

From: European Operational Policy Team

Subject: Extended family members

Date: 01 July 2013

Issue number: 1/2010 (revised)

Purpose of Notice: This notice provides updated information to caseworkers on the assessment of criminal convictions during stage 4 of the consideration process for extended family members on the basis that their presence in the UK is conducive to the public good.

Section 1: The Law - European Directive and UK Regulations

1.1 European Directive

1.1.1 Article 3(2) of the Free Movement Directive provides for Member States to facilitate entry and residence, in accordance with their national legislation, for:

1. “any other family members, irrespective of nationality, not falling under the definition in point 2 of Article 2¹ who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen”; and
2. “the partner with whom the Union citizen has a durable relationship, duly attested.”

1.1.2 The Directive provides that the Member State concerned shall “undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people”. The High Court has confirmed that this duty arises only once the person has established that he is in the required relationship.

1.2 UK Implementation

1.2.1 Regulation 8 of the 2006 Regulations (which deals with extended family members) implements this duty in the UK. Under Regulation 8 there are four kinds of extended family member:

- a person who is a relative of an European Economic Area (EEA) national or his/her spouse or civil partner and who is dependent on

¹ Point 2 of Article 2 defines “family member” as: (a) the spouse, (b) the civil partner, (c) the direct descendants who are under the age of 21 or are dependants, and those of the spouse or civil partner, and (d) the dependant relatives in the ascending line and those of the spouse or civil partner.

the EEA national or is a member of his/her household, and who either (i) is accompanying the EEA national to the UK / wishes to join him there, or (ii) has joined him in the UK and continues to be dependent on him or to be a member of his/her household;

- a person who is a relative of an EEA national or his/her spouse or civil partner and, on serious health grounds, strictly requires the personal care of the EEA national or his/her spouse or civil partner;
- a person who is a relative of an EEA national and would meet the requirements of the Immigration Rules (other than those relating to entry clearance) for indefinite leave to remain (ILR) as a dependent relative of an EEA national were the EEA national a person present and settled in the UK;
- a person who is the partner of an EEA national (other than a civil partner) and can prove that he is in a durable relationship with the EEA national.

1.2.2 Regulation 17(4) provides for the issuing of residence cards to extended family members in certain circumstances. It says that the Secretary of State for the Home Department (SSHD) may issue a residence card to an extended family member who is not an EEA national on application if; (a) the relevant EEA national in relation to the applicant is a qualified person or has a permanent right of residence, and (b) in all the circumstances it appears to the SSHD appropriate to issue the residence card.

1.2.3 Regulation 17(5) requires an extensive examination of the personal circumstances of a person who has applied for a residence card under Regulation 17(4) and who has shown that he is in fact an extended family member. If the SSHD refuses an application, he must give reasons justifying the refusal (unless this is contrary to the interests of national security).

1.2.4 Similar provisions exist in relation to the issuing of EEA family permits (for extended family members who are overseas) and registration certificates (for extended family members who are themselves EEA nationals). Those are in Regulations 12 and 16.

1.2.5 Regulation 7(3) states that a person who is an extended family member and who has been issued with a residence card (or EEA family permit or registration certificate) shall be treated as a family member of an EEA national for so long as he continues to meet the definition of extended family member in Regulation 8 and the card (or permit or certificate) has not ceased to be valid or been revoked.

Summary:

1.2.6 Only if a person has been recognised as an extended family member and issued with a residence card (or EEA family permit or registration

certificate) is he to be treated as a 'family member', with consequential rights deriving from European Union (EU) law.

1.2.7 Until an applicant is recognised as an extended family member and issued with a residence card (or EEA family permit or registration certificate) he has no rights deriving from EU law.

Section 2: Dealing with residence card applications from people claiming to be extended family members

There is a four stage consideration process.

2.1 Stage 1: Is the relevant EEA national a qualified person or does he have a permanent right of residence?

2.1.1 As set out in Regulation 17(4)(a), only if the applicant is connected to a relevant EEA national who is a qualified person or has a permanent right of residence can the application succeed.

