

CHAPTER 2

RIGHTS OF NON-EEA NATIONAL FAMILY MEMBERS OF EUROPEAN ECONOMIC AREA (EEA) NATIONALS

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1. Introduction

1.1 Key Points

- Under EC law the non-EEA national family members of an EEA national derive a right of residence in the UK through the EEA national *provided* that the EEA national has a right to reside under the 2006 Regulations.
- As *confirmation* of this right of residence, non-EEA national family members may apply for a residence card, which if issued, will be valid for 5 years, or shall be valid for the envisaged period of residence in the UK of the EEA national (if this is a shorter period of time). This refers to regulation 17(6)(a) and (b) of the 2006 Regulations.
- A residence card takes the form of an endorsement in the non-EEA national's passport and confirms a right of residence for a given period.

Endorsements and nature of documentation

Prior to November 1994 confirmation of the right of residence for non-EEA national family members took the form of a Code 1 endorsement in the passport.

Since the coming into force of Section 7 of the Immigration Act 1988 (on 26 July 1994) persons exercising Treaty rights in the UK have been exempt from requiring leave to enter or remain in the UK.

For this reason, an endorsement made under the Immigration Rules was no longer appropriate; confirmation therefore took the form of an endorsement in the passport known as a residence document.

Following the coming into force of the 2006 Regulations, the residence document has been replaced by the residence card, which will take the form of a vignette in the holder's passport.

The UK currently imposes no requirement for the non-EEA national family member of an EEA national to obtain a residence card. However such persons may be inconvenienced if they do not obtain a residence card for the following reasons:

- They may have difficulty proving they are lawfully resident.
- If they leave the UK, they will need to obtain an EEA Family Permit before returning (*see Chapter 3 for further details*).
- They may find it difficult to obtain/change employment without a residence card confirming their entitlement to take employment in the UK.

Persons who qualify as family members are set out in regulation 7 and extended family members are covered by regulation 8 of the 2006 Regulations.

1.2 Note on Handling: Temporary Admission/Port Cases

Chapter 8 gives guidance on what to do if the applicant is a port (on entry) case on temporary admission. If a port seeks advice on a case involving EC law, they should be referred to BCPI (Border Control Policy Implementation).

1.3 Note on Handling: Illegal Entry Cases

Some cases will involve a third country national who has entered the UK illegally. However, since the introduction of the Certificate of Approval an illegal entrant may not qualify for the issuing of a Certificate of Approval, and may therefore not be able to take part in a civil marriage ceremony.

However, a marriage involving an illegal entrant and an EEA national may still take place, and be regarded as legally valid, if it is a religious marriage conducted by the Church of England or where a Certificate of Approval has been granted.

Should an illegal entrant marry or enter into a civil partnership with an EEA national they will gain a right of residence under EC law as the spouse or civil partner of an EEA national [provided the EEA national is residing in the UK in accordance with the EEA Regulations](#) (and would therefore be entitled to a residence card).

We should ensure that, prior to granting a residence card, the [Immigration Service](#) is informed of the decision so that any action against the person is stopped. We should also ensure every effort has been made to obtain the applicant's file from the Immigration Service prior to granting a residence card.

Please see Chapter 5 for further details about these cases.

2 **Family Members - Categories**

The family members of an EEA national are defined in regulation 7 and regulation 8 of the 2006 Regulations.

2.1 Key points

The family members of an EEA national include his/her:

- Spouse / civil partner (*excluding a person who is party to a marriage or partnership of convenience - see Chapter 5 of the ECIs*).
- Children of the EEA national or of his/her spouse / civil partner who are:
 - Under 21; or
 - Dependants.

(This includes stepchildren or adopted children provided that the adoption is recognised by the UK, see section 2.3.1 of this chapter for further details on adoption).

- Dependants in the ascending line (i.e. parents, grandparents) of the EEA national or of his/her spouse / civil partner.
- In certain circumstances extended family members (see section 2.4)

In the case of **EEA national students**, only their spouse / civil partner and dependent children are entitled to a right of residence for more than three months.

2.2 Spouse

2.2.1 Marriages and civil partnerships of convenience

Regulation 2 of the 2006 Regulations provides that the definitions of “spouse” and “civil partner” do not include someone who has entered into a marriage or civil partnership of convenience. Therefore, the spouse/civil partner of an EEA national should be refused a residence card if the marriage or partnership is one that has been contracted solely to obtain the benefits of EC law. This is transposed from Article 35 of Directive 2004/38. (See *Chapter 5 for further details on marriage of convenience*).

2.3 Children

Children’s Duty

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction ‘Arrangements to Safeguard and Promote Children’s Welfare in the United Kingdom Border Agency’ sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child’s interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

2.3.1 Adopted Children

The UK recognises adoptions as valid if the adoption order is made in countries that are either:

- Included on the ‘Designated List’; or
- Have ratified or acceded to the Hague Convention.

