reside under a particular regulation).'*

[3] *Sala (EFMs: Right of Appeal)* [2016] UKUT 00411 (IAC).

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| | policy grounds in respect of those who have lived in the United Kingdom for 10 years (regulation 27(4));<br>▪ transitional provisions relating to prior residence before the 2016 regulations came into force (Schedule 6 paragraph 8(4));<br>➢ Addition of further situations when continuous residence will be broken:<br>o periods spent in prison (regulation 3(3)(a));[4]<br>o when a deportation or exclusion order is made (regulation 3(3)(b));<br>➢ Introduction of a note that continuity will not be broken due to a prison sentence where an EEA national has lived in the UK for at least 10 years and the Secretary of State considers that:<br>o prior to serving the sentence, the EEA national had forged integrating links with the UK;<br>o the effect of the sentence was not to break those links, and<br>o overall it would not be appropriate to apply a break in residence due to the sentence. [5] |
| 4. "Worker", "self-employed person", "self-sufficient person" and "student" | ➢ Some changes to paragraph numbering but no substantive changes;<br>➢ Introduction of definition of 'relevant family member'.[6] |
| 5. "Worker or self-employed person who has ceased activity" | ➢ Some changes to paragraph numbering but no substantive changes. |
| 6. "Qualified person" | ➢ Some changes to paragraph numbering, but no substantive changes, save deletion of references to regs 7A and 7B (see 7. Immediately below) |
| 7. "Family member" | ➢ Some changes to paragraph numbering, but few substantive changes<br>➢ Regulation 7A (Application of the Accession Regulations) and regulation 7B (Application of the EU2 Regulations) from the 2006 regulations have been deleted). |
| 8. "Extended family member" | ➢ Some changes to paragraph numbering;<br>➢ Main substantive change is to delete relatives of the spouse or civil partner of the EEA national from eligibility as extended family members:<br>o transitional provisions cover the relatives of spouses and civil partners who prior to 1 February 2017 were issued an EEA family permit, registration certificate or residence |

[4] Implementing *Onuekwere v Secretary of State* C-378/12.
[5] Implementing *MG v Secretary of State* C-400/12.
[6] For the purposes of regulations 4(3) and (4), "'relevant family member" means 'a family member of a self-sufficient person or student who is residing in the United Kingdom and whose right to reside is dependent upon being the family member of that student or self-sufficient person.'

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| | card on the basis of being an extended family member and since the most recent issue of such a document have been continuously resident in the United Kingdom (regulation 8(7));<br>○ note that relatives of a spouse or civil partner are not explicitly covered in Article 3(2) of Directive 2004/38/EC; but the other family members in *SSHD v Rahman*[7] were relatives of the Bangladeshi spouse of the Irish national. While this question was not in direct issue in *Rahman*, as the decision in that case was under the previous Regs , the general tenor of the Court of Justice of the European Union judgment (drawing on *inter alia* Recital 6) suggests that the previous position is to be preferred (e.g. paragraph 67:<br>'a member state may not reduce the scope, either directly, by deciding, for example, to exclude from the facilitation measures family members in the direct line beyond a certain degree of relationship, or even collaterals, or the partner with whom the Union citizen has a durable relationship, or indirectly, by laying down conditions which have the purpose or effect of excluding certain categories of beneficiaries)'.<br>See also e.g. paragraphs 69, 75, 78 and 79.<br>➢ Deletion of the words 'were the EEA national present and settled in the United Kingdom', in the provision relating to the relative of an EEA national who would meet the requirements in the immigration rules for indefinite leave to enter or remain as a dependent relative (regulation 8(4)) . |
| 9. & Schedule 5. Family members of British citizens | ➢ Schedule 5 changed regulation 9 of the 2006 regulations with effect from 25 November 2016. Regulation 9 of the 2016 regulations is identical to the amended regulation 9 (as at 25 November 2016)<br>➢ Major changes to provisions relating to *Surinder Singh*[8] cases, purportedly to implement *O and B;*[9]<br>➢ Extension of scope to cover:<br>○ the family members of British students and self-sufficient people (in addition to workers and self-employed persons);<br>○ the family members of British citizens who have acquired the right of permanent residence in an EEA State, provided that the person would have acquired permanent residence had such residence taken place in the UK;<br>➢ Introduction of '*genuine residence'* test. This expands on the 2006 regulations' centre of life test (regulation 9(2)(c) and 9(3) of 2006 regulations). Factors relevant to whether residence |

[7] Case C-83/11
[8] Case C-370/90.
[9] *O & B* Case C-456/12.

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| | was genuine include:<br>○ the factors cited in the 2006 regulations' relating to the centre of life test, namely centre of life, period of residence, degree of integration and location of principal residence;<br>○ nature and quality of the parties' accommodation in the EEA State;<br>○ whether the person's first lawful residence in the EU with British citizen was in the EEA State;<br>➢ New provision disapplying regulation 9:<br>○ where the purpose of the residence in the EEA State was to circumvent immigration laws applying to non-EEA nationals (this provision, by acting as a complete bar on application of regulation 9, whether or not the exercise of treaty rights has been genuine and effective, appears to contravene longstanding EU law on abuse of rights, e.g. *Akrich*[10])<br>○ where a person is only a family member on the basis of regulation 7(3), which treats certain extended family members as family members;<br>➢ Amendment of regulation 6 so that British citizens now need to be exercising Treaty rights in the UK (i.e. overruling *Eind*[11]) (regulation 9(7), except that:<br>○ no requirement that British citizen students or self-sufficient persons have comprehensive sickness insurance in the UK, though this does not exempt family members;<br>○ concessions relating to a British citizen still being treated as a worker or jobseeker despite not fulfilling certain of the conditions in regulation 6(2)and 6(1);<br>➢ Introduction of new requirement that family members must have lived with the EEA national with the EEA State:<br>○ 2006 regulations only required this of spouses and civil partners;<br>○ no transitional arrangements for family members already admitted to the UK with a right to remain under regulation 9 of the 2006 regulations. |
| 10. "Family member who has retained the right of residence" | ➢ Some changes to paragraph numbering but no substantive changes. This means that the Court of Justice of the European Union decision in *Singh*[12] (which held that in divorce and departure cases the requirement is for the EEA national to have been a qualified person or to have had have permanent residence in the UK on the date of the commencement of proceedings, not on the date of termination of the marriage, has not been implemented and regulation 10(5)(a) remains defective. |

[10] Case C-109/01.
[11] Case C-291/05.
[12] Case C-218/14.

## PART 2 *EEA RIGHTS*

***Professor Bernard Ryan***

### Regulation 11: Right of admission

- Regulation 11(8) provides for admission to be refused to a person covered *inter alia* by regulation 23(3).

  Regulation 23(3) states that "a person is not entitled to be admitted … if the Secretary of State considers there to be reasonable grounds to suspect that the person's admission would lead to the misuse of a right to reside under regulation 26(1)."

  While these are in line with old regulations 11(8) and 19(1AB), the Regulation concerning misuse has been altered (new Regulation 26, old Regulation 21B). This has meant the adoption of the language used at paragraph 58 of the *O & B*[13] ruling

  The main query concerns a provision which has *not* materially changed – now regulation 26(2). Why is it a 'misuse' that a person seeks to enter the UK within 12 months of having been removed for not being a qualified person, and they are "unable to provide evidence that, upon re-entry to the United Kingdom, the conditions for a right to reside, other than the initial right of residence … will be met"? This gloss on the general rule in regulation 26(1) appears too prescriptive, as an 'abuse' cannot be deduced from the simple fact of seeking to enter the United Kingdom.

### Regulation 12: Issue of EEA family permit

- No queries.

- There is a positive change is regulation 12(3)(b), which provides for the first time for the issue of a family permit to a non-EEA national with the right of permanent residence. Compare old regulation 12(1B).

### Regulation 13: Initial right of residence

- No queries, but the following changes.

- Regulation 13(2) has been redrafted to make sense.

  The main purpose of Regulation 13(2) is presumably to give effect to Article 6(2) of Directive 2004/38/EC. That was achieved by its original (2006) version, which stated that "A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport."

[13] *O & B* Case C-456/12.

Difficulties presumably arose when regulation 13(2) was amended in 2012[14] to include a reference to family members with 'retained rights'. At that point, regulation 13(2) stated that

> *A family member of an EEA national or a family member who has retained the right of residence who is residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.*

The drafting problem with the 2012 version is that it does not clearly link 'family member' to residence under paragraph (1). It could therefore be read as giving an unlimited right of residence to family members.

The new version appears to have addressed that by stating that "A person who is not an EEA national but is a family member who has retained the right of residence or the family member of an EEA national residing in the United Kingdom under paragraph (1) is entitled to reside in the United Kingdom provided that person holds a valid passport.

- Regulation 13 (3) excludes a person who "*is* an unreasonable burden on the social assistance system".

  In old regulation 13(3), the exclusion referred to a person who "*becomes* an unreasonable burden on the social assistance system". That corresponds to Article 14(1) of Directive 2004/38/EC, where the word "become" is used.

