

## CHAPTER 5 - RESIDENCE CARD APPLICATIONS

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## **5. Residence Card**

Residence Cards are issued to family members of EEA nationals who are not themselves EEA nationals.

If their EEA national family member is exercising Treaty rights in the UK then a third country national may request that they be issued with a Residence Card as confirmation of their right of residence under EC law.

### **Application form**

An application form, EEA2, is available for use when applying for a Residence Card. However, an application cannot be rejected because the form has not been used or has not been fully completed.

### **Letter confirming receipt of application – Certificate of Application**

Upon receipt of an application for a Residence Card a Certificate of Application is issued as required by Regulation 17 (3) of the 2006 Regulations.

It is a responsibility of the caseworker to check CID to ensure that the acknowledgement letter, ECD.3101, has been dispatched by the Data Processing Team.

## **5.1 Family Members**

### **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.

### **Definition of family members**

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

### **The family members are defined in Regulation 7 as being:**

- spouse / civil partner (excluding a person who is party to a marriage or civil partnership of convenience)
- children of the EEA national or of his/her spouse / civil partner who are under 21 years of age or are dependent. (This includes stepchildren or adopted children provided that the adoption is recognised by the U.K.)
- dependants in the ascending line (i.e. parents, grandparents) of the EEA national or of his/her spouse / civil partner.

**The extended family members are defined in Regulation 8 as being:**

- more distant family members of the EEA national or of his spouse / civil partner who can demonstrate that they are dependant
- partners where there is no civil partnership but they can show that they are in a 'durable relationship' with the EEA national.

See section below which provides more information in relation to more distant family members and partners.

In the case of **EEA national students**, after the student's initial 3 months residence only their spouse / civil partner and dependent children are entitled to a right of residence.

## 5.2 Dependency

After the initial 3 month 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 an EEA national's children aged under 21. Provided the EEA national is residing in the UK in accordance with the EEA Regulations such persons will 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 hin/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 member's **essential needs** in the country of origin – not in order to have a certain level of income. The applicant must be wholly or mainly financially dependent on the EEA principle to meet his/her essential needs in order to qualify for a family permit.

## 5.3 Partners

Regulation 8 of the 2006 Regulations covers partners of EEA nationals, i.e. common-law partners and same-sex partners when no Civil Partnership has been entered into but the third country national is in a 'durable' relationship with the EEA national.

Conditions for qualifying for a Residence Card as a non-EEA national who is in a durable relationship with an EEA national exercising Treaty rights in the U.K.

When deciding whether a partnership is durable for the purpose of an application under Regulation 8 (5) the following criteria should be applied:

- The parties have been living together in a relationship akin to marriage which has subsisted for two years or more.
- The parties intend to live together permanently.
- The parties are not involved in a consanguineous relationship with one another, i.e. they are not blood relatives who would not be allowed to marry as it would constitute incest.
- Any previous marriage (or similar relationship) by either partner has permanently broken down.

If these conditions are met then consideration can be given to issuing a Residence Card.

- However, under no circumstances should a person be granted a Residence Card on the basis of a durable relationship if they are not lawfully resident in the United Kingdom at the time that the application is made.

Although a non-EEA national can be considered on the basis of Regulation 8 if they have provided proof that they are in a durable relationship we have discretion with regard to the issue of a Residence Card. We should not seek to exercise discretion in their favour in instances where the non-EEA national is not lawfully resident in the United Kingdom.

Any decision to refuse an application made by a common-law partner should be referred to a SCW.

## **5.4 Extended family members**

**All cases involving extended family members should be referred to a senior caseworker prior to a decision to either grant or refuse being despatched.**

Regulation 8 of the 2006 Regulations covers extended family members (e.g. brothers, sisters, aunts and cousins) and direct family members (e.g. parents, children over the age of 21) who have failed to provide evidence of financial dependency.

- Cases involving extended family members should normally be refused where the EEA national is a student. However, if the non-EEA extended family member has been issued an EEA Family Permit, possibly on the basis that the EEA national was exercising Treaty rights in another capacity at the time that the Family Permit was issued, then refusal may not be appropriate.

For example, an uncle of a self-sufficient EEA national may be issued with a Family Permit if he had demonstrated to the entry clearance officer that he was a dependent relative. The EEA national becomes a student after his uncle's arrival, but before the uncle applies for a Residence Card. In theory a Residence Card should be issued, but not before it has been established whether the EEA national can support his uncle.

#### Conditions for qualifying for a right of residence as an extended family member

An applicant for a residence card may be considered on the basis that s/he is an extended family member under Regulation 8 (2) if he/she satisfies the following conditions:

- s/he was residing in the same EEA state as the EEA national, where she was dependant on the EEA national or a member of the EEA national's household, before the EEA national came to the UK; and
- s/he has joined the EEA national in the UK and continues to be dependant on him or a member of his household.

Note: there is no dependency test for persons who can show that they have lived under the same roof as the EEA sponsor before coming to the United Kingdom and live under the same roof in the UK.

The Directives refer to facilitating or favouring the admission of any member of the family who meets any of the above conditions. Providing that a person falls within one of these categories, you may issue a Residence Card if in all the circumstances it appears appropriate to do so.

When deciding whether it is appropriate to issue a Residence Card, caseworkers will need to 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 were very elderly or incapacitated. In assessing such cases, it would be important to consider whether there were any relatives to care for them in their home country.

#### Cases falling for refusal

Where an applicant has produced evidence that they are financially dependant on the EEA national, (for instance the non-EEA national may be currently unemployed) caseworkers should consider whether there is any reason to suggest that the EEA national could not send money back to the third country national's home country.

In considering cases under Regulation 8, we would normally refuse those who have for example:

- lived in a third country whilst the EEA national has resided in another Member State prior to entering the United Kingdom;
- lived as part of the EEA national's household many years ago;
- have their own family unit (unless there are sufficient compassionate circumstances).

## 5.5 Adopted children

**All cases involving adopted children should be referred to a senior caseworker prior to a decision to either grant or refuse being despatched.**

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

- included on the 'Designated List' *or*
- that 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.)

It is important to note that once a child has reached the age of 18 the child cannot be adopted through the courts in the UK.

However, European law considers children to be dependant family members until the age of 21.

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

Where the UK does not recognise the adoption, then such an application falls to be considered under the Immigration Rules. See Chapter 8, Section 5, of the IDIs for further details.

The details of any unusual adoption cases should be referred to Immigration Policy.

## 5.6 Marriages of convenience / Civil Partnership of convenience

- Regulation 2 of the 2006 Regulations provides that the definitions "spouse" and "civil partner" do not include someone who has entered into a marriage of convenience / civil partnership of convenience. Therefore, the spouse or civil partner of an EEA national is to be refused a Residence Card if the marriage / civil partnership is one of convenience, meaning one which has been contracted solely to obtain the benefits of EC law. (See Annex A for further details on marriage / civil partnership of convenience).

## 5.7 Qualifying for a Residence Card

**Before a Residence Card is issued the applicant must produce the following:**

- A valid passport, or, where this is unavailable, a Home Office issued identity document, such as an ARC card, as evidence of their own identity.
- The valid passport or national identity card of the EEA family member.
- Evidence of their relationship to the EEA sponsor. For example, a spouse should produce a marriage certificate, a civil partner a civil partnership certificate, for a child a full birth certificate should be produced which names the parent(s), for an unmarried partner proof that they have lived together for 2 years .

- Evidence that the EEA family member is exercising a Treaty right in the U.K.

Applications for Residence Cards by family members may be accompanied by an application for a Registration Certificate from the EEA sponsor, or the EEA sponsor may already have been issued with a Registration Certificate. However, there is no requirement for the EEA sponsor to have either applied for or been issued with a Registration Certificate before a Residence Card is issued.

## **Photographs**

An application for a Residence Card should be accompanied by 2 passport sized photos of the non-EEA national. One is featured on the Residence Card and the other retained in our case records.

If the application includes non-EEA dependant children each child is entitled to be issued with a Residence Card. Therefore photographs of the non-EEA children included in the application are also required.

If a child does not have their own passports, but is featured on their non-EEA parent's passport, then a separate Residence Card vignette relating to the child will be placed on a page of their non-EEA parent's passport.

If a non-EEA national qualifies for the issuing of a Residence Card but no photographs have been supplied then we must request the submission of photographs. If after a request is sent photographs are not supplied then the case must be extended to an SCW.

## **5.8 Determining that a marriage is legally valid**

### **Bigamy**

#### **Any case involving a bigamous marriage must be referred to a Senior Caseworker.**

If there is evidence that either the EEA national or the non-EEA national was already married at the time that their marriage took place, and that the earlier marriage had not ended in divorce, then the marriage is bigamous. As such the marriage will not be valid and the application for a Residence Card should be refused on the basis that we do not accept that the applicant is a family member.

### **Marriage in the U.K.**

All marriages which take place in the United Kingdom must, **in order to be recognised as valid**, be monogamous.

A claim to be married in the United Kingdom must be supported by a marriage certificate (normal green style in all cases) issued by one of the following:

- \* Superintendent Registrar;
- \* Registrar;
- \* Clergyman (of Church of England or Church in Wales);
- \* Authorised person of a Non-Conformist Church;
- \* The General Register Office;

- \* Secretary of Marriage for a Synagogue;
- \* Registering Officer for the Society of Friends; and
  - in a building approved for civil marriages under the Marriage Act of 1994.

### **Religious marriage**

A religious marriage certificate **cannot** be accepted on its own except as evidence of a common law relationship.

Where a religious marriage has taken place in the U.K. the application should be refused on the basis that we do not accept that the couple are legally married, unless it is clear that the non-EEA would qualify as a common-law partner.

### **Marriage in a foreign embassy in the U.K.**

#### **Any case involving a marriage that has taken place in an embassy must be referred to a Senior Caseworker**

A foreign embassy, high commission, consulate or other diplomatic premises in the United Kingdom are not regarded as being outside the United Kingdom because in the case of RADWAN V RADWAN (1972) ALL ER 967 it was found that a diplomatic premises forms part of the state in which it is situated. Since the Marriage Act of 1994 (which came into effect on 1 April 1995) it would be possible for an embassy to be listed as an approved building for a civil marriage in the United Kingdom.

