EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT) REGULATIONS 2012

2012 No. 1547

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 These Regulations amend the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations') which transpose into UK law Directive 2004/38/EC ('the Directive') on the right of citizens of the Union and their family members to move and reside feely within the territory of the Member States.

2.2 These Regulations give effect to recent judgments delivered by the Court of Justice of the European Union ('the ECJ'); and make a number of other amendments to address some transposition issues and to provide clarity and consistency in the 2006 Regulations.

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

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

3.2 Paragraph 25 of Schedule 1 to the Regulations provides that periods of activity or residence prior to entry into force of the Regulations can in certain circumstances be taken into account in calculating periods of activity or residence under the 2006 Regulations. Any rights arising as a result of these changes will be conferred prospectively so the powers in section 2(2) of the European Communities Act 1972 are not being used to create provisions which have retrospective effect.

4. Legislative Context

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

4.2 The Regulations give effect to the judgments of the ECJ in the cases of ***Chen (C-200/02), Ibrahim(C-310/08)*** **and** ***Teixeira(C-480/08), Lassal(C-162/09), Dias(C-325/09), McCarthy (C-434/09)*** **and** ***Ziolkowski and others (C-424/10 and 425/10).***

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

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom

6. European Convention on Human Rights

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

7. Policy Background

<u>What is being done and why?</u>

A. Derivate Rights of Residence

7.1 Amendment of the 2006 Regulations is required in order to give effect to recent ECJ judgments concerning the rights of entry and residence of EEA nationals and their family members.

7.2 Paragraphs (1) and (2) of new regulation 15A (which is inserted into the 2006 Regulations by paragraph 9 of Schedule 1 to the Regulations) specifies that a derivative right of residence arises for the primary carer of a self-sufficient EEA national child where the denial of such a right would prevent the child from exercising their own right of residence. This regulation gives effect to the ECJ judgment in *Chen*. The UK Border Agency has to date been operationally compliant with this judgment by virtue of paragraph 257 of the Immigration Rules which will now be deleted on commencement of this amending regulation.

7.3 Paragraphs (3) and (4) of new Regulation 15A give effect to the ECJ judgments in the linked cases of *Ibrahim* and *Teixeira.* In these cases the Court confirmed that the child of a national of a Member State who has entered and resided in a Member State whilst their parent was residing their as a worker can claim a right of residence in the host State. The Court also and determined that the primary carer of such a child can reside in that Member State whilst the child is in education and would not be able to continue in education were their primary carer denied a right of residence. Regulation 15A(3) confirms the right of residence of the child in such a scenario; new regulation 15A(4) confirms the right of residence of the primary carer in such a scenario.

7.4 In support of these new regulations confirming rights to reside:

i. New regulation 15A(7) and (8) define primary carer for the purposes of those rights. New regulation 15A(9) stipulates the circumstances in which those rights can be denied.
ii. 15A(5) establishes the associated right to reside of any dependant children of the primary carer other than the child from whom the right of residence is derived.
iii. Regulation 15 is amended to specify that derivative rights to reside can not be relied upon to assert a right to permanent residence.
iv. Regulation 11 is amended to stipulate the circumstances in which a person claiming a derivate right to reside or the dependant child of which they are a primary carer and with whom they are travelling can be admitted to the UK.
v. New regulation 18A provides for documentation to be issued to those with a derivative right of residence.
vi. New regulation 21A confirms that those falling within the derivate rights to reside established at regulation 15A do not benefit from the same levels of

protection given to those exercising rights established under the Directive but can instead be removed from the UK if their removal would be conducive to the public good.

B. Other Changes

7.5 Paragraph 6 of Schedule 4 gives effect to the ECJ judgment in *Lassal* and *Dias* by providing that residence undertaken in accordance with previous EU law instruments concerning free movement can be counted for the purposes of acquiring permanent residence save in cases where there has been an absence from the UK of more than two years before the right to permanent residence was acquired or where the period of lawful residence was followed by a period of more than two years in which the person in question was not residing in accordance with the relevant EU law instrument.

7.6 Paragraph 6 of Schedule 4 also gives effect to the ECJ judgment in *Ziolkowski and Others* to provide that time spent in a Member State under domestic legislation before a Union citizen's country acceded to the European Union counts for the purposes of acquiring permanent residence, provided that such pre-accession residence would have been in accordance with the 2006 Regulations had they been in force and applied to the person in question at the relevant time.

7.7 Paragraph 1(d) of Schedule 1 gives effect to the ECJ judgment in *McCarthy*. This determined that a person who holds the nationality of the host Member State and has never exercised their right of free movement and residence does not benefit from the terms of the Free Movement Directive. Transitional provisions have also been made by way of paragraph 2 of schedule 3 of the amending Regulations to provide continuation of rights for those who have already placed reasonable reliance on the pre-McCarthy position which enabled British citizens to fall within the definition of EEA national for the purposes of the Regulations where they held another EEA nationality.

7.8 The amendments also make the following further changes to address transposition issues and practical matters concerning the operation of the 2006 Regulations:

a) Regulation 2 is amended to make it clear that a person will not be regarded as the spouse, civil partner or durable partner of another person for the purpose of the 2006 Regulations where another spouse, civil partner or durable partner of either person is already residing in the UK.
b) Regulation 4 is amended to remove reference to the Department for Innovation Universities and Skills from the definition of ''student'' in regulation 4(d)(i). The

DIUS register was last maintained by the Department for Innovation Universities and Skills on 20th March 2009 and so is no longer appropriate for use. The definition is amended to cover persons studying at a publicly funded establishment or an establishment otherwise recognised by the Secretary of State as an establishment accredited within the law or practice of the part of the UK in which it operates.

c) Regulation 10 is amended so as to ensure that the family member of a person with a permanent right to reside can also obtain a retained right of residence.
d) Regulation 12 is amended to enable a person with a retained right to be able to obtain an EEA family permit.
e) New regulation 15B provides for a right of residence to continue whilst an appeal against certain decisions made under the Regulations could be brought or is pending.
f) Regulation 20(1A) is amended to enable a removal decision to invalidate a document held under the 2006 Regulations.
g) Regulation 24 is amended to make clear that EEA nationals and their family members will not be detained unless for reasons of public policy, public health or public security.
h) Regulation 24A is amended so that revocation of a deportation or exclusion order may be undertaken by the Secretary of State where the criteria for making such an order are no longer justified.
i) Regulation 25 is amended to delete the definitions of the 'Human Rights Convention' and the 'Refugee Convention' and replace these with 'human rights claim' and 'asylum claim' as a result of the changes being made to regulation 27.
j) New regulation 20A reflects the power in the Directive for the Secretary of State to cancel a right to reside on public health, public policy or public security grounds, where that individual has not applied for documentation confirming their right to reside and where it is not possible to remove that person from the UK.
k) Regulation 26 is amended to require a direct family member or an extended family member of an EEA national wishing to assert a right of appeal to produce evidence of identity and nationality. It is also amended to confirm the right of appeal for family members with a retained right of residence.
l) Regulation 27 is amended so that the provisions concerning the certification of asylum and human rights claims reflect the approach in the Nationality, Immigration and Asylum Act 2002. Regulation 27 is also amended so as to prevent a person from appealing within the UK against a documentation decision taken while the person was outside the country.
m) Regulations 13, 14 and 15 are amended to reflect the power in the Directive to deny the right of residence a person has under the Directive where the Secretary of State is denying documentation on grounds of public policy, public health or public security.

8. Consultation outcome

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

9. Guidance

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

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

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

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

13. Contact

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