



Home Office

Shared Services
Directorate
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)

www.homeoffice.gov.uk

Mr Wayne Pearsall
[request-147779-
d9b300cc@whatdotheyknow.com](mailto:request-147779-d9b300cc@whatdotheyknow.com)

7 February 2014

Dear Mr Pearsall

Freedom of Information request (our ref. 29818): internal review

I am writing further to our correspondence of 21 December 2013, about your request for an internal review of our response to your Freedom of Information (Fol) request for a list of all funds accessible to a partner of a British citizen who has "no recourse to public funds".

I have now completed the review. I have examined all the relevant papers, including the information that was withheld from you, and have consulted the policy unit which provided the original response. I have considered whether the correct procedures were followed and assessed the reasons why information was withheld from you. I confirm that I was not involved in the initial handling of your request.

My findings are set out in the attached report. My conclusion is that the original response was correct. Although the information requested is not held on a singular list, it is held by the Department and is available via the links provided to you in the original response. Section 21 was correctly cited.

Yours Sincerely

M Riddle
Information Access Team

Internal review of response to request under the Freedom of Information (Fol) Act 2000 by Wayne Pearsall (reference 29818)

Responding Unit: Information Management Services (IMS)

Chronology

Original Fol request submitted by Mr Pearsall: 30 January 2013

- The original request was submitted to the 'IND public enquiries' mailbox. This is a 'no reply' mailbox which provides automated information on the visa applications process, but does not receive incoming correspondence. The Department therefore did not receive this request.
- Between 31 January 2013 and 16 April 2013 Mr Pearsall sent three additional pieces of correspondence about his request to this 'no reply' mailbox.
- On 16 April 2013, after receiving correspondence from the ICO, Mr Pearsall sent the request to the correct mailing address for FOI requests to the former UK Border Agency. At that stage the former UKBA was not aware of the full story behind the request or the ICO's involvement.
- Between 1 May 2013 and 1 November 2013, Mr Pearsall chased his request 8 times, but as the Department had never received the original request, no action was taken.
- On 11 November 2013, following an ICO decision notice requiring the Home Office to respond to the request, the Department took the original request from the whatdotheyknow.com website (we did not hold a copy of the original request, having never received it) and dealt with it in the normal way.

ICO decision notice: 11 November 2013

IMS response: 5 December 2013

Request for internal review: 23 December 2013

Subject of request

1. The request was for the following information:

Can you please provide a list of all funds which are accessible to a partner of a British citizen when they have 'no recourse to public funds'. UKBA must hold information in some form about what a British citizen's family member is entitled to receive and would not be considered public funds. Even if normally funds would be considered public funds. Please supply all documents, instructions and guidance provided to DWP/UKBA staff in relation to this. When a British citizen claims contribution based Job Seekers Allowance what affect does their partners No Recourse to public funds have on the benefit claim? Considering that CB JSA is not listed as a public fund.

What information and guidance has been given to DWP staff to ensure that they are aware about the status of Contribution based benefits and the true meaning of the stamp 'No Recourse to Public funds'.

*Have UKBA made DWP/UKBA staff aware of the true definition of public funds?
Please provide a copy of all documentation relating to the above which surely the
UKBA must hold a copy of."*

2. A copy of the full request can be found in Annex A.

The response by IMS

3. Mr Pearsall was informed that the Home Office held information relevant to his request but that it was exempt from disclosure under section 21 of the FOI Act. Section 21 relates to information already reasonably accessible to applicant by other means. The response provided Mr Pearsall with internet links directing him to where he could locate the information he was interested in.

Request for an internal review

4. Mr Pearsall requested an internal review because he believes he was not provided with all the information relevant to his request.
5. Mr Pearsall refers to the wording used in a speech by the Immigration Minister on 9 September 2013, a Department for Work and Pensions (DWP) memo and an email he received in another case (all detailed in Annex C) as grounds that the Home Office must have a very clear guidance outlining the benefits that a family member of a British Citizen is entitled to claim and a list of benefits which a family member of a British Citizen is entitled to claim.

