



Home Office

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2 Marsham Street
London
SW1P 4DF

Mr Amit Hidri

By email: request-218066-4c88d846@whatdotheyknow.com

28 July 2014

Dear Mr Hidri,

FOI Request 32195

Thank you for your email of 27 June 2014, your request is being handled as a request for information under the Freedom of Information Act 2000 ('the Act').

Your email request had two parts:

Part 1) 'You refer to communication with the EC (European Commission) in 2012 regarding residence documentation for non-EEA nationals applying under article 9 and 10. Please can you provide a full copy of the communication sent to the EC and a copy of their response?' This part of your request has been handled as a request for information under the Freedom of Information Act 2000.

Response to Part 1): I am able to disclose the relevant extracts from the correspondence between the Home Office and the European Commission and these extracts are provided in Annex A.

Part 2) 'On what basis is it lawful for you to require biometric data for a family permit issued in line with article 5?' This part of your request does not fall to be handled as a request for information under the Freedom of Information Act 2000. Instead, it is being handled as an enquiry about Home Office policy and processes.

Response to Part 2): Article 5(2) of Directive 2004/38/EC (the 'Free Movement Directive') states that "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".

Regulation 539/2001 does not apply to the United Kingdom but we have transposed Article 5(2) into our national laws, through the Immigration (European Economic Area) Regulations 2006. Under these Regulations, an EEA Family Permit is the correct form of entry clearance for a third country national family member of an EU citizen who wishes to accompany or join their EU citizen relative in the UK. In common with other forms of entry clearance, we request the provision of biometric data as part of the application process.

Nothing in Article 5(2) or any other part of the Free Movement Directive prevents Member States from requesting biometric information as part of the application process for documents issued to non-EEA nationals under Article 5(2).

I hope that this information meets your requirements. I would like to assure you that we have provided you with all relevant information that the Home Office holds.

If you are dissatisfied with the response to the sections of your email which have been handled as requests for information under the Freedom of Information Act 2000 you may request an independent internal review of our handling by submitting a complaint within two months to the address below, quoting reference 32195. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Information Access Team
Home Office
Ground Floor, Seacole Building
2 Marsham Street
London
SW1P 4DF
Email: info.access@homeoffice.gsi.gov.uk

As part of any internal review the Department's handling of the sections of your information request which have been handled under the Freedom of Information Act 2000 will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

D Morrison
International and Immigration Policy Group

Annex A (FOI 32195): Disclosure

Request: “You refer to communication with the EC (European Commission) in 2012 regarding residence documentation for non-EEA nationals applying under article 9 and 10. Please can you provide a full copy of the communication sent to the EC and a copy of their response?”

Response: On 12 January 2012, the Home Office wrote to DG Justice, in the European Commission and the letter included the following paragraphs which are relevant to your request:

Following recent discussions, during meetings of the Free Movement Expert group, we are considering possible reforms to the UK's arrangements for issuing documentation under the Directive to EEA nationals and their family members as detailed below. These discussions have been helpful in indicating the Commission's preliminary view that the change in policy which we have in mind may be compatible with the Directive. I would therefore welcome your written advice on these proposals.

Collecting biometrics from family members of EEA nationals:

We are grateful for the Commission's attention to concerns we have raised regarding the wide variance in format and security provisions seen in some residence cards issued by Member States. We support the Commission's position on encouraging Member States to issue residence cards to family members under the Directive using the uniform format of residence permit issued to third country nationals (governed by Regulation (EC) No 1030/2002 as amended by Regulation (EC) No 380/2008). We consider that this would limit the scope for such documents to be easily forged, building on the political declaration that Member States signed on 10 March 2008 to encourage the use of this format of document (recorded in the minutes of the Council regarding amendments made to Regulation (EC) 1030/2002 reference 1302/07). We will continue to work closely with the Commission and other Member States through the Article 6 Committee and the Free

Movement Expert group, to drive forward work to improve the security standards of residence cards.

