

**From:** European Operational Policy Team

**Subject:** Assessing applications in accordance with public policy, public security or public health

**Date:** 05 February 2013

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### **Purpose of Notice**

1. This notice replaces EOPN 19/2011, 03/2012 and 05/2012 and provides guidance to UKBA staff on considering applications in accordance with Regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") on the grounds of public policy, public security or public health. This notice applies only to EEA nationals and their direct family members. Different considerations apply to extended family members and persons with a derivative right of residence (i.e. *Zambrano*) as these persons do not come within the provisions of the Free Movement Directive. Separate guidance on how to assess criminality for such persons is being issued.

### **Current Arrangements**

2. Annex A of this note sets out detailed guidance on how to consider applications with reference to regulation 21 of the Regulations. Caseworkers should note that when referring to the EEA public policy matrix (see paragraph 33 of the Annex) cases falling within the 'amber' box (i.e. 'consider/refuse' or 'consider/issue') should be discussed with a deputy chief caseworker and if further advice is necessary may be referred to IBPD policy colleagues. These will be considered on a case by case basis until further guidance is issued..

3. Any policy enquiries on this notice should be addressed to <REDACTED – section 40(2)> or to the European Operational Policy inbox: EuropeanOperational@ukba.gsi.gov.uk.

<REDACTED – section 40(2)>  
**Head of European Operational Policy**

## **Annex A**

### **Background**

1. Under the Free Movement of Persons Directive 2004/38/EC, (“the Directive”) an EEA national and their family members have a right to free movement and residence within the United Kingdom and other Member States subject to certain limitations and conditions laid down in the Treaties and the Directive. The Directive has been transposed into domestic legislation via the Immigration (European Economic Area) Regulations 2006 (“the Regulations”). The Regulations set out who the rights relate to, how they are acquired and under what circumstances the rights may be refused or removed.

### **Purpose of residence documents**

2. The four categories of documents considered in this guidance are registration certificates (issued to EEA nationals only), residence cards (issued to non-EEA nationals only), documents certifying permanent residence (issued to EEA nationals who have acquired a right of permanent residence) and permanent residence cards (issued to non-EEA nationals who have acquired a right of permanent residence).
3. There is no requirement for an EEA national or a non-EEA family member of an EEA national to apply for a document to confirm their right to reside in the UK. However, non-EEA family members are more likely to apply for documents to evidence their status in the UK. Except in the case of extended family members (whose position is dealt with in separate guidance), residence documentation evidences rights which arise automatically as a matter of Union law. For instance they demonstrate a person’s entitlement to reside and work in the United Kingdom. However, a person who has been issued with a document only resides lawfully for so long as s/he continues to meet the underlying conditions for issue of that document.
4. A person cannot argue that just because s/he holds a document issued under the Regulations s/he resides lawfully in the UK. Regulation 20A explicitly provides for the power for the Secretary of State to cancel a person’s right to reside on public policy, public security or public health grounds regardless of whether or not they hold residence documentation.
5. The Secretary of State has a general power to revoke or refuse to renew residence documentation. Residence documents may be revoked where a person ceases to have the right to reside under the Regulations or if the document has been obtained by fraudulent means.
6. The issue of documents certifying permanent residence and permanent residence cards also evidences the fact that consideration has been given to whether or not that individual has acquired a right of permanent residence. As well as a right of permanent residence, the individual acquires a higher level of protection against expulsion from the UK (the “serious grounds” threshold). However, the position remains that simply

possessing the relevant documentation does not confer that right on the holder. The right of permanent residence can still be lost (for example, by two years' absence from the UK) or it may subsequently be concluded that that individual has never enjoyed a right of permanent residence in the UK (for example, because the evidence provided in support of their original application is found to be fraudulent).