  It is not clear, however, that this change makes any material difference.

- Regulation 13(4) excludes *inter alia* a person who is the subject of a current 'misuse' decision under regulation 26(3).

  A change from old regulation 13(4) is that then the exclusion applied only if the 'abuse' decision had been taken in the previous 12 months.

  It is not clear, however, that this change in itself is incompatible with EU law.

**Regulation 14: Extended right of residence**

- No queries.

- One change is the removal of the previous statement (old regulation 14(4)) to the effect that 'extended' rights of residence are "in addition" to 'initial' and 'permanent' rights. It is unclear that this change is of any practical significance.

**Regulation 15: Permanent right of residence**

- There is an important issue in relation to regulation 15(3) concerning absences after the right of permanent residence has been acquired.

[14] The Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547), paragraph 3.

Article 16(4) of Directive 2004/38/EC states that "once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years."

The old regulation 15(2) was in line with that, and stated that "The right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years."

New regulation 15(3) states that "The right of permanent residence under this regulation is lost through absence from the United Kingdom for a period exceeding two years."

The critical change is the omission of the word 'only'. This opens the door to loss of the right for other unspecified reasons, something that the Directive does not contemplate.

- See also a change in regulation 15(1) concerning the family members of "a worker or self-employed person who has ceased activity", as defined in Article 17 of Directive 2004/38/EC and regulation 5.

  Article 17 confers a right upon a family member "residing with" the person who has ceased activity "in the territory of the host Member State".

  The old regulation 15(1)(d) merely required that a person *be* "the family member of a worker or self-employed person who has ceased activity". It did not state any requirement about residence.

  The new regulation 15(1)(d) adds requirements that the person was a family member with a right of residence under the Regulations when the person ceased activity. This is narrower than before. It is not obviously inconsistent with Directive 2004/38/EC on its face, but appears to overrule the decision of the Court of Appeal in *RM (Zimbabwe) v Secretary of State* [2013] EWCA Civ 775.

**Regulation 16: Derivative right to reside**

- No queries about changes.

## PART 3: *RESIDENCE DOCUMENTATION*

***Colin Yeo***

This part of the new regulations concerns residence documentation. Some significant changes have been introduced.

There follows a line by line comparison of the changes to the relevant paragraphs, then afterwards analysis of some completely new paragraphs.

***Issue of residence certificate***

| 2006 as amended | 2016 |
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| **16.** (1) The Secretary of State must issue a registration certificate to a qualified person immediately on application and production of—<br>(a) a valid identity card or passport issued by an EEA State;<br>(b) proof that he is a qualified person. | **17.**—(1) The Secretary of State must issue a registration certificate to a qualified person immediately on application and production of—<br>(a) a valid national identity card or passport issued by an EEA State; and<br>(b) proof that the applicant is a qualified person. |
| (2) In the case of a worker, confirmation of the worker's engagement from his employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b). | (2) In the case of a worker, confirmation of the worker's engagement from the worker's employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b). |
| (3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 immediately on application and production of—<br>(a) a valid identity card or passport issued by an EEA State; and<br>(b) proof that the applicant is such a family member. | (3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a right of permanent residence under regulation 15 immediately on application and production of—<br>(a) a valid national identity card or passport issued by an EEA State; and<br>(b) proof that the applicant is such a family member. |

| 2006 as amended | 2016 |
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| (4) The Secretary of State must issue a registration certificate to an EEA national who is a family member who has retained the right of residence on application and production of—<br>(a) a valid identity card or passport; and<br>(b) proof that the applicant is a family member who has retained the right of residence. | (4) The Secretary of State must issue a registration certificate to an EEA national who is a family member who has retained the right of residence on application and production of—<br>(a) a valid national identity card or passport; and<br>(b) proof that the applicant is a family member who has retained the right of residence. |
| (5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if—<br>(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and<br>(b) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate. | (5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if—<br>(a) the application is accompanied or joined by a valid national identity card or passport;<br>(b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and<br>(c) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate. |
| (6) Where the Secretary of State receives an application under paragraph (5) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security. | (6) Where the Secretary of State receives an application under paragraph (5) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Secretary of State must give reasons justifying the refusal unless this is contrary to the interests of national security. |
| (7) A registration certificate issued under this regulation shall state the name and address of the person registering and the date of registration. | (7) A registration certificate issued under this regulation must state the name and address of the person registering and the date of registration. |

| 2006 as amended | 2016 |
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| | (8) A registration certificate is—<br>(a) proof of the holder's right to reside on the date of issue;<br>(b) no longer valid if the holder ceases to have a right to reside under these Regulations;<br>(c) invalid if the holder never had a right to reside under these Regulations. |
| (8) But this regulation is subject to regulations 7A(6) and 20(1). | (9) This regulation is subject to regulations 24 (refusal to issue or renew and revocation of residence documentation) and 25 (cancellation of a right of residence). |

***Comments***

Paragraph 5(a) of the 2016 regulations is new and only empowers the Secretary of State to issue a residence certificate to an extended family member where "the application is accompanied or joined by a valid national identity card or passport". This is appears to rule out issue of a residence certificate to extended family members who do not possess such a document. On the face of it, paragraph 5(a) does not explicitly state whether the identity card or passport must belong to the EEA national, the extended family member, both or neither. This is probably lawful given the lesser protection for other family members in Article 3 of Directive 2004/38/EC.

See further comments below in relation to new paragraph 21. It is not completely clear that production of a passport or identity card is mandatory as such. The Secretary of State shall issue documents where one is produced, along with other necessary proof, but the regulations do not provide that the documents can *only* be issued where the identity card or passport is produced.

Paragraph 8 of the 2016 is new. This provision is broadly replicated later in the regulations for each species of residence document. It is possible to foresee problems with the "hostile environment" arising with para 8(a), which specifically states that the card is only proof of residence at the date of issue. What happens when an employer, landlord or bank sees such a document two years later? The whole paragraph itself also gives rise to huge uncertainty on when a person does or does not have a right of residence. The root cause is the judgment of the Court of Justice of the European Union in *Lassal*[15] and other cases, but it does not have to follow necessarily that residence documents are on their face worthless, as is explicitly provided for by this paragraph.

[15] Case C-162/09.

***Issue of residence card***

| 2006 as amended | 2016 |
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| **17.** (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of—<br>(a) a valid passport; and<br>(b) proof that the applicant is such a family member. | **18.**—(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a right of permanent residence under regulation 15 on application and production of—<br>(a) a valid passport; and<br>(b) proof that the applicant is such a family member. |
| (2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of—<br>(a) a valid passport; and<br>(b) proof that the applicant is a family member who has retained the right of residence. | (2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of—<br>(a) a valid passport; and<br>(b) proof that the applicant is a family member who has retained the right of residence. |
| (3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received. | (3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State must immediately issue the applicant with a certificate of application for the residence card and the residence card must be issued no later than six months after the date on which the application and documents are received. |
| (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—<br>(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and | (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—<br>(a) <u>the application is accompanied or joined by a valid passport</u>;<br>(b) the relevant EEA national |

| 2006 as amended | 2016 |
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| (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card. | is a qualified person or an EEA national with a right of permanent residence under regulation 15; and<br>(c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card. |
| (5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security. | (5) Where the Secretary of State receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Secretary of State must give reasons justifying the refusal unless this is contrary to the interests of national security. |
| (6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be valid for—<br>(a) five years from the date of issue; or<br>(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person,<br>whichever is the shorter. | (6) A residence card issued under this regulation is valid for—<br>(a) five years from the date of issue; or<br>(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person,<br>whichever is the shorter. |
| (6A) A residence card issued under this regulation shall be entitled "Residence card of a family member of an EEA national" or "Residence card of a family member who has retained the right of residence", as the case may be. | (7) A residence card—<br>(a) must be called "Residence card of a family member of a Union citizen";[16]<br>(b) is proof of the holder's right to reside on the date of issue;<br>(c) is no longer valid if the holder ceases to have a right to reside under these Regulations;<br>(d) is invalid if the holder never had a |

[16] Wording changed from EEA national to Union citizen by The Immigration (European Economic Area) (Amendment) Regulations 2017 SI 2017/1.

| 2006 as amended | 2016 |
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| | right to reside under these Regulations. |
| (7) Omitted. | |
| (8) But this regulation is subject to regulation 20(1) and (1A). | (8) This regulation is subject to regulations 24 and 25. |

***Comments***

Paragraph 4(a) repeats the encouragement for an extended family member to present a valid identity card or passport. See comments above.

