Residence rights of the parents of an EEA national child

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Do parents of an EEA national child have the right to reside in Britain as the family members of an EEA national?

This question has been under scrutiny for a great deal of time and the most recent judgment of the Court of Justice of the European Union in the case of *Alokpa C-86/*12 came out in October 2013. For case summary see our news article of 5 November 2013.

There are two inherent problems in the scenario: first, the EEA national has to be exercising Treaty rights in order to share with his family members the right of residence in a member state which is not the country of his or her nationality. Exercise of Treaty rights can be in the form of pursuing an economic activity or being a self-sufficient person (in other words, having a comprehensive medical insurance and sufficient funds not to become a burden on the system). Thus, the child, who is unlikely to be economically active, has to be self-sufficient to engage Treaty rights. The other difficulty, rather surprisingly, comes from the definition of a family member which excludes parents of minor children. If, before *Alokpa*, this could have been seen as the draftsman's oversight exploited in the anti-European tenor of the UKBA, *Alokpa*explicitly confirms that parents of an EEA national child are excluded from the definition of family members unless the parents are dependent on the child financially (a situation highly unlikely, but not quite inconceivable).

Nearly ten years ago, the European Court of Justice in the case of *Chen C-200/02* ruled that self-sufficient EEA national children have the right to be accompanied by their third-country national parents.

This ruling was eventually given effect in the EEA Regulations 2006, as amended in November 2012, which now provide for a derivative right of residence of the parents and siblings under the age of 18 of a self-sufficient EEA national child under the age of 18, as well as of the primary carers of British citizen children (who do not have to be self-sufficient). Apropos it may be noted that the concept of a minor, normally covering children under the age of 21 in EU law, has shrunk to children under 18. Children remaining in education after 18 may very well keep the age bar at 21 and even further if they remain financially dependent on the parents. But what appears to be a glaring black hole is the absence of any derivative rights beyond this point, unless the dependency situation quickly turns 180 degrees and the parent becomes financially dependent on the child as soon as the child stops being financially dependent on the parent. Whether this

was the original intention of the legislation when free movement rights were in promotion is a question that would be dubbed “academic” in derogative legal jargon.

It is difficult to imagine that the parent of a child who has turned 18 and is not pursuing further studies is required by law to go and leave the 18-year-old to his or her own devices. Yet this appears to be the current position of the law on derivative rights of residence.

In addition to this, the self-sufficiency requirement is one of the most controversial provisions of this law, as self-sufficient has to exist before the right to take up employment is conferred on the parent. Moreover, the family has to demonstrate self-sufficiency for the full period of residence in advance of being issued with the residence documents.

For a parent who is in the UK as a migrant with a right to work, for example a Tier 2 migrant, with primary care responsibilities for an EEA national child, deriving the right of residence from parental relationship may be a plausible option. It would allow the parent to continue working in the UK and provide additional freedom in taking and changing employment outside Tier 2 sponsorship.

Yet, if the parent has no initial residence rights independently of the child and has no right to work, as was the case in *Alopka*, parental relationship with an EEA national child will not give rise to an automatic right of residence. In this situation the parent has to demonstrate adequate resources to prove self-sufficiency or convince the officials that refusal of the right of residence would constructively amount to expulsion of the EEA national child from outside the European Union – a rather difficult hurdle to overcome when the child has nationality of, and inherent right of residence in, another Member State where he would be expected to move together with his carers and other family members. It is not impossible that in the absence of the right to public assistance, accommodation and any source of income in the child’s country of nationality, the parent may genuinely prefer to take the EU national child outside the European Union to his or her own country of origin, depending on the specific circumstances of the case. Yet, whether this would be accepted by the UK officials would ultimately depend on the decision maker or the immigration judge on appeal.

Another major difficulty of the derivative right of residence is that it does not lead to the right to **permanent residence** after five years, as would be the case for “family members” who fall within the prescribed definition, or at all. Immigration rules will allow beneficiaries of derivative right of residence to apply for indefinite leave to remain after ten years of lawful residence.

Another important resource of domestic law is the duty of the Secretary of State to give **primary consideration to the best interests of the child**, as well as the right to respect for private and family life which remains good law until this government, or next government, scraps it. In the meantime, it is likely that legal gaps in EU law will, to a certain extent, be bridged by protective domestic legislation.

For more information or help with any immigration related issue, please contact Kadmos.