7. Extended family members of EEA nationals do not benefit from the Regulations until issued with a residence document. Whilst family members derive rights automatically as a matter of Union law, extended family members of EEA nationals have no rights unless and until they are issued with a document under the Regulations. Their position and the appropriate way to treat applications from extended family members is covered in separate guidance that can be found here:

**<Link to staff intranet removed – see pages 11-12 of link below for equivalent public guidance>**

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/283657/EEA\\_family\\_permits\\_v7\\_0EXT.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283657/EEA_family_permits_v7_0EXT.pdf)

### **Issuing registration certificates, residence cards, permanent residence cards and documents certifying permanent residence**

8. Residence cards, registration certificates, permanent residence cards and documents certifying permanent residence must be issued to any applicants that are entitled to them in line with the requirements of the Directive and Regulations. Failure to meet the obligations to issue such documents within the stipulated time frame exposes the UK to the risk of domestic challenge for breach of statutory duty and/or infraction proceedings by the European Commission for failure to comply with the terms of the Directive.
9. When assessing the rights of an individual and whether or not to issue documentation, consideration must first be given to whether they have satisfied the evidential requirements to demonstrate that they have acquired the relevant right of residence. Secondly, consideration should be given to the question of whether they should continue to enjoy that right on public policy grounds and therefore, in turn, whether they should be issued with residence documentation denoting that they enjoy such a right in accordance with the test set out at regulation 21 of the Regulations. In particular, the presence of criminality and the person's personal conduct may cumulatively justify a decision to refuse residence documents and trigger enforcement action on public policy grounds.
10. Any decision under the Regulations taken on grounds of public policy, public security or public health must comply with regulation 21. This applies to decisions to refuse admission, decisions to deport, exclusion decisions and decisions to refuse to issue/renew or revoke documentation. This guidance is concerned with the final category of decisions.
11. There are essentially three different tests which fall to be applied when determining whether EEA nationals or their family members have a right of residence or a right of permanent residence and whether they enjoy the

associated right to be issued with the relevant residence documentation in accordance with the Directive. The tests are hierarchical. Public health falls away after the lowest test and public policy falls away after the serious grounds test. Which test must be considered depends upon how long the person in question has been residing in the UK in accordance with the Directive. The tests are as follows:

***‘Basic’***

- Public policy, public security and public health grounds for EEA nationals and their family members residing here in accordance with the Directive for a period of less than 5 years

***‘Serious’***

- Serious public policy and public security grounds for EEA nationals and their family members who have acquired a permanent right of residence (where they have been continuously residing in the UK in accordance with the Directive for between 5 years and 10 years).

***‘Imperative’***

- Imperative public security grounds in respect of EEA nationals who have resided in the UK for a period of at least ten years prior to the relevant decision.

12. This means that the longer the length of residence in the UK and the greater the degree of integration, the greater the level of protection afforded to the EEA national or their family member against refusal, removal or exclusion from the United Kingdom

**Public Policy / Public Security**

13. Public Policy relates to the protected interests of society and more generally to preventing disturbance of social order. Public security is generally viewed as the United Kingdom’s right to protect itself from threats to national security by preserving the integrity of its territory and its institutions from terrorism or other crimes that are likely to pose a risk to the safety of the wider community or a section of the public.
14. Each case should be assessed on its own merits, however for an EEA national or family member to be deported and or refused documentation (or have their documentation revoked) on public policy or public security grounds the decision maker needs to be satisfied that the person’s conduct represents **a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.**
15. Public policy considerations are relevant only to the basic and serious tests. “Serious” is not defined in the Regulations or the Directive, but it implies that there must be significantly stronger grounds for refusal and or deportation than would be the case for someone who did not have a right of permanent residence. It is the present risk arising from the conviction for the offence in question which must be established.
16. There are two basic stages that apply when deciding whether or not to

issue relevant documentation.

### Stage 1 - Evidential Requirements

17. The decision maker must consider whether a person has a right to reside under the Regulations by considering all of the relevant evidence available to them, such as documents confirming a person's identity and status in the UK or for instance evidence to support whether a marriage between an EEA and non EEA national is genuine (and that person can be considered to meet requirements under the Regulations).
18. Evidence of fraud or abuse such as deliberate deception, false documentation or a sham marriage to acquire rights under the Regulations are some examples of reasons to refuse. However, even if a refusal can be made under another provision of the Regulations, where there are additional reasons for refusal based on the person's criminality and personal conduct which represents a serious threat to public interests, decision makers should also mention those in the notice of refusal.
19. It should be noted that it may not be possible to seek to rely on other grounds not mentioned at the point of refusal in the future therefore decision makers should take into consideration all known facts of the case before the relevant decision is made.
20. Only time residing in the UK in accordance with Treaty and Directive rights should be counted in establishing whether someone has a right of residence or permanent right of residence in the UK.