(See Chapter 8, Section 5, Annex Q of the IDIs for further details of the designated countries.)

In cases where the UK recognises the adoption as valid, the adopted child will be recognised as a family member and therefore treated as such under the 2006 Regulations.

Where the UK does not recognise the adoption, the application would need to be considered under the Immigration Rules. *(See Chapter 8, Section 5 of the IDIs for further details).*

2.3.2 Dependency (including other family members)

After the initial 3 months period of residence, the children of a student must be dependent on the EEA national. In all other cases there is no dependency requirement for children aged under 21. The EEA national simply needs to be present in the UK and exercising Treaty rights for such persons to have a right of residence.

Other relatives in the ascending or descending line of an EEA national or his/her spouse must show that they are dependent:

- There is no need to determine the reasons for recourse to the financial support or to consider whether the family member is able to support him/herself by taking up paid employment;
- The definition of dependency only includes financial dependency (material support); it does not include emotional dependency.
- Financial dependency should be interpreted as meaning that the family member needs the financial support of the EEA national or his or her spouse/civil partner in order to meet the family members essential needs in the country of origin – not in order to have a certain level of income.

2.4 Extended family members

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 Kingdom¹; *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 national²

¹Note: 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.

²EC 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.

Evidence of a "durable relationship" is based on the criteria set out in Chapter 8, Section 7 of the Immigration Rules.

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.

2.4.1 Extended Family Members of Students

Family members of students (other than his/her spouse and dependent children) are entitled to join the EEA national for the initial three month period s/he is in the UK. However, should these “other” family members wish to remain in the UK with the EEA national student for a period longer than this “initial right of residence”, it is at our discretion (see Regulation 7(4)).

See section 4.3 of this chapter for information on refusing a residence card application in these circumstances.

2.5 Other Categories

2.5.1 Family Members of a British national (*Surinder Singh*)

The ECJ case of SURINDER SINGH ruled that where a national of a Member State goes with his/her non-EEA national spouse to another Member State to exercise an economic Treaty right, on return to his/her own Member State the non-EEA national spouse is entitled to join the EEA national under EC law.

Under regulation 9 of the 2006 Regulations, the family members of a British national returning to the UK will be treated as if they were the family members of an EEA national under the following conditions:

- After leaving the United Kingdom, the British national resided in an EEA state and –
 - Was employed there (other than on a transient or casual basis); or
 - Established him/herself there as a self-employed person; and
- If the family member is his/her spouse, the marriage took place, and the parties lived together in an EEA state, before the British national returned to the United Kingdom.

The family member of a British national will only have a right to reside in the UK under the 2006 Regulations if the British national would have a right to reside in the UK under those Regulations if he/she were an EEA national, e.g. because he/she is working or self-sufficient.

See section 3.2 of this chapter for information on issuing a residence card in SURINDER SINGH cases.

See Chapter 3 for more information on evidence required by Entry Clearance Officers in order to issue an EEA family permit in these circumstances.

2.5.2 Family Members of EEA national Minor Children (*Chen*)

The ECJ case of CHEN ruled that an EEA national child who holds sickness insurance would have a right to reside in the UK with his/her non-EEA national parents provided there were sufficient resources to ensure that the child did not become a burden on public funds. *See Chapter 1, section 8 for more information on the rights of EEA national minor children.*

This ruling did not say that the EEA national child's parent would have a right to reside as a "family member" as defined in EC law because the parent will not be financially dependent on a child. The parent is entitled to reside in a Member State with his or her child solely to facilitate the child to exercise his or her Treaty rights. The ruling did not give non-EEA national parents the right to work.

Paragraph 257C of the Immigration Rules allows for non-EEA parents and other close relatives of self sufficient EEA children to be granted leave to enter or remain in the UK.

Applications for leave to enter or remain in the UK from non-EEA national relatives of EEA minor children

The requirements to be met by a person seeking leave to enter as the primary carer or relative of a self-sufficient child are set out in Paragraph 257C of the Immigration Rules. To qualify, the applicant is required to meet the following criteria. They must:

- be the primary carer, parent or sibling of an EEA national who is under the age of 18 and who has a right of residence in the UK under the Immigration (EEA) Regulations 2006 as a self sufficient person;
- be living with the EEA national or seeking entry to the UK in order to live with the EEA national;
- be able to and will be maintained and accommodated without taking employment or having recourse to public funds;
- hold a valid entry clearance if seeking leave to enter;
- in the case of a sibling¹ of the EEA national:
 - (a) be under the age of 18 or holding current leave to enter or remain in this category ; *and*
 - (b) be unmarried, not having formed an independent family unit and not leading an independent life;

¹"Sibling" includes a half brother or half sister and a stepbrother or stepsister

Leave to enter as the relative of a self-sufficient EEA national

For family members wishing to enter the UK, an immigration officer (IO) should be satisfied that:

- The passenger holds a valid UK entry clearance as the relative of a self-sufficient EEA national child; *and*
- There is no reason to believe that false representations were made to obtain the entry clearance or that circumstances have changed since it has been issued.

