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Michel Barnier
Chief Negotiator
Taskforce on Article 50 negotiations with the United Kingdom
European Commission
Rue de la Loi, 200
B-1049 Brussels

By email:

cc.
Sabine Weyand, Deputy Chief Negotiator

Brussels, 12 December 2017

Dear Mr Barnier,

Brexit: Protecting citizens' rights

We are representatives of various organisations that provide legal assistance and advice to EU citizens and their family members in the UK as well as UK nationals and their family members in the other 27 Member States.

We wish to congratulate you on the progress made so far in securing protection of the rights of EU citizens and their family members following the UK's withdrawal from the EU.

While we welcome the breakthrough achieved in the negotiations that has resulted in agreement on most aspects of citizens' rights, we write to express our fears and concerns that the Withdrawal Agreement will not comprehensively protect all residence rights which are currently enjoyed by EU citizens and their family members under EU law.

We wish to recall that the negotiating guidelines of the Council of 29 April 2017 called for "reciprocal guarantees to safeguard the status and rights derived from EU law at the date of

withdrawal of EU and UK citizens, and their families". We also wish to note that the Commission's "Essential Principles on Citizens' Rights" of 24 May 2017 committed to ensuring that the rights set out in the Withdrawal Agreement should provide the "same level of protection as set out in Union law at the date of withdrawal of EU27 citizen".

However, it appears that the Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union will not cover the rights of all EU citizens and family members who currently enjoys rights of residence under EU law.

We therefore seek urgent confirmation from yourselves concerning the status of the following categories of EU citizens and family members who currently enjoys rights of residence under EU law under the Withdrawal Agreement:

- family members of EU citizens who have returned home after having resided in another Member State as recognised by the Court of Justice's ruling in Case C-370/90 *Surinder Singh* and subsequent cases;
- primary carers of the children in education of migrant workers or former migrant workers under Regulation 492/2011 on the free movement of workers as recognised by the Court of Justice's rulings in Case C-480/08 *Teixeira* and Joined Cases C-147/11 *Teixeira* and subsequent cases;
- primary carers of Union citizens having a right of residence in the EU citizens' home country arising from the Court of Justice's ruling in Case C-34/09 *Ruiz Zambrano* and subsequent cases.

We also wish to obtain assurances from yourselves that the terms of the Withdrawal Agreement will contain specific wording addressing the following issues:

- ensuring that the interpretation of "lawful residence" fully reflects the conditions applicable under EU law in order to avoid a restrictive application of concepts of EU law (such as but not limited to "worker", "genuine and effective work", "genuine chance of being engaged", "person having retained the status of a worker or self-employed person", "comprehensive sickness insurance") that might lead to a refusal to recognise the rights of residence or permanent residence to EU citizens and their family members in the UK as well as UK citizens and their family members in the EU27;
- ensuring that the commitments made by the UK not to require inactive EU citizens and their family members residing in the UK to demonstrate that they hold "comprehensive

sickness insurance” for the purposes of determining any application to obtain a status conferring the rights of residence as provided for by the Withdrawal Agreement and be issued with a residence document attesting to the existence of that right;

- ensuring that the commitments made by the UK not to impose a requirement on EU citizens in work to demonstrate “genuine and effective work” by reference to the primary earnings threshold under national law for the purposes of determining any application to obtain a status conferring the rights of residence as provided for by the Withdrawal Agreement and be issued with a residence document attesting to the existence of that right; and
- ensuring that restrictions on grounds of public policy or security related to conduct after the specified date will be subject to EU law, or at the very least that such restrictions will involve an individual assessment that complies with the principles of proportionality and equality, adhere to fundamental and human rights and provide for procedural safeguards and full rights of appeal.

In the Annex, you will find further background information on the reasons that have prompted us to raise these issues with you, including brief summaries of the cases mentioned above.

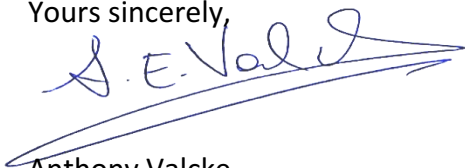
We are confident that you share our desire to prevent any EU citizen or family member from being deprived of the rights that they enjoyed as a matter of EU law prior to the UK’s withdrawal from the EU.

We would be grateful to receive confirmation from yourself that the above issues have been the subject of agreement in principle with the UK authorities.

We stand ready to attend a meeting to discuss these issues in person.

We thank you for your kind assistance in this matter and look forward to your response.

