

Wayne Pearsall
request-151507-14d8ec37@whatdotheyknow.com

(FOI)Home Office Ref: 26630

Date: 9 April 2013

Dear Mr. Pearsall,

Thank you for your e-mail of 28 February, in which you ask for guidance relating to derivative rights of residence under European Union (EU) law. Your request is being handled as a request for information under the Freedom of Information Act 2000.

You have requested the following information:

- Can you please provide (as per FOI 2000) a copy of all legislation relating to a persons derivative right to reside.
- Can you please provide me all information in relation to who actually qualifies for a derivative right of residence.
- my particular query is in relation to the non-eea national mother of two extremely young children (3 and six months) who are British citizens.

'Derivative rights' are rights of residence which derive from EU law other than Directive 2004/38/EC (the 'free movement' Directive) and have been established by case law handed down by the Court of Justice of the European Union (ECJ). The relevant legislation for persons with a derivative right of residence under EU law is regulation 15A of the Immigration (European Economic Area) Regulations 2006 (as amended).

Provision for the issuing of a document confirming a derivative right of residence under these Regulations was made by two amending Regulations in July and November 2012. You can find the 2006 Regulations and subsequent amending Regulations using the following links:

Immigration (European Economic Area) Regulations 2006:
<http://www.legislation.gov.uk/ukxi/2006/1003/contents/made>

Immigration (European Economic Area) (Amendment) Regulations 2009:
<http://www.legislation.gov.uk/ukxi/2009/1117/contents/made>

Immigration (European Economic Area) (Amendment) Regulations 2011:
<http://www.legislation.gov.uk/ukxi/2011/1247/made>

Immigration (European Economic Area) (Amendment) Regulations 2012:
<http://www.legislation.gov.uk/ukxi/2012/1547/made>

Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012:
<http://www.legislation.gov.uk/ukxi/2012/2560/made>

The UK Border Agency issues guidance to entry clearance staff on the issuing of EEA Family Permits, including to persons claiming a derivative right of residence. You can find this guidance on the UK Border Agency website at the following address: <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/eun/>. Please note that sections of this guidance relating to applications from primary carers of self-sufficient EEA national children ('*Chen*' cases) are currently under review.

Section 21 of the Freedom of Information Act exempts the Home Office from having to provide you with this information, because it is already reasonably accessible. You can access the legislation you have requested using the internet links above. If you have any difficulties in accessing this information at the source which I have indicated, please contact me again.

I can confirm that the UK Border Agency holds internal guidance for caseworkers assessing applications on the basis of derivative rights of residence. The guidance held relates to derivative rights in the following categories:

- Primary carers of British citizens ('*Zambrano*' cases)
- Primary carers of self-sufficient EEA national children ('*Chen*' cases)
- Children of an EEA national worker or former worker where the child is in education in the UK ('*Ibrahim/Teixeira*' cases)
- Primary carers of children of an EEA national worker or former worker where the child is in education in the UK ('*Ibrahim/Teixeira*' cases)
- Dependent children of primary carers who have a derivative right of residence in the UK.

I have released six European Operational Policy Notices (EOPNs) to you in Annexes A-F to this response. These notices provide guidance for European caseworkers when assessing whether a person has a derivative right of residence. The notices released are:

13/2011	- Implementation of the Zambrano Judgement (Annex A)
07/2012	- Ibrahim/Teixeira (Annex B)
07/2012	- Ibrahim/Teixeira (revised) (Annex C)
08/2012	- Chen (Annex D)

08/2012 - Chen (revised) (Annex E)
21/2012 - Zambrano (Annex F)

Please note that the documents which have been released have had some of the information within them redacted as it falls to be exempted from release under Section 40(2) of the Act, as it refers to personal information. The exempted sections are marked as redacted.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference FOI 26630. 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
e-mail: FOIRequests@homeoffice.gsi.gov.uk

As part of any internal review, the Department's handling of your information request 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

European Operational Policy Team
UK Border Agency

Annex A to FOI 26630 – EOPN 13/11 – Zambrano

From: European Operational Policy Team

Subject: Implementation of *Ruiz Zambrano* judgment

Date: 16 September 2011

Issue number: 13/2011

Purpose of Notice

1. This instruction provides interim guidance for all UK Border Agency staff dealing with third country nationals claiming to have acquired a right of residence in the UK on the basis of the Court of Justice of the European Union (ECJ) case of *Ruiz Zambrano* (C-34/09).