The majority of passengers seeking leave to enter under these provisions will be in possession of a valid entry clearance. However, where a person arrives without the required entry clearance, the IO will need to examine the case further to decide whether there are any exceptional compassionate circumstances to warrant the exercise of discretion, which would prevent removal.

Leave to remain as the relative of a self-sufficient EEA national child

We should be satisfied that:

- The applicant is related as claimed to the EEA national child;
- The EEA national is under the age of 18 and qualifies for a registration certificate as a self-sufficient person (*See section 9.2*);
- The applicant is able to maintain and accommodate him/herself without access to work or self-employment or public funds;
- The applicant is living with the EEA national child;
- In the case of siblings, the applicant is under the age of 18 or has current leave to enter or remain in this category; is unmarried; has not formed an independent family unit and is not leading an independent life.

If an applicant fulfils the above criteria we should grant him/her leave to remain with no access to employment or public funds (code 3).

3 Issue of a residence card

In order to issue a non-EEA national with a residence card, the following criteria must be met:

- The applicant must produce the passport or ID card of the EEA national family member, together with evidence of his/her relationship to the EEA national. For example, a spouse should produce a marriage certificate and a full birth certificate should be produced in respect of a child.
- The applicant should also submit a valid passport, or, where this is unavailable, a Home Office issued identity document, such as an ARC card, as evidence of his/her own identity.
- Evidence must be produced that the EEA national is exercising a Treaty right in the UK or has a permanent right of residence under the 2006 Regulations

The EEA national would not need to hold a registration certificate before his/her family member was able to make an application. Provided the EEA national has a recognised right of residence under the 2006 Regulations, a residence card should be issued without a registration certificate being issued for the EEA national.

Residence cards should be issued for 5 years, or the envisaged period of residence of the EEA national (if this is a shorter period of time).

3.1 Six Month rule

EC law requires the UK to decide applications for a residence card within 6 months from the date of receipt of the application. It is vital that this requirement is adhered to.

3.1.1 Certificate of application

Regulation 17(3) of the 2006 Regulations concerns the issue of certificates of application. When applications are made for residence cards we should immediately issue the applicants with certificates of application. The subsequent residence cards should be issued no later than six months after the date on which the application and documents were received.

3.2 Surinder Singh cases

- Successful non-EEA national family member applicants are issued with a residence card, valid for 5 years.
- The British spouse/family member is *not* issued with a registration certificate.
- A non-EEA national family member issued with an EEA family permit (in accordance with SURINDER SINGH criteria) would not then qualify for *leave to remain* in the UK under the immigration rules, as s/he would not have valid leave in the UK at the time of application. S/he should instead be issued with a residence card (as highlighted in the first bullet point).
- The non-EEA national family member may qualify for permanent residence after 5 years.

3.3 Applicants not producing a passport

We may exercise discretion and issue a residence card where the applicant proves his/her identity by producing a Home Office issued identity card (i.e. an ARC card) or where the applicant produces another form of conclusive evidence that s/he is a family member of the EEA national (*see 4.3 below*).

Where an applicant produces a Home Office issued identity card that corresponds to the person named on the marriage certificate, we can be satisfied that the individual is the family member of an EEA national and, provided we are satisfied that the marriage is not one of convenience (see Chapter 5) and we are satisfied that the EEA national is a qualified person or has a permanent right of residence under the 2006 Regulations, we would issue a residence card. Where a residence card is issued on this basis, the applicant's previous immigration files should be checked for confirmation that the applicant is the rightful holder of the Home Office issued identity card.

4 Refusal of request to issue a residence card

Where an applicant produces a marriage certificate, but does not produce *any* evidence of his/her identity, we cannot be satisfied that s/he is the person to whom the marriage certificate relates. We cannot, therefore, be satisfied that s/he is the person who actually married the EEA national. In such cases, the application for a residence card should be refused. There would be no right of appeal under the Regulations in cases where *no* evidence of identity is produced.

For information on refusals of requests to issue a residence card, please refer to Chapter 5.

4.1 Divorce or annulment of marriage / dissolution of civil partnership

The case of DIATTA (ECJ 267/83) established that a spouse did not cease to be a family member in the event of marital breakdown/separation until such time as a divorce was finalised (Decree Absolute obtained).