Procedural issues

6. These are covered in the bullet points under 'Chronology'.

Consideration of the response

7. Mr Pearsall's internal review request suggests some confusion about the Department's original response. I have split this internal review into two parts: this section examines the FOI aspects of the internal review request, while the following advice and assistance section aims to clarify some of the points which Mr Pearsall has raised.
8. The response informed Mr Pearsall that the Department held the information requested, in the form of the published modernised casework guidance on public funds, but that it was exempt from disclosure under section 21 of the Act. It is therefore unclear why Mr Pearsall felt the need to ask for evidence that the Home Office held the requested information.
9. The information Mr Pearsall requested is held by the Department, but not in the format he requested. Mr Pearsall requested a single "list", which does not exist. The information he requested on public funds is contained in the guidance held by the Department and published at the links specified in the original response.
10. Section 21 relates to information accessible to the applicant by other means. In this case the information requested was already publicly available on the internet. Mr Pearsall was provided with internet links to various sources of information to answer his request. Section 21 is an absolute exemption; no public interest test is required.
11. I have examined the information within scope of this request and can confirm that the exemption was correctly engaged in this case. The information publicly available answers

Mr Pearsall's request. The Department is therefore under no obligation to provide copies of the information already available.

Advice and assistance

12. Mr Pearsall, in his internal review request, appears to conflate the position of a UK national with a non-EEA spouse with that of an EEA national with a non-EEA spouse exercising their Treaty rights in the UK. A UK national does not have to be exercising a Treaty right in order to have a right to reside in the UK. To clarify the distinction, I have included information about the circumstances in which a British citizen would be considered to be an EEA national under EU law in the attached Annex E.
13. The public funds which a non-EEA national can claim depends on whether they are exercising a treaty right, their immigration status and conditions of leave.
14. Mr Pearsall is not correct to state that the imposition of the condition "No recourse to public funds" means nothing or has no effect. If a person subject to immigration control is granted leave to enter or remain with a condition stating "No recourse to public funds" and they then claim public funds, that person will be in breach of their conditions of leave, unless they were entitled to claim the public fund due to an exception. A person who breaches their conditions of leave may have any future immigration application refused under the general grounds for refusal in the Immigration Rules and/or have their existing leave curtailed.

Conclusion

15. The Department was not in breach of section 10(1) of the Act in relation to the timeliness of the response.
16. There was also no procedural breach of section 17(7)(a) and 17(7)(b).
17. The Department correctly engaged section 21 in relation to the information requested. Suitable internet links were provided to direct Mr Pearsall to the locations where the information was publicly available.

Information Access Team
Home Office
7/2/2014

Annex A – Original FOI request

Dear UK Border Agency,

Your Website state: A person subject to immigration control can claim certain public funds when they have a right to reside in the UK if they live with a family member who is:

a British citizen, or a national of a country in the European Economic Area (EEA).

UKBA must hold information in some form about what a British citizen's/EEA Nationals family member is entitled to receive and would not be considered public funds. Even if normally the funds would be considered public fund. Please supply all documents, instructions, and guidance provided to DWP/UKBA staff in relation to this.

Can you please provide a list of all funds which are accessible to a partner of a British citizen when they have 'no recourse to public funds'. UKBA must hold information in some form about what a British citizen's family member is entitled to receive and would not be considered public funds. Even if normally funds would be considered public funds. Please supply all documents, instructions and guidance provided to DWP/UKBA staff in relation to this. When a British citizen claims contribution based Job Seekers Allowance what affect does their partners No Recourse to public funds have on the benefit claim? Considering that CB JSA is not listed as a public fund.

What information and guidance has been given to DWP staff to ensure that they are aware about the status of Contribution based benefits and the true meaning of the stamp 'No Recourse to Public funds'.

Have UKBA made DWP/UKBA staff aware of the true definition of public funds? Please provide a copy of all documentation relating to the above which surely the UKBA must hold a copy of

Yours faithfully,

Annex B – Response

Dear Mr Pearsall,

I am writing further to the Information Commissioner's Decision Notice of 31 October, which found that the Home Office had failed to furnish a response to your request for information under the Freedom of Information Act (2000). Your request has now been passed to me to answer. I apologise for the failure to answer your original request in time and to your satisfaction.

