



From: **European operational policy team**

Subject: **Derivative rights of residence – Ruiz Zambrano cases**

Date: **12<sup>th</sup> December 2012**

Issue number: **21/2012**

### **Purpose of notice**

1. This notice replaces EOPN 13/11 and provides guidance to UK Border Agency staff on considering applications from persons claiming a derivative right of residence as:
  - (A) The primary carer of a British citizen residing in the UK; or
  - (B) The dependant of such a primary carer.

### **Background**

2. On the 8<sup>th</sup> November 2012, amendments to the Immigration (European Economic Area) Regulations 2006 (“the Regulations”) giving effect to the decision of the Court of Justice of the European Union (“ECJ”) judgment in the case of Ruiz Zambrano (C34/09), were commenced.
3. The Zambrano judgment established that member states cannot refuse a person the right to reside and work in the host member state, where:
  - that person is the primary carer of a Union citizen who is residing in their member state of nationality; and
  - refusal of a right of residence to that primary carer would deprive the Union citizen of the substance of their European citizenship rights by forcing them to leave the EEA.
4. In practice this means that the primary carer of a British citizen who is residing in the UK has a right to reside under EU law if their removal from the UK would require the British citizen to leave the EEA.
5. This right of residence is not a right conferred by Directive 2004/38/EC (“the Directive”), but is instead a right derived from the right of Union citizenship contained in Article 20 of the Treaty on the Functioning of the European Union (a ‘derivative right’). As a result someone who has a derivative right of residence is not entitled to all of the benefits which flow from a right of residence arising under the Directive. In particular, those who acquire a derivative right of residence cannot:

- rely on their status as a basis for bringing other family members to the UK under the Regulations (save in the specific case of dependants dealt with below);
  - acquire permanent residence in the UK;
  - rely on the public policy protection against removal or deportation from the United Kingdom that is given to those exercising free movement rights.
6. A person who meets the criteria for a derivative right of residence does, however, qualify for:
- a right of admission to the UK under amended regulation 11;
  - a right to an EEA family permit under amended regulation 12; and
  - a right to a derivative residence card under regulation 18A.
7. For further guidance on rights of admission and the right to an EEA family permit, please see Annex A to this notice.

## **Zambrano rights of residence**

### **“Exempt persons”**

8. As a Zambrano right need only be conferred where a refusal to grant would force the primary carer to leave the UK (and thereby deprive the British Citizen of their rights under EU law) certain “exempt persons” cannot acquire a Zambrano right of residence.
9. A person is an “exempt person” if they are a person:
- a. who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;
  - b. who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act;
  - c. to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or
  - d. who has indefinite leave to enter or remain in the United Kingdom.
10. Where someone has limited leave (and so is not listed as one of the exempt categories above) and can demonstrate they meet all other requirements of regulation 15A, then they can acquire a derivative right of residence.

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

11. A primary carer of a British citizen will qualify for a derivative right of residence under regulation 15A(4A) where they satisfy the conditions set out in that paragraph. The conditions are that:
- a. the applicant is the primary carer of a British citizen (“the relevant British citizen”) who:
    - i. is residing in the UK, **and**

- ii. would be unable to reside in the UK or in another EEA state if their primary carer were required to leave the UK.

12. A primary carer is defined in regulation 15A(7) as:

- a. a direct family member or legal guardian of the person from whom they would claim a derivative right, **and**
- b. the person who:
  - i. has primary responsibility for that person's care, **or**
  - ii. shares the responsibility for that person's care equally with one other person who is not an exempt person.

### **Mere financial support**

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

### **Is the applicant a primary carer?**

14. Once a caseworker has confirmed that the person is the direct relative or legal guardian of the British citizen (this can be evidenced by birth/marriage certificates or a Court order confirming guardianship), they must then determine whether that person has primary responsibility or shares equal responsibility with another person for that British citizen's care.

15. For persons who share equal responsibility with another person who is **not an exempt person** (see paragraph 9 of this notice) then they will be regarded as a primary carer and therefore potentially entitled to a derivative right of residence.

16. For persons who share equal responsibility with another person who is exempt then neither person will be able to establish for the purposes of the Regulations, that they come within the definition of a primary carer and therefore neither will be entitled to a derivative right of residence.

17. Cases involving shared responsibility must be referred to a deputy chief caseworker.

### **Primary or shared responsibility for a child**

18. In cases where the British citizen is a child under the age of 18, primary or shared responsibility will generally be established where that child is living with the primary carer(s) and the majority of their care is being provided for by that primary carer(s). Evidence to demonstrate this responsibility can include custody/guardianship orders, or if this is not available, any additional evidence which shows:

- that the child lives with the primary carer(s) or spends the majority of their time there;
- that the primary carer(s) makes the day to day decisions for that child, for example decisions relating to their education or health; and
- that the primary carer(s) has financial responsibility for that child.

19. How this is evidenced will vary depending on the facts of the case, but the primary carer(s) may submit letters from the child's school, GP or from a solicitor to demonstrate primary/shared responsibility.

