Mr Wayne Howard

By email: request-219801-5c71d81a@whatdotheyknow.com

Our reference: 32280 (BAU)

19 August 2014

Dear Mr Howard,

Thank you for your email of 10th July to the Home Office Freedom of Information Team in which you asked six questions about family members of British citizens crossing the UK border without a “code 1A” stamp. I note that the Home Office North West Correspondence Team sent a response to you on 31 July in respect of your question 1, which was dealt with under the terms of the Freedom of Information Act 2000. You were advised in that letter that questions 2, 3, 3A, 4 and 5 would be answered outside of the terms of the Act by the European Policy Team. I apologise for the delay in responding. Our responses are now set out below.

2) What is [the] legal status [of the family member (spouse) of a British citizen who has exercised free movement rights in another EEA state before returning to the UK] if they choose not to apply for EEA2 [residence card] after they have arrived?

If the family member (spouse) meets the conditions set out in regulation 9 of the Immigration (European Economic Area) Regulations 2006 (‘the EEA Regulations’), which gives effect in UK law to the judgment of the Court of Justice of the European Union in the case of Surinder Singh, then they will have a right to reside in the UK under the EEA Regulations for as long as the relevant British citizen is in the UK and the non-EEA national remains their family member. This is irrespective of whether the family member holds a valid residence card issued under the EEA Regulations. Nonetheless, we recommend that the family member applies for a residence card as this will make it easier
for them to prove their status when required to do so – for example, when applying for jobs, accessing public services, or travelling from or to the UK.

For convenience, I have set out regulation 9 (in its amended form since 1st January 2014) at Annex A to this response.

It should be noted that this right is subject to the provisions of regulation 19. This means that a person who has entered the UK, or acquired a right to reside, pursuant to regulation 9, may lose that right and be removed from the UK on the grounds of public policy, public security or public health, or in the event of abuse of free movement rights (such as entering into a marriage of convenience), or fraud.

3) Is there a law that states you can only enter the Borders of the UK with a Border Patrol to report your arrival?

Passengers arriving in and seeking entry to the UK must be examined by an immigration officer (also known as a Border Force officer), who will determine whether the passenger is a British citizen and, if not, whether they require leave to enter the UK under the Immigration Act 1971, or are entitled to admission to the UK under regulation 11 of the EEA Regulations.

The general power for an immigration officer to examine passengers arriving in the UK is contained in paragraph 2 of Schedule 2 to the Immigration Act 1971:


This is modified, in respect of those seeking entry under the EEA Regulations, by regulation 22(2) of the EEA Regulations:

22 Person claiming right of admission

[…]

(2) A person to whom this regulation applies is to be treated as if he were a person seeking leave to enter the United Kingdom under the 1971 Act for the purposes of paragraphs 2, 3, 4, 7, 16 to 18 and 21 to 24 of Schedule 2 to the 1971 Act (administrative provisions as to control on entry etc), except that--

(a) the reference in paragraph 2(1) to the purpose for which the immigration officer may examine any persons who have arrived in the United Kingdom is to be read as a reference to the purpose of determining whether he is a person who is to be granted admission under these Regulations

[…]

Some exceptions may apply where the person is travelling within the Common Travel Area (comprising the UK, Republic of Ireland, Channel Islands and the Isle of Man). For this, I refer you to the guidance contained in Chapter 1, Section 2, of our Immigration Directorate Instructions (IDIs):

www.gov.uk/government/publications/chapter-1-section-2-travel-applications

3A) Is it not correct that once within the EU a [non-EEA family member] taking Surinder Singh rights is legal all over the EU and there by has not left the EU so needs no other stamps to travel freely around the EU under Freedom of movement?
This is not quite correct. Non-EEA nationals do not have independent rights of free movement. Directive 2004/38/EC (‘the Free Movement Directive’) applies to EEA nationals who move to, or reside in, a Member State of which they are not a national, and to their family members who accompany them to, or join them in, the host Member State. (See Article 3(1) of the Directive.)

In the case of *Surinder Singh*, and subsequent related rulings, the Court of Justice of the European Union has ruled that, where an EEA national has exercised free movement rights as a worker or self-employed person in a Member State of which they are not a national, and then returns with their family to their Member State of origin, the Directive applies *by analogy* to those family members.