You requested the following information:

Can you please provide a list of all funds which are accessible to a partner of a British citizen when they have 'no recourse to public funds'. UKBA must hold information in some form about what a British citizen's family member is entitled to receive and would not be considered public funds. Even if normally funds would be considered public funds. Please supply all documents, instructions and guidance provided to DWP/UKBA staff in relation to this. When a British citizen claims contribution based Job Seekers Allowance what affect does their partners No Recourse to public funds have on the benefit claim? Considering that CB JSA is not listed as a public fund.

What information and guidance has been given to DWP staff to ensure that they are aware about the status of Contribution based benefits and the true meaning of the stamp 'No Recourse to Public funds'.

Have UKBA made DWP/UKBA staff aware of the true definition of public funds? Please provide a copy of all documentation relating to the above which surely the UKBA must hold a copy of."

I can confirm that the Home Office holds information in relation to your request. Section 21 of the Freedom of Information Act 2000 provides an exemption from disclosure where the information requested is otherwise reasonably accessible. As the information is already in the public domain, the Home Office is exempt from providing it. The information that you require is available at the following locations.

Information on what constitutes public funds is available on the Home Office website:

<http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/rightsandresponsibilities/publicfunds/>

The public funds modernised guidance, which is the Home Office casework guidance on which UK public funds a foreign national may claim, is available here:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/cross-cut/public-funds/funds.pdf?view=Binary>

In relation to those who are in the UK as the partner of a settled person, guidance is available on what benefits the settled person may be entitled to claim and still satisfy the financial requirements to obtain permission for their non settled partner to travel to or remain in the UK. This guidance is available here:

<http://www.ukba.homeoffice.gov.uk/visas-immigration/partners-families/citizens-settled/spouse-cp/can-you-apply/financial/>

Further information is contained in this document at paragraph 3.6:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/section-FM-1.7.pdf?view=Binary>

The Immigration Rules list the benefits that are considered to be public funds for immigration purposes at Rule 6:

<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/introduction/>

You have asked about guidance available to DWP staff in relation to the definition of public funds in immigration legislation. The Home Office does not play a part in the administration of benefits and does not provide guidance to staff in the Department for Work and Pensions (DWP). It is the responsibility of the DWP to provide their staff with such guidance. This guidance is contained in a number of guidance documents at the DWP. You may access the guidance that DWP provides to their decision makers on their website, starting first with Chapter C1:

<https://www.gov.uk/government/publications/advice-for-decision-making-staff-guide>

You also asked whether a settled partner of a migrant may claim contribution based Job Seekers Allowance. This is a matter for the DWP to consider and answer. As mentioned above, the Home Office does not administer the provision of benefits.

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 29818. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

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.

Yours sincerely

Annex A – (to response)

If you remain dissatisfied after an internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

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

Annex C – Internal review request

Dear UK Border Agency,

29818

First of all, thanks for providing the response, after the serious delay from the date of the original request. I am however, requesting that you please pass this on to the person who is to conduct a Freedom of Information review.

I am writing to request an internal review of UK Border Agency's (Home Office's) handling of my FOI request 'Public Funds for a partner of a british citizen'.

Since the original date of my request, a number of changes have occurred. Firstly, the Immigration Minister Mark Harper was in the middle of a speech in the Adjournment Spousal Visas Debate, on the 9th September 2013.

This can obviously be viewed on the Parliament website
<http://www.parliamentlive.tv/Main/Player.aspx?meetingId=13721>

Or you can read the Hansard here:
<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130909/debtext/130909-0004.htm#1309102000002>

From column 807 I highlight "My hon. Friend is right that in the period when the migrant spouse is in the UK before they get indefinite leave to remain, they are not entitled to benefits, but they will be once they are settled and their spouse may be entitled to income-related benefits because of their being here—housing benefit, for example."

and from column 808 I highlight the following: "My hon. Friend said that his constituent had no intention of claiming benefits, but of course there is no way for us legally to enforce their not claiming benefits once they are in the United Kingdom."

So reading this in light of Case C29/09-10(DLA) from the N.I. courts, in which the DWP's own memo DMG VOL 2/36 reads as below, it appears clear that the Home Office must have a very clear guidance outlining the benefits that a family member of a British Citizen is entitled to claim.