However, no embassy in the U.K. is currently registered as an approved building and therefore **any** marriage conducted in an embassy in the U.K. is not valid.

Where a marriage has taken place in foreign embassy in the U.K. the application should be refused on the basis that we do not accept that the couple are legally married.

### **Marriage overseas**

The recognition of any marriage which has taken place overseas is governed by the following:

- is the type of marriage one recognised in the country in which it took place?
- was the actual marriage properly executed so as to satisfy the requirements of the law of the country in which it took place?
- was there anything in the law of **either** party's country of **domicile** that restricted his freedom to enter the marriage?

If the answers to the above questions are respectively, "yes", "yes" and "no" then the marriage is valid whether or not it is polygamous.

[Comment: It will be a matter for the ECJ whether all of the spouses to a polygamous marriage should be treated as family members under the Directive. We should perhaps discuss this type of case. ]

### **Polygamy**

#### **Any case involving a polygamous marriage must be referred to a Senior Caseworker.**

Whether a marriage is to be regarded as monogamous or polygamous must initially be determined by **where** the marriage is celebrated.

If the law of the country where the marriage takes place prohibits polygamy, (as English law does) then all marriages celebrated under that law must be monogamous, **regardless of whether a party to such a marriage is permitted to practice polygamy in his country of domicile**. Such a person can nevertheless contract a valid marriage here, as long as he is **not** already married, either here or abroad. Any further marriage contracted in this country would be void as it would be bigamous.

If the country in which the marriage is celebrated permits polygamy, any marriage contracted there by a person whose country of domicile permits him to enter into a polygamous union will be polygamous.

The 1988 Immigration Act does not affect the validity or otherwise of polygamous marriages. They are to be addressed as set out above. The 1988 Act mainly acts to limit the consequential immigration rights of actually polygamous wives.

### **Transnational marriages – proxy and telephone**

A transnational marriage may entail the sponsor appointing a "proxy" to stand in for him at the ceremony or, on other occasions, the exchange of vows between the two parties may take place over the telephone.

The law of the United Kingdom does not allow for marriages to be contracted in this country, either by proxy or over the telephone. However, the laws of certain other countries can recognise such a form of marriage as valid, provided it is contracted in that country.

The issue in cases involving proxy or telephone marriages is whether that form of marriage is valid according to the law of the country in which it was contracted. (See below).

### **Proxy marriages**

#### **Any case involving a proxy marriage must be referred to a Senior Caseworker**

Where the law of the country requires a ceremony, and a ceremony takes place with the participation of a proxy **in** that country, then the country where the marriage is celebrated **is** the country in which the ceremony occurred, **not** the country from which the proxy was appointed by the sponsor. Thus, such a marriage would be valid.

### **Telephone marriages**

#### **Any case involving a telephone marriage must be referred to a Senior Caseworker.**

The formal validity of a telephone marriage is to be determined according to the laws of the countries in which **both** parties are physically present when the marriage takes place. Therefore, a telephone marriage celebrated whilst one of the parties is in the United Kingdom will **not** be valid as telephone marriages are not valid in this country.

In cases where the UK based sponsor was overseas when a telephone marriage took place and the laws of both countries recognise such marriages, we cannot deny that the marriage is valid.

## **5.9 Six-month rule**

Community law requires us to decide applications for a Residence Card within 6 months from the date of receipt of the application. Every effort should be made to do so, particularly where an applicant draws our attention to an alleged breach of this requirement. Failure to comply with this requirement could leave the Home Office open to a claim for damages.

## **5.10 Checks that must be conducted before a Residence Card can be issued**

Prior to issuing a Residence Card a caseworker must be satisfied as to the non-EEA national identity (see Section 5.7 and 5.11), their relationship to the EEA national (see Section 5.8), that the non-EEA national is in the U.K and that the EEA national is a qualified person or has a right of permanent residence(see Chapter 4.1).

- In cases where the EEA national is exercising Treaty rights as an employed person or student the name of the employer or college must be entered in the relevant section of the 'sponsor' box on CID.

## **5.11 No evidence of non-EEA national's identity**

Under Regulation 17 (1) (a) of the 2006 Regulations we are only required to issue a Residence Card to those non-EEA family members who produce a valid passport.

Where an applicant produces a marriage certificate, but does not produce **any** evidence of their identity, we cannot be satisfied that they are the person to whom the marriage certificate relates. We cannot, therefore, be satisfied that they are 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.

Applications should be refused by letter without a right of appeal.

### **Applicants producing insufficient evidence of identity**

Where an applicant produces a marriage certificate, but produces insufficient evidence of identity, for instance, they may produce a birth certificate, an identity card with no photo or forged documents, we cannot be satisfied that they are the person to whom the marriage certificate relates. In such cases, we should initially write to the applicant requesting conclusive evidence as to their identity (i.e. a passport, or Home Office ID i.e. ARC card) or another form of conclusive evidence (see section below). If they fail to produce further evidence, then we would refuse the application. The applicant would have a right of appeal under Regulation 26 (3) (b) of the 2006 Regulations.

### **Applicants producing a Home Office ID card (i.e. an ARC card)**

Caseworkers may exercise discretion to issue a Residence Card where the applicant proves their identity by producing a Home Office issued identity card (e.g. an ARC card) or where the applicant produces another form of conclusive evidence that they are a family member of the EEA national (see section below).

Where an applicant produces a Home Office issued identity card (e.g. an ARC card) that corresponds to the person named on the marriage certificate, then 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 Annex A) and we are satisfied that the EEA national is exercising Treaty rights, 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.

### **Applicants producing other forms of conclusive evidence**

Where no valid identity documents are available, for the caseworker to exercise discretion and issue a Residence Card, the applicant must provide sufficiently conclusive evidence to satisfy us that the family member seeking a Residence Card is the person who married the EEA sponsor (e.g. submission of wedding video that conclusively shows that the applicant was the person who actually married the EEA national). If this evidence is not provided with the submitted Residence Card application we should write to the applicant requesting conclusive evidence as to their identity (i.e. a passport, or Home Office ID) or another form of conclusive evidence (e.g. a wedding video). If they fail to produce further evidence, then we would refuse the application. The applicant would have no right of appeal if they had produced no evidence as to their identity or would have a right of appeal under Regulation 26 (3) (b) if they had produced some evidence but we were not satisfied as to the quality of the evidence.

Where the refusal of the Residence Card is on the basis of not being satisfied that the non-EEA national is a family member of an EEA national, but the applicant later produces conclusive evidence to prove they are a family member, reconsideration of the decision to refuse a Residence Card is appropriate. Caseworkers must, however be, satisfied that the EEA national is still exercising their Treaty Rights in the UK at the time of reconsideration.

## **5.12 Issuing a Residence Card**

Once the relevant checks detailed above have been completed the caseworker may issue a Residence Card if they are satisfied that the third country national is related to the EEA national and that the EEA national is exercising a Treaty right.

Residence Cards are issued with a validity of 5 years.

Residence Cards take the form of a vignette endorsement placed in the non-EEA national's passport or on an immigration status document (ACD.2150) if no passport is available.

- The appropriate covering letter is the ECD.3108.

## **5.13 Issuing a Swiss Residence Card**

Although Swiss nationals are not EEA nationals the Agreement between the EU and its Member States and the Swiss Confederation on the Free Movement of Persons in general terms confers on Swiss nationals and their non-EEA family members the same rights as those enjoyed by EEA nationals and their non-EEA family members. Swiss nationals are treated as EEA nationals under the 2006 EEA Regulations. If a non-EEA family member of a Swiss national qualifies they are issued with a Swiss Residence Card.

Swiss Residence Cards are issued with a validity of 5 years.

Swiss Family Member Residence Cards take the form of a vignette endorsement placed in the non-EEA national's passport or on an immigration status document (ACD.2150) if no passport is available.

- The appropriate covering letter is the ECD.3109.

#### **5.14 Exemption from Police Registration**

Third Country nationals who are required to register with the police are exempt from police registration if they are family members of EEA or Swiss nationals.

Where a person who has been required to register subsequently becomes exempt, for example, on marriage to an EEA national, the Police Registration Certificate should be endorsed by CDU with an "exempt from registration" stamp before it is returned. Caseworkers should advise CDU to carry this out in cases where the Police Registration Certificate has been supplied.

Caseworkers should also amend the appropriate sections on G-CID relating to Police Registration, which will ensure that the police are advised of this change in status.

In cases where we have not been supplied with the Police Registration Certificate, but it is clear from G-CID that the third country national has previously been required to register, caseworkers should amend the appropriate sections on G-CID relating to Police Registration, which will ensure that the police are advised of this change in status.

For more information regarding Police Registration, including details of the nationalities that are subject to this requirement, see Chapter 10 of the IDIs.

#### **5.15 Refusing Residence Card applications**

An application for the issuing of a Residence Card can be refused in the event of any of the following:

- ◆ Evidence of EEA nationality of sponsor is not supplied.\*
- ◆ Evidence of EEA nationality is forged / counterfeit.
- ◆ Evidence of the exercise of Treaty rights is not supplied.

- ◆ Enquiries reveal that either the evidence of the exercise of Treaty rights is false, that the EEA national has left the UK, or that the EEA national has ceased to exercise Treaty rights and does not have a right of permanent residence under the 2006 EEA Regulations.\*\*
- ◆ Evidence of the third country national's identity is not supplied.\*\*\*
- ◆ Evidence of the relationship between the third country national and the EEA national is not supplied.\*\*\*\*
- ◆ The third country national is not genuinely a dependant family member.
- ◆ Refusal is justified on the grounds of Public Policy, Public Health or Public Security.\*\*\*\*\*

\*In cases where no document purporting to be evidence of the EEA sponsor's nationality is supplied the application is refused by letter without a right of appeal.

