



Home Office

Shared Services Directorate 020 7035 4848 (switchboard)  
2 Marsham Street  
London SW1P 4DF

[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)

R.Brown

[request-192004-41f4db0e@whatdotheyknow.com](mailto:request-192004-41f4db0e@whatdotheyknow.com)

Dear R Brown

**Freedom of Information request (our ref:30199): internal review**

Thank you for your e-mail of 2014, in which you asked for an internal review of our response to your Freedom of Information (Fol) request about the Immigration (European Economic Area) (Amendment) Regulations 2012, SCHEDULE 3 Transitional Provisions.

I have now completed the review. I have examined all the relevant papers, and have consulted the policy unit which provided the original response. I have considered whether the correct procedures were followed. 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 response correctly informed you that it would not be possible to answer the request without exceeding the cost limit, but failed to cite the correct part of the FOI Act (Section 12(2)). For further explanation see paragraphs 11-15.

Yours sincerely

**Diana Pottinger**  
**Information Access Team**

Internal review of response to request under the Freedom of Information (Fol) Act 2000 by R Brown (reference 30199)

**Responding Unit: UK Visas and Immigration (UKVI)**

### **Chronology**

Original Fol request:	7 January 2014
UKVI response:	30 January 2014
Request for internal review:	10 February 2014

### **Subject of request**

1. The request asked two questions about the Immigration (European Economic Area) (Amendment) Regulations 2012, SCHEDULE 3 Transitional Provisions, and quoted the relevant legislation at length. The questions were:
  - How many British persons who fulfill the criteria outlined in the Schedule 3 Transitional Provisions will continue to be considered EEA nationals?
  - How many are provided with derivative residence cards, instead of residence cards?

For the full text of the request see **Annex A**.

### **The response by UKVI**

2. The response informed R Brown that it was not possible to answer the request without exceeding the cost limit. For the full text of the response see **Annex B**.

### **The request for an internal review**

3. R Brown challenged the use of the cost limit, stating that it should not cost more than £600 to answer each question, and that UKVI simply did not want to answer. For the full text of the IR request see **Annex C**.

### **Procedural issues**

4. The Home Office received R Brown's request via email on 7 January 2014.
5. On 30 January 2014 the Home Office provided R Brown with a substantive response, which represents 17 working days after the initial request. Therefore, the Home Office complied with section 10(1) by providing a response within the statutory deadline of 20 working days.

6. Section 1(1)(a) did not apply as it was not possible to confirm whether or not the requested information was held without exceeding the cost limit.
7. An explanation of why the cost limit was exceeded was provided, as required by section 17(7)(c) of the Act, but the relevant part of the Act was not cited.
8. Section 16 was not complied with, as UKVI did not explain how the request could be refined so that it could be answered within the cost limit, or confirm that this would not be possible.
9. R Brown was informed in writing of the right to request an independent internal review of the handling of the request, as required by section 17(7)(a) of the Act.
10. The response also informed R Brown of the right of complaint to the Information Commissioner, as set out in section 17(7)(b) of the Act.

### **Consideration of the response**

#### **Use of the cost limit – section 12**

11. UKVI informed R Brown that it was unable to comply with the request, as the requested information was not held on a mandatory field on the Case Information Database (CID) and a manual search would therefore have to be carried out.
12. The response failed to state that it was relying on section 12 of the FOI Act – disproportionate cost, or specify which part of section 12. This would either be 12(1) – confirming that the information was held, but it would exceed the cost limit to collate it, or 12(2) – stating that it would not be possible to confirm whether the information was held without exceeding the cost limit.
13. R Brown stated that it could not possibly cost more than £600 to answer each question. However the cost limit is for each request i.e. the amount it would take to answer all questions posed, not for each question. Prescribed costs include those which cover the cost of locating and retrieving information. They do not include considering whether any information is exempt from disclosure, overheads such as heating or lighting, or disbursements such as photocopying or postage.
14. In the course of this internal review, UKVI confirmed that it was relying on section 12 (2). This was because it would be necessary to search tens of thousands of records individually in order to ascertain whether the requested information was held. UKVI explained that it would not be possible simply to run an electronic report in order to locate the requested information because the regulations under which an application is made is not recorded in a reportable format. Consequently, it would be necessary to undertake a manual case by case search of records.

#### **Advice and assistance**

15. The response failed to offer R Brown advice and assistance on whether, and if so how the request could be refined so that it could be answered within the cost limit. In

the course of this review, I contacted UKVI who confirmed that it would not be possible to refine the request so that it could be answered within the cost limit.

## **Conclusion**

16. The response was sent within 20 working days; consequently the Home Office complied with section 10(1) of the FOI Act.
17. Section 1(1)(a) did not apply as the work necessary to ascertain whether the requested information was held exceeded the cost limit.
18. The response correctly cited the cost limit, but failed to specify the relevant part of the Act which was section 12(2).
19. The response complied with the requirements in section 17(7)(a) and 17(7)(b) as it provided details of the complaints procedure.