2.1.2 Evidence of identity such as a valid passport or national identity card for the EEA national must be provided.

2.1.3 In terms of whether an EEA national is a qualified person, caseworkers should refer to chapter 4 of the European Casework Instructions (ECIs). Where the EEA national is an A8 or A2 national and claims to exercise Treaty rights as a worker, caseworkers should refer to chapter 7 of the ECIs.

2.1.4 Where the relevant EEA national has claimed a right of permanent residence, but the caseworker is unclear as to whether the relevant EEA national has acquired such a right, he should refer to Chapter 6 of the ECIs.

2.1.5 If the relevant EEA national is not a qualified person or does not have permanent residence, the application can be refused without proceeding to stages 2 to 4.

Summary:

2.1.6 If the answer to the question is yes, the caseworker should proceed to stage 2.

2.2 Stage 2: Is the applicant an extended family member?

2.2.1 The next question is whether the applicant is actually an extended family member of the relevant EEA national. In other words, does s/he fit into one of the four categories in Regulation 8?

2.2.2 As a preliminary to that assessment, s/he must have submitted a valid national passport to establish their identity (see Sections 1.7, 1.10 and 1.11 of Chapter 5 of the ECIs).

2.2.3 Relatives who are dependent/members of household

In the case of Rahman the ECJ was asked to rule on several questions concerning the position of extended family members under Directive 2004/38/EC ('the Directive'). The key findings of the court in this case were that:

- a. At the time of their application a person who is an extended family member must be, or have been, dependent upon the relevant EEA national (or their spouse or civil partner) in the country from which they (the extended family member) has come.
- b. Member States cannot require that this dependency existed at a time when both the extended family member and the EEA national resided together in the same country.
- c. There is no automatic right of entry and residence for extended family members (unlike direct family members of EEA nationals).
- d. Member States have a wide discretion as to what factors should be taken into account when considering such applications.

2.2.4 In terms of dependency, the evidence must show financial rather than merely emotional or other dependency on the EEA national. It must also show that, having regard to the applicant's financial and social conditions, he is not in a position to support himself without such support. For further information regarding establishing dependency, please refer to chapter 5 of the ECIs and EOPN 17/2012.

2.2.5 Relatives strictly requiring personal care on serious health grounds

2.2.6 The AIT in *TR (reg 8 (3) EEA Regs 2006)* [2008] UKAIT 00004 found that for a relative to satisfy Regulation 8(3) the following conditions must be met:

- the 'serious health grounds' need to be significantly beyond ordinary ill health and as a matter of practice detailed medical evidence in support of any claim on these grounds will be required;
- 'personal care' must be provided on a day to day basis and relate to the physical and/or mental tasks and needs required for a person to function; and

- 'strictly' must be restrictively construed to reinforce the need for the personal care to be provided on a day to day basis.

2.2.7 Relatives meeting the requirements in the Immigration Rules for ILR as a dependent relative of a person present and settled

2.2.8 Caseworkers should refer to chapter 8 section 6.3 of the immigration directorate instructions (IDIs) for the relevant criteria.

2.2.9 Durable Partners

2.2.11 The following conditions should normally be satisfied:

- The parties have been living together in a relationship akin to marriage which has subsisted for two years or more.
- The parties intend to live together permanently.
- The parties are not involved in a consanguineous relationship with one another. For instance, they are not blood relatives who would not be allowed to marry as this would constitute incest.
- Any previous marriage (or similar relationship) by either party has permanently broken down.

2.2.12 These conditions are similar to those which apply in respect of unmarried and same-sex partners of people present and settled in the UK/being admitted on the same occasion for settlement (paragraph 295A of the Immigration Rules).

2.2.13 The applicant must satisfy the caseworker that he is a durable partner as a matter of fact. In circumstances other than the above, the applicant is unlikely to be able to satisfy us that he is a durable partner falling within Regulation 8(5). However, each case must be considered on its merits, taking into account all the facts and circumstances, as there may be cases where notwithstanding that one or more of these points is not satisfied the caseworker is satisfied that the parties are in a durable relationship.