A. Background

2. The judgment in the case of *Ruiz Zambrano* established that member states are precluded from refusing a third country national, upon whom a Union citizen is dependent, a right to reside and work in the Member State of residence and nationality of that Union citizen when refusing residence would deprive the Union citizen of the genuine enjoyment of the substance of their European citizenship rights. In practice this means that refusal of the right of residence to the third country national, and so their removal, would require the Union citizen to leave the Member state by virtue of their dependency upon that third country national.
3. This right is derived from Article 20 of the Treaty on the Functioning of the European Union (TFEU) and not from Directive 2004/38/EC ("the Free Movement Directive") which has been transposed into legislation via the Immigration (European Economic Area) Regulations 2006 ("the Regulations").
4. There is currently no provision within the Regulations to issue documentation on the basis of the *Ruiz Zambrano* judgment. Amendments to the Regulations are expected to be progressed before close 2011. However, until such time as these changes have been effected, UKBA officials must make decisions in accordance with this instruction where a right to residence is claimed by an applicant/appellant on the basis of the *Ruiz Zambrano* judgment.

B. Scope

5. The UK Border Agency has considered the implications of the *Ruiz Zambrano* judgment and the effect of this on the rights of third country nationals with a dependent Union citizen. The following high-level scope has been agreed with Ministers following detailed consultation with legal advisors and Counsel and should be applied by all business areas of the Agency until substantive changes to the Regulations can be effected.

6. Firstly, it has been agreed that the judgment applies **only** to cases in which the dependent Union citizen is within their state of nationality. For the United Kingdom, this means that the judgment applies **only** to cases involving a dependent British citizen.
7. Secondly, it has been agreed that the judgment does **not** apply in cases where dependency is simply financial.
8. On this basis there are then two classes of potential beneficiary:
 - A third country national adult upon whom a British citizen child is dependent
 - A third country national adult upon whom a British citizen adult is dependent

Third country national adults upon whom a British citizen child is dependent

9. In practice, the majority of cases are likely to come within this category and so will involve a British citizen child who is dependent upon a third country national parent. In order for an applicant/appellant to demonstrate that they are a potential beneficiary within this category then the following criteria need to be met:
 - there is evidence that the child is under the age of 18, and
 - there is evidence that the child is a British citizen, and
 - there is evidence of a relationship between the child and the parent/guardian/carer, and
 - there is evidence of the child's dependency on the third country national parent/guardian/carer (care responsibilities, court orders are examples)
10. In cases where there is another parent/guardian/carer upon whom the child is, or can become, dependent then this would fall out of scope. This is because removal of the third country national in such circumstances would not oblige the child to leave the EU because an alternative carer is available.

Third country national adults upon whom a British citizen adult is dependent

11. In relation to this category of applicant/appellant clear medical evidence, for example of a severe physical and/or mental disability, supported by (a) evidence which shows the adult British citizen is wholly dependent upon the third country national for their care and (b) evidence that no alternative care is available. Such cases are likely to be rare and will require consideration on an individual basis.
12. This high-level scope will be further developed before amendments to the Regulations are progressed to then enable documentation to be acquired by those falling within scope of the *Ruiz Zambrano* judgment. This will in turn lead to further and more detailed guidance being issued which will expand the agreed high-level scope.

Applying the Agreed High-Level Scope

C. Applications for documentation made before arrival in the UK

13. There is currently no provision to issue a person an EEA family permit under the Regulations as a result of the *Ruiz Zambrano* judgment. Unless a person qualifies under another capacity, either under the Regulations or under the Immigration Rules, then until the Regulations are changed they can not be issued with documentation enabling them to travel.

D. Applications for documentation made after-entry to the UK

14. Applications made after entry for documentation to confirm a right to reside in the UK on the basis of the *Ruiz Zambrano* judgment should be made to the European Caseworking team. Where an application is considered to potentially come within the agreed high-level scope of the judgment (as outlined in section B of this instruction), then these must be accepted into the business and held until changes to the Regulations have been made which will make provision for the Agency to issue formal documentation.
15. A certificate of application (COA) must be issued in such cases to enable the third country national to reside and work in the UK whilst a substantive consideration of their claimed right is pending.
16. Applications which do not potentially fall within the scope must be rejected at the Front End Sift.
17. Additional guidance will be issued to operational staff by European Casework managers on the process to be followed in these cases.

