EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (EUROPEAN ECONOMIC AREA) (AMENDMENT) REGULATIONS 2015

2015 No. 694

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

2. Purpose of the Instrument

2.1 These Regulations amend the Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003, as amended) ('the 2006 Regulations') which transpose into UK law Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States ('the Directive'). They also make a number of amendments to the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013 (S.I. 2013/1460, as amended) ("the 2013 Regulations") which establish a worker registration regime for workers from Croatia.

2.2 The Regulations make a number of changes to the 2006 Regulations relating to the procedural requirements for admission to the UK of some non-EEA residents of certain EEA States, the circumstances in which persons may have their admission to the UK under the 2006 Regulations revoked and the circumstances in which they may be removed from the UK. These Regulations also introduce a number of changes to the appellate regime in the 2006 Regulations. These changes reflect amendments to the appellate regime in the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') which have been introduced by the Immigration Act 2014 ('the 2014 Act'). These Regulations also make a number of other amendments to address some transposition issues and, to the 2013 Regulations in respect of Croatian nationals who are subject to the worker authorisation scheme, to reflect changes to the immigration rules.

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

3.1 None.

4. Legislative Context

4.1 The Directive sets out the right of Union citizens and their family members to move and reside freely within the territory of the member States. It has been applied by the EEA Agreement to the remaining non-EU EEA States (Iceland, Norway and Liechtenstein). An agreement between the EU, its member States and Switzerland

provides similar rights to nationals of Switzerland[1] ('the Switzerland Agreement'). The 2006 Regulations, which transpose the Directive and implement the requirements of the EEA Agreement and the Switzerland Agreement, set out the rights of nationals of the European Economic Area ('EEA') and Switzerland (defined in the 2006 Regulations as 'EEA nationals'), their family members and those with certain other EU rights of residence, to be admitted to, and reside in, the UK. The 2006 Regulations also make provision for the granting, denial and revocation of residence documentation issued by the UK, and for removal or deportation from the United Kingdom in certain circumstances.

4. 2 Part 5 of the 2002 Act contains the legal framework for non-EEA immigration appeals. The non-EEA appeal regime was amended substantially by the 2014 Act. The 2006 Regulations establish a framework for EEA appeals by applying certain provisions of Part 5 of the 2002 Act to appeals against EEA decisions. As a result of the changes made by the Immigration Act 2014 to non-EEA appeals, a non-EEA appeal may only be brought against the refusal of a human rights claim, a protection claim (humanitarian protection and asylum) and revocation of a refugee or humanitarian protection status. These Regulations apply the amended provisions of the 2002 Act to EEA appeals with the modifications necessary to retain the full range of EEA appeal rights.

4.3 The 2013 Regulations (as amended) establish a regime of transitional controls on the rights of workers who are Croatian nationals to reside and work in the UK.

5. Territorial Extent and Application

5.1 This instrument extends and applies throughout the United Kingdom.

6. European Convention on Human Rights

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

7. Policy Background

What is being done and why?

A. Qualifying EEA State residence cards

7.1 Paragraph 1(b) of Schedule 1 to the Regulations ('Schedule 1') amends the definition of a 'qualifying EEA State residence card' in regulation 2(1) of the 2006 Regulations. A non-EEA family member of an EEA national may be admitted to the UK if they present a 'qualifying EEA State residence card', in addition to presenting a valid passport, providing they are accompanying or joining an EEA national with a right to reside in the UK and providing the family relationship is genuine. A 'qualifying EEA State residence card' is defined by regulation 2(1) of the 2006 Regulations as a valid residence card issued under Article 10 of the Directive by certain EEA States (as defined) to the non-EEA family member of an EEA national exercising free movement rights in that member State.

[1] The Agreement between the European Community and its member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons signed at Luxembourg on 21st June 1999 and which came into force on 1st June 2002.

7.2 Prior to these changes, the UK recognised Article 10 residence cards issued by Germany and Estonia. Paragraph 1(b) of Schedule 1 expands the definition of a 'qualifying EEA State residence card' to encompass residence cards issued by any EEA State, except Switzerland. The terms of the Switzerland Agreement do not provide for the issue or recognition of Article 10 residence cards. The purpose of this amendment is to implement the judgement of the Court of Justice of the European Union (CJEU) in the recent case of Case C-202/13 *McCarthy and Others* (ECLI:EU:C:2014:2450).