### *EEA nationals*

21. Under Regulation 16 an EEA national who is "a qualified person", an EEA national family member of a qualified person or EEA national with a permanent right of residence or an EEA national family member who has retained the right of residence must be issued with a registration certificate '*immediately*' on application provided that they produce a valid identity card or passport issued by an EEA State and proof that they fall into the relevant category of applicant.
22. Under Regulation 18(1), EEA nationals who have acquired a right of permanent residence must be issued with a document certifying permanent residence '*as soon as possible*' after the application (plus the proof of entitlement) has been received. It is important to note that time spent in prison does not count as lawful residence for the purposes of acquiring the right of permanent residence, that time in prison breaks continuity of residence and that time either side of a period of imprisonment cannot be aggregated. A right of permanent residence can also be lost by a continuous absence from the UK of two years or more after the right was acquired.

### *Non-EEA nationals*

23. Under Regulation 17, non-EEA family members of an EEA national who is a qualified person for the purposes of the Regulations or who has acquired

a right of permanent residence **and** non EEA national family members who have retained the right of residence (as per regulation 10) must immediately be issued with a certificate of application for a residence card and must be issued with a residence card no later than 6 months after the application (plus proof of entitlement) has been received. They must produce a valid passport and proof that they fall into the relevant category of applicant.

24. Under regulation 18(2) non-EEA national family members who have acquired a right of permanent residence must be issued with a Permanent Residence Card no later than 6 months after the date on which an application (plus the proof of entitlement) has been received. Considerations relating to the role of periods of imprisonment for EEA nationals similarly apply when deciding whether a non EEA national has acquired the permanent right of residence.

Stage 2 - consideration of whether Regulation 21 public policy/security considerations are satisfied.

25. The decision maker must first determine what is the relevant test to be applied – (basic/serious/imperative test based on length of residency in the UK) and then public policy decisions must be taken in accordance with the following principles:

- The decision must not be taken to serve economic ends.
- The decision must comply with the principle of **proportionality**; For example, refusal action against a person who has committed a single minor offence would not be proportionate.
- The decision must be based exclusively on the **personal conduct** of the person concerned;
- The personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- Matters isolated from the particulars of the case or which relate to considerations of general prevention/deterrence do not justify the decision. Decisions must not be made based on considerations of general deterrence. 'general preventative grounds' or 'general risk'. They must, save in a small number of extremely rare cases, be based on the actual threat posed by the individual concerned;
- A person's previous criminal **convictions** do not of themselves justify the decision so you cannot rely solely on a person's past convictions as the basis on which to take a decision. However an example of where previous convictions might be relevant is in circumstances where the applicant is a persistent offender and his offending is escalating in seriousness. Here, the pattern of offending could potentially provide evidence of genuine, present and sufficiently serious threat.
- **Where the person is resident in the UK**, (and this information is available) the decision must take into account the person's age, health,

family and economic situation, length of residence, social and cultural integration into the UK and extent of their links with the country of origin in assessing whether the relevant public policy threshold is met.

\*Note where the applicant is overseas and matters are being considered by Entry Clearance Officers (ECOs), for instance when dealing with requests for 'family permits', considerations such as age, health, length of residence etc which relate to persons residing in the UK do not apply.