E. Removal and Enforcement

18. Appellants subject to administrative removal action who potentially meet the scope of *Ruiz Zambrano* should have any removal action suspended until a substantive decision can be made in their case following finalisation of UKBA guidance on the judgment. This is because a substantive decision can not be made until outstanding considerations have been progressed, including determining when it would be proportionate to remove a third country national falling within the agreed scope of the judgement.
19. However, appellants subject to deportation action should **not** have any deportation action suspended. The right to reside and work established under the *Ruiz Zambrano* judgment is not derived from the Free Movement Directive. This means that applicants who assert a right to reside in accordance with this judgment can not rely on the greater protection against removal provided for by the Directive when facing deportation action. This therefore means that even where a person potentially comes within the scope of *Ruiz Zambrano* in

accordance with section B above that they can still be deported where their presence in the UK is not in the public interest.

20. Cases where the third country national adult meets the criteria for deportation will be dealt with by the Criminal Casework Directorate. For further information on which cases meet the CCD criteria see the link: [When to refer a case to Criminal casework directorate \(CCD\)](#).

21. Any policy enquiries on this notice should be addressed to [REDACTED]

[REDACTED]

Assistant Director

Head of European Operational Policy

Annex B to FOI 26630 – EOPN 07/2012 – Ibrahim/Teixeira

From: European Operational Policy Team

Subject: Derivative rights of residence – Ibrahim/Teixeira cases

Date: 16 July 2012

Issue number: 07/2012

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 16th 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 REDACTED]

Enquiries

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

[REDACTED]

Head of European and Nationality Policy

16 July 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.

Annex C to FOI 26630 – EOPN 07/2012 – Ibrahim/Teixeira (revised)

From: European Operational Policy Team

Subject: Derivative rights of residence – Ibrahim/Teixeira cases revised

Date: 08/08/2012

Issue number: 07/2012

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 16th 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 REDACTED]

Enquiries

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

[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.

Annex D to FOI 26630 – EOPN 08/2012 – Chen

From: European Operational Policy Team

Subject: Derivative Rights of Residence – Chen Cases

Date: 16 July 2012

Issue number: 08/2012

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 primary carer of an EEA national child who is exercising free movement rights in the UK, and
 - (B) the dependant of such a primary carer.

Background

2. New regulation 15A of the Immigration (European Economic Area) Regulations 2006 (“the Regulations”) was commenced on 16th July 2012. This includes a new provision within the Regulations for Chen cases, making paragraph 257C of the Immigration Rules obsolete. Paragraph 257C will be repealed in due course but is immediately disapplied when applications are made on the basis of the Chen judgment.
3. By virtue of the terms of Directive 2004/38/EC (“the Directive”) a child will have an right of residence in a member state where that child:
 - (a) is an EEA national,
 - (b) holds sufficient resources to prevent them (and their primary carer) becoming a burden on the social assistance system of the host member state, and
 - (c) holds comprehensive sickness insurance.
4. The court also found that such a child is entitled to be accompanied by his or her primary carer, and therefore that the primary carer of such a child will have a right of residence in the host member state until the child’s eighteenth birthday where to refuse such a right would prevent the child from continuing to reside in the UK.
5. Dependants of primary carers who have a derivative right of residence on this basis also derive a right of residence in the UK where requiring those dependants to leave the UK would have the effect of preventing the primary carer from residing in the UK.

6. 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 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 public policy protection against removal 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.
7. Regulation 15A sets out the conditions which must be satisfied in order for a person to have a derivative right of residence.
8. A person who meets the criteria for a derivative right of residence can qualify for a right of admission to the UK under amended regulation 11(4) with reference to regulation 11(5), a right to a family permit under 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.
9. 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

(A) Primary Carer

10. A primary carer of an EEA national child will qualify for a derivative right of residence under regulation 15A(4) where they satisfy the conditions set out in that regulation. The conditions are that:
 - (a) the applicant is the primary carer of an EEA national ("the relevant EEA national"), and
 - (b) the relevant EEA national
 - (i) is under the age of 18;
 - (ii) is residing in the UK as a self-sufficient person; and
 - (iii) would be unable to remain in the UK if their primary carer were required to leave the UK.
11. New regulation 15A(7) confirms the definition of primary carer for the purpose of regulation 15A. The definition requires that 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.
12. 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).
13. 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.