To assist the UK's development of these proposals, we would be grateful if the Commission could provide written advice on whether they consider that Member States can require family members of EEA nationals to provide their biometric data under Article 10 of the Directive for the purposes of issuing them with a residence card (potentially in the format of a uniform biometric residence permit). There may be circumstances in which an individual is physically unable to provide their biometrics, but in cases where a person refuses to give their biometrics as part of the residence card application, in the Commission's view, would it be permissible for Member States to refuse to issue the document?

Charging for residence documentation:

The UK is also exploring the possibility of charging for documentation issued to EEA nationals and their family members under the Directive. Currently, the UK Border Agency issues all such documentation free of charge, creating significant financial pressures at a time when budgets are being reduced.

Article 25(2) of the Directive makes clear that Member States shall issue the documents mentioned in paragraph 1 (registration certificates, residence cards, certificates of application and documents certifying permanent residence) “*free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents*”. Although the UK does not issue identity cards to UK citizens, we do not consider that point alone prevents us from charging for documentation under the Directive, and we are considering whether any other documents issued to UK citizens (e.g. UK passports) may be considered “similar documents” for the purposes of Article 25(2) of the Directive.

I would be grateful for the Commission's view on what criteria ought to be applied when determining if a national document is similar to documentation issued under the Directive for the purposes of Article 25(2). In particular, we would be grateful to know whether the UK passport is such a similar document, meaning that the UK could charge for residence documentation under the Directive in line with the standard fee for a UK adult passport.

As these questions have already been raised with colleagues in DG Justice, I would be grateful for a response at your earliest convenience.

I am copying this letter for information to Mr Stefano Manservigi in DG HOME.

Yours sincerely,

On 24 February 2012 the European Commission responded to the Home Office and the letter included the following paragraphs relevant to your request:

Thank you for your letter of 12 January 2012 concerning the UK's implementation of Directive 2004/38/EC.

Concerning use of biometric data in residence documents issued to non-EU family members of EU citizens under Directive 2004/38/EC, I would like to confirm that nothing in the Directive prevents Member States from including biometric data of such family members in residence cards¹ issued to them under Directive 2004/38/EC.

In doing so, Member States must comply with national implementing EU law on data protection. Among other things, they must make sure that principles such as purpose limitation and proportionality of data processed are complied with and that measures to prevent unlawful or unauthorised access and collection of biometric data are implemented.

Another aspect to be taken into account is that according to Article 20 of Directive 95/46/EC Member States shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof. Consequently, should the United Kingdom determine that the processing of biometric data is likely to present such a risk, the data controller will have to contact the supervisory authority, the UK Information Commissioner's Office (ICO), which will have to carry out prior checks.

Member States may refuse to issue biometric residence card to non-EU family members who have not provided their biometric data. It should be noted that residence cards are documents which merely attest that the underlying right of residence exists, but the right is not conditional upon the residence card and therefore upon providing biometric data.

Regarding charges for residence documents issued to EU citizens and their non-EU family members under Directive 2004/38/EC, Article 25(2) of Directive 2004/38/EC stipulates that such documents should be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

This provision is expression of the fundamental principle of non-discrimination on the grounds of nationality, as expressed in Article 24(1) of Directive 2004/38/EC and Article 18 of the Treaty on the Functioning of the European Union.

In assessing compliance with EU law of the UK plans to introduce charges which are identical with charges for a UK adult passport², it is fundamental to examine whether the UK adult passports are the appropriate comparator and that there are no other, better, documents.

If that is not the case, the UK policy on passport charges may have been set up to reflect certain aspects which are relevant for passports but may not be relevant for residence documents issued under Directive 2004/38/EC – such as that passports may be issued by the UK embassies abroad, they have more security features, they must be in a harmonised format, they are more voluminous, they have a different period of validity, they are travel documents accepted by all countries or that the charges are set in such a way that the whole service is more or less self-financing.

Compliance of your plans with EU law can be assessed only on the basis of proper justification and in-depth analysis addressing the above issues. Where no appropriate comparable document other than a passport can be identified, the above justification and analysis should also examine an alternative solution – instead of issuing the residence documents free of charge or for a charge for a UK adult passport, which charges would cover the genuine administrative costs the UK authorities incur in issuing these documents³.

Yours sincerely,