

CHAPTER 11

SWISS AGREEMENT CASES

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1. Introduction

1.1 History

On 1 June 2002 an Agreement between the EU and its Member States and the Swiss Confederation on the Free Movement of Persons came into force. In general terms the Agreement confers on Swiss nationals and their family members the same free movement rights as those enjoyed by EEA nationals and their family members.

Under the Swiss Agreement Swiss nationals and their family members have a right of residence in the UK if the Swiss nationals are exercising their rights in the UK. Swiss nationals are regarded as exercising these rights if they are working, self-employed, providing or receiving services, studying or self-sufficient.

The Immigration (Swiss Free Movement of Persons) (No 3) Regulations 2002 transposed the provisions of the Swiss Agreement into UK law. This agreement did not mean that Switzerland was part of the EEA.

1.2 Immigration (EEA) Regulations 2006

The Swiss Regulations 2002 have now been revoked (save for the paragraphs relating to posted workers – see section 2 of this chapter). Swiss nationals are now considered under the Immigration (EEA) Regulations 2006, which defines Swiss nationals as EEA nationals. Their family members are considered as if they were family members of EEA nationals.

Children's Duty

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

Documentation

Any documentation should be issued in line with the 2006 Regulations and all refusals should be made in line with the 2006 Regulations. (See Chapters 4 and 5 for more information).

Appeals

Swiss nationals and their family members have the same rights of appeal as EEA nationals and their family members against any EEA immigration refusal. (See *chapter 9 for more information*).

2. Posted Workers

The Swiss Agreement provides for “posted workers” to come to the UK. A posted worker is defined as a non-EEA national who is posted to the UK for the purpose of providing services on behalf of his/her employer, who is a Swiss national or company that provides or seeks to provide services in the UK.

A Swiss company means a company that is formed in accordance with the law of Switzerland and has its registered office, central administration or principal place of business in Switzerland. Prior to that posting the worker needs to have been integrated into the labour market of a Swiss or EEA country.

There is a mandatory requirement under the Swiss Regulations for a posted worker to apply for a posted worker authorisation from an entry clearance issuing post overseas before entry to the UK. The Entry Clearance Officer needs to be satisfied that:

- a) the posted worker is lawfully resident¹ in an EEA State (which includes Switzerland for the purposes of the Swiss Regulations);
- b) the employee is lawfully and habitually employed by an employer who is temporarily providing a service in the UK;
- c) the employee will not take any other employment;
- d) the employee has been employed by his/her employer for at least 12 months;
- e) the employee intends to leave the UK after s/he has spent 90 days in the UK in any calendar year².

“Lawfully resident in” should be taken to mean a person with either permanent residence in the Member State concerned or with permission to work in another capacity, such as with some form of work permit.

² The posted worker authorisation allows the posted worker to live in the UK for a total of 90 days per calendar year, either in one go, or for smaller periods totalling 90 days. The time limit will be shown on the authorisation. Since posted workers have a right to come to the UK for 90 days, on arrival in the UK they will not be given leave to enter. Instead, their passports will be date stamped. Posted workers will not generally need to be granted residence cards.

Other information

If the posted worker meets all these requirements, s/he can only be excluded from the UK on the grounds of public policy, public security or public health.

Family members are not allowed to accompany the posted workers to the UK.

Applications from posted workers who have already been in the UK for more than 90 days in one calendar year

An application from a posted worker in relation to a calendar year in which s/he has already been authorised to enter and reside in the UK for 90 days is invalid and should be rejected using the following wording:

Paragraph 322(1) of HC 395, with reference to the Immigration (European Economic Area) Regulations 2000 as applied by the Immigration (Swiss Free Movement of

Persons) (No 3) Regulations 2002 refers. See Schedule 3, part 2 of the Immigration (EEA) Regulations 2006 for more information.

“You have applied for a right to reside in the United Kingdom as a posted worker under the provisions of the Immigration (Swiss Free Movement of Persons) (No 3) Regulations 2002. However, in view of the fact that you have already had authority to enter and reside in the UK for 90 days in the calendar year concerned, you are not entitled to apply for a further authorisation in relation to that year. Accordingly your application is invalid and will not be determined. “

Appeal rights

There is no right of appeal in the 2000 Regulations against this decision.

Following the refusal to extend the period that could be spent as a postal worker, the applicant has no basis of stay in the UK. However action cannot be taken to enforce departure in accordance with Section 10 (Immigration Act 1999) as the applicant would not have been admitted subject to any leave. The applicant should therefore be granted with leave outside of the Rules for a short period and advised that s/he should make arrangements to depart. If s/he does not embark, then Section 10 would be appropriate. There is no right of appeal under Section 82 of the NIA Act against the imposition of leave.