**Information Access Team**  
**Home Office**

## **Annex A – full text of request**

**How many British persons who fulfil the criteria outlined in the Schedule 3 Transitional Provisions will continue to be considered EEA nationals?**

**How many are provided with derivative residence cards, instead of residence cards?**

The Immigration (European Economic Area) (Amendment) Regulations 2012, SCHEDULE 3 Transitional Provisions state

Amendments to the definition of EEA national

2. (1) Where the right of a family member (“F”) to be admitted to, or reside in, the United Kingdom pursuant to the 2006 Regulations depends on the fact that a person (“P”) is an EEA national, P will, notwithstanding the effect of paragraph 1(d) of Schedule 1 to these Regulations, continue to be regarded as an EEA national for the purpose of the 2006 Regulations where the criteria in subparagraphs (2), (3) or (4) are met and for as long as they remain satisfied in accordance with subparagraph (5).

(2) The criterion in this subparagraph is met where F was on 16<sup>th</sup> July 2012 a person with a permanent right to reside in the United Kingdom under the 2006 Regulations.

(3) The criteria in this subparagraph are met where F—

(a) was on the 16th July 2012 a person with a right to reside in the United Kingdom under the 2006 Regulations; and

(b) on the 16th October 2012—

(i) held a valid registration certificate or residence card issued under the 2006 Regulations;

(ii) had made an application under the 2006 Regulations for a registration certificate or residence card which had not been determined; or

(iii) had made an application under the 2006 Regulations for a registration certificate or residence card which had been refused and in respect of which an appeal under regulation 26 could be brought while the appellant is in the United Kingdom (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002(1)).

(4) The criteria in this subparagraph are met where F—

(a) had, prior to the 16th July 2012, applied for an EEA family permit pursuant to regulation 12 of the 2006 Regulations; or

(b) has applied for and been refused an EEA family permit and where, on the 16th July 2012, an appeal under regulation 26 against that decision could be brought (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the 2002 Act).

(5) Where met, the criteria in subparagraph (2), (3) and (4) remain

satisfied until the occurrence of the earliest of the following events—

- (a) the date six months after an EEA family permit has been issued if F has not within that period been admitted to the United Kingdom;
- (b) the date on which an appeal against a decision referred to in subparagraph (3)(b)(iii) or (4)(b) can no longer be brought (ignoring the possibility of an appeal out of time with permission) where no such appeal has been brought;
- (c) the date on which any appeal against a decision referred to in subparagraph (3)(b)(iii) or (4)(b) is finally determined, is withdrawn or is abandoned (within the meaning of section 104 of the 2002 Act) (save where the outcome of the appeal process is that the document in question falls to be granted);
- (d) the date on which F ceases to be the family member of an EEA national; or
- (e) the date on which a right of permanent residence under regulation 15 of the 2006 Regulations is lost in accordance with regulation 15(2) of those Regulations.

(6) P will only continue to be regarded as an EEA national for the purpose of considering the position of F under the 2006 Regulations.

Yours faithfully,

#### **annotation dated 7 January 2014**

Further guidance:

Regulation 8 of the 2006 Regulations covers extended family members (for example, brothers, sisters, aunts and cousins). It also covers direct family members (such as parents or children over the age of 21) who have failed to provide evidence of financial dependency.

An applicant may be considered under regulation 8 of the 2006 Regulations if s/he falls within any of the following conditions (see overleaf):

Was living as part of the EEA national's household in an EEA state before the EEA national came to the United Kingdom<sup>1</sup>; or

Is living as part of the EEA national's household in the United Kingdom; or

Has joined the EEA national in the UK and continues to be dependent on the EEA national or his/her spouse (see section 2.3.2); or

Strictly requires personal care from the EEA national on serious health grounds; or

Can prove that s/he is in a durable relationship with the EEA national<sup>2</sup>

<sup>1</sup>Note: there is no dependency test for persons who can show that they have lived under the same roof as the EEA national before coming to the UK.

<sup>2</sup>EC law now recognises "durable relationships". For this reason an applicant may also be considered under regulation 8 if s/he:

Is the EEA national's partner (other than a civil partner) and can show the decision maker that s/he is in a durable relationship with the EEA national.

For guidance on how to assess if a relationship is durable, see Chapter 5 of the ECIs..

Directive 2004/38 refers to facilitating the entry and residence of any member of the family who meets any of the above conditions. Providing that a person falls within one of these categories, we may issue a residence card if in all the circumstances it appears appropriate to do so. The Directive states:

“The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people”

When deciding whether it is appropriate in all the circumstances to issue a residence card, we must assess whether refusing the family member would deter the EEA national from exercising his/her Treaty rights or would create an effective obstacle to exercise of Treaty rights. Each case must be assessed on an individual basis but an example of where it might be appropriate to issue a residence card would be if the family member was very elderly or incapacitated. In assessing such cases, it would be important to consider whether there were any relatives to care for him/her in the home country.

For guidance on assessing if extended family members can be issued with a document confirming their right of residence, see Chapter 5 of the ECIs.

#### **annotation dated 12 February 2014**

People who should qualify for residence cards are being "pushed" in to derivative residence cards.

It isn't even lawful for them to have a derivative residence category as it discriminates against one particular class of family member; i.e., parents.