\*\*However, an EEA worker does not cease to be a qualified person solely because they are temporarily unable to work due to illness or accident, or if they have become involuntarily unemployed and are seeking work.

\*\*\*In cases where no evidence of the third country national's identity is supplied the application is refused by letter without a right of appeal.

\*\*\*\*In cases where no evidence of the relationship between the third country national and the EEA national is supplied, i.e. no marriage certificate / birth certificate, the application is refused by letter without a right of appeal.

\*\*\*\*\*Cases involving Public Policy, Public Health or Public Security are rare but the family member of a European national who has been convicted of a crime may apply for a Residence Card. If Criminal Casework Team are taking deportation action, or are intending to take deportation action, against the individual then it will be appropriate to refuse a Residence Card on the basis of Public Policy.

## **5.16 Regulation to quote on the refusal form and the Reason For Refusal Letter (RFRL) and wording for the refusal form:**

### Refuse Residence Card no evidence of EEA family member's nationality:

- ECD.3117 is the appropriate letter to use. No right of appeal.

*On (specify date) a letter was sent to you/your representatives requesting that you submit either a valid national passport or ID card as evidence of your EEA family member's identity and nationality. However, to date you have failed to supply such evidence.*

*Your application has therefore been refused on the grounds that you have not provided evidence in the form of either a valid national passport or ID card as evidence that your family member is an EEA national as claimed.*

### Refuse Residence Card no evidence of identity:

- ECD.3117 is the appropriate letter to use. No right of appeal.

#### Wording:

*On (specify date) a letter was sent to you/your representatives requesting that you submit a passport as evidence of your identity. However, to date you have failed to supply such evidence.*

*Your application has therefore been refused on the grounds that you have not provided evidence in the form of a valid national passport or any other document as evidence of your identity and therefore you have not established that you are related as claimed to an EEA national.*

### Refuse Residence Card no evidence of relationship to EEA national:

- ECD.3117 is the appropriate letter to use. No right of appeal.

#### Wording:

*On (specify date) a letter was sent to you/your representatives requesting that you submit a marriage certificate / civil partnership certificate / birth certificate as evidence of your relationship. However, to date you have failed to supply such evidence.*

*Your application has therefore been refused on the grounds that you have not provided evidence in the form of a marriage certificate / birth certificate / civil partnership certificate as evidence that you are related as claimed to an EEA national.*

### Refuse Residence Card insufficient evidence of relationship to EEA

Regulation 7 of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

#### Wording:

*You have applied for a Residence Card as confirmation of a right of residence as the family member of an EEA national who is a qualified person, but you have failed to produce [specify] as evidence that you are related as claimed to an EEA national.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

### Refuse Residence Card EEA national not exercising Treaty rights:

Regulation 6 of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation of a right of residence as the family member of an EEA national, but your EEA family member has failed to provide evidence that they are a qualified person as set out in Regulation 6 of the Immigration (EEA) Regulations 2006.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refuse Residence Card EEA ppt or ID card is forged / counterfeit:

Regulation 6 of EEA Regulations 2006

- ECD.3117 is the appropriate letter to use. No right of appeal.

Wording:

*You have applied for confirmation of a right of residence in the United Kingdom as the family member of....., who it is claimed is an EEA national exercising rights in the United Kingdom under European Community law. But the ID card / passport that has been produced purporting to be evidence of their EEA nationality is counterfeit / forged. Therefore you are not entitled to rely on the provisions of the Immigration (EEA) Regulations 2006.*

Refuse Residence Card Marriage / Civil Partnership of Convenience:

Regulation 2 of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation of a right of residence as the spouse / civil partner of an EEA national exercising Treaty rights in the United Kingdom. However, your marriage / civil partnership is one of convenience.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refuse Residence Card Common-law partner of an EEA, no evidence of two year co-habitation:

## Regulation 8 (5) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

### Wording:

*You have applied for a Residence Card as a person who is in a durable relationship with an EEA national. Your application has been considered in accordance with Regulation 8 of the Immigration (EEA) Regulations 2006 but you have failed to prove that you are in a durable relationship with an EEA national.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

## Refuse Residence Card family members not dependant on EEA:

### Regulation 7 of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

### Wording:

*You have applied for a Residence Card as confirmation of a right of residence in the United Kingdom as the dependent family member of an EEA national, but in view of [specify reasons] you have failed to demonstrate that you are genuinely dependent upon your EEA family member.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

If the applicant has provided evidence that they had lived under the same roof as the EEA national prior to coming to the UK, caseworkers must consider whether it is appropriate in all the circumstances to issue a Residence Card under the provisions of Regulation 8 of the 2006 Regulations which makes provision for more distant family members. If there are insufficient grounds to suggest that the EEA national would be deterred from exercising his or her Treaty rights if the applicant had to leave the UK, it will be necessary to add the following wording to the refusal:

*Furthermore, your application has been considered in accordance with Regulation 8 of the Immigration (EEA) Regulations 2006 on the basis that you are an extended family member who resided as part of the household of an EEA national in an EEA State and continue to be a member of that person's household in the UK. However, it is not considered appropriate to issue you with a Residence Card on this basis.*

## Refuse Residence Card more distant family members not dependant on EEA:

### Regulation 8 of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as the extended family member of an EEA national. Your application has been considered in accordance with Regulation 8 of the Immigration (EEA) Regulations 2006 but there are insufficient grounds for issuing you with a Residence Card.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

#### Refuse Residence Card - Public Policy, Public Health or Public Security:

Regulation 20 (1) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation of a right to reside in the United Kingdom as the family member of an EEA national exercising rights in the United Kingdom under European Community law. However, you would pose a threat to the requirements of public policy if allowed to remain in the United Kingdom.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

### **5.17 Appeal Rights**

- A refusal to issue a Residence Card on the grounds that the EEA national family member is not exercising a Treaty right attracts a full 'in country' right of appeal under Regulation 26 of the 2006 Regulations.
- A refusal to issue a Residence Card on the grounds that the passport / ID card presented as evidence of EEA family member's nationality is forged / counterfeit attracts no right of appeal under Regulation 26 of the 2006 Regulations.
- A refusal to issue a Residence Card on the grounds of Public Policy Public Health or Public Security attracts a full 'in country' right of appeal under Regulation 26 of the 2006 Regulations.
- If no evidence of the EEA family member's EEA nationality has been supplied then there is no right of appeal and the application is refused by letter. ECD.3117 is appropriate. An applicant would need to supply some form of document purporting to be evidence of their family member's EEA nationality before qualifying for a right of appeal under the 2006 Regulations. The applicant must provide some form of evidence that their EEA family member is an EEA national before benefiting from rights of appeal provided under European law.

- If no evidence of the non-EEA national's identity / relationship to the EEA national is provided the application is refused without a right of appeal. ECD.3117 is appropriate. The applicant must provide some form of evidence of their own identity and relationship to the EEA before they can benefit from a right of appeal under European law.

## 5.18 Revocation of Residence Card

- ◆ Regulation 20 (2) of the 2006 Regulations makes provision for the revoking of a Residence Card if:

“the holder of the ... card has ceased to have a right to reside under [the] Regulations”.

- ◆ Regulation 20 (1) of the 2006 Regulations makes provision for the revoking of a Residence Card on the grounds of public policy, public security or public health.

It is rare to encounter such a case but the family member of an EEA national who has been convicted of a crime may have been issued with a Residence Card. If Criminal Casework Team are taking deportation action, or are intending to take deportation action, against the individual then it will be appropriate to revoke a Residence Card on the basis of Public Policy.

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

## 5.19 Regulation to quote on the revocation form and the Reason For Revocation Letter (RFRL) and wording for the revocation form:

### Revoke Residence Card EEA no longer exercising Treaty rights:

Regulation 20 (2) of EEA Regulations 2006

- ECD.3128 is the appropriate revocation template.

Wording:

*On.....you were issued a Residence Card as confirmation of a right of residence in the United Kingdom as the family member of an EEA national. However, your EEA family member is not exercising Treaty rights in the United Kingdom. You have therefore ceased to be the family member of a qualified person.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

### Revoke Residence Card non-EEA no longer a family member

Regulation 20 (2) of EEA Regulations 2006

- ECD.3128 is the appropriate revocation template.

Wording:

*On.....you were issued a Residence Card as confirmation of a right of residence in the United Kingdom as the family member of a qualified person. However, you have ceased to be the family member of that person and no longer have a right of residence in the United Kingdom or the right to hold a Residence Card confirming such a right.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

#### Revoke Residence Card EEA ppt or ID card is forged / counterfeit:

Regulation 20 (2) of EEA Regulations 2006

- ECD.3134 - Revoke Residence Card - Family Member's Passport / ID Card Forged

Wording:

*On.....you were issued a Residence Card as confirmation of a right of residence in the United Kingdom as the family member of an EEA national. However, checks have revealed that the passport / ID card submitted as evidence of their EEA nationality is forged / counterfeit. Therefore you are not entitled to hold a residence card as the family member of an EEA national.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

#### Revoke Residence Card - Public Policy, Public Health or Public Security:

Regulation 20 (1) of the EEA Regulations 2006

- ECD.3128 is the appropriate revocation template.

Wording:

*On ..... you were issued a Residence Card as confirmation of a right of residence in the United Kingdom as the family member of an EEA national exercising rights in the United Kingdom under European Community law. However, you would pose a threat to the requirements of public policy if allowed to remain in the United Kingdom.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

## 5.20 Appeal Rights in revocation cases

All revocations of Residence Cards attract a full 'in country' right of appeal under Regulation 26 of the 2006 Regulations.

## 5.2. Illegal Entry Cases

Illegal entrants are persons who have either:

- entered the United Kingdom clandestinely without presenting themselves to an Immigration Officer;
- entered the United Kingdom using forged or fraudulently obtained documents;
- gained entry using deception;
- entered in breach of a deportation order.