- **Applicant's age** - This has greater significance where for instance the person is under the age of 18 and consideration must be given to serving their best interests.
  - **State of health** – Is the person dependent on others due to their state of health? Do they need a well-developed support system which is unavailable in one or other of the Member States in question? etc.
  - **Family and economic situation** – For example, decision makers should consider whether a person is married, in a civil partnership, has children, or is financially or physically dependent on others already legally residing within the UK
  - **Length of residency** – How long has the person resided in the UK under the requirements of the Regulations? Did they accrue a relatively long period of residence without any history of criminality and/or any time spent in prison?
  - **Social / cultural integration** - the degree of the person's integration with the UK. This could include links to family/friends, length of residence, properties/business interests in UK as well as any absences from the UK, length and frequency of those absences and whether the person's personal, family or occupational interests has transferred to another country.
  - **Lack of links to the country of origin**, e.g. the person has no family there, doesn't speak the language and has not lived in the country for a significant period.
26. Ultimately, the **personal conduct** of the person concerned is the most important factor when deciding whether there is a public policy case to answer. In particular, the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

### **Rights of Residence**

27. '*Initial*', '*extended*' and '*permanent*' rights of residence of EEA nationals or their family members are set out in the Directive relating to free movement rights and the Regulations.
28. Under regulation 15 of the Regulations, EEA nationals or their family members who have resided in the UK for a continuous period of 5 years in accordance with the Regulations will acquire permanent residence ('PR'). Once a person has acquired PR in the United Kingdom, the person benefits from a higher level of protection such that a decision not to issue

them with documentation (or to seek their expulsion from the UK) could only be taken on 'serious' grounds of public policy or public security. This is a higher threshold than for someone not entitled to permanent residence. After ten years' of continuous residence in accordance with the Directive an EEA national (but not non-EEA family members) potentially benefits from the highest level of protection and a relevant decision can only be taken on 'imperative' grounds of public security.

### **Refusal to issue documentation on public policy or public security grounds**

29. Under regulation 20 of the Regulations, the Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health or where the individual does not have or ceases to have the right to reside in the UK.
30. It is important to note that refusal and or removal on public policy / security grounds does not just apply to PR applications. Where an EEA national or their family member is resident in the UK but has not yet acquired PR the public policy test under Regulation 21 still applies.
31. Each case should be examined on its merits, taking into account all the facts and circumstances of the case and the personal conduct of the person (which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society) before documentation is refused and if necessary a relevant decision is taken to remove the person in accordance with Regulation 21.

### **Imminent prospect of removal / deportation action**

32. Where enforcement proceedings are being pursued or ongoing in respect of public policy **and a notice of deportation has been served** to the individual concerned under the Regulations, no action should be taken on an application for a residence document. An application is not a reason to defer deportation and CCD will have regard to relevant substantive issues in the context of representations against deportation.

### **Assessing Criminality (Public Policy / Public Security)**

33. The EEA Public Policy Matrix below is designed to assist the decision maker when considering criminality during their assessment of residence documentation. The Matrix is a starting point to help judge the applicant's behaviour against the 'basic', 'serious' and 'imperative' public policy and security thresholds. It is intended for guidance only and should not be referred to as part of the reasons for refusals as each cases must be considered on its own merits.

**Fig. 1 - EEA Public Policy Criminality Matrix**

		Number of Occasions <sup>1</sup>			
		5+	4-5	2-3	1
Sentence <sup>[2]</sup>	2 years+	Refuse			
	12 months+	REFER TO CCD			
	6-12 months	Refuse		Consider refuse	
	3-6 months				
	0-3 months	Consider refuse		Consider Issue	
	(Community sentences/ Suspended sentences) Fines  Others (eg. fixed penalty notice, bind-over, reprimand, caution, warning, discharges)	(Public policy issues unlikely)			

- [Green Box] Typically, where a person is otherwise of good character and has no more than a single minor unspent conviction (custodial sentence), community or inactive suspended sentence or has repeatedly attracted minor convictions (fines, admonition, caution, fixed

<sup>1</sup> Number of occasions a 'single' offence has occurred

<sup>[2]</sup> Custodial sentence or suspended sentence where any element has been activated by the Courts

penalty notice etc) and there are no public policy issues residence applications should be considered against other factors and if appropriate should be issued.

- [Redacted] The decision maker should assess the public policy risk and examine other factors (see below guidance) before considering issuing residence documentation
- [Redacted] The decision maker should assess the public policy risk and examine other factors (see below guidance) before considering refusing documentation
- [Redacted] Typically, public policy test is met and residence documentation should be refused. The case must be referred to CCD.