***Issue of a document certifying permanent residence and a permanent residence card***

| 2006 as amended | 2016 | |
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| **18.** (1) The Secretary of State must issue an EEA national with a permanent right of residence under regulation 15 with a document certifying permanent residence as soon as possible after an application for such a document and proof that the EEA national has such a right is submitted to the Secretary of State. | **19.**—(1) The Secretary of State must, as soon as possible, issue an EEA national with a right of permanent residence under regulation 15 with a document certifying permanent residence on application and the production of—<br>(a) a valid national identity card or passport issued by an EEA State; and<br>(b) proof that the EEA national has a right of permanent residence. | |
| (2) The Secretary of State must issue a person who is not an EEA national who has a permanent right of residence under regulation 15 with a permanent residence card no later than six months after the date on which an application for a permanent residence card and proof that the person has such a right is submitted to the Secretary of State. | (2) The Secretary of State must issue a person who is not an EEA national who has a right of permanent residence under regulation 15 with a permanent residence card no later than six months after an application is received and the production of—<br>(a) a valid passport; and<br>(b) proof that the person has a right of permanent residence. | |
| (3) Subject to paragraph (5), a permanent residence card shall be valid for ten years from the date of issue and must be renewed on application. | (3) Subject to paragraph (4) a permanent residence card is valid for ten years from the date of issue and must be renewed on application. | |
| (4) Omitted. | | |
| (5) A document certifying permanent residence and a permanent residence card shall cease to be valid if the holder ceases to have a right of permanent residence under regulation 15. | (4) A document certifying permanent residence and a permanent residence card is—<br>(a) proof that the holder had a right to reside under regulation 15 on the date of issue;<br>(b) no longer valid if the holder ceases to have a right of permanent residence under regulation 15;<br>(c) invalid if the holder never had a right of permanent residence under regulation 15. | |

| 2006 as amended | 2016 | |
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| (6) But this regulation is subject to regulation 20. | (5) This regulation is subject to regulations 24 and 25. | |

***Comments***

Paragraph 19(1) is differently worded but nothing major seems to have changed. The new version strangely does not specify to whom the evidence of permanent residence must be produced and also specifically requires a valid identity card or passport (see comments above).

Paragraph 19(2) repeats this for family members.

See above regarding new paragraph 19(4).

***Issue of a derivative residence card***

| 2006 as amended | 2016 |
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| **18A.** (1) The Secretary of State must issue a person with a derivative residence card on application and on production of—<br>(a) a valid identity card issued by an EEA State or a valid passport; and<br>(b) proof that the applicant has a derivative right of residence under regulation 15A. | **20.**—(1) The Secretary of State must issue a person with a derivative residence card on application and on production of—<br>(a) a valid national identity card issued by an EEA State or a valid passport; and<br>(b) proof that the applicant has a derivative right to reside under regulation 16. |
| (2) On receipt of an application under paragraph (1) the Secretary of State must issue the applicant with a certificate of application as soon as possible. | (2) On receipt of an application under paragraph (1) the Secretary of State must issue the applicant with a certificate of application as soon as possible. |
| (3) A derivative residence card issued under paragraph (1) <u>may take the form of a stamp in the applicant's passport</u> and will be valid until—<br>(a) a date five years from the date of issue; or<br>(b) any other date specified by the Secretary of State when issuing the derivative residence card. | (3) A derivative residence card issued under paragraph (1) is valid until—<br>(a) the date five years from the date of issue; or<br>(b) any earlier date specified by the Secretary of State when issuing the derivative residence card. |

| 2006 as amended | 2016 |
|---|---|
| (4) A derivative residence card issued under paragraph (1) must be issued and as soon as practicable. | (4) A derivative residence card issued under paragraph (1) must be issued as soon as practicable. |
| | (5) A derivative residence card is—<br>(a) proof of the holder's derivative right to reside on the day of issue;<br>(b) no longer valid if the holder ceases to have a derivative right to reside under regulation 16;<br>(c) invalid if the holder never had a derivative right to reside under regulation 16. |
| (5) But this regulation is subject to regulations 20(1) and 20(1A). | (6) This regulation is subject to regulations 24 and 25. |

See above regarding new paragraph 20(5).

***Procedure for applications for documentation under this Part and regulation 12***

There is no equivalent to this regulation in the 2006 regulations.

| **Text** | **Brief observations** |
|---|---|
| **21.**—(1) An application for documentation under this Part, or for an EEA family permit under regulation 12, must be made—<br>(a) online, submitted electronically using the relevant pages of www.gov.uk; or<br>(b) by post or in person, using the relevant application form specified by the Secretary of State on www.gov.uk. | Introduces the mandatory use of application forms. This is not the first time the Home Office has done this.[17] Strongly arguable to be contrary to EU law, which does not allow for such forms and for workers explicitly limits what can be required as part of an application. |
| (2) All applications must—<br>(a) be accompanied or joined by the evidence or proof required by this Part or regulation 12, as the case may be, as well as that required by paragraph (4), within the time specified by the Secretary of State on www.gov.uk; and<br>(b) be complete. | Failure to comply with this subparagraph renders an application "invalid": see new regulation 21(4) below<br><br>No specific "evidence or proof" is actually required by "this Part or regulation 12". All that is "required" is evidence that the applicant has the right in question, e.g. regulation 17(3), 17(4). |

[17] See e.g. see from 2009 https://www.freemovement.org.uk/ec-law-applications/

| Text | Brief observations |
| --- | --- |
| | This seems confusing and a little misleading. It is not clear that a passport or identity card is "evidence or proof" as such within the meaning of this paragraph, meaning that production of the identity card or passport may not necessarily be mandatory in law.<br><br>It is probably permissible for Secretary of State to set a time limit for production of evidence or proof. See Commission v Belgium C-408/03. It is not lawful then automatically to require a person to leave the country, though: same case.<br><br>The need for the application to be "complete" is problematic in at least two ways. Firstly, there are many parts of the multipurpose current EEA series forms that have to be left blank. Secondly, will failure to answer literally any question render an application invalid? This seems whollydisproportionate, especially given there are so many unnecessary and irrelevant questions in the current forms (will the forms be changed and improved,?) |
| (3) An application for a residence card or a derivative residence card must be submitted while the applicant is in the United Kingdom. | No obvious basis for this requirement. Why can a person who is entitled to a residence card not apply from abroad? One would have thought this would lead to clear breaches of EU law if applied. |

| Text | Brief observations |
|---|---|
| (4) When an application is submitted otherwise than in accordance with the requirements in this regulation, it is invalid. | The phrasing admits no discretion *not* to treat an application as invalid (e.g. a single question is not answered and a form is thereby not "complete"). There is no basis in EU law for treating as invalid and thereby in effect rejecting a request for a residence document by a person who is entitled to one and submits evidence that he or she is so entitled.<br><br>This paragraph may well cause problems with appeals. The definition of "EEA decision" purports to exclude a decision that an application for documentation is invalid. Yet a decision to reject an application because it is judged invalid "concerns a person's entitlement." Given the wording of the regulations, First-tier Tribunal and Upper Tribunal are judges more likely to decline jurisdiction and suggest judicial review. And it is unlikely to be proportionate to appeal or to bring a judicial review rather than just making a new, valid application. |
| (5) Where an application for documentation under this Part is made by a person who is not an EEA national on the basis that the person is or was the family member of an EEA national or an extended family member of an EEA national, the application must be accompanied or joined by a valid national identity card or passport in the name of that EEA national. | This overrules the *Barnett and others (EEA Regulations: rights and documentation)* [2012] UKUT 00142 (IAC) case. In practice the Home Office never seem to have followed and applied *Barnett*. |
| (6) Where—<br>(a) there are circumstances beyond the control of an applicant for documentation under this Part; and<br>(b) as a result, the applicant is unable to comply with the requirements to submit an application online or using the application form specified by the Secretary of State,<br>the Secretary of State may accept an application submitted by post or in person | This introduces a limited discretion to accept applications other than by the official online and application form methods. It is not clear when the discretion may be applied but guidance will probably be forthcoming on 1 February 2017.<br><br>The discretion does not extend to waiving other requirements in this regulation, though, such as the form |

| Text | Brief observations |
|---|---|
| which does not use the relevant application form specified by the Secretary of State. | being "complete." |

***Verification of a right of residence***

As a preliminary point which is perhaps besides the point, why does much of this new regulation needs to exist in the regulations at all. There has never been any doubt that the Secretary of State could investigate an application where there was a good reason to do so and it is hard to see why it requires setting out formally in the regulations.

