ILPA information sheet

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BREXIT

12. UK regulations on free movement that may breach EU Law

This information sheet identifies some aspects of the UK domestic regulations, used to decide applications made by European Economic Area (EEA) and Swiss nationals and their family members, that may be in conflict with European Union (EU) law on free movement. It explains which law applies, and what happens where there is a conflict between domestic legislation and EU law.

Which law applies to the rights of residence of EEA and Swiss nationals?

EEA and Swiss nationals and their family members have rights of residence under EU law. The UK Government makes regulations for UK decision-makers to use when they consider applications made by EEA/Swiss nationals under EU law on free movement. On 3 November 2016, the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) were made, most of the provisions of which came into effect on 12 February 2017. Some provisions in the new regulations do not correctly reflect the position in EU law.

What happens where there is a conflict between domestic regulations and EU law?

EU law on citizenship and free movement takes precedence over UK domestic legislation. This means that where there is a conflict between EU law and domestic legislation, EU law, not UK law, is followed. If domestic regulations do not reflect correctly the position in EU law, they are unlawful and may be challenged, either in an appeal to the First-tier Tribunal (Immigration and Asylum Chamber) or, where there is no right of appeal, through a judicial review of the decision.

This will remain the case while the UK remains in the EU but when the UK leaves the EU, it proposes that the Court of Justice of the European Union will not have jurisdiction in the UK. If it is necessary for historic reasons to interpret EU law after Brexit it cannot be assumed that EU law will be preferred to domestic interpretations; we do not know. If the provisions in the new regulations are not challenged before the UK leaves the EU and remain relevant in any circumstances after the UK leaves, it may not then be possible to challenge them. As a result, lawyers are working to challenge many of the points now.

Which requirements in the regulations may be in conflict with EU law on citizenship and free movement?

The requirement **to use an application form** (online or paper) specified by the Home Office and **to submit a 'complete' application**, otherwise the application will be declared invalid. An invalid, rather than refused, application will not attract a right of appeal. EU law does not provide for the use of mandatory forms and, for workers, explicitly limits what may be required as part of an application.

The refusal to treat relatives of the spouse or civil partner of an EEA national as extended family members. Those who had already been issued with an EEA family permit, registration certificate or residence card as an extended family member and have been continuously resident in the UK since its issue are protected but other extended family members are not. This is contrary to the approach of the Court of Justice in *Rahman* (C83/11) to the EU law requirement to 'facilitate' the entry of extended family members.

The requirement that non-EEA family members, or extended family members, **submit the EEA national's valid national identity card or passport with their applications** for documentation. The requirement may be difficult for persons such as survivors of domestic violence to fulfil. The Upper Tribunal held in *Barnett & ors (EEA regulations, rights and documentation)* [2012] UKUT 00142 (IAC) that under EU law an application cannot be refused solely on this basis.

Further evidence requirements where the Home Office doubts, or wishes to verify, **a family relationship.** The cases of *Rosa v SSHD* [2016] EWCA Civ 14 and *Agho v SSHD* [2015] EWCA Civ 1198 set out what can and cannot be required.

The refusal to allow an EEA national to benefit from rights of free movement and residence after acquiring British nationality. This is relevant to the requirements to be met by their family members: those of the immigration rules or those of EU law? The question of whether such a refusal is permissible is to be considered by the Court of Justice of the European Union in *Lounes,* Case C-165/15.

The criteria for qualifying as a worker whilst looking for work and on being a job seeker. These are inconsistent with EU law as set out in the Court of Justice case of *Antonissen,* Case 292/89

The requirement that family members of returning British Citizens, **who are treated as EEA nationals having exercised treaty rights in an EEA State** (*Surinder Singh* route) **do not qualify under EU law where the British Citizen exercised rights of free movement for the specific purpose of then coming back to the UK with their family without having to meet the more restrictive requirements of the Immigration Rules.** Motive in such cases is irrelevant under EU law. See e.g. *Akrich* Case C-109/01). See *Surinder Singh* Case C-370/90 *and O and B* Case C-456/12.

The requirement that such British citizens be exercising Treaty rights in the UK for them to be allowed to be joined by their family members under EU law. This is contrary to the case of *Eind* (C-291/05).

The prohibition on the extended family members (family members who are not a spouse, civil partner, parent, grandparent, child or grandchild) **of such British citizens from qualifying for residence.** The Upper Tribunal has made a reference to the Court of Justice of the European Union on this in the case of *Banger (Unmarried partner of British national*) *2017 UKUT 00125 (IAC)*. The decision of the Court of Justice is awaited.

To remove a right of appeal against a Home Office refusal in certain categories of case. This includes applications relating to the extended family members in a case involving a British citizen treated as an EEA national on return to the UK. See the case of *Banger* described above.

To provide that where an EEA national leaves the country during divorce proceedings, the family member is eligible to remain if the EEA national was a qualified person or had permanent residence on the date divorce proceedings were commenced, rather than the date that the marriage or civil partnership was terminated. This is contrary to the case of *Singh, case* C 218/14)