Our policy is to revoke or to refuse to issue/renew a residence card in the event of divorce from the EEA family member, unless the non-EEA national has a retained right of residence in the UK (see section 6).

5. **Appeal Rights**

For all information and guidance on appeal rights for non-EEA national family members of EEA nationals, please see Chapter 9.

6. **Retention of the right of Residence**

Directive 2004/38 has incorporated ECJ caselaw such as Baumbast and Diatta to allow non-EEA nationals family members to retain the right of residence.

There are now a number of circumstances in which non-EEA national family members of EEA nationals may retain their right of residence in the UK if the EEA national leaves the UK or dies or the relevant marriage or civil partnership is terminated. These circumstances are set out in regulation 10 of the 2006 Regulations.

6.1 Retention of the right of residence following divorce or annulment of marriage/dissolution of civil partnership

A person who ceases to be a family member of a qualified person on termination of a marriage or civil partnership will retain a right of residence if:

- the marriage or partnership lasted for at least three years immediately before the initiation of proceedings for divorce, annulment or dissolution, and
- the parties to the marriage or civil partnership had resided in the UK for at least one year during the duration of the marriage or civil partnership, or
- the former spouse or civil partner of the qualified person has custody of the children or a right of access to the children in the UK, or
- there are particularly difficult circumstances (such as domestic violence) justifying the retention of the right of residence.

In such circumstances a family member retains a right of residence if:

- (a) S/he is a non-EEA national but is pursuing activity which would make him/her a worker or a self-employed person if s/he were an EEA national,
- (b) S/he is a self-sufficient person, or
- (c) S/he is the family member of a person in the UK who is either a worker, self-employed, or is a self-sufficient person.

See Regulation 10(5) of the 2006 Regulations for more information.

6.2 The continuing right of residence if the EEA national dies (spouse and children)

Retention of a right of residence if the EEA national dies

Article 12 of Directive 2004/38 makes provision for the retention of a right of residence by family members of an EEA national if the EEA national dies. To qualify the family members must have been residing in the UK as family members of the EEA national for at least one year before the EEA national's death and would (if s/he was an EEA national) be a worker, self-employed or self-sufficient person or the family member of such a person.

See Regulation 10 (2) of the 2006 Regulations for more information.

Retention of a right of residence for a **child** - If the EEA qualified person dies or leaves the United Kingdom

The child of either the EEA national or of the EEA national's spouse, civil partner, former spouse or former civil partner, will retain a right of residence if:

- a) s/he was attending an educational course in the UK immediately before the qualified person died or left the UK, and s/he continues to be in education.

See Regulation 10(3) of the 2006 Regulations for more information.

6.3 The parent of a child who retains a right of residence under regulation 10(3) of the 2006 Regulations

The parent with custody of a child retains a right of residence if the child qualifies as detailed in section 6.2 above. *See regulation 10(4).*

6.3.1 Making an application for a residence card in the case of retained right of residence under regulation 10(3) or 10(4) (child in education)

Child

Where a child makes an application to remain in the UK in accordance with the provisions set out in regulation 10(3), we should ask for evidence that includes proof that the child was a family member of an EEA national who was a qualified person in the UK and was attending an education course when the qualified person died or left the UK and that the child is still in education.

A residence card should normally be issued with a validity of 5 years unless the child is nearing completion of his/her studies. In this case we may wish to limit the validity of the residence card.

A residence card issued in accordance with these provisions should be revoked in accordance with regulation 20(2) of the 2006 Regulations if the child no longer fulfils the conditions set out in paragraph 2.9., for instance, if the child leaves school.

Non-EEA national parent of a child who retains a right of residence

Where a non-EEA national spouse or civil partner, or former spouse or former civil partner, makes an application for a residence card on the basis of regulation 10(4) we should be provided with evidence that includes confirmation that the child is in education in the UK.

A residence card should normally be issued with a validity of 5 years unless the child is nearing completion of his/her studies. In this case we are able to limit the validity of the residence card to the period under which the child has rights of residence (above).

A residence card issued on this basis should be revoked in accordance with Regulation 20(2) of the 2006 Regulations if the non-EEA national no longer fulfils the conditions set out above, for instance, if the child leaves school or if the non-EEA national ceases to have custody of the child.

7. Revocation of residence cards

Regulation 20(2) of the 2006 Regulations makes provision for the revoking of a residence card if:

“...the holder of the certificate or card has ceased to have a right to reside under these Regulations.”

Regulation 20(1) of the 2006 Regulations makes provision for the revocation of a residence card on the grounds of public policy, public security or public health.

For more information concerning Public Policy, Public Security, and Public Health please see Chapter 8.

*For **appeal rights in revocation cases**, please see Chapter 9.*