| Text | Brief observations |
|---|---|
| **22.**—(1) This regulation applies where the Secretary of State—<br>(a) has reasonable doubt as to whether a person ("A") has a right to reside or a derivative right to reside; or<br>(b) wants to verify the eligibility of a person ("A") to apply for an EEA family permit or documentation issued under Part 3. | (a) Is "reasonable doubt" the right test to be applied?<br>(b) there is no threshold at all here. This applies simply where Secretary of State "wants to verify". Could apply to any case even where there is no reasonable doubt.<br><br>This regulation has general application including for those who have not applied - it is a general power to check the residence status of any EEA national or family member. The intention may be to target street homeless, perhaps, but the power is far wider. |
| (2) Where this regulation applies, the Secretary of State may invite A to—<br>(a) provide evidence to support the existence of a right to reside or a derivative right to reside (as the case may be), or to support an application for an EEA family permit or documentation under this Part; or<br>(b) attend an interview with the Secretary of State. | (a) This applies to two separate circumstances. The first is to verify the right of residence of any EEA national or family member. One can see the purpose behind this. The second is to invite additional evidence as part of an application process. This could conceivably be helpful if it were used to reduce outright rejections of applications. The context, however, suggests that the power is essentially for demanding additional documents that the applicant did not submit, perhaps advisedly. |

| Text | Brief observations |
|---|---|
| (3) If A purports to have a right to reside on the basis of a relationship with another person ("B"), (including, where B is a British citizen, through having lived with B in another EEA State), the Secretary of State may invite B to—<br>(a) provide information about their relationship or residence in another EEA State; or<br>(b) attend an interview with the Secretary of State. | This specifically mentions *Surinder Singh*[18]cases (there are reports of interviews being requested or even enforced by visits in *Surinder Singh* cases) but is not limited to them. This goes far beyond simply requiring a marriage certificate, which should be all that is needed, and there is no "reasonable doubt" threshold or similar. This is obviously in breach of European Commission handbook on marriages of convenience.[19] |
| (4) If without good reason A or B (as the case may be)—<br>(a) fails to provide the information requested;<br>(b) on at least two occasions, fails to attend an interview if so invited;<br>the Secretary of State may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances. | As above, this appears obviously in breach of the Commission handbook on marriages of convenience and indeed also domestic case law such as *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14 and *Agho v The Secretary of State for the Home Department* [2015] EWCA Civ 1198 in which the Court of Appeal has ruled the burden rests with the Home Office. |
| (5) The Secretary of State may decide following the drawing of an inference under paragraph (4) that A does not have or ceases to have a right to reside. | See above. |
| (6) But the Secretary of State must not decide that A does not have or ceases to have a right to reside on the sole basis that A failed to comply with this regulation. | This appears contradictory - the drafter seems to be tying the regulations in knots to try to appear arguably compliant with EU law. |
| (7) This regulation may not be invoked systematically. | Cold comfort and no protection. |

[18] Case C-370/90.

[19] Available at http://ec.europa.eu/justice/citizen/files/swd_2014_284_en.pdf . See section on burden and standard of proof, pp 26-27.

## PART 4 *REFUSAL OF ADMISSION AND REMOVAL ETC.* AND SCHEDULE 1 *CONSIDERATIONS OF PUBLIC POLICY PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY*

*Expulsion and removal - Professor Elspeth Guild and Maeve Keenan*

British citizens and citizens of the other 27 Member States[20] share a common citizenship known as EU citizenship. The principle of this citizenship as set out in Article 18 of the Treaty on the Functioning of the European Union is that all citizens must be treated equally (a prohibition on discrimination on the basis of nationality). The exact wording is that discrimination on grounds of nationality is prohibited. Any difference in treatment must be expressly permitted by EU law or be outside the scope of EU law altogether in order to be lawful. In the field of deportation or administrative removal, British citizens cannot be deported or administratively removed (though on national security grounds they can now be prohibited from entering the UK for a period up to two years). Nationals of the other 27 Member States (plus the EEA States) are entitled to non-discrimination on the basis of nationality in comparison with British citizens according to EU law. Residence for nationals of 27 Member States in the UK is a field of law which is within the competence of the EU so the issue is within the scope of EU law.[21] Thus an express exception is required in order to permit EU (and EEA) citizens who are not British citizens to be expelled from the UK. This exception is to be found in the Treaty on the Functioning of the European Union. Article 20(2) provides that the right to move and reside is subject to the duties provided in the Treaties and the measures adopted thereunder. The specific provisions are free movement of persons – workers, self-employed in the Treaty on the Functioning of the European Union and Directive 2004/38/EC.

As EU (and EEA) citizens do not need leave to enter the UK they cannot be subject to the immigration rules on deportation and administrative removal. Instead the Immigration (European Economic Area) Regulations 2016[22] for most provisions, including the removal (expulsion/deportation) provisions apply. The terminology of the regulations regarding expulsion of EU and EEA nationals is 'removal'. While Part 4 of the regulations is entitled Refusal of Admission and Removal, technically the regulations use the term 'a person not entitled to be admitted' (exclusion). In the language of the Immigration Rules[23], this is the equivalent of an entry ban. See Alison Harvey's contribution below on entry bans, also an important and contested area.

The right to enter and reside in the UK can only be extinguished and a non-British EU (EEA) citizen required to leave the UK where the UK authorities can satisfy a high EU test that the

[20] To the extent that non EU nationals of European Economic Area countries are protected against removal to the same extent as their EU counterparts, this note applies also to them.

[21] The UK authorities maintain that if a non-British EU (EEA) national who has remained in the UK for more than three months is not a worker, self -employed, a self-sufficient student, pensioner or self-sufficient but economically inactive, then the person is not within the scope of EU law and does not enjoy the protection which EU provides in respect of removal. This argument has not been confirmed by the Court of Justice of the European Union and the counter argument has been made that EU citizens are entitled to move and reside freely in the EU as an essential element of their citizenship. This right cannot be limited in the manner maintained by the UK authorities as the source of the limitation is secondary legislation (Directive 2004/38) while the right is in primary law – the Treaty on the Functioning of the European Union Articles 20 – 21.

[22] Made on 2 November 2016 and entering into force on 1 February 2017, although some provisions entered into force on 25 November 2016.

[23] HC 395 as amended.

person is a threat to public policy, public security or public health. The ground of public health is virtually never used. Public policy is the most common ground which Member States invoke to require an EU/EEA national to leave their territory. Public policy is normally used to justify removal on the basis of criminal convictions and public security is traditionally aligned to national security. Nevertheless, recently the Court of Justice of the European Union has permitted the removal of an EU national on this ground as a result of conviction of a very serious criminal offence.

The burden of proof is on the UK where it seeks to remove a national of another Member State. A removal measure must comply with the EU principle of proportionality and must be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Article 27 Directive 2004/38/EC). This is a forward looking test: the person must be a future threat thus past behaviour is only relevant if and to the extent that it provides strong evidence of the risk of a future threat. The threat must be to a fundamental interest of society. A criminal conviction is required by the test of public policy threat. This is a very different kind of test than applies to deportation or administrative removal from the UK under national immigration law.

***Non EU or British citizens' removal***

The UK domestic law deportation provisions which apply to non-EU or British citizens provide much more flexibility to the UK authorities. A non EU or British citizen with leave to enter or remain in the UK may be subject to deportation on three grounds:
(1) that this is conducive to the public good;
(2) where the person is a spouse or civil partner or child under 18 of a person ordered deported; and
(3) where a court recommends deportation in the case of a person over 17 who has been convicted of an offence punishable with imprisonment.[24]For a non EU or British citizen without leave to enter or remain (or expired) administrative removal is the expulsion power under national law.[25]

The UK Borders Act 2007 creates a statutory presumption that deportation of a person who is not a British citizen, will automatically be conductive to the public good when that person has committed a criminal offence carrying a sentence of at least 12 months. This obliges the Secretary of State to make a deportation order against a 'foreign criminal,'[26] unless one of the narrowly defined exceptions in s 33 of the UK Borders Act 2007 applies. Section 33 provides an exhaustive list of the exceptions to this statutory presumption including, 'where the removal of the foreign criminal in pursuance of a deportation order would breach their rights under the EC treaties.'[27]The problem with this framework as regards EU law is that there is a presumption in favour of deportation or administrative removal on much wider grounds than permitted by EU law vis-à-vis EU citizens but the exception is only by way of a carve out.

[24]Immigration Rules HC 395, paragraph 363.
[25] Section 10 Immigration and Asylum Act 1999 and s 1 Immigration Act 2014.
[26] UK Borders Act 2007, s 32.
[27] UK Borders Act 2007, s 33.

### *Understanding the EU Test*

During the debates in Parliament on the UK Borders Act 2007, ILPA briefed Members of Parliament regarding the incompatibility of the presumption to deport with EU law. The fact of a presumption in favour with only a carve-out exception, in the view of ILPA, was unlikely to satisfy the test set down by the Court of Justice on public policy. So it was not a surprise when, in the 2016 judgment *CS,* the Court of Justice held that:

> "*43. In the present instance, the referring court indicates that, under the national legislation at issue in the main proceedings, the Home Secretary is obliged to make a deportation order in respect of a national of a State other than the United Kingdom who is convicted of an offence and sentenced to a period of imprisonment of at least 12 months, unless that order 'breach the rights of the convicted offender under the EU Treaties'.*
>
> *44. That legislation therefore seems to establish a systematic and automatic link between the criminal conviction of the person concerned and the expulsion measure applicable to him or, in any event, there is a presumption that the person concerned must be expelled from the United Kingdom.*"[28]

The Court criticised the automatic nature of the UK approach as inconsistent with the State's duty that such a conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result, where appropriate, only from a specific assessment by the national authorities and ultimately the court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights. The UK legislation offends against this requirement (paragraph 42).