Summary:

2.2.14 If the answer to this question is no, the application can be refused without proceeding to stages 3 and 4.

2.2.15. If the answer to this question is yes, the caseworker should proceed to stage 3.

2.3 Stage 3: Would refusing the application deter the relevant EEA national from exercising his/her free movement rights?

2.3.1 If refusing the application would not deter the relevant EEA national from exercising his EU law free movement rights, a residence card should not be issued.

2.3.2 It is at this stage that Article 3(2) of the Directive and Regulation 17(5) require an extensive examination of the personal circumstances of a person who has applied for a residence card before a decision is reached.

2.3.3 For example, in respect of relatives who are dependent on the relevant EEA national or members of his household, it will be now be necessary to consider not only the circumstances of any financial dependency but also any emotional dependency between the applicant and the EEA national. Factors to consider when assessing emotional dependency should include, but not be limited to, the length and quality of the relationship with the EEA national. If the dependency is only financial then there is unlikely to be any reason why the relevant EEA national cannot continue to support the applicant whilst the latter is abroad (e.g. by sending cheques). For instance, there may be a scenario where the extended family member has not seen the relevant EEA national for several years but is financially dependent upon him through money transfers. In the absence of evidence to the contrary it may be decided that the applicant was only financially dependent and hence a refusal appropriate. By refusing to issue the applicant with a residence card in such a case the free movement rights of the relevant EEA national are unlikely to be impeded, as the dependency can continue whilst the relevant EEA national is in the UK and while the extended family member remains outside the UK.

2.3.4 If, however, the dependency is both financial and emotional, then it is more likely that refusing a residence card would impede the free movement rights of the relevant EEA national. This is because the EEA national would be more reluctant to go to another Member state and exercise his Treaty rights if this meant having to leave an extended family member behind who was both financially and emotionally dependent upon him. This could result in the EEA national's free movement rights being impeded.

2.3.5 In summary, each case should be examined **on its merits**, taking into account all the facts and circumstances of the relationship and the dependency, to determine whether refusing to issue a residence card would deter the relevant EEA national from exercising their free movement rights.

2.3.6 If the dependency or household membership is historical, then refusing to issue a residence card to the applicant will not deter the relevant EEA national from exercising their right of free movement. In any event, as stated above, following the Court of Appeal's decision in *Bigia*, historical dependency or membership of household is not enough to bring the person within the first category of extended family member.

2.3.7 In relation to durable partners, provided the applicant meets the definition of a durable partner it is likely that to refuse a residence card would deter the relevant EEA national's free movement rights, given that the parties are in a long-standing and enduring relationship akin to marriage. However,

the circumstances of the case should still be fully examined to come to a decision on that issue.

Summary:

2.3.8 If the answer to this question is no, the application should be refused without proceeding to stage 4.

2.3.9 If the answer to the question is yes, the caseworker should proceed to stage 4.

2.4 Stage 4: In all the circumstances, is it appropriate to issue a residence card?

2.4.1 Under Regulation 17(4)(b), a residence card may be issued if in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

2.4.2 Caseworkers will have to assess whether, on balance, it is appropriate to exercise discretion under 17(4) and issue a residence card. All the facts and circumstances of the case should be taken into account, including:

2.5 Evidence of criminality

For guidance on assessing criminality, please refer to Annex B of European Operational Policy Notice 01/2013 (revised) which was issued on 01 July 2013.

2.6 An adverse immigration history

2.6.1 Although an adverse immigration history is likely to weigh against issuing a residence card, an application should not be refused simply because the applicant has an adverse immigration history. Each case should be examined on its merits, taking into account all the facts and circumstances including the extent and nature of the abuse and/or fraud. Deliberate deception (e.g. obtaining leave by deception or making a false representation) will weigh more heavily against issuing a residence card than, say, remaining beyond the duration of a previous grant of leave.

2.7 Any other reasons

2.7.1 Consideration should be given as to whether there are any other reasons why it is conducive to the public good that the applicant should not be granted a residence card.