(B) Assessing if the CHEN Criteria are Met

14. In order to assess whether a primary carer of an EEA national has a right of residence in the UK caseworkers should firstly consider whether the EEA national child is exercising Treaty rights in the UK as a self-sufficient person.
15. Caseworkers were previously asked only to assess if the EEA national child claiming to be self-sufficient was able to demonstrate that they satisfied the conditions for a self-sufficient person as set out in regulation 4(c) of the Regulations at the date of application for documentation. This was because the primary carer of such a child had no right to work in the UK when issued with documentation under Paragraph 257 of the Immigration Rules.
16. However, primary carers with a right to reside on the CHEN basis are, since 16th July 2012, able to work in the United Kingdom regardless of whether or not documentation has been issued to them by UKBA in that capacity. This means caseworkers may now encounter two distinct categories of application:
- 1. Applications in which the CHEN right has not already been relied on by the primary carer to work legally in the UK **or**
 - 2. Applications in which the CHEN right has already been relied on by the primary carer to work legally in the UK

17. In the first case type caseworkers should continue to assess applications as before by ensuring that on the date of application the EEA national child is exercising rights in the UK as a self-sufficient person. This includes the requirement to hold comprehensive sickness insurance and to have sufficient resources not to become a burden on the social assistance system of the UK during their period of residence. It should be noted that the resources relied upon by the EEA national child need not necessarily belong directly to that child in order to satisfy regulation 4(1)(c)(i), provided that those resources are available to prevent the child from becoming a burden on the social assistance system of the UK.
18. Furthermore, the EEA national child, by virtue of new regulation 4(5), must comply with the conditions of regulation 4(2) so requiring that they have adequate funding and comprehensive sickness insurance for their family members as well as themselves.
19. Income which is as a result of the primary carer's current right to work in the UK (where that right arises as a result of a previous grant of leave under the Immigration Rules) can be taken into account when assessing the self-sufficiency of the child and family members. However, income which can only be obtained as a result of a future right to work under the Regulations attached to a *Chen* right cannot be taken into account where the applicant does not already have sufficient resources to meet the *Chen* criteria.
20. In the second case type, where the right to work which the Regulations now reflect has been exercised or is being exercised by the primary carer on the date of application, the casework must ensure that the EEA national child was self-sufficient **before** the primary carer commenced in the employment in question. This will ensure that the funds derived from that employment are not used inappropriately for the child to meet the self-sufficiency requirement. As self sufficiency of the EEA national child is a precondition to the existence of a *Chen* right to reside and work that right to work can obviously not be relied upon to discharge the burden of self sufficiency.
21. In cases where self-sufficiency has been established and the primary carer has begun working in exercise of their *Chen* right these funds can, however, be relied upon to support assertions by the EEA national child that they will remain self-sufficient whilst in the UK; for example where an application is made for a renewal of a derivative residence card.
22. In all case types, in order to establish a derivative right to reside the primary carer must also show that the child upon whom they are claiming a derivative right would be unable to continue to reside in the UK should the primary carer be forced to leave. 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 reside in the UK. Each case must be considered on its individual merits with reference to a Senior caseworker

(B) Dependants of Primary Carers

23. A person who is the dependant of a primary carer with a right of residence under regulation 15A(2) will be entitled to a derivative right of residence under regulation 15A(5) where they satisfy the conditions of that regulation. These conditions are that:

- (i) the person is the child of a primary carer who has a right of residence under regulation 15A(2), and
- (ii) the child does not have leave to enter, or remain in, the UK and is not entitled to reside in the UK as a result of any other provision of the Regulations, and
- (iii) requiring them to leave the UK would have the effect of preventing their primary carer from residing in the UK.

24. Caseworkers should note that where paragraph 257C of the Immigration Rules allowed siblings of self-sufficient EEA national children to qualify for leave to remain on the basis of *Chen*, the provision within the Regulations is narrower and requires that such children are dependant on the primary carer of the EEA national child in order to come within scope of the provisions of regulation 15A.

Issue or Refusal of a Derivative Residence Card

25. 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 an 'DRF1' application form and will be considered free of charge. 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'.