Nonetheless, spurred on by the referendum result on 24 June 2016, the government has boldly announced that it will not wait until 'Brexit' to implement plans to extend even further the deportation powers of the Secretary of State vis-à-vis EU citizens and apply the same domestic law regime in place for non-EEA nationals. While nothing is certain for the future position of EEA nationals in the UK, it is clear that while the UK remains subject to EU law the actions proposed by the Sectary of State are both illogical and illegal.

### *A rather threatening commitment*

On 4 October 2016 the Rt Hon Amber Rudd MP, the current Home Secretary, spelt out her plan at the Conservative party conference to 'make it easier to deport EU criminals, aligning their fortunes more closely with those from outside the EU.'[29] She vowed not to wait until the UK leaves the EU to launch her 'immigration crackdown'. Ms Rudd stated:

> *"And there are things which the EU is currently considering which we can support, particularly those measures to tackle crime and terrorism. Many of them were our ideas in the first place. So we are going to overhaul our legislation to make it easier to deport criminals and those who abuse our laws. By setting out in legislation what is in the fundamental interests of the UK, we will make it easier to deport EU criminals, aligning their fortunes more closely with those from outside the EU. And going one step further, for*

[28] C-304/14, 13 September 2016.
[29] Amber Rudd – Conservative Party conference, 4 Oct 2016

*the first time, we will deport EU nationals that repeatedly commit so-called minor crimes in this country. So-called minor crime is still crime – its pain is still felt deeply by victims. Well, those criminals will face being banned from coming back to the country from between 5 and 10 years. That delivers on a very clear manifesto pledge."*[30]

Ms Rudd's statement that the EU is thinking about changing its rules on removal of EU (EEA) nationals who are not citizens of the host state seems to be a reference back to the negotiations on the 'New deal for the UK' which the previous Prime Minister, the Rt Hon David Cameron MP negotiated with his EU counterparts as the price for him to agree to campaign for the UK to remain in the EU. In the final version of the deal,[31] the European Commission was committed to clarifying that Member States could take into account the past conduct of an individual in the determination of whether a Union citizen's conduct poses a 'present' threat to public policy or security. The *Council Conclusions* confirmed that the Commission would indicate that Member States may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned. The *Conclusions* state that the Commission would also clarify the notions of 'serious grounds of public policy or public security' and 'imperative grounds of public security' (the grounds for removal of EU (EEA) citizens who have five or ten years' residence in the host Member State). Moreover, the document continues, on the occasion of a future revision of Directive 2004/38/EC the Commission would examine the thresholds to which these notions are connected.

On 24 June 2016, however, after the results of the UK referendum were announced, a joint statement by EU leaders and the Presidency of the EU stated "As agreed, the 'New Settlement for the United Kingdom within the European Union', reached at the European Council on 18-19 February 2016, will now not take effect and ceases to exist. There will be no renegotiation."[32] This appears to mean that the EU institutions and Member States abandoned the agreement which they had made with former Prime Minister Cameron for the purposes of convincing him to lead the remain campaign in the referendum. Certainly, the section of the agreement which refers to new 'clarifications' on removal powers for Member States against EU nationals of other EU Member States is of questionable consistency with the constant jurisprudence of the Court of Justice.

***Delivering on the commitment***

On 3 November 2016 the new Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) were laid before Parliament. These regulations deliver on the Home Secretary's commitment to strengthen her department's powers to remove EU (EEA) nationals from the UK. Regulation 27 deals with decisions taken on grounds of public policy, public security and public health. The provision starts off rather traditionally, using the language of Directive 2004/28/EC correctly. Things start to go wrong at regulation 27(5)(f) an innovation which states "the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the individual." This provision has an uncanny similarity to the rejected 'New Deal for the UK' where the Commission was to 'clarify' the expulsion rules in ways not consistent with the

[30] http://www.ibtimes.co.uk/read-home-secretary-amber-rudds-speech-conservative-conference-full-1584757 (visited 24 November 2016).
[31] Council Document EUCO 1/16.
[32] http://www.consilium.europa.eu/en/policies/uk/2016-uk-settlement-process-timeline/( visited 24 November 2016).

jurisprudence of the Court of Justice. One might call this jumping a gun that was never fired and actually taken out of action.

More problematic is regulation 27(8) which states "A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc)." This part of the regulations is directed exclusively at the courts and tribunals and creates an obligation on these judicial bodies to take into consideration certain factors. This must mean that the factors contained in the schedule and to which the judiciary must have regard have also been taken into account by the Home office in its decision making.

Schedule 1 is reproduced in its entirely below. It is a rather astonishing direction to courts and tribunals which presents a series of insults to the jurisprudence of the Court of Justice. It commences by explaining that Member States enjoy considerable discretion in determining the parameters of public policy or public security "to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time." This is certainly not what the Court of Justice has held to be EU law. The definition of public policy and public security is strictly interpreted as it is a derogation from the right of free movement. It has reiterated recently its constant position that the concept of 'public policy' presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Further the concept of public security covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (*CS,* C-304/14, 13 September 2016). The Court emphasised that a conclusion in favour of expulsion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result, where appropriate, only from a specific assessment by the national court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures (*CS* paragraph 41). Further according to the Court of Justice it is for the national court to assess

(i) the extent to which an EU (EEA) national's criminal conduct is a danger to society; and

(ii) any consequences which such conduct might have for the requirements of public policy or public security of the Member State.

This is anything but a light touch or evidence of considerable discretion.

The assessment of the personal circumstances of the individual under threat of removal must take account in particular of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the child at issue and his state of health, as well as his economic and family situation (*CS* paragraph 42). The list in Article 28(1) of Directive 2004/38/EC includes also social and cultural integration.

If one turns to Schedule 1, paragraph 2 defines integration into the UK, for the purposes of an assessment as to whether removal of an EU (EEA) nationals is consistent with the right of free movement, as more than extensive familial and societal links with persons of the same nationality or language (even if the family is British and the language Welsh?). Instead, wider cultural and societal integration must be present before a person may be regarded as integrated into the UK. This is a high exclusionary threshold which facilitates removal. As such it is contrary to the right of free movement against which removal is an exception to be interpreted narrowly. Further, paragraph 4 states that little weight should be attached to the integration of the EU (EEA) citizen or his or her family members in the UK if the integrating links were formed at or around the time of:
(a) the commission of a criminal offence;
(b) an act otherwise affecting the fundamental interests of society; or
(c) when the EU citizen or one of his or her family members was in custody.

There is no precedent in EU law for such an exclusion of factors of integration from the assessment of the proportionality of a removal decision.

Paragraph 5 of the schedule seeks to reverse the burden of proof from the shoulders of the state to prove that the individual is a threat to those of the EU (EEA) national. According to the wording of this provision is it for the EU (EEA) citizen to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EU (EEA) national or his or her family member has successfully reformed or rehabilitated). According to the long standing jurisprudence of the Court of Justice, the burden of proof that an EU (EEA) citizens is a threat to public security is firmly on the shoulders of the state which alleges the fact and seeks to interfere with the EU (EEA) national's right of free movement. This attempt at reversal of the burden of proof is inconsistent with EU law. Further, the requirement is that the EU (EEA) national prove a double negative – that he or she is not a threat. Those who had the misfortune of having to advise couples of the infamous 'primary purpose' rule for family reunion which was abolished only in 1997 will well remember, proving a negative – that the primary purpose of the marriage was not to obtain an immigration benefit for the foreign spouse - is very difficult and easily manipulated by the Home Office. Just so now the Home Office wants EU (EEA) citizens to prove that they are not a threat to public policy.

Paragraph 6 of the schedule states that it is consistent with the meaning of public policy that a person be removed for fraudulently obtaining or attempting to obtain a right to reside under the regulations.

Worse still is paragraph 7 which seeks to define the fundamental interests of society. Far from the interests being fundamental, many of those in the list are marginal. Others are simply empty words. So the list starts with preventing unlawful immigration as a fundamental interest of society (not many people would agree that this is fundamental at all). The maintenance of public order is the next, yet everyone who has participated in a demonstration or otherwise exercised their constitutional right to civil disobedience may disagree that public order is a fundamental interest of society. Next is the so called fundamental interest of preventing social harm. Social harm is not a concept of British criminal law so who is entitled to determine what social harm is? As we are all aware, one person's social harm is another person's liberty as the campaign for LGBTI rights has clearly shown. Preventing the evasion of taxes and duties is a fundamental interest of society according to the Schedule paragraph 7(d). Does this fundamental interest require EU (EEA)

nationals to denounce anyone they suspect of evading taxes or duties? When one considers the diligence with which the Crown Prosecution Service pursues people who have committed massive tax fraud and the preference of Her Majesty's Revenue and Customs to reach a settlement rather than prosecute, the behaviour of the government itself does not reveal that this is a fundamental interest.[33]

Paragraph 7(e) is even more problematic – a fundamental interest of society is protecting public services. But what does this mean in the context of removal of EU (EEA) citizens? What appears to be suggested is that by using public services EU (EEA) citizens may be putting those services at risk and thus this in itself might constitute a ground for removal. For instance, does the fundamental interest of protecting social services mean that if a French mother tries to enrol her child in a primary school she is committing an act for which she (and her child) can be expelled from the UK?

