

Colin Yeo
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(FOI)Home Office Ref: 23592

Date: 15 August 2012

Dear Mr. Yeo,

Thank you for your e-mail of 25 July which you ask for information regarding the UK Border Agency policy on contacting other government departments in order to establish whether the estranged EEA family member of an applicant continues to be a qualified person for the purposes of acquiring permanent residence. Your request is being handled as a request for information under the Freedom of Information Act 2000.

You have referred in your email to the retention of a right of residence by a person who is estranged from their EEA national spouse but who continues to be legally married to that EEA national. I should firstly point out that there is a distinction in Directive 2004/38/EC ("the Directive") between a person who is separated from, but still legally married to, their EEA national spouse, and a person who seeks to retain a right of residence following the termination of their marriage to an EEA national. The Directive is transposed into UK law by the Immigration (European Economic Area) Regulations 2006 ("the Regulations")

A person who is the spouse or civil partner of an EEA national, and who separates from that EEA national but remains married to, or in a civil partnership with them, cannot retain a right of residence under regulation 10 of the Regulations. They will, however, have a continued right of residence under regulation 14 where the EEA national spouse or civil partner continues to be a qualified person in the UK. This position was confirmed in the judgment of the Court of Justice of the European Union (ECJ) in the case of *Aissatou Diatta v. Land Berlin* (C267/83).

Where a such a person wishes to apply for a permanent residence card in the UK, they would need to provide evidence to demonstrate that they had resided in accordance with the Regulations for a continuous period of 5 years. This would include evidence to demonstrate that the EEA national spouse or civil partner had been a qualified person throughout the relevant 5 year period.

You have asked about whether checks could be made with other government departments to establish that the EEA national spouse is still a qualified person

where there has been a separation but not a divorce. I can confirm that such checks do take place but only in exceptional circumstances. This is set out in the policy notice which has been attached at Annex A of this response. Please note that this document has had some of the information held within it 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.

With regards to your question on whether the UK Border Agency ever conducts such checks without a request from the applicant, in certain circumstances, the UK Border Agency will request information from other government departments to establish whether an EEA national spouse or civil partner was a qualified person at the relevant time. Where a person is applying for a document confirming permanent residence on the basis that they have resided in the UK as the family member of a qualified person for a continuous period of 5 years, the UK Border Agency would look to obtain this information by checking with other relevant government departments where the applicant had provided evidence that they were the victim of domestic violence and cannot provide evidence relating to their EEA national sponsor's nationality or treaty rights. The UK Border Agency acknowledges that in such circumstances, requiring the applicant to attempt to obtain evidence of the exercise of Treaty rights by the EEA national could potentially put the applicant at risk.

It is open to an applicant to make a request for the UK Border Agency to make enquiries with other government departments in order to assist them in establishing their right of residence or permanent residence. However, the UK Border Agency will only consider such requests where they meet the criteria set out in the policy notice.

You have enquired as to how the UK Border Agency would respond to directions from the First-Tier or Upper Tribunal to conduct such checks. If UK Border Agency is directed by an Immigration Judge to contact another government department to obtain evidence on the exercise of Treaty rights, the Agency will comply with this in all cases. In such circumstances, however, UKBA would hope and expect that the Tribunal would not make directions where the applicant has not even attempted to obtain this information themselves.

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

If you are dissatisfied with 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 23592. 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 – European Operational Policy Notice 10/2011 “Pragmatic Approach (revised)”

From: European Operational Policy Team

Subject: Pragmatic approach in cases where an applicant is unable to provide required evidence - revised

Date: 4 August 2011

Issue number: 10/2011 (Revised)

Purpose of Notice

1. This notice seeks to clarify the process that caseworkers must follow when a family member of an EEA national applies for documentation under the Immigration (EEA) Regulations 2006 (the Regulations) but is unable to demonstrate that they meet all of the requirements due to the exceptional circumstances of the application.