2.8 All other circumstances

2.8.1 If the caseworker is minded **not** to exercise discretion to issue a residence card on the basis of factors such as criminality or an adverse

immigration history, he must proceed to consider all the other facts and circumstances of the case (i.e. relating both to the applicant and the relevant EEA national) before making a final decision on whether it is appropriate to issue a residence card. These include:

- The extent of integration of the applicant into the UK. Factors to be considered here include the applicant's length of residency, family ties in the UK, whether s/he is working in the UK or owns property here.
- The extent of integration of the relevant EEA national into the UK and, in particular, all the circumstances which led the caseworker to the conclusion that a negative decision would deter the EEA national from exercising his/her free movement rights.
- The extent of family/private life. For example, in relation to durable partners, caseworkers should consider the length of the relationship and whether there are any children.

Summary:

2.8.2. If the decision is not to exercise discretion, the application should be refused.

2.8.3 If the decision is to exercise discretion, a residence card can be issued.

Section 3: Making and communicating the decision, and appeal rights

3.1 Decisions should be referred to a SCW before the decision is dispatched to the applicant.

3.1.2 In circumstances where it is considered appropriate to refuse the application, the caseworker must write to the applicant setting out the decision and, except only in cases where to do so would be contrary to the interests of national security, giving reasons. Specimen RFRL wordings are set out in section 4 below. In those cases, the SCW should also consider whether enforcement action is appropriate.

3.1.3 Where an applicant has been refused a residence card, any appeal rights that may result derive from the 2006 Regulations.

3.2 Applicants claiming to be a durable partner

3.2.1 As the 2006 Regulations are currently drafted there is an appeal right accruing to Third Country Nationals who make an application for a residence card as an unmarried partner whether or not they satisfy the SSHD that they are in a durable relationship with an EEA national.

3.2.2 Current legal advice is that an appeal against a refusal of a residence card in such circumstances is not a suspensive appeal right under the EEA Regulations. This means in practice that removal directions may be

maintained and the applicant removed. The applicant may then exercise his/her right of appeal from overseas.

3.3 Applicants claiming to be any other kind of extended family member

3.3.1 If the applicant produces proof that he is related as claimed to the EEA national, he has a right of appeal. As above, the right of appeal is also non-suspensive.

Section 4: Refusal wordings for extended family members

4.1 Refuse residence card -more distant family members not dependant on EEA/member of his/her household. No consideration under Regulation 17(4):

Regulation 8 (2) of EEA Regulations 2006

Wording:

You have applied for a residence card on the basis that you are an extended family member who has been dependent on your EEA national sponsor/ a dependent member of your EEA national sponsor's household and continue to be so in the UK. Your application has been considered in accordance with Regulation 8 (2) of the Immigration (EEA) Regulations 2006. You have failed, however, to provide sufficient evidence to prove that you fall within the category of extended family member claimed. ***[Caseworker to insert reasons]*** Consequently, the Secretary of State does not accept that you are person who falls within Regulation 8(2). Your application is not, therefore an application for a residence card by an extended family member falling to be determined under Regulation 17(4) of those Regulations and is consequently refused.

Reasons could include:

- Applicant was not dependent on the EEA national or a member of his/her household in a country from which the EU citizen has come.
- Applicant has failed to show s/he was dependent upon the EEA national prior to his/her arrival in the UK.
- Applicant was dependent on the EEA national/member of his/her household but this was years ago.

4.1.1 Refuse residence card- relative does not require the personal care of the EEA national or his/her spouse or civil partner on serious health grounds. No consideration under Regulation 17(4).

Regulation 8 (3) of the EEA Regulations 2006

Wording:

You have applied for a residence card on the basis that you are an extended family member who on serious health grounds, strictly requires the personal care of your EEA national relative, his/her spouse or civil partner. Your

application has been considered in accordance with Regulation 8 (3) of the Immigration (EEA) Regulations 2006. You have failed however, to provide sufficient evidence to prove that you fall within the category of extended family member claimed. ***[Caseworker to insert reasons]*** Consequently, the Secretary of State does not accept that you are person who falls within Regulation 8(3). Your application is not, therefore an application for a residence card by an extended family member falling to be determined under Regulation 17(4) of those Regulations and is consequently refused.