### **Primary or shared responsibility for an adult**

20. In cases where the British citizen is at, or over the age of 18, then the level of evidence required to demonstrate primary and shared responsibility will be **significantly higher** than in cases involving children. This is because it can generally be assumed an adult has the capacity to care for their own daily needs unless there are reasons such as a severe physical or mental disability which would prevent this. Only evidence that shows the British citizen's reliance on the primary carer is for such reasons will that person likely fall within scope of the judgment.
21. In order to demonstrate primary/shared responsibility for adults, the majority of the care must be provided by the primary carer(s). Evidence from the NHS/local authority/private care may be submitted to support this.
22. Appropriate medical evidence must also be presented that confirms the British citizen is, and will remain, wholly dependent upon the primary carer. Details must be provided as to whether any other sources of care are available and what the predicted effect would be on the British citizen if the primary carer was no longer able to care for them.
23. Such cases are likely to be rare and will require consideration on an individual basis. Referral to a deputy chief caseworker **must** be made for each case involving a dependent adult.

### **Would the British citizen be forced to leave the EEA if the primary carer was forced to leave?**

24. Even where there is evidence of primary and shared responsibility, evidence to show why the British citizen would be forced to leave the EEA (for example because they cannot access alternative care in the UK) is still required.
25. If there is another person in the UK who can care for the British citizen, then a derivative residence card must be refused on the basis that such a refusal would not result in the British citizen being forced to leave the EEA.
26. Therefore caseworkers must assess whether there is another direct relative or legal guardian in the UK who can care for the British citizen and, in the case of a child, who has already had established contact. In making this assessment, the burden of proof remains on the applicant and the standard of proof is the balance of probabilities. This means the onus is on the applicant to demonstrate that their removal would force the British citizen to leave the EEA. If there is no information to demonstrate this, then caseworkers may wish to make further enquiries with the applicant as to the status or whereabouts of the other parent in the case of a child, or alternative care provisions in the case of a British citizen adult.

27. Examples of when it may be appropriate to issue a derivative residence card to a primary carer would be where:
- there are no other direct relatives or legal guardians to care for the British citizen; or
  - there is another direct relative or legal guardian in the UK to care for the British citizen but there are reasons why this carer is not suitable; or
  - in the case of an adult British citizen, there are no alternative care provisions available in the UK.
28. An example of when a person may be considered unsuitable to care for a child would be where there are child protection issues which would prevent this child being placed with this particular relative/legal guardian- for example as a result of a particular criminal conviction or because of findings in family law proceedings. Another example might be where the person in question would be unable to care for the child due to a physical or mental disability.
29. A lack of financial resources or an unwillingness to assume care responsibility would not, by itself, be sufficient for the primary carer to assert that another direct relative or guardian is unable to care for a British citizen. Caseworkers must start from the assumption that where there is another direct relative or legal guardian in the UK, that they can care for the British citizen unless there is sufficient evidence to the contrary.

### **Assessing whether the British citizen would be forced to leave the EEA in cases involving persons with a shared responsibility**

30. Regulation 15A(7A) makes it clear that when assessing primary carers with shared responsibility it is necessary to consider the claim on the basis that **both** persons would be removed from the UK. This prevents a situation where neither of the primary carers can obtain a derivative right because when their claims are assessed individually it would be possible to conclude that the British citizen would not be forced to leave the EEA as he or she could remain with the *other* primary carer.
31. Regulation 15A(7B) makes it clear though that the presumption in regulation 15A(7A) only applies if the primary carer in question has assumed responsibility for that British citizen's care **at the same time** as the other joint primary carer. This prevents someone from acquiring a derivative right as a carer with shared responsibility where there is already another person in the UK with a derivative right as the primary carer of that British citizen.

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

32. A child who is the dependant of a primary carer will also be entitled to a derivative right of residence under regulation 15A(5) where they are not an exempt person (see paragraphs 8 & 9) **and** where they satisfy the conditions of that paragraph. These conditions are that:
- a. the person is the child of a primary carer who has a right of residence under regulation 15A(4A); and
  - b. the child does not have leave to enter, or remain in, the UK; and

- c. requiring them to leave the UK would have the effect of preventing their primary carer from residing in the UK.

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

33. 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'.
34. Derivative residence cards will ordinarily be issued for a period of five years. In certain circumstances caseworkers may issue for an alternative period 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 caseworkers should only issue a document for three years.
35. 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).
36. 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 derivative residence rights**

#### **Right to work**

37. 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 of residence- and therefore a right to work- for as long as the holder continues to enjoy the underlying right to reside.
38. 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.
39. 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:

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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.

- a. a valid national identity card issued by an EEA state or a passport **and**
- b. an EEA family permit; or
- c. proof that–
  - i. where the person claims to have a right under regulation 15A(4A), that he or she is the direct relative or guardian of a British citizen;
  - ii. where the person claims to have a right under regulation 15A(5), that he or she is under the age of 18 and is the dependant of a person satisfying the criteria in (i).

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

#### **Permanent residence**

41. There is **no** right to permanent residence for persons claiming to have a derivative right of residence.

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

42. Regulation 21A confirms that persons who have a derivative right of residence under regulation 15A(4A) 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**

43. 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 Operational Policy**

December 2012

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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>.

## **Annex A – Right of admission and right to an EEA 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 conduciveness grounds.
4. A person who has not obtained an EEA family permit or a derivative residence card 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 as 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 an EEA 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 (2), (3) and (4).
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 on conduciveness grounds 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

11/2012 for further guidance on appeal rights against a refusal to issue a document confirming a derivative right of admission.