7.3 A 'qualifying EEA State residence card' is a 'visa of the required kind' for the purposes of the carriers' liability regime contained in the Immigration and Asylum Act 1999[2] and a 'qualifying EEA State residence card' may be presented at juxtaposed control points under the Channel Tunnel (International Arrangements) Order 1993 and the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003.[3]

B. Revocation of admission and persons subject to removal

7.4 Paragraph 9 of Schedule 1 inserts a new regulation 23A into the 2006 Regulations. Regulation 23A applies, with certain modifications, paragraph 6(2) of Schedule 2 to the Immigration Act 1971 (revocation of a notice of leave to enter) to a decision to admit a person to the UK pursuant to the 2006 Regulations. The effect of this amendment is to permit an immigration officer to revoke a decision to admit a person to the United Kingdom under the 2006 Regulations within 24 hours of that decision being taken, where revocation is justified under regulation 19(1), 19(1A), or 19(1AB) of the 2006 Regulations (which relate to matters of public policy, public security and public health or the abuse of rights). Paragraphs 3 to 8, 13(a) and (b) and 14 of Schedule 1 make related consequential amendments to the 2006 Regulations.

7.5 Paragraph 10 of Schedule 1 expands the category of persons in regulation 24(4) of the 2006 Regulations who are removable as an "illegal entrant" under Schedule 2 to the Immigration Act 1971. Regulation 24(4) previously only applied to persons who enter the UK in breach of a deportation or exclusion order. Paragraph 10 inserts a new category of person into regulation 24(4), namely persons who were not entitled to be admitted to the UK pursuant to regulation 19(1) or 19(1AB) (which relate to matters of public policy, public security or public health or the abuse of rights). The purpose of this amendment is to apply the powers in Schedule 2 of the Immigration Act 1971 to persons who were not entitled to be admitted to the UK under the 2006 Regulations, for example persons within the scope of the 2006 Regulations who enter the UK clandestinely or who otherwise seek to circumvent the UK border control. This amendment is intended to apply to a separate group of persons than those to whom the new regulation 23A applies. Regulation 23A confers a power on an immigration officer, and is intended to primarily apply at or around the UK border to persons who are granted admission to the UK but where information comes to light in the 24 hour period following that decision which justifies the revocation of that admission decision. By contrast, the amendment to regulation 24(4) is intended to apply primarily to persons (who may be resident) who have deliberately circumvented border control, for example a person subject to the 2006 Regulations who has entered the UK by clandestine means.

2 See the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013 (SI 2013/3032)

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C. Appeal rights under the 2006 Regulations

7.6 The 2006 Regulations set out the appellate regime in respect of decisions which are made under those Regulations ('EEA decisions') and they apply certain parts of Part 5 of the 2002 Act to appeals against EEA decisions. The 2014 Act substantially amended the appellate regime in the 2002 Act. The 2014 Act restructured the rights of appeal in the 2002 Act, with the effect that is now only possible to appeal under that Act against the refusal of a human rights claim, a protection claim (humanitarian protection and asylum) and revocation of a refugee or humanitarian protection status ('the tripartite grounds'). In particular the concept of an appeal against an 'immigration decision', upon which appeals against EEA decisions were previously based by the 2006 Regulations, no longer exists.

7.7 Paragraph 15 of Schedule 1 amends paragraph 1 of Schedule 1 to the 2006 Regulations (Appeals to the First-tier Tribunal) so that sections 84, 85, and 86 of the amended 2002 Act have effect in relation to an appeal under the 2006 Regulations as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal).

7.8 Paragraph 15 of Schedule 1 establishes that section 84 (grounds of appeal) of the amended 2002 Act will apply to the 2006 Regulations as though the sole permitted ground of appeal is that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom. However, it will be possible for an appellant to raise one of the tripartite grounds of appeal in the context of an EEA appeal; first in response to a notice served by the Secretary of State under section 120 of the 2002 Act and secondly, as a "new matter" under section 85(6) of the 2002 Act.