## **The EEA Public Policy Criminality Matrix - Fig.1**

### **Persistent criminality**

34. In certain circumstances, persistent “low level” criminality may represent a threat to public policy despite the fact that a single offence of this nature would not be sufficient evidence of a genuine, present and sufficiently serious threat to public policy. For example, in the case of LG and CC (EEA Regs: residence; imprisonment; removal) Italy), the Court commented that a serial shoplifter might properly be removable in circumstances where the basic test applied. A person’s previous convictions may be relevant in a particular case but the existence of multiple convictions may not of itself be enough in itself to justify refusal. An pattern of escalating seriousness in the nature of the offending is an example of evidence which might support such a decision.
35. The decision maker must show that the personal conduct of the individual concerned represents a threat affecting one of the fundamental interests of society on public policy grounds. In these types of cases the decision maker should take into account:
- The nature of the offences and their seriousness; for example, offences that involve violence or drugs supply should weigh more heavily against the applicant than offences against property.
  - Their frequency and pattern of offending. Is it escalating in seriousness?;
  - Damage or harm caused by the offending. Is the person a public protection risk?
36. Where the case can be made that persistent low level offending satisfies the public policy test the decision maker should refer the case to CCD for further consideration.

### **Minor offences**

37. A single minor offence of any type that leads only to a reprimand, warning or caution, particularly if it is a first offence will not, by itself, be sufficient to justify refusal on public policy grounds. However, if an EEA national is convicted of more than one minor offence and there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (generally evidenced by the nature of the offending in terms of the potential harm it represents, a propensity to re-offend and/or the escalating nature of the offending) refusal and deportation on public policy grounds may be considered. However, such cases are likely to be exceptional and should be escalated to senior managers before a decision is taken.

### **Sentences / number of occasions**

38. When applying the 'criminality matrix' it is important to note that when considering a person's criminal history the decision maker should consider the highest sentence the person has received as well as the number of times the person has been sentenced.

39. The more serious the nature of the offence, the sentence given, or the previous criminal history of the person concerned, the greater the potential threat to the public is likely to be and the less likely it is that other considerations will outweigh the presumption towards refusal

40. Since 1 October 2012, the concept of a conviction becoming 'spent' is no longer relevant to immigration and nationality decisions. The decision maker should therefore consider how long ago a conviction took place. Less weight should be placed on offences that occurred a significant time before the application. As a guide, the periods for which convictions would **not** "count" for settlement purposes are:

- Sentences between 12 months and 4 years' imprisonment that occurred more than 15 years ago;
- Sentences of less than 12 months' imprisonment that occurred more than 7 years ago;
- Non-custodial sentences which occurred more than 2 years ago.

41. Where a person has a conviction which resulted in a sentence of 4 years' imprisonment or more, the decision maker should always consider it.

### **Custodial Sentences**

42. The decision maker must have regard to the severity of sentence and frequency in order to consider what action may be most appropriate in individual cases in addition to weighing other factors which should be used to make an assessment of the personal conduct of an individual and the level of threat they present in public policy terms. For instance multiple convictions which, by the pattern and nature of that offending, indicate a propensity to re-offend may satisfy the public policy test.

43. \*\* All EEA nationals (or family members of EEA nationals) with a criminal sentence of 12 months or more will be referred from the prison (NOMS) to CCD to consider deportation. Nevertheless, the decision maker should ensure that CCD are aware of all cases where the applicant has served or is serving a custodial sentence of 24 months or more, 12 months or more for certain types of offences including sex, drugs (supply not possession) or violence, or, where there is sufficient persistent offending, and note any CCD interest. The full offence list for consideration of an EEA national for deportation following a 12 Month Sentence can be found at:

<Link to staff intranet removed>

44. Note that referrals should not be made to CCD where CCD has already considered the case and deportation has not be pursued, unless there is new information/offending that was not considered previously. In **Allowed Appeal** cases the decision maker should comply with the instructions of the Immigration Judge unless the Specialist Appeals Team (SAT) have challenged the IJ's decision within the set time period.

The only exceptions to this are likely to be cases that meet the VISOR (the Violent and Sex Offender's Register) threshold as notified via PNC.