Persons who have been served with notices of illegal entry will be either:

- detained; or
- on temporary release (being obliged to live at a given address and report regularly to the police or an Immigration Officer)

European Casework may receive applications from persons who are illegal entrants, some of whom will already have been identified as illegal entrants and served with notices of illegal entry, and some of whom will not have been in contact with UKBA before.

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 not be able to take part in a civil marriage ceremony.

It should though be noted that 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.

European Casework are responsible for considering whether, in such circumstances, an illegal entrant has a right of residence under EC law. 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 (and therefore be entitled to a residence card.)

### Key points:

Cases involving detained illegal entrants should be actioned without delay. If the case cannot be resolved quickly it will normally be appropriate to advise the local enforcement office to release after we have been provided with evidence that the subject is the family member of an EEA national who is exercising Treaty rights in the United Kingdom. Any other enquiries deemed appropriate should be conducted whilst the subject is on temporary release.

- Responsibility for the decision on the application under EC law lies with European Casework not with IS Enforcement and Removals Directorate.
- IS Enforcement and Removals Directorate may be asked to make enquiries on our behalf, but clear guidance should be given as to the nature and conduct of those enquiries.

IS should always be notified of the outcome of a case, if illegal entry notices have been served. They in turn should be asked to ensure that the enforcement office dealing with the individual are also informed.

### **5.2.1 Issuing a Residence Card to an illegal entrant**

If it is decided that an illegal entrant has acquired a right of residence under EC law, a Residence Card should be issued.

It is important to notify IS that a Residence Card has been issued, as any reporting instructions etc will have to be cancelled.

### **5.2.2 Refusal to issue a Residence Card**

Where it is decided to refuse a Residence Card, refusal wordings set out in this chapter will apply.

The applicant will have an in-country right of appeal, which must be resolved before he/she may be removed as an illegal entrant, only if he/she has supplied evidence of the EEA nationality of their family member, and evidence of their relationship to the EEA national.

### **5.2.3 Release from detention / altering reporting instructions**

It has been argued that we are unable to restrict the movement of the family member of an EEA national by detaining them or requiring them to live at a given address. In most cases it will be appropriate to release the subject from detention. Temporary release should not be authorised and reporting instructions should not be amended in this way unless we have seen:

- Evidence of EEA sponsor's nationality
- Evidence of relationship (e.g., marriage certificate, birth certificate etc)
- Evidence that the EEA sponsor is exercising a Treaty right

## **5.3 PORT / TEMPORARY ADMISSION CASES**

Port cases involve persons who have arrived at a port and have not yet been admitted to the United Kingdom, or been given leave to enter. Such persons have either been placed on temporary admission, or sometimes in detention, pending a decision as to whether to admit / grant leave to enter.

Persons on temporary admission are normally required to live at a given address and report regularly to an immigration officer until a decision is reached.

An immigration officer at the port may sometimes telephone European Policy or European Casework direct about a case. When this happens he / she should be told to contact BCPI.

Representatives frequently, by accident or design, lodge applications for Residence Cards in respect of non-EEA family members of EEA nationals who are port cases with European Casework.

Regulation 22 (2) of the 2006 Regulations states that a person to whom the Regulations apply, i.e. a non-EEA family member of an EEA national, is to be treated as if they were a person seeking leave to enter the United Kingdom under the 1971 Act. Therefore they may be placed on temporary admission, or detained. They are not deemed to have been admitted to the United Kingdom simply by virtue of being the family member of an EEA national.

However, if the non-EEA national has been present in the United Kingdom for more than 3 months a full in-country right of appeal is provided if the application is refused.

Port cases should, therefore, be dealt with by European Casework if the person has been in the UK for more than 3 months. This applies to both absconder cases and persons complying with temporary admission conditions. Reference should be made to BCPI in the first instance.

The only exception to this, would be in cases where a port has expressed a strong interest in a case, and wished themselves to take consideration forward. Ports must make a strong case to justify their continued involvement in the consideration process.

The port must though be made fully aware that there is a requirement to successfully complete applications for Residence Cards within a deadline of 6 months from the date of application, and that failure to comply with this can result in legal action by solicitors and claims for compensation.

If this happened, port must be prepared to take full responsibility for any subsequent legal actions, including Judicial Review and compensation claims.

### **5.3.1 How to recognise a port case:**

Port cases can be identified by the following:

- An I-CID record should exist for the non-EEA national.
- Application form or solicitors letter may feature a port reference number, (e.g. "TN2" plus series of figures).
- Port cases will often have copy port papers on file.
- Applicant will not be able to produce a passport showing leave to enter has been given. Sometimes a new passport will have been obtained in the United Kingdom, sometimes we will be told that passport is being held at port.
- File Tracking will indicate that the file is, or has previously been, in another department, i.e. BCPI or a port.

### **5.3.2 Port cases arriving in European Casework will fall into 3 basic categories:**

- Cases where the non-EEA national was the spouse / civil partner of an EEA national (or is otherwise related) before travelling to the United Kingdom but failed to obtain the requisite EEA Family Permit and does not hold a Residence Card.
- Cases where the non-EEA national married or became a civil partner of an EEA national, whilst on temporary admission. It is not uncommon for people who claimed asylum on arrival to fall into this category. However, the introduction of the Certificate of Approval in February 2005 now limits the ability of people who do not hold valid leave to take part in a civil marriage. Despite this a religious marriage may taken place, or else it may be claimed that the non-EEA is a common-law partner of an EEA national. In either instance [unless the religious marriage was a Church of England marriage] for the non-EEA national to qualify for consideration under regulation 8(5) as the partner of an EEA national we need to determine whether the partnership is durable. In making this determination the common-law partner criteria should be applied. This is that the non-EEA can show that the couple have co-habited with the EEA for 2 years. Even if the non EEA national can show that the partnership is durable the issuing of a residence card is discretionary. As the non-EEA will not have been granted leave such applications will fall to be refused. However, Article 8 of the Human Rights Act (right to family life) would need to be considered prior to refusal. If the application is refused an in country right of appeal on Human Rights grounds would be provided, even if the non-EEA national had not been on temporary admission for less than 3 months.
- Cases where the subject is an EEA national or a family member who does not qualify for admission on the grounds of public policy, public security or public health.

In the majority of cases, the file should be forwarded to the relevant port where known (see below) or if not known to BCPI. No further work on the case should be undertaken in European Casework. However, see bullet point 1 of the key points below for the exception to this rule.

### **5.3.3 Should European Casework conduct enquiries on port cases?**

All enquiries, interviews etc should be conducted by IS, and the file should be forwarded to the appropriate port, without any further action being undertaken in the European Casework if the applicant has been in the UK for less than 3 months. The caseworker should write to the applicant (or his/her representative), explaining that as he/she has not yet been admitted to the United Kingdom, all correspondence should be directed to the relevant port (see letter on the document generator - inappropriate paragraphs should be deleted: see (4) below). If a file does not already exist one should be raised and sent to the relevant port where known, or if not known to BCPI.

However, if the applicant has been in the UK for over 3 months European Casework can consider as normal but must remember to inform the port of their actions.

### **5.3.4 What if there is also an application for a Registration Certificate, from the EEA family member of the person on temporary admission?**

This will clearly have to be handled by the European Casework. The Registration Certificate application should be completed before referring papers back to port. The outcome of the Registration Certificate application will affect the decision as to whether to admit the family member of the EEA national.

### **5.3.5 What action will port take in those cases where the applicant has been in the UK for less than 3 months?**

Port will conduct any necessary enquiries pursuant to their powers under Schedule 2 of the Immigration Act 1971, which have been incorporated into the 2006 Regulations.

If, in the case of a non-EEA national who has married or become the civil partner of an EEA national while on temporary admission, the port are satisfied that:

- the relationship is genuine, and
- the EEA principal is exercising Treaty rights in the United Kingdom

the EEA family permit requirement can be waived, and the passenger admitted to the United Kingdom for 6 months on Code 1A. It is Immigration Service practice to advise the person concerned to apply for a Residence Card after entry.

If Immigration Service establish that the passenger has no entitlement to admission under EC law, admission will be refused after reference to BCPI. This applies both to cases encountered on arrival in the United Kingdom, and in cases where a marriage took place after arrival in the United Kingdom, whilst the passenger was on temporary admission, but had been in the UK for less than 3 months.

An EEA national, or a non-EEA family member, may also be refused admission on grounds of public policy, public security or public health, unless a current and valid Registration Certificate or Residence Card is held. In such circumstances the case details must be forwarded to European casework.

#### **Key points:**

- Port retains responsibility for the majority of cases. However, if the case is accompanied by a Registration Certificate application from an EEA national, (and a Residence Card application for their non-EEA spouse or family member) the application should be completed in the European Casework. This applies only to those cases where the third country national has been present in the UK for over 3 months. The port concerned must be notified of the decision once made.
- Any further enquiries, interview, or home visits should be arranged by the port concerned after liaison with European Casework.
- The port should arrange an interview.
- If it is decided that the non-EEA passenger does have a claim to remain under EC law, IS should first admit the passenger (current practice is to grant

6 months on Code 1A) before European Casework may issue a Residence Card.

- If Port decide to refuse entry to a non-EEA national (who has sought leave to enter under EC law and who is not entitled to admission under EC law) the decision will attract an out of country right of appeal by virtue of Regulation 27 (1) (a) of the 2006 Regulations. This is unless he/she holds a valid EEA family permit, or Residence Card on his/her arrival in the United Kingdom or where a ground of appeal is that the decision was in breach of the appellant's rights under the Human Rights or Refugee Conventions. However, if European Casework refuse there will be an in-country right of appeal. This is because the non-EEA will have been present in the UK for over 3 months.
- An EEA national and his family member(s) refused admission on the grounds of public policy, public health or public security would have a right of appeal only from abroad (Regulation 27 (1) of the 2006 Regulations), unless, in the case of a non-EEA family member, he holds a valid Family Permit on arrival (right of appeal in-country) or where a ground of appeal is that the decision was in breach of the appellant's rights under the Human Rights or Refugee Conventions. A person who holds a valid, current Registration Certificate or Residence Card on arrival would not normally be refused admission; the case details must be forwarded via BCPI to European Casework for consideration.
- All port cases should be referred to the port, or if the port is not known to BCPI.

