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His Excellency Mr Donald Tusk
President of the European Council
Rue de la Loi 175
B-1048 Brussels

by email:
ec.president@consilium.europa.eu

18 January 2018

Dear President Tusk,

Joint Report of 8 December: Citizens' Rights: The Way Forward

We write on behalf of British in Europe and the3million, the two largest organisations representing the “protected group” of citizens affected by the current negotiations on Citizens’ Rights post-Brexit¹.

We recognise that some progress was made on the subject in 2017 leading to the Joint Report of December 8th (“JR”). However, it remains at this stage a “common understanding”, reached to show that sufficient progress had been made in the negotiations to move on to the second phase; it includes agreement on a number of issues but leaves open many outstanding issues, some fundamental.

We are working on a detailed analysis of the JR and the Joint Technical Note (“JTN”) in which we set these matters out in full. At this stage, we wish to flag up headline issues on the further steps needed during the second phase in 2018 to reach a final and binding agreement, and to provide “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”.²

Outstanding issues

Further work needs to be done in four respects to reach a final and complete agreement. This relates to:

1. Issues on which it has been agreed that there should be further discussion;
2. Issues on which there remains ambiguity;
3. Issues which the European Parliament has indicated need to be resolved;
4. The drafting of the final agreement.

In relation to outstanding issues on Ireland and Northern Ireland, the parties have agreed that work in the next phase should continue “in a distinct strand of the negotiations” (JR para. 56). Given the priority which has rightly been accorded to reaching a full agreement on Citizens’ Rights, the same process should be adopted for outstanding issues under this head both to maintain continuity and to reflect the urgency of finalising it.

Matters on which further discussion has been agreed

“Where there was not mutual agreement that an issue should be discussed in this phase of the negotiations,

1 The term “protected group” in this letter refers to EU citizens in the UK and UK citizens in the EU pre-withdrawal and “Citizens’ Rights” is used to refer to the full complex of these rights.

2 EU Council Negotiating Guidelines 29.4.17 para. 8.

it has been agreed to return to it later” (JR para. 88).

Those touching Citizens’ Rights are set out in box 58 of the JTN and all, apart from future healthcare arrangements, form part of the “rights derived from EU law at the date of withdrawal.” As such, they should be discussed in Phase 2 and included in the Withdrawal Agreement (“WA”). The main issues centre on the right of continuing free movement for UK nationals already living in another EU Member State before exit. They include related rights such as those of running a business, providing cross-border services and recognition of professional qualifications, which also apply to EU nationals in the UK.

EU negotiators argued that these matters were outside their mandate for Phase 1 of the negotiation. It has been suggested to us that this was because they were not rights of the protected group derived from EU law at the date of withdrawal as referred to in the Negotiating Guidelines. This view was, as we have argued elsewhere, incorrect³.

The following two practical examples as regards professional qualifications and free movement illustrate this.

- EU citizens moved to the UK and obtained a professional qualification in the reasonable belief that it would be valid across the EU28: when they made that choice they had no reason to believe that negotiators representing the EU would deprive its own citizens of that right.
- Likewise, many UK citizens moved to other EU countries to work precisely because the EU is a territory without internal boundaries: from lawyers and lorry-drivers to caterers and IT contractors, this freedom to move for work and provide services across borders was an essential part of their life plan.

These EU rights of free movement and recognition of qualifications ARE rights they enjoy at the moment, as are the other related matters set out in JTN box 58. The mandate for the Phase 2 should make it very clear that all such matters⁴ are to be negotiated and included in the Article 50 agreement. If this is not the EU Council’s intention, the protected group should be entitled to a clear statement to that effect supported by reasons.

The UK has offered EU citizens within the protected group a lifetime right of return to the UK post-Brexit, in exchange for free movement for UK citizens in the EU. When the issue of free movement is considered during the second phase of the negotiations, the existing JR provision for a 5-year right of return for those with permanent residence rights should also be reconsidered for both groups.

Issues on which there remains ambiguity or which have not been covered yet

There are a number of issues which remain unclear in the JR and/or the JTN. They are “technical” in the sense that they are of some legal complexity, the exposition of which would not be appropriate in this letter, which looks primarily at how things are to move on. Despite their technical nature they are of great importance to those affected and they will be set out in detail in our analysis of the JR/JTN (see above).