Reasons could include:

- Applicant has failed to provide medical evidence demonstrating the seriousness of his/her condition.
- EEA national has failed to provide evidence detailing the role played in the care of his/her relative
- EEA national takes no part in the applicant's care or provides limited care only on a sporadic basis.

4.1.2 Refuse residence card- relative would not meet the requirements of the Immigration Rules (other than those relating to entry clearance) for ILR as a dependent relative of an EEA national were the EEA national a person present and settled in the UK. No consideration under Regulation 17(4).

Regulation 8 (4) of the EEA Regulations 2006

You have applied for a residence card on the basis that you are an extended family member who would meet the requirements of the Immigration Rules (other than those relating to entry clearance) for ILR as a dependent relative of an EEA national were the EEA national a person present and settled in the UK. Your application has been considered in accordance with Regulation 8 (4) of the Immigration (EEA) Regulations 2006. You have failed however, to provide sufficient evidence to prove that you fall within the category of extended family member claimed. ***[Caseworker to insert reasons]*** Consequently, the Secretary of State does not accept that you are person who falls within Regulation 8(4). Your application is not, therefore an application for a residence card by an extended family member falling to be determined under Regulation 17(4) of those Regulations and is consequently refused.

Reasons could include:

- Applicant is not a relative who would qualify i.e. they are not a parent/grandparent/son/daughter/sister/brother/uncle/aunt of the EEA national.
- Applicant has failed to show they are living alone in the most exceptional and compassionate circumstances.
- Applicant has failed to demonstrate that s/he will be maintained and accommodated without recourse to public funds.

4.1.3 Refusal of residence card – SSHD not satisfied that the applicant is in a durable relationship with an EEA national. No consideration under Regulation 17(4)

Regulation 8 (5) of the EEA Regulations 2006

You have applied for a residence card on the basis that you are an extended family member in a durable relationship with an EEA national. Your application has been considered under Regulation 8 (5) of the Immigration (EEA) Regulations 2006. You have failed, however, to provide sufficient evidence to prove that you fall within the category of extended family member claimed. **[Caseworker to insert reasons]**. Consequently the Secretary of State does not accept that you are a person who falls within Regulation 8(5) of the EEA Regulations 2006. Your application is not, therefore, an application for a residence card by an extended family member falling to be determined under Regulation 17(4) of those Regulations and is consequently refused.

Reasons could include:

- Applicant has failed to show that s/he has cohabited with his/her EEA national partner for at least two years.
- Applicant's previous marriage (or similar relationship) has not permanently broken down.
- Applicant's relationship with EEA national partner is consanguineous.

4.1.4 Refusal of Residence card- Applicant meets the criteria under Regulation 8 as an extended family member but SSHD is not prepared to exercise discretion under Regulation 17 (4) (b) of EEA Regulations 2006.

Regulation 17(4)(b) of the EEA Regulations 2006

You have applied for a residence card on the basis that you are an extended family member of an EEA national. The Secretary of State has discretion as to whether or not to issue a residence card to those who meet the requirements of Regulation 8 of the EEA Regulations. The Secretary of State is prepared to accept on the basis of the information provided that you are an extended family member of **[insert name of EEA national]**. Extended family members are only entitled to a Residence Card under Regulation 17(4)(b) if in all the circumstances it appears to the Secretary of State as a matter of her discretion appropriate to issue the card.

After careful consideration of your personal circumstances and taking into account the factors above, it is considered that you have failed to provide sufficient evidence to warrant an exercise of discretion in your favour and for the following reason(s) discretion will not be exercised in your favour **[Caseworker to insert reasons]**.

As a result it is not considered appropriate, in accordance with the provisions of Regulation 17(4)(b) of the Immigration (EEA) Regulations 2006, to issue you with a Residence Card.

Reasons could include

- There is evidence of criminality.
- Applicant has an adverse immigration history.
- Applicant's refusal of a residence card would be conducive to the public good.

Enquiries

If you have any enquiries regarding this notice please contact <REDACTED – section 40(2)>, or the European Operational Policy Mailbox EuropeanOperational@UKBA.gsi.gov.uk

<REDACTED – section 40(2)>
Head of European Operational Policy
01 July 2013