

**From:** European Operational Policy Team

**Subject:** Derivative rights of residence – Ibrahim/Teixeira 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 child of an EEA national where that child is in education in the UK,
  - (B) - the primary carer of such a child
  - (C) - the dependant of the primary carer of such a child

### **Background**

2. New regulation 15A of the Immigration (European Economic Area) Regulations 2006 (“the Regulations”) was commenced on 16<sup>th</sup> July 2012 and confers a derivative right to reside on persons claiming a right to reside on the basis of the Court of Justice of the European Union (ECJ) judgments in the linked cases of *Ibrahim* (C130/08) and *Teixeira* (C480/08) where the relevant criteria are met.
3. In the cases of *Ibrahim* and *Teixeira*, the ECJ ruled that, by virtue of Article 10 of Regulation 492/2011 (i) the children of an EU citizen who works or has worked in the host Member State (who are in education in that State), and (ii) the primary carer of those children, can claim a right of residence in that State. UKBA has also decided that dependant children of such primary carers should also qualify for a right of residence where failure to give such a right would have the effect of preventing that primary carer from residing in the UK.
4. 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 Directive 2004/38/EC (“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 the public policy protection against removal or deportation 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.
5. 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. For further guidance on rights of admission and the right to a family permit, please see Annex A of this notice.

6. 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**

7. The conditions of new regulation 15A which must be satisfied in order for:

- (A) children of EEA nationals
- (B) primary carers of children of EEA nationals, and
- (C) dependants of primary carers of children of EEA nationals

to derive a right of residence are set out separately below by category. A person who does **not** satisfy the relevant conditions of regulation 15A will not qualify for a derivative right of residence.

#### **(A) Child of an EEA national where that child is in education in the UK**

8. Children of EEA nationals may qualify for a right of residence under **regulation 15A(3)** where they meet the conditions set out in that regulation. The conditions for a right to reside under 15A(3) are that the child:
  - (a) is the child of an EEA national (“the EEA national parent”)
  - (b) resided in the UK at a time when the EEA national parent was residing in the UK as a worker, and
  - (c) is in education in the UK and was in education there at a time when the EEA national parent was in the UK.
9. A child of an EEA national who has worked in the UK, and who was in the UK while that child was in education in the UK, will therefore be entitled to a right of residence to allow them to complete their education should the EEA national either leave the UK, or no longer have a right to reside under the Regulations.
10. It is not necessary for the EEA national parent to have been a worker at a time when the child was in education in order for the child to benefit from this provision. The child must only have been residing in the UK at a time when the EEA national was a worker, and must have been in education at a time when the EEA national was present in the UK.

## **(B) Primary Carers**

11. A person who meets the definition of primary carer as set out in regulation 15A(7) may apply for a derivative residence card confirming a right of residence under **regulation 15A(4)** where they meet the conditions set out in that regulation. The conditions for a right to reside under 15A(4) are that:
- a) the applicant is the primary carer of a person who meets the criteria set out in category (A) above; and
  - b) the child would be unable to continue to be educated in the UK if the primary carer were required to leave.

In relation to point b) above, 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 be educated in the UK. Where the child is over the age of 18, and so has reached the age of majority, it would be reasonable to expect a higher threshold of care to be evidenced which if it were unavailable, would mean the child would be forced to abandon their education. An example of this may be where the primary carer is providing daily care for a child with a severe physical/mental disability. Each case must be considered on its individual merits with reference to a Senior caseworker

12. For further guidance on assessing whether a person is the primary carer of a relevant child, please see paragraphs 14-16 of this notice as defining primary carer for the purposes of regulation 15A.

## **(C) Dependants of Primary Carers**

13. A child who is the dependant of a primary carer with a right of residence under regulation 15A(4) may apply for a derivative residence card confirming a right of residence under regulation **15A(5)** where they satisfy the conditions of that regulation. These conditions are that:

- (a) the child is under the age of 18, and
- (b) the primary carer is a person who meets the criteria set out in category (B) above, and
- (c) the child does not have leave to enter, or remain and is not entitled to reside in the UK as a result of any other provision of the Regulations, and
- (d) requiring the child to leave the United Kingdom would prevent their primary carer from residing in the United Kingdom.

## **Definitions**

### **Primary carer**

14. New regulation 15A(7) confirms the definition of primary carer for the purpose of regulation 15A where 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.

15. 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).

16. 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.

## **Education**

17. For the purposes of regulation 15A, "education" excludes nursery education.

## **Worker**

18. For the purposes of regulation 15A, "worker" excludes a jobseeker or person who falls to be regarded as a worker by virtue of regulation 6(2).

19. With regards to the EEA national parent's capacity as a worker, evidence should be provided that the EEA national was working in the UK (for example, payslips, contract of employment) at a time when the child was also in the UK.

20. There is no minimum requirement for how long the EEA national parent must have worked in the UK, but in all cases the person needs to be / have been a "worker" as that term is defined in EU law (i.e. the activity must be / have been effective and genuine, to the exclusion of activities on such a small scale as to be / have been regarded as purely marginal and ancillary). In addition, work undertaken in accordance with the A8 and A2 worker schemes is included.

## **Issue or Refusal of a Derivative Residence Card**

21. A person who meets the criteria of regulation 15A as outlined above 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. As rights claimed on this basis do not stem directly from the Directive, they are not subject to the normal 6 month timescales. However, such cases should be considered 'as soon as practicable'.
22. Derivative residence cards should generally be issued for a duration of five years. In certain circumstances, caseworkers may issue for a period of short 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 finish their education in 3 years time, then it would be reasonable to issue a document for only three years.
23. 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 must 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).
24. 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 27 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**

25. 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.
26. 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 to Appeal**

27. 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 or 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

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

### **Permanent Residence**

29. 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 22 above).

### **Denial of Derivative Rights of Residence**

30. Regulation 21A confirms that persons who have a derivative right of residence under regulation 15A(4) 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 revocation, refusal and removal 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]

### **Enquiries**

31. Any policy enquiries on this notice should be addressed to [REDACTED] or [REDACTED], or to the European Operational Policy inbox:

[EuropeanOperational@UKBA.gsi.gov.uk](mailto:EuropeanOperational@UKBA.gsi.gov.uk)

[REDACTED]

**Head of European and Nationality Policy**

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 public policy, public security or public health as set out in regulation 19(1) and (2).
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 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 11/2012 for further guidance on appeal rights against a refusal to issue a document confirming a derivative right of admission.