Another fundamental interest of society is "excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused public offence) and maintaining public confidence in the ability of the relevant authorities to take such action". So the fundamental interest of society which is to be tested regarding a decision by the Home Office on whether to removal an EU (EEA) citizen is the right of the Home Office to remove that person. This is a shockingly circular argument which is so obviously contradictory of proper consideration of a matter that it is astonishing to find it in a piece of UK secondary legislation.

The next fundamental public interest set out in the Schedule is that of tackling offences likely to cause harm to society (note this does not necessarily include offences which do cause public harm) where an immediate or direct victim may be difficult to identify but where there is wider societal harm. Once again one is faced with a form of words which is designed to create as wide as possible a discretion for the Home Secretary to remove EU citizens. It might be arguable that this so called fundamental interest of society is actually empty of meaning altogether. Thereafter, the next interest is combating the effects of persistent offending in particular regarding offences which would not otherwise meet the criteria (bearing in mind that the criteria are so wide that it would be difficult to find an offence which is excluded). Next comes protecting the rights and freedoms of others including but not limited to exploitation and trafficking. As this interest is not limited to the extremes, protecting the claimed freedom of UK Independence Party supporters to live in an EU (EEA) national-free England could possibly qualify as a fundamental interest under this heading.

Protecting the public is the next fundamental interest to be protected by removing EU (EEA) citizens – but with no definition of protection or of the public such a vague ground could be used to justify anything. Then comes acting in the best interests of a child, including when this means refusing a child admission to the UK or taking a decision against an EU (EEA) national child. So here it is the concept of the best interests of the child which is inverted and deprived of essential content. Finally, a fundamental interest is countering terrorism and extremism and protecting shared values. Even if one accepts counter terrorism and possibly extremism might come within the fundamental interests fold, protecting shared values lacks the essential characteristic of law: certainty.

[33] https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy (visited 24 November 2016).

***A Challenge***

From 2013 the Home Office, together with Metropolitan Police and other police forces around the country, began a pilot operation known as Operation Nexus targeting EU citizens who are homeless for administrative removal on the basis that they have no right to reside in the UK and therefore are subject to the Immigration Act 1971 and the domestic rules on deportation and administrative removal. While originally the operation began as a trawl to deport or administratively remove those convicted of criminal offences (not only EU citizens) it has evolved to one where suspicion of possible criminal activity seems to be a ground. The AIRE Centre has instructed Deighton, Pierce Glynn solicitors in a challenge to the administrative removal of EU citizens who are 'rough sleepers or low-level offenders' under 'Operation Nexus'.

The new UK interpretation of fundamental interests of society will permit activities such as Operation Nexus to avoid examining whether the EU (EEA) national is exercising a free movement right when seeking to remove them. This has been an issue for a number of EU (EEA) nationals in the UK who may be homeless but are nonetheless working and so are exercising Treaty free movement rights. As such there is no available argument for the Home Office that they have no right to reside. Now, with the new Schedule 1 of the 2016 regulations, the Home Office and police can immediately apply the public policy ground for removal on the basis that the presence of the EU (EEA) nationals is a threat to a fundamental interest of society. Using this ground of public policy means that it is no longer relevant whether the EU (EEA) national was exercising a Treaty right of free movement or not. EU law permits the removal of an EU (EEA) national on public policy grounds even where they are a worker.

The protection against removal of EU (EEA) nationals living in a host Member State increases after five years residence to a standard of serious grounds of public policy or public security and after ten years or in respect of a minor, the ground is an imperative ground of public security (as defined by the Member State: Article 28(3) Directive 2004/38/EC).

***Non-Suspensive Appeal Rights***

The 2016 regulations (regulation 37) include extensive provisions regarding rights of appeal for EU (EEA) nationals and their family members which cannot be pursued so long as the appellant is in the UK. These are where the decision was:

(a) to refuse to admit that person to the United Kingdom;
(b) to revoke that person's admission to the United Kingdom;
(c) to make an exclusion order against that person;
(d) to refuse to revoke a deportation or exclusion order made against the person;
(e) to refuse to issue the person with an EEA family permit;
(f) to revoke, or to refuse to issue or renew any document under these Regulations where that decision is taken at a time when the person is outside the United Kingdom; or
(g) to remove the person from the United Kingdom following entry to the United Kingdom in breach of a deportation or exclusion order, or in circumstances where

that person was not entitled to be admitted pursuant to regulation 23(1), (2), (3) or (4).[34]

The exclusion from the UK grounds based on public policy, public security and public health contained in regulation 27, which are subject to the very wide considerations of fundamental interests of society, also constitute a reason for the person to be removed to have a non-suspensive appeal right only. Regulation 23(6)(b) enables the Secretary of State to make a removal order on the basis of public policy but a simple reading of regulation 37 would lead the reader to believe that this decision carries an in country right of appeal but this is not the case. Regulation 33 provides for the Secretary of State to deprive an appeal against removal on public policy grounds of suspensive effect by certifying the case as not raising an issue of human rights.[35] So the EU (EEA) national can be removed from the UK on the grounds of public policy and his or her right of appeal can be exercised only from outside the UK. In order to cover the express provision of the Citizen's Directive that a person is entitled to present his or her case on appeal, regulation 41 provides that a person whose appeal right is based on regulation 23(6)(b) (public policy) may be granted temporary admission to the UK for the purpose of making submissions in respect of his or her appeal to the tribunal in person. This presupposes that the person will not be in the UK or possibly only applies where the person was temporarily outside the UK (without the Secretary of state's knowledge) at the time when the removal decision was made.

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[34] **23.**—(1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if a refusal to admit that person is justified on grounds of public policy, public security or public health in accordance with regulation 27.

(2) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if that person is subject to a deportation or exclusion order, except where the person is temporarily admitted pursuant to regulation 41.

(3) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if the Secretary of State considers there to be reasonable grounds to suspect that the person's admission would lead to the misuse of a right to reside under regulation 26(1).

(4) A person is not entitled to be admitted to the United Kingdom as the family member of an EEA national under regulation 11(2) unless, at the time of arrival—

(a)that person is accompanying the EEA national or joining the EEA national in the United Kingdom; and

(b)the EEA national has a right to reside.

[35] 33.—(1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 32(3) applies, in circumstances where—

(a)P has not appealed against the EEA decision to which regulation 32(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or

(b)P has so appealed but the appeal has not been finally determined.

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998(25) (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—

(a)where the removal decision is based on a previous judicial decision;

(b)where P has had previous access to judicial review; or

(c)where the removal decision is based on imperative grounds of public security.

(5) In this regulation, "finally determined" has the same meaning as in Part 6.

***After Brexit***

One of the big questions about Brexit is what security of residence EU citizens may have in the UK. There has been some suggestion of 'mass' deportation of EU citizens; undoubtedly an administrative nightmare. At this point it is very difficult to predict what is likely to happen. There are, however, an increasing number of indications that the UK's departure from the EU may be un-negotiated; the result of the operation of law under Article 50 that two years after the triggering of Article 50 a Member State ceases to be a Member State unless there is a unanimous agreement of all Member States to extend the negotiation period. If following a triggering of Article 50 by the UK, there is an impasse in the discussions with the Commission on the terms of departure, it is not self-evident that there will be the political will for a unanimous decision to extend the negotiating period. If this is the case, there the UK's departure would be determined by the operation of law contained in Article 50.

There has been substantial discussion of the 'Great Repeal Bill': the legislation which would need to be put into place on the UK's departure from the EU to secure the legal basis of all UK law including secondary legislation which has as its legal base some part of EU law. Without an act of parliament to provide all of this legislation with a new legal base in national law there could be substantial problems about the validity of any measure. Further EU Regulations which are not transposed into national law would just cease to apply if a 'Great Repeal Bill' were not enacted before the UK's departure. One Member of Parliament suggested that the better term would be the 'Great Download and Save Act', a reference to the need to secure all EU law currently applicable in the UK in the event of the disappearance of an EU legal basis for it.

Assuming that a 'Great Download and Save Act' were adopted, it is likely that among the measures to come under scrutiny for change very quickly would be all those measures in UK secondary legislation which provide for free movement and residence of EU nationals in the UK. The most obvious alternative to extending the rights of EU nationals to enter and reside (work, be self-employed, students etc.) is simply to make them subject to the Immigration Act 1971 as amended and to the Immigration Rules. Administratively this would be rather difficult as it would mean that the very complex and onerous rules for third country nationals would apply to EU citizens who are numerous in the UK. In respect of deportation and administrative removal, the UK national rules could be applied to all EU citizens (not merely those whom the Home Office claims are not exercising Treaty rights) and the lower standard would become applicable to them. Administrative removal of EU citizens without leave to enter or remain would pose alternative problems. As EU citizens do not require leave to remain at the moment, most of them (a few exceptions exist and a number of EU citizens are seeking indefinite leave to remain in the UK under domestic law rather than permanent residence under EU law to place themselves in this position) would have leave to enter or remain. That would mean that those without a domestic immigration status would be eligible for administrative removal. In order to avoid a rather chaotic situation, the Home Office could propose secondary legislation deeming that EU citizens have leave to enter or remain if they are in the UK.