## **5.4 THE CONTINUED RIGHT OF RESIDENCE OF NON-EEA NATIONALS**

There are various ways in which a non-EEA national may retain a right of residence.

### **5.4.1 Divorce or annulment of marriage / dissolution of civil partnership**

A non-EEA national who is the spouse / civil partner of an EEA national does not cease to be a family member in the event of marital breakdown / separation as long as the EEA national continues to exercise Treaty rights in the United Kingdom.

The non-EEA national continues to have a right of residence until such time as a divorce is finalised, (Decree Absolute obtained) / the civil partnership is dissolved.

However, a non-EEA national spouse / civil partner will lose their right of residence if the EEA national leaves the United Kingdom, unless the non-EEA qualifies for a retention right of residence as detailed in the following section.

Policy is to revoke or to refuse to issue / renew a Residence Card in the event of divorce / dissolution of civil partnership, or when there is evidence that the EEA national has left the United Kingdom, unless the non-EEA qualifies for a retention of a right of residence.

### **5.4.2 Retention of a right of residence following divorce or annulment of marriage / dissolution of civil partnership**

Regulation 10 (5) of the 2006 Regulations makes provision for the following:

If the marriage or civil partnership has 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 United Kingdom for at least one year during the duration of the marriage or civil partnership, then the third country national retains a right of residence if:

- (a) they are pursuing activity which would make them a worker or a self-employed person if they were an EEA national;
- (b) they are a self-sufficient person – including a retired person;
- (c) they are the family member of a person in the United Kingdom who is either a worker, self-employed, or is a self-sufficient person.

If the non-EEA national is a student then they will not qualify, unless they are a student with sufficient resources to be self-sufficient.

#### **5.4.3 Making an application following divorce or annulment of marriage / dissolution of civil partnership**

The following documents must be supplied:

- Passports of the non-EEA family members
- Divorce certificate/certificate showing termination of civil partnership
- Evidence that at least one of the non-EEA family members is a worker, self-employed or self-sufficient.

If we have not previously issued a Residence Card we must be satisfied that the alleged EEA national is an EEA national and that the non-EEA nationals were living in the UK with the EEA national prior to divorce / dissolution of civil partnership, and that EEA was exercising Treaty rights during that time.

#### **5.4.4 Retention of a right of residence if the non-EEA does not meet the requirements detailed in 4.2 but has custody of a child of the EEA national**

Regulation 10 (5) (d) (ii) of the 2006 Regulations makes provision for the following:

If the marriage or civil partnership has lasted less than three years, or the parties have not resided in the U.K. for at least one year during the duration of the marriage or civil partnership, the non-EEA may still qualify if they have custody of the child of the EEA national.

#### **5.4.5 Making an application on the basis that the non-EEA national has custody of the child**

The following documents must be supplied:

- Passports of the non-EEA family members
- Divorce certificate/termination of partnership certificate
- Birth cert of child confirming relationship
- Court Order confirming custody
- Evidence that at least one of the non-EEA family members is a worker, self-employed, or economically self-sufficient\*.

\*If the only activity undertaken is as a student then they will not qualify, unless the student has sufficient resources to be self-sufficient.

If we have not previously issued a Residence Card we must be satisfied that the alleged EEA national is an EEA national and that the non-EEA nationals were living in the UK with the EEA national prior to divorce/termination of civil partnership, and that EEA was exercising Treaty rights during that time.

#### **5.4.6 Retention of a right of residence by a former spouse or civil partner of an EEA national who has a right of access to a child under the age of 18 and a court has ordered that such access must take place in the U.K.**

Regulation 10 (5) (d) (iii) of the 2006 Regulations makes provision for the following:

If the non-EEA national has a right of access, ordered by a court, to a child residing in the U.K. then they will retain a right of residence in order to make use of this access right.

#### **5.4.7 Making an application on the basis of having a right of access to a child under 18**

The following documents must be supplied:

- Passports of the non-EEA family members
- Divorce certificate/ termination of partnership certificate
- Birth certificate of child confirming relationship
- Court Order confirming access rights
- Evidence that the non-EEA family members is a worker, self-employed, or self-sufficient.

If the non-EEA national is a student then they will not qualify, unless they are a student with sufficient resources to be self-sufficient.

If we have not previously issued a Residence Card we must be satisfied that the alleged EEA national is an EEA national and that the non-EEA nationals were living in the UK with the EEA national prior to divorce/ termination of partnership, and that EEA was exercising Treaty rights during that time.

#### **5.4.8 Retention of a right of residence if the non-EEA has been the victim of domestic violence**

Regulation 10 (5) (d) (iv) of the 2006 Regulations makes provision for the following:

If a non-EEA has been subject to domestic violence then they will retain a right of residence (or if there are other particularly difficult circumstances that justifying the retention).

**All applications made on this basis must be referred to a Senior Caseworker prior to a decision to either grant or refuse being dispatched.**

#### 5.4.9 Making an application on the basis of being the victim of domestic violence

The following documents must be supplied:

- Passports of the non-EEA family members
- Evidence that the applicant has been the victim of domestic violence\*
- Evidence that the non-EEA family members is a worker, self-employed, or self-sufficient.

If the non-EEA national is a student then they will not qualify, unless they are a student with sufficient resources to be self-sufficient.

If we have not previously issued a Residence Card we must be satisfied that the alleged EEA national is an EEA national and that the non-EEA nationals were living in the UK with the EEA national prior to divorce / termination of partnership, and that EEA was exercising Treaty rights during that time.

##### \*Evidence of domestic violence

In order to establish a claim of domestic violence evidence should be sought in the form of:

- An injunction, non-molestation order or other protection order made against the EEA national (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.

##### Police cautions

Where an applicant claims that the police have issued a caution against the EEA national or have decided to prosecute him or her, ***the applicant will not be able to produce any documentary evidence to this effect.***

Caseworkers will need to make enquiries of the Criminal Records Office (CRO) of the Police Force covering the area where the incident took place. (See Chapter 8 of the IDIs).

Where the police confirm that a caution was issued to the sponsor for domestic violence against the applicant this will be sufficient for us to issue confirmation of a continuing right of residence.

Where the police confirm that there is a prosecution pending ***we should not issue a Residence Card until the charge has been proved and the EEA national found guilty.*** In these cases the applicant should be granted ***further leave to remain for periods of 6 months at a time, subject to the same conditions, until the outcome of the prosecution is known.*** The police have asked us ***not*** to make progress enquiries in these cases as this would place an unnecessary burden upon their staff.

Where the non-EEA claims they are waiting for a court hearing for a Court Order, a decision on the application may be delayed pending the outcome of that hearing, provided evidence is received **from the Court** confirming the case has been listed to be heard, and the date of the hearing. An ex-parte application is normally heard on the day of application and the date for the full hearing (if there is to be one) is normally within 7 days. Every effort is made by the court to resolve the case on the date set, but where the case is complicated and likely to last a full day it may be re-listed but will be given priority and will be heard at the earliest opportunity. It is therefore most unlikely that there will be any significant delay.

### **Other acceptable proof of domestic violence**

It is often difficult for victims of domestic violence to produce the documentary evidence of violence and there is often an unwillingness or insufficient evidence to take the matter to court. Although caseworkers should still try to obtain police or court evidence confirmation of domestic violence, **where this is not possible**, acceptable evidence may take the form of **more than one** of the following:

- A medical report from a hospital doctor confirming that the non-EEA has injuries consistent with being a victim of domestic violence;
- A letter from a family practitioner who has examined the non-EEA and is satisfied that the applicant has injuries consistent with being a victim of domestic violence;
- An undertaking given to a court that the perpetrator of the violence will not approach the non-EEA who is the victim of the violence;
- A police report confirming attendance at the home of the non-EEA as a result of a domestic violence incident;
- A letter from a social services department confirming its involvement in connection with domestic violence;
- A letter of support or report from a women's refuge.

### **5.4.10 Retention of a right of residence if the EEA national dies**

Regulation 10 (2) of the 2006 Regulations makes provision for the following:

If the EEA national has died a third country national may retain a right of residence in certain circumstances.

To qualify the third country 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. Furthermore, the non-EEA will also have to show that they would qualify as if they were an EEA national, i.e. as a worker, self-employed person, or self-sufficient person or that they are the family member of a third country who meets this requirement.

Therefore, the adult aged non-EEA son of an EEA national who has died will qualify if he is working in the UK, and his mother would also qualify on the basis of being the family member of her son if she is financially dependent upon him.

#### **5.4.11 Making an application on the basis that the EEA national has died**

The following documents must be supplied:

- Passports of the non-EEA family members
- Death certificate of the EEA national
- Evidence that the non-EEA family members is a worker, self-employed, or self-sufficient.

If the non-EEA national is a student then they will not qualify, unless they are a student with sufficient resources to be self-sufficient.

If we have not previously issued a Residence Card we must be satisfied that the alleged EEA national is an EEA national and that the non-EEA nationals were living in the UK with the EEA national prior to death, and that EEA was exercising Treaty rights during that time.

#### **5.4.12 The continued right of residence of children if the EEA national dies or the EEA leaves the United Kingdom.**

Regulation 10 (3) of the 2006 Regulations makes provision for the following:

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

- a) they were attending an educational course in the United Kingdom immediately before the qualified person died or ceased to be a qualified person, and they continue in education.

**If the child is an EEA national then the child will qualify for the issuing of a Registration Card and not a Residence Card.**

#### **5.4.13 Making an application for a Residence Card where a non-EEA child retains a right of residence.**

Where a child makes an application to remain in the United Kingdom in accordance with the provisions set out above the following documentation is required:

- child's passport;
- evidence that the child was the family member of an EEA national who was exercising Treaty rights in the UK :
  - Residence Card or
  - birth certificate or evidence of dependency if the child is over 21, EEA national's P60's, wage slips, accountant's letter etc;
- evidence that the child is attending education in the UK e.g. a letter from the child's school; and
- evidence that the child was being educated in the UK prior to the EEA national leaving the UK or dying; and
- confirmation that the EEA national has left the UK or died.