You have supplied me with a link to the 'funds.pdf' file, which outlines the text also on your website, that family members of a British Citizen can claim certain public funds without it affecting their status.

Read in light of '

5. The Commissioner decided that the overarching purpose of the 2000 Consequential Amendment Regulations was to make further provision for the reception conditions of asylum seekers in the UK. Paragraph 1 of Part II of the 2000 Consequential Amendment Regulations was adopted so as to ensure that individuals, because of their EEA status, would not be affected by these measures and would be exempt from the exclusions contained in the Immigration and Asylum Act 1999. The Oporto and Brussels Agreements were mentioned in paragraph 1 of Part II of the 2000 Consequential Amendment Regulations so as to define the category of persons included i.e. EEA citizens and their family members.'

from the DMG memo, it appears pretty clear that the regulations have no effect on the spouse of a British Citizen.

I have also gained possession of an email message from your staff at the home office to the DWP about the "No Recourse to Public Funds" stamp, actually meaning pretty much NOTHING:

http://pearsall.eu/2013/04/ukba-do-not-decide-who-has-recourse-to-public-funds/email_from_homeoffice_re_public_funds/

So, following on from Mark Harper's speech in the Commons on the 9/9/13, the case referred to, and the email linked, I am certain that the Home Office does indeed hold a list of benefits which a family member of a British Citizen is entitled to claim.

As such, I would expect a release of this list. Mark Harper may be the best person to approach on this matter.

A full history of my FOI request and all correspondence is available on the Internet at this address: https://www.whatdotheyknow.com/request/public_funds_for_a_partner_of_a

Yours faithfully,

Wayne Pearsall

DMG Memo Vol 2/36

EEA FAMILY MEMBERS - PERSON SUBJECT TO IMMIGRATION CONTROL - SOCIAL SECURITY COMMISSIONER'S DECISION IN C29/09-10 (DLA)

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INTRODUCTION

1. This Memo is to advise of the implications of a Commissioner's decision dated 12.03.12¹ and gives guidance on its effect for Decision Makers.

1 C29/09-10 (DLA) JFP v Department of Social Development

BACKGROUND

2. The appellant, a national of the United States of America, was permitted to enter the United Kingdom due to her marriage to a British citizen. She was granted a clearance visa subject to the condition “no recourse to public funds”.

3. The appellant made a claim for Disability Living Allowance which was disallowed as she was considered to be a ‘person subject to immigration control’ and was excluded from being awarded Disability Living Allowance in accordance with section 115 of the Immigration and Asylum Act 1999.

THE COMMISSIONER'S DECISION

4. Paragraph 1 of Part II of the Social Security (Immigration and Asylum) Consequential Amendments Regulations (NI) 2000 (the 2000 Consequential Amendments Regulations) provides for exceptions to the exclusions contained in section 115 of the Immigration and Asylum Act 1999. This includes being a member of a family of a national of a State contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 (the Oporto Agreement) and the Protocol Adjusting the Agreement on the European Economic Area signed at Brussels on the 17 March 1993 (the Brussels Agreement), i.e. being an EEA family member.

5. The Commissioner decided that the overarching purpose of the 2000 Consequential Amendment Regulations was to make further provision for the reception conditions of asylum seekers in the UK. Paragraph 1 of Part II of the 2000 Consequential Amendment Regulations was adopted so as to ensure that individuals, because of their EEA status, would not be affected by these measures and would be exempt from the exclusions contained in the Immigration and Asylum Act 1999. The Oporto and Brussels Agreements were mentioned in paragraph 1 of Part II of the 2000 Consequential Amendment Regulations so as to define the category of persons included i.e. EEA citizens and their family members.

6. In summary, The Commissioner found that the appellant's husband was an EEA national by virtue of his UK citizenship. The appellant was in turn the family member of an EEA national and could benefit from the exemptions contained in the 2000 Consequential Amendment Regulations. This meant that as an EEA family member she was not subject to section 115 of the Immigration and Asylum Act 1999 and could not therefore be considered a ‘person subject to immigration control’.

BENEFITS AFFECTED

7. This decision applies to Attendance Allowance, Severe Disablement Allowance, Invalid Care Allowance, Disability Living Allowance and a Social Fund payment¹.