7.9 Paragraph 16(a) of Schedule 1 omits paragraphs (1) to (7) and (9) of paragraph 4 of Schedule 2 to the 2006 Regulations (appeals under the 2002 Act and previous immigration Acts). Those provisions were specific to the regime contained in the 2002 Act which existed before the amendments to the 2002 Act made by the 2014 Act.

7.10 Paragraph 16(b) of Schedule 1 applies section 120 of the 2002 Act, as amended by the 2014 Act, to the 2006 Regulations. This permits the Secretary of State to issue a so-called "section 120 notice" where she has taken, or intends to take, or may take a decision under the 2006 Regulations. That notice will require the person upon whom it is served to provide a statement setting our any other reasons he or she has for being permitted to enter or remain in, or not be removed from, the UK. The recipient of a section 120 notice need not repeat any reasons relating to the EEA decision, but may make additional EEA points, or include one or more of the tripartite grounds of appeal contained in section 84(1) of the amended 2002 Act. Pursuant to section 85(2) of the 2002 Act, the Tribunal shall consider any ground of appeal raised in a response to a section 120 notice.

7.11 Paragraph 16(b) of Schedule 1 also provides that in an appeal brought pursuant to section 82(1) of the amended 2002 Act, a person may raise, in response to a section 120 notice issued under that Act, or as a "new matter", that the decision under challenge breaches their rights under the EU Treaties.

7.12 In summary, taken together these amendments permit an appellant to raise the tripartite grounds in an appeal against an EEA decision under the 2006 Regulations

and to advance EU law grounds in an appeal against one of the tripartite grounds under the amended 2002 Act, provided that the respective conditions for doing so are met in each case.

7.13 Paragraph 6 of Schedule 1 inserts a new paragraph 8 into regulation 26 (appeal rights) of the 2006 Regulations. This clarifies that a person who enjoys a right of appeal under the 2006 Regulations is not prevented from pursuing a separate appeal to the Tribunal under the amended 2002 Act, or pursuant to the Special Immigration Appeals Commission Act 1997, provided the criteria for doing so contained in those Acts are met.

D. Other amendments

7.14 Paragraph 2 of Schedule 1 amends regulation 4 of the 2006 Regulations in order to require a person claiming a right of residence in the UK as a student to hold comprehensive sickness insurance cover not only for themselves but also for their family members. This mirrors the requirement for persons seeking a right of residence in a self-sufficient capacity. This amendment is to better reflect the requirements of Article 7 of the Directive which establishes the conditions which must be met in order for a person to have a right of residence in another Member State.

E. Amendments to the 2013 Regulations

7.15 Schedule 2 to these Regulations ('Schedule 2') amends the 2013 Regulations. Paragraph 1(b) of Schedule 2 brings into effect an updated 'Statement of Relevant Requirements'. The effect of this amendment is to bring the requirements which apply to Croatian nationals in respect of access to the labour market into line with the recent changes to the immigration rules which apply to those persons subject to immigration control. In particular these changes mean that the addition of Tech City to the list of Designated Competent Bodies for the purposes of the Tier 1 (Exceptional Talent) Category of the Points Based System also applies to the definition of a highly skilled worker for the purposes of the 2013 Regulations. Paragraph 2 of Schedule 2 amends the 2013 Regulations to bring them into line with the arrangements under the immigration rules which provide for a Tier 4 student to be employed as a student union officer.

8. Consultation outcome

8.1 No external consultation was undertaken as these changes address the implementation of Directive 2004/38/EC and the decisions of the CJEU to which the United Kingdom is required to give effect.

9. Guidance

9.1 The Home Office will publish guidance on the effect of these changes. The primary source of such guidance will be on the following website: https://www.gov.uk/government/organisations/uk-visas-and-immigration

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 has no impact on small business.

12. Monitoring & review

12.1 The Home Office will closely monitor the impact of these Regulations.

13. Contact

13.1 Deborah Morrison, European Union Free Movement Policy Team, Home Office, Tel: 0207 035 0655 or email: deborah.morrison@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.