A Residence Card should normally be issued with a validity of 5 years, unless the child is nearing completion of their studies. In this case we can limit the validity of the Residence Card.

A Residence Card that is 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 5.4.12. For instance, if the child leaves school.

#### **5.4.14 The continued right of residence of a non-EEA parent of a child who retains a right of residence in the event that the EEA national dies, or the EEA leaves the United Kingdom.**

The non-EEA parent, or former civil partner, with custody of the child retains a right of residence under regulation 10(4) if the child has a right to reside under regulation 10(3).

#### **5.4.15 Making an application for a Residence Card on the basis of being a non-EEA 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 this basis the following documentation is required:

- their passport or identity card;
- their child's passport or identity card;
- evidence that they were the spouse / civil partner of a qualified person
  - Residence Card or
  - marriage certificate plus the EEA national's P60s, wage slips, accountant's letters etc;
- child's birth certificate;
- evidence that they have custody of the child, for example court order or a letter that has been officially sworn by a solicitor confirming that the non-EEA national has custody;
- evidence that the child is attending school in the UK e.g. a letter from the child's school; and
- evidence that the child was being educated in the UK prior to the death or departure of the EEA national from the United Kingdom;
- if the applicant is applying on the basis of departure, confirmation that the EEA national has left the UK. This can be in the form of a declaration.
- In the cases of a former spouse or civil partner with access rights a court order confirming this.

A Residence Card should normally be issued with a validity of 5 years, unless the child is nearing completion of their studies. In this case we can limit the validity of the residence card to the period under which the non-EEA national has rights of residence.

A Residence Card that is 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 in paragraph 5.4.12. For instance, if the child leaves school or if the non-EEA national ceases to have custody of the child.

#### **5.4.16 Checks that must be conducted before a Residence Card can be issued**

Prior to issuing a Residence Card on the basis of the retention of a right of residence a caseworker must be satisfied as to the Non-EEA national identity (see Section 5.7), and that they did previously qualify for a right of residence under European law prior to their change of circumstance.

#### **5.4.17 Issuing a Residence Card**

Once the relevant checks detailed above have been completed the caseworker may issue a Residence Card if they are satisfied that the third country national retains a right of residence.

Residence Cards should be issued with a validity of 5 years or, in the following cases, in line with when child reached the specific age, whichever is shorter:

In cases where the child is established in education this ends when the child reached the age of 21.

In cases where the non-EEA former spouse or civil partner has access rights this ends when the child reaches the age of 18.

#### **5.4.18 Refusing Residence Card (retention of a right of residence) applications**

If a non-EEA national applies for the issuing of a Residence Card as confirmation that they retain a right of residence but does not qualify then the application should be refused.

Cases involving Public Policy, Public Health or Public Security are rare but a family member who retains a right of residence may be convicted of a crime. If Criminal Casework Team are taking deportation action, or are intending to take deportation action, against the individual then it will be appropriate to refuse a Residence Card on the basis of Public Policy.

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

#### **5.4.19 Regulation to quote on the refusal form and the Reason For Refusal Letter (RFRL) and wording for the refusal form:**

Refusal if the non-EEA does not qualify following divorce or annulment of marriage / dissolution of civil partnership:

Regulation 10 (5) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation that you retain a right of residence as the former spouse / civil partner of an EEA national. However, you do not qualify on this basis.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refusal if the non-EEA does not have custody of a child of an EEA national:

Regulation 10 (5) (d) (ii) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation that you retain a right of residence on the basis that you have custody of a child. However, you do not qualify on this basis.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refusal if the non-EEA national does not have a right of access to a child under the age of 18 ordered by a court:

Regulation 10 (5) (d) (iii) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation that you retain a right of residence on the basis that you have a right of access to a child in the United Kingdom. However, you do not qualify on this basis.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refusal if the non-EEA has not been the victim of domestic violence:

Regulation 10 (5) (d) (iv) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation that you retain a right of residence on the basis that you have been the victim of domestic violence. However, you do not qualify on this basis.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refusal if the non-EEA does not qualify on the basis that the EEA national has died:

Regulation 10 (3) (a) (i) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation that you retain a right of residence on the basis that you are the family member of an EEA national who has died. However, you do not qualify on this basis.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refusal for a non-EEA child under the age of 21 if the non-EEA child was not attending an education course in the U.K.

Regulation 10 (3) (b) of the EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation that you retain a right of residence on the basis that you are established in education in the United Kingdom. However, you were not attending an education course in the United Kingdom when you ceased to be the family member of a qualified person. You therefore do not qualify on this basis.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

Refuse Residence Card - Public Policy, Public Health or Public Security:

Regulation 20 (1) of EEA Regulations 2006.

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation that you retain a right of residence. However, you would pose a threat to the requirements of public policy if allowed to remain in the United Kingdom.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

#### **5.4.20 Appeal Rights**

All refusals to issue a Residence Card when the application has been made on the basis of a retention of a right of residence attract a full 'in country' right of appeal under Regulation 26 of the 2006 Regulations.

However, if we have not previously seen evidence in the form of a passport / ID card confirming the family member's EEA nationality, and none has been provided, the application is refused without a right of appeal.

If no evidence of the non-EEA national's identity / relationship to the EEA national / evidence of EEA nationality is provided the application is refused without a right of appeal. ECD.3117 is the appropriate letter. The applicant must provide some form of evidence of their own identity and relationship to the EEA before they can benefit from a right of appeal under European law.

#### **5.4.21 Revocation of Residence Card issued to someone who did retain a right of residence**

- ◆ Regulation 20 (2) of the 2006 Regulations makes provision for the revoking of a Residence Card if:

"the holder of the ... card has ceased to have a right to reside under [the] Regulations".

- ◆ Regulation 20 (1) of the 2006 Regulations makes provision for the revoking of a Residence Card on the grounds of public policy, public security or public health.

Cases involving Public Policy, Public Health or Public Security are rare but a family member who retains a right of residence may be convicted of a crime. If Criminal Casework Team are taking deportation action, or are intending to take deportation action, against the individual then it will be appropriate to revoke a Residence Card on the basis of Public Policy.

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

#### **5.4.22 Regulation to quote on the revocation form and the Reason For Revocation Letter (RFRL) and wording for the revocation form:**

##### Revoke Residence Card non-EEA no longer retains a right of residence:

Regulation 20 (2) of EEA Regulations 2006

- ECD.3128 is the appropriate revocation template.

Wording:

*On.....you were issued a Residence Card as confirmation that you retained a right of residence in the United Kingdom. However, you no longer continue to retain this right of residence.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

##### Revoke Residence Card - Public Policy, Public Health or Public Security:

Regulation 20 (1) of EEA Regulations 2006

- ECD.3128 is the appropriate revocation template.

Wording:

*On ..... you were issued a Residence Card as confirmation that you retain a right of residence in the United Kingdom under European Community law. However, you would pose a threat to the requirements of public policy if allowed to remain in the United Kingdom.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

#### **5.4.23 Appeal Rights in revocation cases**

All revocations of Residence Cards attract a full 'in country' right of appeal under Regulation 26 of the 2006 Regulations.

#### **5.5. Non-EEA family members of British Citizens (Surinder Singh ruling)**

A third country national who is the spouse / civil partner / partner or other family member of a British citizen can be availed by European law if they have resided with the British citizen in another Member state, and the British citizen was either employed or self-employed in the other Member state, prior to travelling to the U.K.

In these circumstances the third country nationals are treated as if the British citizen were an EEA national and therefore will be entitled to an EEA family permit.

In such circumstances the third country national has the option to enter the U.K. either under the Immigration Rules or as the spouse of an EEA national, if the British citizen is also returning to the U.K..

If the third country national has been issued with an EEA Family Permit and has entered the U.K. on this basis then they have opted to use European law and cannot then switch to being considered under the Immigration Rules. The only way they could then avail themselves of the Immigration Rules would be if they left the U.K. and applied for entry clearance under the Immigration Rules as the spouse of a British citizen.

However, the British citizen is not issued with a Registration Certificate as a Registration Certificate can only be issued to EEA nationals who are exercising Treaty rights in Member states other than their own.

### **Application form**

An application form, EEA2, should be for use when applying for a Residence Card. However, it should be noted that in some cases the applicant will have applied using form FLR(M) and will have paid a fee in the mistaken belief that they can still be considered under the Immigration Rules despite the fact that they have entered on an EEA Family Permit. There is though no requirement for the applicant to complete form EEA2 and in contrast to the policy governing applications made under the Immigration Rules an application cannot be rejected because the form has not been used or has not been fully completed.

#### **5.5.1 Qualifying for the issuing of a Residence Card as the non-EEA family member of a British citizen.**

**The following documents must be supplied by a non-EEA family member of a British citizen who is applying for a Residence Card:**

- The valid British passport of the British citizen
- The passport of the third country national
- Marriage certificate / civil partnership certificate
- Documentation confirming that the British citizen would be a qualified person if s/he were an EEA national

#### **5.5.2 Checks that must be conducted before a Residence Card can be issued to a non-EEA member of a British Citizen.**

Prior to issuing a Residence Card to a spouse/civil partner we must be satisfied that the marriage/partnership is legally valid and is not a marriage/partnership of convenience, that the British citizen was working or self-employed in another member state prior to returning to the U.K. and that the non-EEA national was residing with him/her.

### **5.5.3 Issuing a Residence Card to a non-EEA family member of a British citizen.**

Once the relevant checks detailed above have been completed the caseworker may issue a Residence Card if they are satisfied that the third country national is related to the British citizen, and that prior to coming to the United Kingdom the couple were living in another Member state and the British citizen was working or self-employed there, and that the British citizen would be a qualified person if s/he were an EEA national.

Residence Cards should be issued with a validity of 5 years.