If, however, some deeming provision or other solution were not used to provide EU citizens in the UK with a domestic basis for their entry and residence in the UK then in theory at least the UK could commence a dramatic administrative removal campaign. Article

4 Protocol 4 European Convention on Human Rights prohibits the collective expulsion of aliens. The UK, however, has never ratified this protocol.

## IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016 SCHEDULE 1: CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

### Considerations of public policy and public security

**1.** The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

### Application of paragraph 1 to the United Kingdom

**2.** An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

**3.** Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

**4.** Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a)the commission of a criminal offence;
(b)an act otherwise affecting the fundamental interests of society;
(c)the EEA national or family member of an EEA national was in custody.

**5.** The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

**6.** It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

(a)entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or
(b)fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

### The fundamental interests of society

**7.** For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a)preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;
(b)maintaining public order;
(c)preventing social harm;
(d)preventing the evasion of taxes and duties;
(e)protecting public services;
(f)excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
(g)tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
(h)combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
(i)protecting the rights and freedoms of others, particularly from exploitation and trafficking;
(j)protecting the public;
(k)acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
(l)countering terrorism and extremism and protecting shared values.

## PART 4 *REFUSAL OF ADMISSION AND REMOVAL ETC.* AND SCHEDULE 1 *CONSIDERATIONS OF PUBLIC POLICY PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY*

### *Entry bans – Alison Harvey*

While Part 4 of the regulations is entitled Refusal of Admission and Removal, in respect of exclusion the regulations use the term 'a person not entitled to be admitted' (exclusion). In the language of the Immigration Rules[36], this is the equivalent of an entry ban.

The first part of regulation 23 is written in the terms similar to those of regulation 19 of the 2006 regulations save that the term 'misuse of rights' is substituted for 'abuse of rights' in the 2006 regulations. See the comments by Professor Guild and Maeve Keenan in the section above, on that concept.

Then regulation 23(8) provides that an EEA national or their family member who entered the UK and is removed as a person not having, or ceasing to have, a right to reside (23(6)(1)(a)), or on public policy grounds (23(6)(1)(b)) or on the grounds of misuse of rights (23(6)(1)(a)), the decision must state that upon execution of any deportation order arising from that decision, the person against whom the order was made is prohibited from entering the United Kingdom until the order is revoked; or for the period specified in the order. Paragraph 23(9) further states that a decision taken on the grounds of public policy

[36] HC 395, Part 9, as amended, re-entry bans having been introduced by HC 321 *Statement of Changes in Immigration Rules* in 2008.

(23(6)()b) or misuse of rights (23(9)(c)) has the effect of terminating any right to reside otherwise enjoyed by the person concerned.

Regulation 23(8) sets out that a person deported from the UK on the grounds of public policy or public security will be prohibited from entering the UK until the deportation order is revoked (23(8)(a), the equivalent of regulation 24A(1) in the 2006 regulations) or for the period specified in the deportation order (23(8)(b)). These time limited orders are new. Regulation 23(9) then goes on to provide that a decision taken on the grounds of public policy (regulation 23 (6)(b)) or misuse of rights (paragraph 23(b)(c)) has the effect of terminating any right to reside that a person has. Regulation 32(4) (the equivalent of regulation 24(4) in the 2006 regulations) provides that an EEA national or their family member who enters the UK in breach of an exclusion order which is still is in force will be removable as an illegal entrant. Regulation 26 makes provision for a right of appeal against that decision which, by virtue of regulation 37(1)(g), will be out of country. Regulation 41 provides for a person to be temporarily admitted for the purpose of making submissions in person at their appeal against deportation. See the discussion of the appeals provisions below.

New Home Office guidance *EEA decisions on grounds of public policy and public security v1* was issued on 1 February 2017 and deals, inter alia, with the new time limited orders with these decisions. Not all of the guidance is public; some of it is restricted for internal Home Office use. The guidance provides that that "The length of the re-entry restriction associated with the deportation order will depend on the risk that is imposed to the fundamental interests of society." For a discussion of such risks, see the contribution from Professor Guild and Maeve Keenan above. The guidance goes on refer the reader to guidance on the general grounds of refusal under Part 9 of the Immigration Rules. It provides a table to be used where consideration is being given to making a deportation decision on the basis of behaviour considered contrary to the fundamental interests of society. The guidance states:

> *'…the table in this section provides an indication of the length of re-entry restriction to be imposed where an indefinite re-entry ban would be disproportionate. This is not prescriptive and in some cases the re-entry restriction may differ depending on the specifics of each individual case. In cases of serious criminality not covered in the table an indefinite deportation may apply. '*

In the table, a three-year ban s suggested in cases of unlawful immigration and/or facilitating 'immigration abuse' where there is no criminal conviction. Examples given are marriages of convenience and the use of fraudulent documents. Five to ten years are suggested in cases of 'social harm'; the example given is anti-social behaviour. This appears to indicate that breaches of immigration control, 'immigration abuse' and marriages of convenience are not regarded as anti-social behaviour. The tariff suggested for evasion of taxes and duties and the 'abuse of public services', the example given being income tax evasions and benefit fraud, is five to ten years, depending upon the nature, severity and time span of the acts under consideration. Five to ten years is also suggested for 'low level persistent criminality', the example being given are convictions, warnings and/cautions, for shop-lifting, with reference once again to the nature, severity and time span of the offences.

The guidance is couched in terms which pays deference to the EU law concept of proportionality. Under the 2006 regulations deportation orders simply remained in force until lifted. It is arguable, however, that this forced upon the decision-maker the

consideration of all material facts in the individual case which the EU law doctrine of proportionality requires. The focus is on past history rather than present threat and on that which individuals have in common, rather than that which sets them apart. See the discussion of the case of *CS*[37] is the comments of Professor Guild and Maeve Keenan above.

[37] C-304/14, 13 September 2016.

## PART 5 *PROCEDURE IN RELATION TO EEA DECISIONS*

***Kim Vowden***

Part 5 of the 2016 regulations sets out the procedure in relation to EEA decisions – admission, refusal of admission and removal.

It replicates Part 5 of the 2006 Regulations and includes the following regulations:

29. Person claiming right of admission
30. Person refused admission
31. Revocation of admission
32. Person subject to removal
33. Human rights considerations and interim orders to suspend removal
34. Revocation of deportation and exclusion orders.

The changes in this part are consequential amendments resulting from the changes in other parts of the regulations.

For instance, in the new regulation 29(1)(b), which is the equivalent of the old regulation 22(1)(b), the references to the old regulation 19(1),(1A) and (1AB) are now references to the new regulation 23(1),(2),(3) and (4). The old regulation 19 and the new regulation 23 both relate to exclusion and removal from the UK.

There are no substantive changes in this part.

## PART 6 *APPEALS UNDER THESE REGULATIONS* AND SCHEDULE 2 *APPEALS TO THE FIRST-TIER TRIBUNAL*

***Bojana Asanovic***

Part Six deals with the appeal rights related to the EEA decisions. Much of it consolidates what had been introduced in previous changes. The comments below address new provisions only.

**Regulation 35** introduces no new provisions. It defines what is a pending appeal, by way of reference to whether it is finally determined, withdrawn or abandoned and provides that an appeal is not withdrawn by virtue of a person leaving the United Kingdom.

**Regulation 36** establishes the conditions for exercising the right of appeal against EEA decisions which is now defined by way of a reference to the subject of the decision being entitled to a right of appeal. This change is minor but means that only a person who is subject to the decision can appeal against that decision.

This subsection, however, needs to be read in conjunction with the amended regulation 2 which defines what is an EEA decision. 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 - in line with the reported decision in *Sala (EFMs: Right of Appeal)* [2016] UKUT 411 (IAC).

The absence of a full merits-based review with respect to at least some parts of the decisions relevant to establishing a right to reside based on being an extended family member is problematic. The construction of Case C-83/11 *Secretary of State v Rahman and others* adopted in *Sala* so as to warrant no merits-based review was as follows. "In Rahman the court made clear that a full merits-based appeal was not required by the Citizens Directive; only a judicial review to ensure that the decision-maker has 'remained within the limits of the discretion set by [the] Directive'".

The *Sala* construction of the provision is likely to be too narrow given the phrase in *Rahman*[38] and does not give adequate procedural guarantees for two issues which are matters of EU law defined by Directive 2004/38/EC and which directly arise in relation to establishing a right to reside under Article 3 of that Directive. There is a case to be made that where there are EU law issues involved in the determination of as to whether a person is an "other family member", a full merits review of those issues should follow.

Whether the decision not to admit an "other family member" is in line with the EU meaning of the term "facilitate" is an EU law concept (as is clear from paragraph 25 of *Rahman*). It is necessary to consider the notion of dependency in EU law, and who is an "other family member" (Court of Justice of the European Union ruling in *Rahman* at paragraphs 27-35). Regulation 36 makes the exercise of a right of appeal conditions on producing identity documents and also proof of relationship with the EU citizen with a right to reside. These requirements have now been extended to include family members of returning British residents (Case C-370/90 *Surinder Singh)*, with *Surinder Singh* cases now included in regulation 36(5). The remaining categories are for durable partners (regulation 36(3)); family and extended family members and those with retained rights (regulation 36(4)) and derivative rights of residence (regulation 36(5)).