Applications on the basis of having a retained right of residence

2. Applications received on the basis that the applicant has a retained right to reside in accordance with regulation 10 of the Regulations, should be treated pragmatically where there has been a breakdown in the relationship between the applicant and their EEA national sponsor. This is because it may not be possible for the applicant to provide the required documents to support their application. Examples of this may include:
 - Where the applicant provides proof that they were the victim of domestic violence (see paragraph 8) and cannot provide evidence relating to their EEA national sponsor's nationality or treaty rights. To require them to do so in such circumstances could, otherwise put the applicant at risk.
 - Where the applicant's relationship has ended acrimoniously but they have provided evidence to show that they have made every effort to provide the required documents. For example, attempts to make contact with the EEA national sponsor during divorce proceedings.
3. Caseworkers must look at each case according to its individual merits and where they are satisfied that there is a valid reason why the applicant is unable to get the required evidence, enquiries must be made on behalf of the applicant where possible. Caseworkers must get the agreement of their senior caseworker before making any such enquiries.

Applications on the basis of being the family member of an EEA national

4. Applications received on the basis that the applicant is a family member of an EEA national but where there has been a breakdown in the relationship between the applicant and their EEA national sponsor should only be treated pragmatically in certain circumstances. This is because it may not be possible for the applicant to provide the required documents to support their application.
5. The pragmatic approach **will only** apply in the following circumstances:
 - Where the applicant provides proof that they were the victim of domestic violence (see paragraph 8) and cannot provide evidence relating to their EEA national

sponsor's nationality or treaty rights. To require them to do so in such circumstances could, otherwise put the applicant at risk.

6. The pragmatic approach will **NOT** apply where there has been a breakdown in the relationship but there is no element of domestic violence involved.
7. Caseworkers must look at each case according to its individual merits and where they are satisfied that the applicant has proved they were a victim of domestic violence, enquiries must be made on behalf of the applicant where possible. Caseworkers must get the agreement of their senior caseworker before making any such enquiries.

Evidence of domestic violence

8. In order to establish a claim of domestic violence the following types of evidence are acceptable:
 - an injunction, non-molestation order or other protection order made against the EEA national sponsor (other than an ex-parte or interim order), or
 - a relevant court conviction against the EEA national, or
 - full details of a relevant police caution issued against the EEA national.

Further evidence may also be acceptable and this should be considered on a case by case basis and in accordance with the current guidance on domestic violence.

Applications for registration certificates or residence cards or permanent residence

9. Where it is agreed that a caseworker can make additional enquiries, the applicant will be expected to provide as much detail as they can about the EEA national sponsor.
 - If they cannot provide proof of the EEA national sponsor's identity, nationality or proof of relationship, then the caseworker must check existing records on G-CID to see if their identity has been established in any previous applications.
 - If they can give the name of the EEA national sponsor's employer or their place of study or existing records on G-CID hold such details, then caseworkers may contact the employer or educational establishment to enquire if the EEA national sponsor is working or studying there. The decision to contact the employer or educational establishment should be made according to the facts of the individual case and in conjunction with a SCW. No reference to Domestic Violence should be made to the employer or educational establishment where this is the reason for the enquiry.
 - If the decision is made not to obtain information directly from the EEA national's employer or educational establishment, (for example because of the exceptional circumstances of the case or because the EEA national is self-employed) then caseworkers must make enquiries with Her Majesty's Revenue and Customs (HMRC) to try and gather the necessary information.
10. It is important to note there is a limit to the number of enquiries that can be made with HMRC each month. Therefore making such enquiries must only be done when the caseworker is sure that the applicant cannot get the required evidence.
11. If the quota of checks has already been reached for the month the caseworker must check the target date for the case to assess if the decision can be postponed until the following month. If the target date will expire before the next month begins, the caseworker must speak to their senior caseworker to discuss what action to take.
12. Checks can be made with HMRC to gather the following information:
 - If the EEA national was working at the date the relationship was terminated.

- If the EEA national was self-employed at the date the relationship was terminated.
 - Past details of employment/self employment for permanent residence applications.
13. You must refer the details of the applicant to your senior caseworker who will then contact HMRC to make these checks.
14. It will not be possible to make enquiries on behalf of the applicant if the EEA national sponsor:
- is exercising treaty rights as a self-sufficient person, or
 - is studying but the applicant cannot state where, or
 - is required to have comprehensive sickness insurance and no previous application has been made for a registration certificate.
15. In such cases and where enquiries made on behalf of the applicant have not provided the information needed, caseworkers must discuss the case with their senior caseworker who will then decide if discretion should be applied based on the particular circumstances of the case and the level of evidence provided.
16. If discretion is not to be applied then the application must be refused.
17. Any policy enquiries on this Notice should be addressed to [REDACTED] or [REDACTED]

[REDACTED]

Head of European and Nationality Policy

4 August 2011