### **5.5.4 Refusing applications made on the basis of being the non-EEA family member of a British citizen.**

An application can be refused for any of the reasons detailed in section 5.14.

Furthermore, we can also refuse for the following reasons:

- No evidence that the couple were living in another Member state prior to coming to the U.K.
- No evidence that the British citizen was working or self-employed in the other Member state.

### **5.5.5 Regulation to quote on the refusal form and the Reason For Refusal Letter (RFRL) and wording for the refusal form:**

Use the appropriate Regulation as detailed in section 2.18 when the reason for refusal is one detailed in section 2.17.

#### **Refuse Residence Card – couple did not live together in another Member state:**

Regulation 9 (2) (b) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation of a right of residence as the family member of a British citizen who was previously residing in another Member state. However, no evidence that you and your spouse / civil partner lived in another Member state prior to coming to the United Kingdom has been supplied.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

**Refuse Residence Card British citizen not exercised Treaty rights in another Member state:**

Regulation 9 (2) (a) of EEA Regulations 2006

- ECD.3126 is the appropriate refusal template.

Wording:

*You have applied for a Residence Card as confirmation of a right of residence as the family member of a British citizen who was previously working or self-employed in another Member state. However, no evidence that the British citizen was working or self-employed in another Member State prior to coming to the United Kingdom has been supplied.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

**Family member not resident in other Member state:**

**Regulation 9 (2) (b)**

Wording:

*You have applied for a Residence Card as confirmation of a right of residence as the family member of a British citizen who was previously working or self-employed in another Member state. However, no evidence that you were resident in another Member state prior to coming to the United Kingdom has been supplied.*

*Your application has also been considered under Article 8 of the Human Rights Act. After careful consideration of your case we are satisfied that this decision does not represent a breach of Article 8 of your human rights.*

### **5.5.6 Appeal Rights**

All refusals to issue a Residence Card when the application has been made on the basis of being the third country family member of a British citizen attract a full 'in country' right of appeal under Regulation 26 of the 2006 Regulations.

However, if we have not seen evidence in the form of a passport confirming the British citizen's nationality, and none has been provided, the application is refused without a right of appeal.

If no evidence of the non-EEA's identity / relationship to the British citizen is provided the application is refused without a right of appeal. An amended version of the ECD.3117 is appropriate. The applicant must provide some form of evidence of their own identity and relationship to the British citizen before they can benefit from a right of appeal under European law.

### **5.5.7 Qualifying for Permanent Residence by a Non-EEA national family member of a British citizen.**

Once a non-EEA national has resided in the U.K. with the British citizen for 5 years they will qualify for permanent residence in the same way as a third Country family member of an EEA national. (See Chapter 6).

### **5.6. EEA National Spouses / Civil Partner of British Citizens and Settled Persons**

An EEA national who is the spouse of a British citizen or settled person may make a charged application under the Immigration Rules for leave to remain despite the fact that they are not required to obtain valid leave to remain.

The primary reason why an EEA national may choose to do this is so that they can obtain permanent residence within 2 years rather than within 5 years. This will then allow them to make an application for British citizenship at an earlier stage.

These applications are subject to the normal charges applying to applications made under the Immigration Rules.

# **ANNEX A**

## **EEA MARRIAGE CASEWORK**

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Updated February 2005

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### **1. INTRODUCTION**

**1.1** Following the introduction of Certificates of Approval (COA's) at the beginning of February 2005 any third country national wishing to marry in the UK must first obtain a COA from IND unless they fall into one of the exempt categories.

Applications for COA's are charged applications. Generally a person will not be able to obtain a COA unless they can show that they were admitted for more than 6 months and that they have more than three months extant valid leave to remain.

Further information about COA's can be found in the IDI's Chapter 1 Section 15.

**1.2** The grounds on which a Residence Card in a marriage case can be refused remain unchanged by the introduction of COA's. These grounds are:

- The EEA spouse is present in the UK, but not exercising treaty rights.
- The EEA spouse is not present in the UK.
- The couple are not lawfully married.
- The marriage is one of convenience.

## **2. CONSIDERING APPLICATIONS**

**2.1** To obtain a Residence Card the non-EEA national must provide:

- The document with which they entered the UK,
- Evidence of their relationship to their EEA spouse, and
- Evidence that their EEA spouse is exercising treaty rights in the UK.

### **2.2 The document with which the applicant entered the UK**

In all cases the document with which they entered the UK should be available following the introduction of COA's. This is because the document will have been presented when the COA was sought.

#### **2.21 Forged evidence of identity**

Where a forgery check shows that either the EEA or the non-EEA national's documents are false, the application should be refused without further consideration. However, where the non-EEA national can prove by other means of identity that they are the person who lawfully married the EEA national a Residence Card may be issued. See ECI Chapter 5 for further details.

#### **2.3 Evidence of relationship**

Where the documents submitted are genuine, the caseworkers should check that the names on the marriage certificate and the photographs in the ID documents match the details on the checklist for the COA. Where the details do not match, the application must be drawn to the attention of a Senior Caseworker and the marriage task team informed.

#### **2.4 Evidence that the EEA national is exercising treaty rights in the UK**

See ECI Chapter 4.

#### **2.5 Whether the marriage is lawful**

IDI chapter 8 contains general information on the acceptability of marriages in the UK. IDI chapter 1 Section 15 says that a COA should be refused if the intended marriage would be unlawful (i.e. one of the parties is still married, the marriage is consanguineous, or one party is under 16).

#### **2.6 Marriage appears unlawful**

It may not become apparent at the COA stage that the marriage would be unlawful. Therefore where the marriage appears unlawful, even though a COA has been obtained, the case should be referred to a Senior Caseworker.

### **3. MARRIAGES OF CONVENIENCE**

**3.1** The introduction of COA's will reduce the number of marriages of convenience caseworkers encounter. Previously the first criterion to be considered when assessing whether a marriage was one of convenience was the applicant's immigration status. An applicant had to be:

- i. an illegal entrant; or
- ii. an overstayer; or
- iii. a failed asylum seeker; or
- iv. someone who has been refused leave to remain; or
- v. v. the subject of a deportation order.

**3.2** With the exception of (iv) a person in any of these categories may not be able to obtain a COA and therefore may not be able to marry in a civil ceremony.

**3.3** A person admitted for more than six months, who has been refused variation of that leave, may contract a marriage of convenience if, for example their extant leave was not curtailed when their application for variation of leave was refused.

#### **3.4 Key points**

A marriage of convenience is a totally sham marriage entered into solely for immigration purposes.

The burden of proof is on the Secretary of State

Cases to be considered as possible marriages of convenience are to be arrived at by a process of elimination in which strict criteria are applied. Where the case involves a person seeking admission to the UK (e.g. a port asylum applicant) the Europe Team, BCPI, should be contacted. They need to be made aware that a European application is being considered and they need to be advised of the outcome in due course.

Where an application is refused on Marriage of Convenience grounds a right of appeal exists under Regulation 26 of the Immigration (European Economic Area) Regulations 2006 in both "in country" and port cases.

#### **3.5 Burden of Proof**

The burden of proof is on the Secretary of State to show that the marriage is one of convenience. In deciding whether a case can be investigated as a possible marriage of convenience, caseworkers must proceed by a process of elimination using the criteria set out in section 3.7. The following cases should be discarded from consideration as marriages of convenience:

- Where there is a child of the relationship. Children from previous relationships should be excluded except for Article 8 considerations.

- Where there is evidence to suggest cohabitation it is difficult to prove that the marriage is one of convenience. However, it is possible that evidence may come to light following the issue of a residence document, which indicates that the marriage was a sham and there was never an intention to live as husband and wife. This evidence may not come to light until permanent residence is sought. Where a marriage of convenience is suspected at the permanent residence stage the application should be referred to a senior caseworker and drawn to the attention of the marriage team.
- On the totality of evidence on file there seems for any other reason little prospect of sustaining a refusal at appeal.

### **3.6 Criteria to be applied when considering a case as a Marriage of Convenience.**

All the core criteria must be present along with at least one of the additional criteria.

### **3.7 Core Criteria**

The core criteria which must be considered when assessing a marriage as one of convenience are:

#### **3.71 Applications made Pre 1st February 2005 (introduction of COA)**

- Illegal entrant or
- overstayer or
- failed asylum seeker or
- someone who has been refused leave to remain or
- the subject of a deportation order  
and
- the application has followed quickly after the marriage, and
  - there is no evidence of a previous relationship between the applicants

#### **3.72 Applications made Post 1st February cases**

- The validity of the Certificate of Approval is less than normal.
- The application follows quickly after the marriage; and
- There is no previous evidence of the relationship.

### **3.8 Additional criteria**

The applicant has had an alternative application recently refused (even if the application was in-time);

The applicant has had a previous record of attempts to gain entry or leave to remain (this could include an asylum application);

Reason to question the plausibility of the marriage (e.g. considerable difference in age or background of the couple, no common language);  
There are clear and substantive reasons to doubt the validity of the documentary evidence produced in support of the application;

The applicant and the EEA national should generally intend to live together in the UK. This should be evidenced by a clear commitment from both parties that they will do so following the outcome of the application.

The applicant has earlier claimed to be married to someone else (and has not produced evidence of that marriage being dissolved);

A sum of money has been handed over in order for the marriage to be contracted (with the exception of money given in the form of a dowry in the cases of nationals of countries where the provision of a dowry is common practice).

### **3.9 Other relevant factors**

If the tests in the core and additional criteria are met, caseworkers must consider any compassionate or other factors that would make ultimate removal from the country unlikely.

Possible factors of this type include (the list is not comprehensive):

- The length of time the applicant has spent in the UK, e.g. proven residence of about 10 years
- The strength of the roots the applicant has put down here, e.g. employment, property, community connections.
- The age of the applicant when they first arrived in the UK
- Family ties to the UK outside of the marriage.

### **3.10 Application of criteria**

Having applied the core and additional criteria (and considered other relevant factors), if you conclude that the applicant would not be removed, even if a marriage of convenience were proved, no further action should be taken.

