



Home Office

From: **European operational policy team**  
Subject: **Derivative rights of residence – Chen cases revised**  
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### **Purpose of notice**

1. This notice provides guidance to UK Border Agency staff on considering applications from persons claiming a derivative right of residence as:
  - (A) the primary carer of an EEA national child who is exercising free movement rights in the UK, and
  - (B) the dependant of such a primary carer.

### **Background**

2. New regulation 15A of the Immigration (European Economic Area) Regulations 2006 (“the Regulations”) was commenced on 16<sup>th</sup> July 2012. This includes a new provision within the Regulations for Chen cases, making paragraph 257C of the Immigration Rules obsolete. Paragraph 257C will be repealed in due course but is immediately disapplied when applications are made on the basis of the Chen judgment.
3. By virtue of the terms of Directive 2004/38/EC (“the Directive”) a child will have an right of residence in a member state where that child:
  - (a) is an EEA national,
  - (b) holds sufficient resources to prevent them (and their primary carer) becoming a burden on the social assistance system of the host member state, and
  - (c) holds comprehensive sickness insurance.
4. The court also found that such a child is entitled to be accompanied by his or her primary carer, and therefore that the primary carer of such a child will have a right of residence in the host member state until the child’s eighteenth birthday where to refuse such a right would prevent the child from continuing to reside in the UK.
5. Dependants of primary carers who have a derivative right of residence on this basis also derive a right of residence in the UK where requiring those

dependants to leave the UK would have the effect of preventing the primary carer from residing in the UK.

6. This right of residence is not a Free Movement right but is a 'derivative right'. This means that the recognition of this right by the UK is not equal to rights under the Directive. Recognition of a derivative right does not result in the beneficiary of that right being treated as a qualified person for the purposes of the Regulations and therefore such a person cannot sponsor family members under the Regulations. Nor does recognition of such a derivative right attract public policy protection against removal from the United Kingdom that is given to those exercising free movement rights or entitle the beneficiary to rights of permanent residence in the UK.
7. Regulation 15A sets out the conditions which must be satisfied in order for a person to have a derivative right of residence.
8. A person who meets the criteria for a derivative right of residence can qualify for a right of admission to the UK under amended regulation 11(4) with reference to regulation 11(5), a right to a family permit under regulation 12 and a right to a derivative residence card under regulation 18A. For further guidance on rights of admission and the right to a family permit, please see Annex A of this notice.
9. Derivative rights of residence only arise where the person in question has no other right to reside under the Regulations. It is not therefore possible for someone to have a derivative right **and** some other right of residence under the Regulations.

## **Derivative rights of residence**

### **(A) Primary carer**

10. A primary carer of an EEA national child will qualify for a derivative right of residence under regulation 15A(4) where they satisfy the conditions set out in that regulation. The conditions are that:
  - (a) the applicant is the primary carer of an EEA national ("the relevant EEA national"), and
  - (b) the relevant EEA national
    - (i) is under the age of 18;
    - (ii) is residing in the UK as a self-sufficient person; and
    - (iii) would be unable to remain in the UK if their primary carer were required to leave the UK.
11. New regulation 15A(7) confirms the definition of primary carer for the purpose of regulation 15A. The definition requires that the applicant is:
  - a) a direct family member or legal guardian of the person from whom they would claim a derivative right, **and**

b) is the person who

(i) has primary responsibility for that person's care, **or**

(ii) shares equally the responsibility for that person's care with one other person who is not entitled to reside in the UK as a result of any other provision of these Regulations and does not have leave to enter or remain.

12. Where a person shares responsibility equally with another person who has a right of residence in the UK, for example because they are settled, a British citizen, or has another right to remain in the UK under the Immigration Rules or Regulations, then the person claiming a derived right of residence would **not** meet the definition of primary carer as set out in 15A(7).

13. Regulation 15A(8) confirms that financial support alone will not bring a person within the definition of primary carer for the purposes of the regulations. This will prevent persons who are solely providing financial assistance and have no day to day caring responsibilities from benefitting from these provisions.

#### **(B) Assessing if the Chen criteria are met**

14. In order to assess whether a primary carer of an EEA national has a right of residence in the UK caseworkers should firstly consider whether the EEA national child is exercising Treaty rights in the UK as a self-sufficient person.

15. Caseworkers were previously asked only to assess if the EEA national child claiming to be self-sufficient was able to demonstrate that they satisfied the conditions for a self-sufficient person as set out in regulation 4(c) of the Regulations at the date of application for documentation. This was because the primary carer of such a child had no right to work in the UK when issued with documentation under Paragraph 257 of the Immigration Rules.