1 SS (I & A) Consequential Amdts Regs (NI) 2000, 2(2) & Para 1 of Pt 2 of the Schedule

RELEVANT DETERMINATION

8. This is a relevant decision for the purposes of the Order¹ from 12.03.12.

1 SS (NI) Order 98, art 27

9. Any decision made after 12.03.12 refusing Attendance Allowance, Severe Disablement Allowance, Invalid Care Allowance, Disability Living Allowance or a Social Fund payment on the basis that a non-EEA claimant was considered to be a ‘person

subject to immigration control' whilst they were the family member of a UK national may now need to be reconsidered on the grounds that it is wrong in law.

ANNOTATIONS

The number of this Memo, DMG Memo Vol 2/36 should be noted against the following DMG paragraphs:-

070833, 070834, 070836, 070905, 071187, 071195 & 072980.

CONTACTS

If you have any queries about this memo please contact:

Decision Making Services
Section 5
Level 1
James House
Gasworks Business Park
Belfast

Extensions: 37195, 37196 and 37200.

DECISION MAKING SERVICES Distribution: All Holders of DMG Volume 2
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Annex D – Complaint Procedure

This completes the internal review process by the Home Office. If you remain dissatisfied with the response to your Fol request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Annex E – How a British citizen would be considered an EEA national under EU law

Established position

Following the CJEU decision of *McCarthy v. SSHD (C-434/09)*, it is an established principle of EU law that an EEA national cannot exercise free movement rights in the member state of which he is a national and, similarly, non-EEA family members of that EEA national cannot benefit either. For example, a British citizen cannot exercise free movement rights in the UK; he must move to another EEA member state to benefit from these provisions.

There are only two exceptions to this recognised under EU law and the first is if the EEA national (hereafter referred to as the “British citizen” for ease of explanation) has exercised free movement rights in another EEA member state and has then subsequently returned home. This is commonly referred to as the *Surinder Singh* route and is incorporated into UK law at regulation 9 of the Immigration (European Economic Area) Regulations 2006 [as amended] (“the Regulations”).

Surinder Singh

In order to qualify under these provisions, the British citizen would need to show the following:

- They were residing in another EEA Member State as a worker or self-employed person with their spouse or civil partner before returning to the UK.
- They had transferred the centre of their life to that EEA Member State. The factors to be considered when deciding whether a British citizen has transferred the centre of their life to another member state include, but are not limited to:
 - a. the period of residence in another EEA member state as a worker or self-employed person;
 - b. the location of the British citizen’s principal residence; and
 - c. the degree of integration of the British citizen in the host member state.

If the above criteria are satisfied, the non-EEA national family member of the British citizen would have a right to reside under EU law and would not be subject to immigration control.

Zambrano

The other exception is a right of residence granted under the *Zambrano* judgment (C-34/0). However, it should be stressed that rights granted under this judgment are not free movement rights established by Directive 2004/38/EC, but rather rights derived from Article 20 of the Treaty for the Functioning of the European Union (“TFEU”) and are referred to as “derivative rights of residence”.

Derivative rights of residence under *Zambrano* are granted to non-EEA nationals who satisfy the following criteria:

- The non-EEA national is caring for a British citizen (usually a child, but can be a dependent adult in exceptional circumstances);
- The non-EEA national is the direct relative or legal guardian of the British citizen;
- The non-EEA national has primary responsibility for the British citizen;
- The British citizen would be forced to leave the territory of the EEA if the non-EEA national was removed from the UK
- There is no other ‘exempt’ person able to care for the British citizen – exempt in this case meaning another British citizen or a person not subject to immigration control

If all of the above criteria are satisfied, a derivative residence card will be issued to the non-EEA national for either five years or until the British citizen's 18th birthday. Whether a person has a derivative right of residence or not is a matter of fact. This means that a person is not required to hold a document confirming this right in order to have that right. Possession of a derivative residence card evidences the fact that the holder has a derivative right at the time at which the card was issued, but only confers a right to work and reside for as long as the holder continues to enjoy the underlying right to reside. Access to benefits is not the Home Office's area of responsibility. Details as to whether a person is entitled to benefits may be available publicly, or alternatively you can contact the DWP/HMRC/DCLG.