Article 5(2) of the Directive allows Member States to require entry visas from non-EEA national family members, either to extent permitted by Regulation (EC) No 539/2001 (which refers to the abolition of internal border controls among those countries which are signatories to the Schengen agreement), or in accordance with their own national legislation, where appropriate. The UK does not participate in most aspects of the Schengen agreement but facilitates the entry of non-EEA nationals to the UK by means of the EEA family permit regime.

Article 5(4) stipulates that Member States must not refuse entry to non-EEA nationals solely on the grounds that they do not have the necessary travel document or entry visa. Border officers must give such persons “every reasonable opportunity” to obtain the relevant documents, have them brought to them within a reasonable time, or otherwise prove that they qualify for entry. (See further answer to question 4 below.)

The fact that one Member State has recognised that a non-EEA national has a right of residence, either directly under the terms of the Directive, or as a result of the *Surinder Singh* judgment, does not guarantee their entry to or residence in other Member States. So, for example, where a non-EEA family member of a British citizen has a right to reside in the UK under *Surinder Singh* (regulation 9 of the EEA Regulations), and they subsequently travel together to another Member State, they would come directly within the scope of the Free Movement Directive (provided the British citizen meets the relevant conditions of the Directive). Whether the other Member State requires the non-EEA national to obtain an entry visa or other residence documentation is essentially a matter for that Member State (to the extent permitted by the Directive).

I have set out the relevant provisions of Article 3 and 5 of the Free Movement Directive at Annex B to this response.

Further information on the Schengen area can be found at the following links:


4) Is there a place within the UK [an] EEA family member of a British Citizen can come to ask for a 1A stamp?

If a non-EEA national arrives at the UK border seeking admission under the EEA Regulations as the family member of an EEA national, or of a British citizen under the *Surinder Singh* judgment, and does not have a valid EEA family permit (or other document
specified in regulation 11(2)), the Border Force officer will give the passenger the opportunity to prove by other means that they qualify for entry (as required by Article 5(4) of the Directive and regulation 11(4) of the EEA Regulations).

If the officer is satisfied that the passenger is eligible for admission, the passenger’s valid passport will be endorsed at the border using an ‘EEA Dependant’ ink stamp for a period of six months. This stamp has replaced the ‘code 1A’ stamp previously used for this purpose.

It is not possible to apply for an EEA Dependant stamp once the person has entered the UK, since this stamp is only used at the border in the circumstances described above. If a non-EEA national who is already in the UK believes they have a right to reside as a family member under the EEA Regulations, the appropriate document to apply for would be a residence card.

5) If without EEA2 the EEA family member wants to travel back to say France with the family plus baby who is British and child of the [non-EEA] mother, can they apply for [an EEA family] permit in London before travelling to not to be refused entry on [their] return?

No. It is only possible to apply for an EEA family permit at a British diplomatic post or visa application centre outside the UK. A non-EEA national who is already in the UK may apply for a residence card before travelling outside the UK. A valid UK-issued residence card, when presented with a valid passport, entitles the holder to readmission to the UK under regulation 11(2) of the EEA Regulations (provided they are still a family member of the relevant British citizen/EEA national and subject to the usual considerations of public policy, public security, public health, and abuse of rights and fraud).

I trust this has answered your queries.

Yours sincerely,

P. Grant
Policy Advisor
European Policy Team
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Annex A to 32280 (BAU) (Howard)

Regulation 9 of the Immigration (European Economic Area) Regulations 2006 as of 1st January 2014:

9 Family members of British citizens

(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen ("P") were an EEA national.

(2) The conditions are that--

(a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;

(b) if the family member of P is P’s spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

(c) the centre of P’s life has transferred to the EEA State where P resided as a worker or self-employed person.

(3) Factors relevant to whether the centre of P’s life has transferred to another EEA State include--

(a) the period of residence in the EEA State as a worker or self-employed person;

(b) the location of P’s principal residence;

(c) the degree of integration of P in the EEA State.

(4) Where these Regulations apply to the family member of P, P is to be treated as holding a valid passport issued by an EEA State for the purpose of the application of regulation 13 to that family member.
Annex B to 32280 (BAU) (Howard)

Relevant provision of Directive 2004/38/EC referred to in answer to question 3A.

**Article 3**

**Beneficiaries**

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

[ ]

**Article 5**

**Right of entry**

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas.

Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

[...]

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

[...]