There is no limitation on access to a right of appeal based on absence of documentation in the Directive 2004/38/EC. While there is a provision in the Directive on the claiming rights on production of valid identity card or a passport of a member State, this is qualified by caselaw. In case C-215/03 *Oulane*, paragraphs17-24, production of identity documents was considered an administrative formality and it was held that denial of rights cannot be permitted where identity and nationality can be proven unequivocally by other means. In Case C-459/99 *MRAX,* the Court of Justice determined at paragraph 62 that a member State cannot deny entry to a third country national family unable to provide identity documents where their identity and conjugal ties can be proven. Procedural protection of rights cannot be dependent on documentation as this would deprive such protection of effectiveness especially where the right itself cannot be denied on account of absence of documentation where identity can be established. The 2016 Regulations (as did the 2006 Regulations) contain a tempering of this requirement, whereby the Secretary of State can accept alternative evidence, but only where "the person is unable to obtain or produce the required document due to circumstances beyond the person's control". The trouble with this provision is not only that it is narrower than in *Oulane* but also that Secretary of State has discretion as to what to accept and a substantive right of appeal is dependent on that.

[38] The wording of the passage in *Rahman* is not entirely in line with the manner it was construed by the Tribunal: "the fact remains that such an applicant is entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that directive".

In addition to providing identity documents, applicants are required to produce either an EEA family permit or proof of their relationship to the EEA national with the right to reside. The new provisions relevant to *Surinder Singh*[39] cases in regulation 36(6) cases are that a person must supply not only a valid passport but also either an EEA family permit (36(6)(a)) or a qualifying EEA state residence card (36(6)(b)) as well as "proof that the criteria to be a family member are met" (36(6)(i)) and "proof that the British citizen is residing, or did reside in another EEA state as a worker, self-employed person, self-sufficient person or student" (36(6)(ii)).

If a person had lived in another EEA state without having ever been issued with a residence card and had entered without a family permit they will not have a right of appeal. Given that the definition of the family member in the regulations excludes "extended family members" they will also not have a right of appeal. Practical application of those principles could exclude a right of appeal not only in the absence of identification, but also where UKVI is not satisfied that what has been submitted amounts to "proof" of relationship and/or of status of the British citizen. These limiting factors have no basis in EU law and have the capacity to make the procedural guarantees of EU law ineffective, contrary to Article 47 of the Charter of Fundamental Rights of the EU and Directive 2004/38/EC (as 2004/38/EC is applicable at least by analogy[40]).

**Regulation 37** which deals with the out of country rights of appeal , introduces two more categories of person who do not have an in-country right of appeal (subsection (1)(g)). In addition to the dubious, but old, provision, now contained in regulation 37(1)(f), precluding in country right of appeal in cases where, at the time of decision to revoke, refuse to issue, or to renew any document is made, a person is outside the UK; the extension of the appeal out of country now includes persons who are deemed not to be admitted in the UK pursuant to two new regulations: 23(2) and 23(4) (regulation 37(1)(g)). Regulation 23(2) sets out that persons are not entitled to be admitted where they are subject to a deportation or exclusion order, except where the person is temporarily admitted pursuant to regulation 41. Regulation 23(4) provides that a person is not entitled to admission as a family member unless

(a) they are accompanying the EEA national or joining the EEA national in the United Kingdom; and
(b) the EEA national has a right to reside.
(c)

Both categories seek to exclude from an in-country appeal persons who happened to be in the UK (presumably because the border controls do not detect them) even though they should have been stopped at the point of entry. The latter provision has the capacity to produce unintended effects where family members arrive in the UK at different times.

**Regulation 38** applies a number of provisions of Nationality Immigration and Asylum Act 2002 to the Special Immigration Appeals Commission in the case of appeals against EEA decisions. . Those are the provisions of Schedule 2 to the 2016 Regulations. Almost all appeared in the previous regulations. It is of note that Schedule 2 paragraph 2(1) introduces

[39] Case C- 370/90)

[40] Case C-456/12 *O&B* [2014] QB 1163 required the application of principles of Directive 2004/38/EC "by analogy" to third country national family members of returning residents "given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family" (at paragraph 50). There is no reason not to apply procedural guarantees of Directive 2004/38/EC by analogy also.

an automatic certification of human rights claims resulting from EEA decisions so that they are appealable out of country only where there had been certification of under regulation 33. Paragraph 3 of Schedule 2 applies the Tribunal Procedure Rules[41] to the appeals under the Regulations. This provision may create a tension in relation to rule 16 and the abandonment provisions which do not exist in the EEA Regulations.

**Regulation 40** Regulation 40(2) clarifies that when there is an appeal pending against a refusal of admission (other than in specified circumstances) it is not only that previous removal directions cease to have effect, but also no further directions may be given. No extending mirroring provisions is made in the case of appeals against removal under regulation 40(2)(3). A uncontroversial provision in regulation 40(6) states that if a person in the United Kingdom appeals against an EEA decision to remove him/her from the United Kingdom, a deportation order is not to be made against him/her under s 5 of the Immigration Act 1971 while the appeal is pending.

**Regulation 41**(1)(e) introduces an additional condition for a person to make an application for temporary admission to attend their appeal in person - that of being outside the United Kingdom.

## PART 7 *GENERAL*

For comments on Schedule 5 *Transitory Provisions* see under Part 1 above. There are no comments on Schedule 4 *Revocations and Savings* or on Schedule 7 *Consequential modifications.*

## SCHEDULE 6: *TRANSITIONAL PROVISIONS*

### *Firuza Ahmed*

Regulation 45 states: "**45.** Schedule 4 (revocations and savings), Schedule 6 (transitional provisions) and Schedule 7 (consequential modifications) have effect."

Commentary on the paragraphs of the Schedule is set out below.

| Paragraph | Comment |
|---|---|
| 1 | **Interpretation**<br><br>For applications that are being considered under the new regulations, the phrase "permission to be temporarily admitted in order to make submissions in person" is defined in regulation 41 of the 2016 regulations. |
| 2 | **Existing documents**<br><br>(1) An EEA family permit issued before 1 February 2017 (and under the 2006 regulations) will be treated in the same way as the same as one |

[41] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) (L.31).

| | |
|---|---|
| | issued under the 2016 regulations. The issuance of an EEA family permit is under regulation 12 in both sets of regulations. The wording of regulation 12 in both regulations is nearly identical.<br>(2) Any residence documentation issued under Part 3 of the 2006 regulations is to be treated as issued under Part 3 of the 2016 regulations.<br>(3) Self-explanatory. |
| 3 | **Verification of right of residence**<br><br>Self-explanatory. |
| 4. | **Outstanding applications**<br><br>(1) Pending applications that are not decided before 1 February 2017 will be decided under the 2016 regulations. It does not seem to matter how long the application has been pending.<br>(2) Any application submitted before 1 February 2017 will not have to meet the requirements of regulation 21. Regulation 21 sets out the "Procedure for applications for documentation under this Part and regulation 12". Regulation 21 contains the worrying reference to applications on a relevant form and that the applications must be complete.<br><br>The 2016 regulations have amended the definition of an EEA decision to state that it "…does not include a decision that an application for the above documentation is invalid". This amendment to the "EEA Decision" definition will not apply to any applications submitted prior to 1 February 2017. |
| 5 | **Removal decisions, deportation orders and exclusion orders under the 2006 Regulations**<br><br>(1) A removal decision made under the 2006 regulations will be treated as though it is a removal decision under regulation 23(6)(a)(b) or (c).<br><br>Regulation 23(6) is very nearly the same as the old regulation 19. But the new regulation 23(6)(b) refers to a removal being made in accordance with regulation 27. The first part of regulation 27 is nearly the same as its equivalent, the old regulation 21, until one gets to:<br><br>(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—<br>(a) [to (e)…not quoted here as similar to old wording]<br>(f) the decision may be taken on preventative grounds, even in |

| | |
|---|---|
| | the absence of a previous criminal conviction, provided the grounds are specific to the person.<br><br>(2) Subparagraph (5) appear simply to identify where several paragraphs in the old regulations are now to be found in the new regulations.<br><br>(6) Under regulation 26(2), misuse of the right to reside includes attempting to re-enter the UK:<br>• within 12 months of being removed under regulation 23(6)(a); AND<br>• where the person does not provide evidence they will meet the criteria for a right of residence.<br><br>If this reading is corrected, the 12 month period referenced above becomes 36 months if:<br>• the person has been removed before 1 February 2017 under regulation 19(3)(a) of the old Rules; AND<br>• regulation 26(b) concerning when a misuse of the right to reside applies, viz:<br>"intends to obtain an advantage from these Regulations by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in these Regulations. |