Where you have reached this conclusion, the GCID record must show the reasons why marriage of convenience action is not being pursued.

Where we have decided that the marriage is one of convenience, caseworkers should also consider whether or not the non-EEA national qualifies for leave under the immigration rules and if not whether discretionary leave to remain should be granted. This is required because it is possible that a person not entitled to remain on Marriage of Convenience grounds may be eligible to remain under the rules or under discretionary leave.

### **3.11 Investigation of marriage cases.**

Suspect marriages can be investigated either by asking IS to undertake a home visit or by inviting the applicants to attend an interview.

### **3.12 Marriage interviews**

Interviews can only be undertaken by trained officers. All requests for a marriage interview must be approved at SCW level and the case forwarded to the marriage task team. The result of the interview will be recorded by the marriage task team. The proforma (see Document C below) submitted to the SCW should set out why the caseworker considers that an interview is required.

Invitations to attend interview (using the letter attached, see Document A below) are sent out by a trained interviewing officer.

### **3.13 MARRIAGE HOME VISITS**

**3.131** Home visits are only to be requested if the application cannot be resolved by other means. All requests for a home visit must be sanctioned by the IS Tactical Tasking Co-ordination Group (ISTTCG). Such requests are to be made via the marriage task team who will pass to the ISTTCG using the attached form (see Document B below).

**3.132** Once the ISTTCG have approved a home visit request, a dummy file should be completed and the file sent to the LEO with a copy of the approval form. The original approval form should remain on the file.

## **4. APPEALS**

### **4.1 Rights of Appeal**

These can be summarised as follows:

- EEA national not present in the UK or not exercising treaty rights in the UK-  
Regulation 26 of the EEA Regulations 2006.
- Marriage of convenience-  
Regulation 26 of the EEA Regulations 2006.
- No evidence of non-EEA spouse's ID-  
No right of appeal by virtue of Regulation 26 (3) of the EEA Regulations 2006.
- No or insufficient evidence of relationship to EEA national-  
No right of appeal by virtue of Regulation 26 (3) of the EEA Regulations 2006.
- Marriage not lawful-  
No right of appeal by virtue of Regulation 26 of the EEA Regulations 2006.

**4.1.2** Where there is no right of appeal under the 2006 Regulations, consideration should be given to whether the applicant has any claim to leave to remain under the Rules. If he or she has not, leave should be refused. There will be a right of appeal in accordance with Section 82 of the NIA Act if the applicant is subject to removal and had leave to remain at the time of the application. If there is a right to appeal against the refusal to grant leave and if, following an unsuccessful appeal, it would be appropriate to take enforcement action, the applicant should be served with a one stop notice at the time of refusal.

More information on refusal of residence documents can be found in ECI Chapter 5.

### **4.2 Notification of decision and appeal rights**

Where possible all decisions should be served as one-stop notices, again further advice can be found in Chapter 5.

### **4.3 Refusal wording**

Standard wordings for the refusal of a Residence Card can be found in Chapter 5.

## Document A

Dear

I am writing concerning your application for a Residence Card/permanent residence following your marriage to an EEA national.

So that we consider the matter further you and your spouse are requested to attend an interview on

**Date:**

**Time:**

**Place: Floor 4, Lunar House,** Wellesley Road, Croydon.

Your spouse is required to bring with them evidence of their continuing employment in the form of a letter from their employer, their last pay slip and, if their wages are paid into a bank account, a bank statement showing the wages being received in the account. Should your spouse have changed his/her employment since making your application you should forward evidence of the new employment at least 7 days before the date of the interview. This should include a letter from their new employer, a pay slip and if wages are paid into a bank account, a bank statement showing the wages being received in the account. If a permanent National Insurance number has been obtained since the application was made, evidence of this should be brought to the interview.

Please confirm as soon as possible that both of you will attend this interview, or that you will need to arrange an alternative date (if this appointment cannot be kept), by returning the attached reply form in the envelope provided.

Failure to attend without prior notification will lead to your spouse being refused a residence permit and you being refused a Residence Card. If you are unable to attend due to illness, a medical certificate stating the full nature of the illness must be provided within 5 days of your interview date.

You must also let us know immediately if an interpreter is required, and in what language or dialect, as only official interpreters may be used.

You may bring a legal representative with you to be present during your interview. You may also bring your own accredited interpreter if you wish.

Both your legal representative and interpreter should each provide a letter of introduction. **Please note your representative and interpreter and spouse/partner will only be admitted to the Home Office building if they accompany you.** You should therefore meet your representative and any interpreter at an arranged place outside of the Home Office and enter the building together. Your interview will not be deferred to wait for either your representative or interpreter to arrive.

You should attend on time and bring to the interview this letter and the additional documentation requested plus any other documentation you consider relevant to your application. Please note the information you give will be treated in confidence. Information may, however, be disclosed to your spouse/partner, and/or other government departments or agencies, local authorities, international organisations and other authorised bodies to enable them to carry out their functions.

It would be helpful if you could inform us if anyone attending the interview has a disability which would hinder them evacuating the building in the event of an emergency. If anyone attending the interview has special circumstances

which would mean taking a break while the interview is in progress you should make us aware of these in advance in the space provided on the reply form. On arrival for the interview this letter should be shown to the officer on duty at the Public Enquiry Office entrance to Lunar House who will direct you to the waiting area.

Yours sincerely

Managed Migration Directorate

Encs:	Interview appointment accept/decline form Addressed envelope Map
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**Document B**

**ISTTCG MARRIAGE HOME VISIT REQUEST FORM**

EEA national

Name

*Nationality*

Date of Birth

Non- EEA Spouse

Name

*Nationality*

*Date of Birth*

Have documents submitted by both parties been forgery checked? **Y / N**

Date of last contact at this address

Did the non-EEA spouse obtain a COA? **Y / N**

Was this of limited validity? **Y / N**

Is there any reason for believing that the applicants are not legally married?

Details of EEA national's employment

Reasons why the application cannot be refused without a Home visit.

Any adverse information concerning address or applicants. .

Date by which the application should be completed assuming that the 6 months ruling applies to both the residence permit application (EEA national) and the residence document application (non-EEA national)

Caseworker requesting the Home visit

Name and contact details

Date

Senior caseworker approving home visit request

Name and contact details

Date

IS TTCG approval----- *signature*.

Date

**Document C**

**Marriage Interview Referral Sheet**

**HO Ref ..... Date Referred ..... Target Date .....**

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**Factors that may indicate a suspect marriage:** The decision to refer to interview is the caseworker's, and will usually be based on a combination of the following:

- Poor immigration history, e.g: previous refusal, failed asylum seeker, no valid leave, has had leave extended previously but casenotes indicate suspicions about validity of previous applications.
- Short time between first meeting and decision to marry and/or leave expiring and decision to marry.
- Maintenance and Accommodation, e.g: the applicant has provided a 'home' address, a 'correspondence' address (but doesn't have a rep) and documents (marriage certificate, etc) supplied indicate other addresses also.
- Third party allegations – may be a reason to refer for interview, but seek advice from SCW for how to deal with such allegations.
- Large age difference.
- Different cultural background.
- 'Staged' wedding photographs.
- Application submitted by a 'dubious' representative – such an application could be 'near perfect' or be supported by 'glowing' references.

**All of the core criteria must be present plus at least one additional criteria.**

The core criteria relates to the immigration status of the applicant (this will be the spouse of the EEA national) and the timing of the application.

**CORE CRITERIA: Evidence Which MUST BE on file:**

Illegal entrant or overstayer or failed asylum seeker or someone who has been refused leave to remain or the subject of a deportation order and the application has followed quickly after the marriage and there is no evidence of a previous relationship

<b><u>Additional criteria and Evidence required</u></b> <b><u>(at least one additional criteria must be met)</u></b>		<u>If not submitted, date requested:</u>
The applicant has had an application recently refused	YES/NO	N/A
The applicant has a previous record of attempts to gain entry or leave to remain (can include an asylum claim)	YES/NO	
There is reason to question the plausibility of the marriage e.g. considerable age difference or background or no common language	YES/NO	
The applicant has previously claimed to be married to someone else. (and has not produced evidence of that marriage being dissolved)	YES/NO	
The application has been submitted by an	YES/NO	

immigration consultant who has come to adverse notice previously		
? [There are clear and substantive reasons to doubt the validity of the documentary evidence produced in support of the application]	YES/NO	
? [a sum of money has been handed over in order for the marriage to be contracted (with the exception of money given in the form of a dowry in the cases of nationals of countries where the provision of a dowry is common practice)]	YES/NO	
Visa Application Form (where applicable)	YES/NO	
Landing Card (where applicable)	YES/NO	
Other files of relevance.	YES/NO	
<b><u>From Applicant:</u></b>		
Evidence of sponsor's nationality - Valid passport or valid identity card	YES/NO	
Civil marriage certificate	YES/NO	
Evidence of divorce (if appropriate)	YES/NO	
Evidence of exercising Treaty Rights e.g. 3 recent wage slips, an employer's letter or Section 2 of EEC1 form completed and stamped or If a student evidence of enrolment and ability to support themselves or If self sufficient evidence of funds or If retired evidence of pension or If incapacitated medical evidence showing if the incapacity is likely to be permanent	YES/NO	
<b><u>If applying as an unmarried partner,</u></b>		
Evidence of cohabitation: 5 pieces of evidence in joint names for <u>each</u> of the 2 years If evidence not available in joint names, 3 or 4 pieces of evidence from one person and 1 or 2 pieces of evidence from other for <u>each</u> year.	YES/NO	

**Please provide REASONS for referring application for interview:**  
You should provide brief details of immigration history and current application with your reasons.

**Please identify any QUESTIONS you would like asking at interview:**

Submitted by: ..... Signature ..... Date .....

**I agree that this application should be referred to SEO for approval:**

**HEO Name ..... Signature ..... Date .....**

**I approve this application for interview:**

**SEO Name ..... Signature ..... Date .....**

**Application allocated for interview:**

**Date ..... Time ..... Interviewer .....**

**Signed .....**