#### **Concurrent / Consecutive sentences**

45. Concurrent sentences (i.e. where the Court has passed more than one sentence for separate offences but determined that those should be served at the same time) should be treated as a single conviction having regard to the highest sentence when referring to the matrix for guidance.
46. Mitigating circumstances are usually taken into account when concurrent sentences are handed down by the courts in particular the persons criminal past is usually considered. For instance a first offence or similar crimes are more likely to attract a concurrent sentence. Unrelated crime types are more likely to attract a consecutive sentence (which is where separate sentences are passed by the Court for each offence and one sentence is served after the other sentence ends).
47. Information relating to other types of sentence including community sentences, suspended or deferred sentences can be found on the Ministry of Justice website:

<http://www.justice.gov.uk/news/features/toughening-community-sentences>

#### **Nature of offence / number of offences**

48. As a rule certain types of offences may be said to meet the public policy test. Those offences typically relate to violent, sexual or drug related offences (where there is intent to supply) that attract a custodial sentence and or requirement to sign the Violent and Sex Offender's Register (ViSOR).

49. A propensity to reoffend might not be necessary in every case. In **exceptional cases** it may be that a single offence / crime committed or previous history of offending may be considered to be of such a serious nature that this is sufficient in itself to demonstrate a genuine, present and sufficiently serious threat to society, even where there is no clear indication of a propensity to act in the same way in the future.

### **Personal Conduct**

50. When assessing **personal conduct** individuals can have their rights restricted only if their personal conduct represents a **genuine, present and sufficiently serious threat affecting one of the fundamental interests of society**. Past conduct may be taken into account only where there is a likelihood of reoffending. A **previous criminal conviction** can be taken into account, but only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. In this regard the type and number of previous convictions can form part of an assessment of the person's present conduct. In particularly serious cases an offence occurring in the past could be sufficiently serious to satisfy the public policy/ security test.

51. Other mitigating circumstances / factors for consideration might include (where the information is available to decision makers):

- Individual's age and state of health
- Supporting evidence to suggest the person was of previous good character (i.e was previously lawful until the incident)
- Person co-operated fully with the authorities, police, courts and or prison institutions
- Relevant professional risk assessments (including NOMs reports), pre-sentence reports etc identifying that the person presents a low risk of future harm.
- Any relevant remarks of the sentencing judge relating to a person's most recent offences or other relevant sentencing comments for offences. In particular, and wherever available, the decision maker should take account any court recommendations or direction relating to the person's right to reside or remain in the UK, for instance where a recommendation to deport an individual has been made.
- Note any comments made by the Parole Board in testament to the person's character, personal conduct etc and the behaviour of the person during their period in prison

### **The Proportionality Assessment**

52. The decision must comply with the principle of proportionality. Any interference with a person's free movement rights must be both appropriate in the circumstances of the case and go no further than is necessary to achieve the public policy or public security need
53. The following factors should be taken into account when analysing the characteristics of the threat:
- Degree of social danger resulting from the presence of the person concerned in the UK
  - Nature of the offending activities, their frequency, cumulative danger and damage caused;
  - Time elapsed since acts committed and behaviour of the person concerned (NB: good behaviour in prison and possible release on Parole could be taken into account)
54. Regulation 21 (also see paragraph 25) sets out the principles that apply.
55. In assessing the proportionality of a decision to refuse/revoke or deport, regard should be had to whether the risk could be mitigated by less strict means. Where it could, then refusal / deportation action is unlikely to be proportionate.

### **Appeals under the EEA regulations**

56. Regulations 26 and 27 of the Regulations outline the appeal rights of EEA nationals and their family members.

### **Public Policy Refusals**

57. Standard Refusal Wording for public policy and residence documents can be found under the EEA Casework Instructions:
- **Chapter 5: Residence Card Instructions** (RFRLs - refuse residence card - public policy, public health or public security) and;
  - **Chapter 6: Permanent Residence Card Instructions** (RFRLs - refuse document certifying permanent residence - public policy, public health or public security **and** refuse permanent residence card - public policy, public health or public security)