At this stage, we simply flag up a non-exhaustive list of examples:

- How “lawful residence” will be defined and tested in the UK and in the EU 27. Unilateral guarantees made by the UK as regards Comprehensive Sickness Insurance and genuine and effective work should be clearly referenced in the WA as they were in the JR. Moreover, we oppose systematic criminality checks as, under existing EU law, these should not be permitted as a pre-requisite of registration.
- What will happen to an EU citizen who applies unsuccessfully in the UK under the initial non-statutory scheme which contains no appeal rights? Will s/he be deported?
- CJEU judgments: what will be the position of those with dual UK and EU27 nationality (Lounes) covered

3 For example, in our response to the negotiations in phase 1:
https://britishineurope.org/wp-content/uploads/2017/10/Phase-1-review_final.pdf

4 Other than future healthcare arrangements, as mentioned above.

by the Withdrawal Agreement? Will people presently protected by CJEU decisions such as Surinder Singh (family members of returning nationals pre- and post-exit) still be covered? Further, we are concerned that Zambrano carers (non-EU carers for EU citizens) are not covered by the JR.

- In terms of effective judicial oversight in the UK, we are concerned that the proposed change to data protection law regarding immigration matters will prevent EU citizens applying under the WA from being able to effectively challenge rejection.
- What will be the rights of those temporarily absent, e.g. for work, on exit date?
- Will there be healthcare reimbursement for those under pension age at Brexit but who will attain it later and will be entitled to S1 reimbursement from the UK (if a UK citizen) or another EU country (if an EU citizen in the UK) at retirement?
- There are other detailed issues relating to the domestic implementation of the JR and any final agreement in the WA on Citizens' Rights in the UK, and EU 27, which we are currently analysing and which we will set out in our comprehensive analysis of the JR/JTN. Sufficient detail in the WA, and robust accountability including dispute resolution mechanisms in both the UK and EU27, are also needed.

Issues which the European Parliament has indicated need to be resolved

There are issues that the European Parliament, which has to approve any final withdrawal agreement, indicated in its resolution of 13.12.17 must be resolved before the WA can be finalised. This will require that some aspects of what has been agreed for the purposes of the JR will need to be revisited:

- Key among these is that the procedure should be declaratory in nature and free of charge. Although earlier in the negotiations it was anticipated that this would affect only EU citizens in the UK, at the last minute an option was included in the JR for EU 27 countries to require UK citizens in their boundaries to make fresh applications, a proposal on which there was no prior consultation. Given that it represents a clear departure from EU law for both groups, the Parliament is right to ask that this aspect of the JR be reconsidered. The departure from EU law can have serious consequences for those who either fail to make a 'constitutive' application for grant of status, for instance due to lack of mental capacity, digital, language, or evidential barriers, or for those who were granted this non-declaratory status but may then have it more easily revoked after exit, under UK domestic immigration rules. The 3million's 'Alternative to Settled Status' sets out clearly how a declaratory procedure can be organized in the context of a country leaving the EU.
- The WA would need to be extended to future partners and family members.
- Decisions of the CJEU continue to be binding – this is met only in part by the JR.

The Parliament also considers that there should be a guarantee of continuing free movement rights across the whole EU for UK citizens currently resident in an EU27 state, to which the economic rights and recognition of qualifications, and a reciprocal lifelong right of return for EU citizens in the UK, are linked.

The drafting of the final agreement

It goes without saying that the final agreement needs to be carefully drafted. We have been consulted at a high level by officials on both sides throughout the negotiation, including meetings with M. Barnier and Ms. Weyand. We have provided timely and detailed advice, and we have been told that our contributions have been helpful. Where we have been asked to maintain a confidence we have done so. We believe that it would help produce a better agreement if our legal teams were able to view and comment on drafts of the WA once these have got beyond the initial stage and before it is finalised. Not only are our minds

particularly focused when we are considering clauses that will directly affect our own lives and those of our families and friends, but we have several lawyers qualified and experienced in English law, as well as of course EU law. We would also like to be involved on governance issues of the Withdrawal Agreement as they strongly affect our status, even if they are discussed in a separate stream from citizens' rights.

New Negotiating Directives

We therefore ask that the new Negotiating Directives:

- Direct that negotiations over Citizens' Rights continue in a "distinct stream";
- Confirm that to the extent that existing rights have been safeguarded by the JR, they should not be reduced;
- Make clear that the matters in JTN box 58 are to be discussed and included in the Article 50 agreement in a way which preserves the existing rights of the protected group, and that there be further negotiations with a view to achieving a life-time right of return for those with permanent residence;
- Direct that there be further discussion and clarification of the matters over which there is ambiguity and on which the Parliament has expressed reservations with a view to resolving all those issues in a way which preserves the existing rights of the protected group;

In addition, we would ask that the involvement of our two groups in the drafting of the final agreement should be encouraged.

In the event that the view is taken that the matters in JTN box. 58 (or indeed any other matters referred to above) should not be discussed with a view to inclusion in the Article 50 agreement, we ask for a written communication of that decision with reasons why, of all the EU rights presently enjoyed by the protected group, these should be excluded from the agreement.

Yours sincerely,

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