Yours sincerely,



Anthony Valcke
Founder and Supervising Solicitor
EU Rights Clinic

On behalf of the following signatories:

Elsbeth Attwooll, former Member of the European Parliament for Scotland and honorary affiliate of University of Aberdeen Law School

Sue Bent, Chief Executive, Central England Law Centre

Lapo Bettarini, Founding Member, Europe4People

Julie Bishop, Director, Law Centres Network

Dr Justin Borg-Barthet, Senior Lecturer in Law, University of Aberdeen

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Colin Yeo, Barrister, Garden Court Chambers

Annex: Legal Background

1. EU citizens and family members: *Surinder Singh* rights

In Case C-370/90 *Surinder Singh*, the Court of Justice has held that EU citizens who reside in a Member State other than their country of nationality have a right to return to their home Member State accompanied by their family members with whom they had resided in the first State. In Case C-456/12 *O & B*, the Court of Justice confirmed that this right was also conferred by Article 21 of the Treaty on the Functioning of the European Union (TFEU).

It is therefore necessary to ensure these rights are explicitly covered by the Withdrawal Agreement to ensure compliance with the negotiating guidelines of the Council of 29 April 2017, which called for “reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families”.

In its Working paper "Essential Principles on Citizens' Rights" of 24 May 2017, the Commission committed to ensuring that “the rights set out in [the Withdrawal Agreement should provide the] *same level of protection* as set out in Union law at the date of withdrawal of EU27 citizen”. The Essential Principles also specifically confirmed that “the material scope [of the Withdrawal Agreement] should cover the rights set out in ... Article 21 [TFEU] (citizens – free movement)” and that “the Withdrawal Agreement should apply to ... EU27 citizens who reside or have resided in the UK ... [and] UK nationals who reside or have resided in the EU27 at the date of entry into force of the Withdrawal Agreement”.

In October 2017, the European Parliament’s resolution on the state of play of negotiations with the United Kingdom “emphasise[d] that the withdrawal agreement must incorporate *the full set* of rights citizens currently enjoy, such that there is no material change in their position” and “[s]tressed in that regard that the withdrawal agreement should maintain the whole set of European Union rules on citizens’ rights as defined in relevant European Union legislation”.

As a result, in order to ensure that all rights arising under Article 21 TFEU are protected following the UK’s departure from the EU, the Withdrawal Agreement must explicitly cover the rights of family members of EU citizens who have returned home after having resided in another Member State in accordance with the Court of Justice’s ruling in Case C-370/90 *Surinder Singh* and subsequent cases.

2. EU citizens and family members: *Teixeira* cases

In Case C-480/08 *Teixeira*, the Court of Justice confirmed that a child of an EU worker or former worker benefits from a right of residence in order to complete their education even if

the worker has since left the Member State under Article 12 of Regulation 492/2011 on the free movement of workers (previously Regulation 1612/68).

In that case, the Court also recognised that the primary carer of a migrant worker's or former migrant worker's child who is in education has a right to reside with the child. The Court specifically held that a refusal to allow the carer of such a child to remain in the host Member State during the period of their child's education might deprive that child of the right granted to them by Article 12 of Regulation 492/2011.

It is therefore necessary to ensure these rights are explicitly covered by the Withdrawal Agreement to ensure compliance with the negotiating guidelines of the Council of 29 April 2017 and the Commission's Essential Principles on Citizens' Rights of 24 May 2017 which specifically confirmed that "the material scope [of the Withdrawal Agreement] should cover the rights set out in ... Regulation 492/2011" and that "the Withdrawal Agreement should apply to should apply to ... the family members ... regardless of their nationality", as well as the European Parliament's Resolution of 3 October 2017.

However, the European Commission's Joint technical note expressing the detailed consensus of the UK and EU positions on citizens' rights (8 December 2017) only covers the rights of children of migrant workers to remain in a Member State to complete their education (Point #8 - Children and education). There is no mention of the rights of their primary carer.

In order not to deprive the effectiveness of the residence rights of children of migrant workers to remain in a Member State until they complete their education, the Withdrawal Agreement must explicitly cover the rights of the children's primary carers in accordance with the Court of Justice's ruling in Case C-480/08 *Teixeira* and subsequent cases.

3. EU citizens and family members: Ruiz Zambrano cases

In Case C-34/09 *Ruiz Zambrano*, the Court also recognised that the primary carer of an EU child has a right to reside in the child's home Member State.

It is therefore necessary to ensure these rights are explicitly covered by the Withdrawal Agreement to ensure compliance with the negotiating guidelines of the Council of 29 April 2017, which called for "reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families". No exception was made as regards any category of family members.

The European Parliament's Resolution of 3 October 2017 also called for the Withdrawal Agreement to "incorporate the full set of rights citizens currently enjoy, such that there is no material change in their position" and that it "should maintain the whole set of European

Union rules on citizens' rights as defined in relevant European Union legislation". No exception was made as regards any category of family members.

Given that the Withdrawal Agreement should seek to protect the rights of all EU citizens and UK nationals together with their family members, it is therefore necessary to ensure that the Withdrawal Agreement explicitly covers the rights of family members of Union citizens, in accordance with the Court of Justice's ruling in Case C-34/09 *Ruiz Zambrano* and subsequent cases.