For example, the cousin of an EEA national can qualify for a residence card as an other family member and access all the rights of a British national. The parent of an EEA national is barred from doing so, simply because they are parents.

Family Barristers and Solicitors argued discrimination on the wrong grounds, which is why they failed in court. They argue that the derivative card is discriminatory based on nationality, but the UK can discriminate on nationality (even if it is mean).

## **Annex B – full text of response letter**

Dear Sir or Madam

Thank you for your e-mail of 7 January, in which you ask for information about the Immigration (European Economic Area) (Amendment) Regulations 2012, SCHEDULE 3 Transitional Provisions. Your request has been handled as a request for information under the Freedom of Information Act 2000.

You have requested the following information;

**How many British persons who fulfil the criteria outlined in the Schedule 3 Transitional Provisions will continue to be considered EEA nationals?**

**How many are provided with derivative residence cards, instead of residence cards?**

The Immigration (European Economic Area) (Amendment) Regulations 2012, SCHEDULE 3 Transitional Provisions state

Amendments to the definition of EEA national

2. (1) Where the right of a family member ("F") to be admitted to, or reside in, the United Kingdom pursuant to the 2006 Regulations depends on the fact that a person ("P") is an EEA national, P will, notwithstanding the effect of paragraph 1(d) of Schedule 1 to these Regulations, continue to be regarded as an EEA national for the purpose of the 2006 Regulations where the criteria in subparagraphs (2), (3) or (4) are met and for as long as they remain satisfied in accordance with subparagraph (5).

(2) The criterion in this subparagraph is met where F was on 16th July 2012 a person with a permanent right to reside in the United Kingdom under the 2006 Regulations.

(3) The criteria in this subparagraph are met where F—

(a) was on the 16th July 2012 a person with a right to reside in the United Kingdom under the 2006 Regulations; and (b) on the 16th October 2012—

(i) held a valid registration certificate or residence card issued under the 2006 Regulations;

(ii) had made an application under the 2006 Regulations for a registration certificate or residence card which had not been determined; or

(iii) had made an application under the 2006 Regulations for a registration certificate or residence card which had been refused and in respect of which an appeal under regulation 26 could be brought while the appellant is in the United Kingdom (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002(1)).

(4) The criteria in this subparagraph are met where F—



(a) had, prior to the 16th July 2012, applied for an EEA family permit pursuant to regulation 12 of the 2006 Regulations; or (b) has applied for and been refused an EEA family permit and where, on the 16th July 2012, an appeal under regulation 26 against that decision could be brought (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the 2002 Act).

(5) Where met, the criteria in subparagraph (2), (3) and (4) remain satisfied until the occurrence of the earliest of the following events—

(a) the date six months after an EEA family permit has been issued if F has not within that period been admitted to the United Kingdom;

(b) the date on which an appeal against a decision referred to in subparagraph (3)(b)(iii) or (4)(b) can no longer be brought (ignoring the possibility of an appeal out of time with permission) where no such appeal has been brought;

(c) the date on which any appeal against a decision referred to in subparagraph (3)(b)(iii) or (4)(b) is finally determined, is withdrawn or is abandoned (within the meaning of section 104 of the 2002 Act) (save where the outcome of the appeal process is that the document in question falls to be granted);

(d) the date on which F ceases to be the family member of an EEA national; or

(e) the date on which a right of permanent residence under regulation 15 of the 2006 Regulations is lost in accordance with regulation 15(2) of those Regulations.

(6) P will only continue to be regarded as an EEA national for the purpose of considering the position of F under the 2006 Regulations.

We are only able to report on data that is captured in certain mandatory fields on the Case Information Database (CID). The regulations under which an application is made is not recorded in a reportable format. Consequently, in order to provide the requested information, we would need to undertake a manual case by case search of records.

The Home Office is not obliged to comply with any information request where the prescribed cost of supplying you with the information exceeds £600. The £600 limit applies to all central government departments and is based on work being carried out at a rate of £25 per hour, which equates to 3½ days work per request. Prescribed costs include those which cover the cost of locating and retrieving information, and preparing our response to you. They do not include considering whether any information is exempt from disclosure, overheads such as heating or lighting, or disbursements such as photocopying or postage.

We have estimated that to gather and collate the information you have requested would exceed the £600 cost threshold.

In keeping with the Freedom of Information Act, we assume that all information can be released to the public unless it is exempt. In line with normal practice we are therefore releasing the information which you requested via the Home Office website.

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 30199. 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: [info.access@homeoffice.gsi.gov.uk](mailto:info.access@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

Emma Byrne  
North West Correspondence Team

## **Annex C – full text of IR request**

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Home Office's handling of my FOI request 'The Immigration (European Economic Area) (Amendment) Regulations 2012, SCHEDULE 3 Transitional Provisions'.

You refused to answer every question. I doubt each question cost more than £600. I think you just don't want to answer.

A full history of my FOI request and all correspondence is available on the Internet at this address:

<https://www.whatdotheyknow.com/request/t...>

Yours faithfully,

R.Brown

## **Annex D – complaints procedure**

This completes the internal review process by the Home Office. If you remain dissatisfied with the response to your FoI 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