26. Derivative residence cards should generally be issued for a duration of five years. In certain circumstances, caseworkers may issue for a period of shorter 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 reach the age of majority in 3 years time, then it would be reasonable to issue a document for only three years.

27. 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).

28. 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

29. 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.
30. 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 of Appeal

31. 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:
- 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
32. For further guidance on appeal rights please refer to European Operational Policy notice 11/2012.

Permanent Residence

33. 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 25 above).

Denial of Derivative Rights of Residence

34. Regulation 21A confirms that persons who have a derivative right of residence under regulation 15A(2) 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 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 REDACTED]

Enquiries

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

[REDACTED]

Head of European and Nationality Policy, Operational Policy Rules Unit

16 July 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
 - (iii) an EEA family permit, or
 - (iv) 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 and 08/2012 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 /2012 for further guidance on appeal rights against a refusal to issue a document confirming a derivative right of admission.

Annex E to FOI 26630 – EOPN 08/2012 – Chen (revised)

From: European Operational Policy Team
Subject: Derivative Rights of Residence – Chen Cases
Date: 08 August 2012
Issue number: 08/2012

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 primary carer of an EEA national child who is exercising free movement rights in the UK, and
 - (B) the dependant of such a primary carer.

Background

2. New regulation 15A of the Immigration (European Economic Area) Regulations 2006 (“the Regulations”) was commenced on 16th July 2012. This includes a new provision within the Regulations for Chen cases, making paragraph 257C of the Immigration Rules obsolete. Paragraph 257C will be repealed in due course but is immediately disapplied when applications are made on the basis of the Chen judgment.
3. By virtue of the terms of Directive 2004/38/EC (“the Directive”) a child will have an right of residence in a member state where that child:
 - (a) is an EEA national,
 - (b) holds sufficient resources to prevent them (and their primary carer) becoming a burden on the social assistance system of the host member state, and
 - (c) holds comprehensive sickness insurance.
4. The court also found that such a child is entitled to be accompanied by his or her primary carer, and therefore that the primary carer of such a child will have a right of residence in the host member state until the child’s eighteenth birthday where to refuse such a right would prevent the child from continuing to reside in the UK.
5. Dependants of primary carers who have a derivative right of residence on this basis also derive a right of residence in the UK where requiring those

dependants to leave the UK would have the effect of preventing the primary carer from residing in the UK.

6. 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 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 public policy protection against removal 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.
7. Regulation 15A sets out the conditions which must be satisfied in order for a person to have a derivative right of residence.
8. A person who meets the criteria for a derivative right of residence can qualify for a right of admission to the UK under amended regulation 11(4) with reference to regulation 11(5), a right to a family permit under 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.
9. 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

(A) Primary Carer

10. A primary carer of an EEA national child will qualify for a derivative right of residence under regulation 15A(4) where they satisfy the conditions set out in that regulation. The conditions are that:
 - (a) the applicant is the primary carer of an EEA national ("the relevant EEA national"), and
 - (b) the relevant EEA national
 - (i) is under the age of 18;
 - (ii) is residing in the UK as a self-sufficient person; and
 - (iii) would be unable to remain in the UK if their primary carer were required to leave the UK.
11. New regulation 15A(7) confirms the definition of primary carer for the purpose of regulation 15A. The definition requires that 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.
12. 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).
13. 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.

(B) Assessing if the CHEN Criteria are Met

14. In order to assess whether a primary carer of an EEA national has a right of residence in the UK caseworkers should firstly consider whether the EEA national child is exercising Treaty rights in the UK as a self-sufficient person.
15. Caseworkers were previously asked only to assess if the EEA national child claiming to be self-sufficient was able to demonstrate that they satisfied the conditions for a self-sufficient person as set out in regulation 4(c) of the Regulations at the date of application for documentation. This was because the primary carer of such a child had no right to work in the UK when issued with documentation under Paragraph 257 of the Immigration Rules.
16. However, primary carers with a right to reside on the CHEN basis are, since 16th July 2012, able to work in the United Kingdom regardless of whether or not documentation has been issued to them by UKBA in that capacity. This means caseworkers may now encounter two distinct categories of application:
- 1. Applications in which the CHEN right has not already been relied on by the primary carer to work legally in the UK or
 - 2. Applications in which the CHEN right has already been relied on by the primary carer to work legally in the UK