4. Lawful residence

"Lawful residence" should mean that residence complies with the conditions laid down in EU law. The problem is that the UK interprets those conditions restrictively, as made clear by various studies and reports of the EU institutions, civil society and the Commission's open infringement proceedings regarding residence rights in the UK.

For example, the UK authorities presently engage in the following practices that do not comply with EU law:

- a restrictive interpretation of the concept of "worker" by imposing weekly earnings threshold of £157 per week (the primary earnings threshold under national law;
- a restrictive interpretation of the concept of "person having retained the status of a worker" by limiting that status to 6 months and excluding the self-employed;
- a restrictive interpretation of the right of jobseekers to remain in the UK while looking for work by imposing on them an obligation to demonstrate they have "compelling evidence" of continuing to seek employment and having a genuine chance of being engaged;
- a restrictive interpretation of the concept of "comprehensive sickness insurance" by excluding reliance on the NHS;
- an expansive interpretation of the concept of "abuse of rights" by considering sleeping on the streets as "misuse of rights"; and
- the exclusion of dual British / EU nationals from the benefit of EU residence rules.

The EU Rights Clinic and its partners remain at your disposal to provide you with the evidence to support each of these points. Should you feel it would be useful to have this evidence at your disposal, please do not hesitate to get in touch via email rights.clinic@ecas.org.

The European Parliament's Resolution of 3 October 2017 also called for the UK to "refrain from any administrative or other practices which result in obstacles and discrimination for citizens of the EU-27 resident in the United Kingdom" as well as call on "all other Member States, from their side, [to] ensure that UK citizens residing in the European Union are treated in full conformity with European Union law given that they remain EU citizens until the United Kingdom's withdrawal from the European Union."

As a result, many EU citizens and their family members who should be considered as "lawfully resident" in the UK as a matter of EU law are instead considered as not exercising Treaty rights and therefore not "lawfully resident" by the UK authorities.

Regrettably, there is also evidence that such restrictive practices have also been replicated in other Member States, which would affect UK nationals and their family members.

5. "Comprehensive sickness insurance" and "genuine and effective work"

The terms of the Withdrawal Agreement must also include explicit wording that reflects the following undertaking given by the UK authorities not to apply such restrictive practices as made clear by previous joint technical notes and public pronouncements:

"UK prepared to specify in the WA details of implementation such as lack of Comprehensive Sickness Insurance (CSI) or not testing 'genuine and effective' work" (joint technical note on EU-UK positions on citizens' rights after third round of negotiations, 31 August 2017)

"We have agreed with the EU that the conditions for EU citizens and their family members to get settled status in the UK will be the same as, or more generous than, those set out in the existing Free Movement Directive. ... We will not check that you hold comprehensive sickness insurance regardless of what activity you have been undertaking in the UK"

<https://www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-what-you-need-to-know>

6. Restrictions of rights on grounds of public policy or security

The terms of the Withdrawal Agreement must include explicit wording that provides for adequate safeguards to protect EU citizens and their family members from disproportionate, arbitrary or discriminatory use of restrictions on grounds of public policy or security related to conduct after the specified date.

The United Kingdom and the Member States retain the freedom to take measures to restrict residence rights on grounds of public policy and public security. However, when such restrictions are imposed on individuals, there must be safeguards in place to prevent disproportionate, arbitrary or discriminatory measures that replicate those currently in place as a matter of EU law.

The current EU rules require that restrictive measures:

- may be taken only on a case-by-case basis where the personal conduct of an individual represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society;
- cannot be based solely on considerations pertaining to the protection of public policy or public security advanced by another Member State;
- cannot be adopted on general preventive grounds but must be based on an actual threat and cannot be justified merely by a general risk. Automatic expulsions cannot be allowed;
- following a criminal conviction cannot be automatic and must take into account the personal conduct of the offender and the threat that it represents for the requirements of public policy.

Once the authorities have established that the personal conduct of the individual represents a threat that is serious enough to warrant a restrictive measure, they must carry out a proportionality assessment to decide whether the person concerned can be denied entry or removed on grounds of public policy or public security. The personal and family situation of the individual concerned must be assessed carefully with a view to establishing whether the envisaged measure is proportionate.

We wish to recall that the negotiating guidelines of the Council of 29 April 2017, the Commission's "Essential Principles on Citizens' Rights" of 24 May 2017 and European Parliament's Resolution of 3 October 2017 all committed to ensuring that the rights set out in the Withdrawal Agreement should provide the same level of protection as set out in EU law at the date of withdrawal. There is therefore no justifiable reason for removing such protections after the UK withdraws from the EU.

In order to preserve such protections, the terms of the Withdrawal Agreement must include explicit wording that provides for EU law to continue to apply to restrictions on grounds of public policy or security related to conduct after the specified date. In the alternative, such restrictions must be subject to adequate safeguards obligations that involves making an individual assessment that complies with the principles of proportionality and equality,

adhere to fundamental and human rights and provide for procedural safeguards and full rights of appeal.