16. However, primary carers with a right to reside on the Chen basis are, since 16<sup>th</sup> July 2012, able to work in the United Kingdom regardless of whether or not documentation has been issued to them by UKBA in that capacity. This means caseworkers may now encounter two distinct categories of application:

1. Applications in which the Chen right has not already been relied on by the primary carer to work legally in the UK **or**
2. Applications in which the Chen right has already been relied on by the primary carer to work legally in the UK

17. In the first case type caseworkers should continue to assess applications as before by ensuring that on the date of application the EEA national child is exercising rights in the UK as a self-sufficient person. This includes the requirement to hold comprehensive sickness insurance and to have sufficient resources not to become a burden on the social assistance system of the UK during their period of residence. It should be noted that the resources relied

upon by the EEA national child need not necessarily belong directly to that child in order to satisfy regulation 4(1)(c)(i), provided that those resources are available to prevent the child from becoming a burden on the social assistance system of the UK.

18. Furthermore, the EEA national child, by virtue of new regulation 4(5), must comply with the conditions of regulation 4(2) so requiring that they have adequate funding and comprehensive sickness insurance for their family members as well as themselves.
19. Income which is as a result of the primary carer's **current** right to work in the UK (where that right arises as a result of a previous grant of leave under the Immigration Rules ) can be taken into account when assessing the self-sufficiency of the child and family members. However, income which can only be obtained as a result of a **future** right to work under the Regulations attached to a Chen right cannot be taken into account where the applicant does not already have sufficient resources to meet the Chen criteria.
20. In the second case type, where the right to work which the Regulations now reflect has been exercised or is being exercised by the primary carer on the date of application, the casework must ensure that the EEA national child was self-sufficient **before** the primary carer commenced in the employment in question. This will ensure that the funds derived from that employment are not used inappropriately for the child to meet the self-sufficiency requirement. As self sufficiency of the EEA national child is a precondition to the existence of a Chen right to reside and work that right to work can obviously not be relied upon to discharge the burden of self sufficiency.
21. In cases where self-sufficiency has been established and the primary carer has begun working in exercise of their Chen right these funds can, however, be relied upon to support assertions by the EEA national child that they will remain self-sufficient whilst in the UK; for example where an application is made for a renewal of a derivative residence card.
22. In all case types, in order to establish a derivative right to reside the primary carer must also show that the child upon whom they are claiming a derivative right would be unable to continue to reside in the UK should the primary carer be forced to leave. It is considered that any child under the age of 18 would normally require the presence and care of the primary carer (where no other carer is available) in order to continue to reside in the UK. Each case must be considered on its individual merits with reference to a Senior caseworker.

## **(B) Dependants of primary carers**

23. A person who is the dependant of a primary carer with a right of residence under regulation 15A(2) will be entitled to a derivative right of residence under regulation 15A(5) where they satisfy the conditions of that regulation. These conditions are that:
  - (i) the person is the child of a primary carer who has a right of residence under regulation 15A(2), and

- (ii) the child does not have leave to enter, or remain in, the UK and is not entitled to reside in the UK as a result of any other provision of the Regulations, and
- (iii) requiring them to leave the UK would have the effect of preventing their primary carer from residing in the UK.

24. Caseworkers should note that where paragraph 257C of the Immigration Rules allowed siblings of self-sufficient EEA national children to qualify for leave to remain on the basis of Chen, the provision within the Regulations is narrower and requires that such children are dependant on the primary carer of the EEA national child in order to come within scope of the provisions of regulation 15A.

### **Issue or refusal of a derivative residence card**

25. A person who claims to have a derivative right of residence may apply for a derivative residence card under regulation 18A if they are in the UK. Applications made on this basis should be submitted on a 'DRF1' application form and will be considered free of charge<sup>1</sup>. As the rights claimed on this basis do not stem directly from the Free Movement Directive, they are not subject to the normal 6 month timescales. However, such cases should be considered 'as soon as practicable'.

26. Derivative residence cards should generally be issued for a duration of five years. In certain circumstances, caseworkers may issue for a period of shorter or longer duration depending on the individual facts of the case. For example, where a primary carer is claiming a derivative right of residence for their child who is due to reach the age of majority in 3 years' time, then it would be reasonable to issue a document for only three years.

27. Caseworkers should assess whether the evidence submitted demonstrates that the applicant satisfies the relevant conditions in regulation 15A. If the applicant qualifies for a right of residence, the caseworker should issue a derivative residence card **unless** the applicant falls for refusal on conduciveness grounds in accordance with regulations 19(3)(b), 20(1) and 20A(1) with reference to regulation 21A(3).