17. In the first case type caseworkers should continue to assess applications as before by ensuring that on the date of application the EEA national child is exercising rights in the UK as a self-sufficient person. This includes the requirement to hold comprehensive sickness insurance and to have sufficient resources not to become a burden on the social assistance system of the UK during their period of residence. It should be noted that the resources relied upon by the EEA national child need not necessarily belong directly to that child in order to satisfy regulation 4(1)(c)(i), provided that those resources are available to prevent the child from becoming a burden on the social assistance system of the UK.
18. Furthermore, the EEA national child, by virtue of new regulation 4(5), must comply with the conditions of regulation 4(2) so requiring that they have adequate funding and comprehensive sickness insurance for their family members as well as themselves.
19. Income which is as a result of the primary carer's current right to work in the UK (where that right arises as a result of a previous grant of leave under the Immigration Rules) can be taken into account when assessing the self-sufficiency of the child and family members. However, income which can only be obtained as a result of a future right to work under the Regulations attached to a *Chen* right cannot be taken into account where the applicant does not already have sufficient resources to meet the *Chen* criteria.
20. In the second case type, where the right to work which the Regulations now reflect has been exercised or is being exercised by the primary carer on the date of application, the casework must ensure that the EEA national child was self-sufficient **before** the primary carer commenced in the employment in question. This will ensure that the funds derived from that employment are not used inappropriately for the child to meet the self-sufficiency requirement. As self sufficiency of the EEA national child is a precondition to the existence of a *Chen* right to reside and work that right to work can obviously not be relied upon to discharge the burden of self sufficiency.
21. In cases where self-sufficiency has been established and the primary carer has begun working in exercise of their *Chen* right these funds can, however, be relied upon to support assertions by the EEA national child that they will remain self-sufficient whilst in the UK; for example where an application is made for a renewal of a derivative residence card.
22. In all case types, in order to establish a derivative right to reside the primary carer must also show that the child upon whom they are claiming a derivative right would be unable to continue to reside in the UK should the primary carer be forced to leave. 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 reside in the UK. Each case must be considered on its individual merits with reference to a Senior caseworker

(B) Dependants of Primary Carers

23. A person who is the dependant of a primary carer with a right of residence under regulation 15A(2) will be entitled to a derivative right of residence under regulation 15A(5) where they satisfy the conditions of that regulation. These conditions are that:

- (i) the person is the child of a primary carer who has a right of residence under regulation 15A(2), and
- (ii) the child does not have leave to enter, or remain in, the UK and is not entitled to reside in the UK as a result of any other provision of the Regulations, and
- (iii) requiring them to leave the UK would have the effect of preventing their primary carer from residing in the UK.

24. Caseworkers should note that where paragraph 257C of the Immigration Rules allowed siblings of self-sufficient EEA national children to qualify for leave to remain on the basis of *Chen*, the provision within the Regulations is narrower and requires that such children are dependant on the primary carer of the EEA national child in order to come within scope of the provisions of regulation 15A.

Issue or Refusal of a Derivative Residence Card

25. 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 an 'DRF1' application form and will be considered free of charge. 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'.

26. Derivative residence cards should generally be issued for a duration of five years. In certain circumstances, caseworkers may issue for a period of shorter 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 reach the age of majority in 3 years time, then it would be reasonable to issue a document for only three years.

27. 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).

28. 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 Derivate Residence Rights

Right to work

29. 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.

30. 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 of Appeal

31. 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:

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

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

Permanent Residence

33. 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 25 above).

Denial of Derivative Rights of Residence

34. Regulation 21A confirms that persons who have a derivative right of residence under regulation 15A(2) 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 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 REDACTED]

Enquiries

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

[REDACTED]

Head of European and Nationality Policy, Operational Policy Rules Unit

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 and 08/2012 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 /2012 for further guidance on appeal rights against a refusal to issue a document confirming a derivative right of admission.

Annex F to FOI 26630 – EOPN 21/2012 – Zambrano

From: European Operational Policy Team

Subject: Derivative Rights of Residence – *Ruiz Zambrano* cases

Date: 12th 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 8th 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 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. 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 Derivate 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:
- 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 REDACTED]

Enquiries

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

[REDACTED]

Head of European Operational Policy

December 2012

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.