28. Where the applicant has not submitted sufficient evidence to demonstrate that they have a right of residence under regulation 15A, the application should be refused. Please see paragraph 30 below for further guidance on appeal rights against a refusal to issue a derivative residence card.

## **Rights following recognition of derivate residence rights**

### **Right to work**

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<sup>1</sup> For applications submitted on or after 1 July 2013, there is a fee of £55 for each person applying for a derivative residence card.

29. A person who has a derivative right of residence under new regulation 15A is not subject to any restriction on taking employment in the UK. Possession of a derivative residence card evidences the fact that the holder had a derivative right at the time at which the card was issued, but only confers a right to work for as long as the holder continues to enjoy the underlying right to reside.

30. A person who submits a valid application for a derivative residence card will be issued with a certificate of application which will facilitate their taking employment while their application is under consideration.

### **Right of appeal**

31. A person who is refused a document on the basis that they do not have a derivative right to reside will have an appeal under regulation 26(3A) where he/she has produced:

- a) A valid national identity card issued by an EEA state or a passport **and**
- b) An EEA family permit; or
- c) Proof that he or she is –

- i. the primary carer of an EEA national child who is under the age of 18
- ii. the primary carer of the child of an EEA national
- iii. the child of an EEA national
- iv. the dependant of a primary carer

32. For further guidance on appeal rights please refer to European Operational Policy notice 11/2012.

### **Permanent residence**

33. There is **no** right to permanent residence for persons claiming to have a derivative right of residence. Documents issued to persons with a derivative right should be issued for a period of 5 years at a time (subject to the guidance in paragraph 25 above).

### **Denial of derivative rights of residence**

34. Regulation 21A confirms that persons who have a derivative right of residence under regulation 15A(2) and (5) and who either hold or have applied for a derivative residence card are precluded from public policy protection under Part 4 of the Regulations. This means that the relevant threshold for refusal and deportation is whether the person's presence in the UK is conducive to the public good. For further details on how to assess whether a person's presence in the UK is conducive to the public good, please see the following link: [LINK TO STAFF INTRANET REMOVED<sup>2</sup>]

## **Enquiries**

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<sup>2</sup> For the equivalent guidance on the Home Office website, see pages 101-2 of the General grounds for refusal guidance: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/general-grounds-refusing/about.pdf?view=Binary>.

35. Any policy enquiries on this notice should be addressed to [...] or [...], or to the European Operational Policy inbox: [EuropeanOperational@UKBA.gsi.gov.uk](mailto:EuropeanOperational@UKBA.gsi.gov.uk)

[...]

**Head of European and Nationality Policy, Operational Policy Rules Unit**

08 August 2012

## **Annex A – Right of admission and right to a family permit for persons with a derivative right of residence in the UK**

### **Right of admission**

1. A person who has a right of residence under regulation 15A will have a right of admission under regulation 11.
2. Such a person can demonstrate this right of admission by presenting a valid passport and either
  - (i) an EEA family permit, or
  - (ii) a valid derivative residence card issued by the UK Border Agency
3. Where a person can present the above documents they should be admitted to the UK unless a person falls to be excluded on the grounds of conduciveness.
4. A person who has not obtained an EEA family permit or a derivative residence card, they may still qualify for admission under regulation 11(4) where they can demonstrate by other means that they satisfy the conditions for a derivative right of admission under regulation 11(5). This follows the same process for direct family members of EEA nationals who can evidence at port that they have a right of admission to the UK.
5. Where a person does not present an EEA permit or a derivative residence card, and does not produce evidence to demonstrate that they satisfy the conditions in regulation 11(5), they should be refused admission to the UK.

### **Right to a family permit**

6. A person who has a right of admission by virtue of regulation 11(5) can apply for a family permit to facilitate their admission to the UK. A person will qualify for an EEA family permit where they can demonstrate that they meet the conditions in regulation 15A and regulation 11(5). Please refer to European Operational Policy Notice 07/2012 and 08/2012 for further guidance on considering whether a person has a derivative right of residence under regulation 15A.
7. Where sufficient evidence has been submitted to demonstrate that the applicant has a right of admission to the UK, and where that person is not precluded from entering the UK under regulation 19(1) or (2), they should be issued with an EEA family permit.
8. Where an applicant has failed to submit sufficient evidence to demonstrate that they have a right of admission under regulation 11(5), the application should be refused. Please refer to European Operational Policy Notice /2012



for further guidance on appeal rights against a refusal to issue a document confirming a derivative right of admission.