

Anthony Valcke
Supervising Solicitor*
EU Rights Clinic**

ECAS/University of Kent at Brussels
Avenue de la Toison d'Or, 77
B-1060 Brussels, Belgium
T : +32 (0) 2 548 04 94
F : +32 (0) 2 548 04 99
E : rights.clinic@ecads.org

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

cc. Preben Aamann
Carla Valtorta

Brussels, 25 January 2018

Dear President Tusk,

Brexit: Protecting Citizens' Rights and New Negotiating Directives

We are representatives of various organisations that provide legal assistance, advice and other forms of support 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.

While we welcome the breakthrough achieved in the negotiations that has resulted in agreement on many aspects of citizens' rights as contained in the Joint Report of 8 December 2017¹, we write to express our fears and concerns that the Withdrawal Agreement will not comprehensively protect all rights which are currently enjoyed by EU citizens and their family members as a matter of 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 refer to the Council's directives of 22 May 2017 which recognised that "[t]he [Withdrawal] Agreement should safeguard the status and rights derived from Union law at the withdrawal date".

¹ 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, 8 December 2017 <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf>.

We note that these principles were given further expression by the Commission's "Essential Principles on Citizens' Rights" of 24 May 2017, which 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 citizens".

However, it has become apparent that the Joint Report of 8 December 2017 will not fully cover the entire spectrum of rights which all EU citizens and family members presently enjoy in connection with residence, work and equal treatment under EU law.

In this respect, we therefore consider that the statement made by the Commission in its Communication of 8 December 2017² that "the Joint Report means that both Union citizens and United Kingdom nationals, as well as their respective family members can continue to live, work or study as they currently do under the same conditions as under Union law, benefiting from the full application of the prohibition of any discrimination on grounds of nationality" is not correct as a matter of law and fact.

Indeed, it has been confirmed to us in writing by Ms Marie Simonsen³ (on behalf of Mr Barnier, Chief Negotiator, Commission's Brexit Task Force) that the following categories of EU citizens and family members who currently enjoy rights of residence, work and equal treatment under EU law have been excluded from the deal reached at the end of the phase 1 negotiations concerning the UK's terms of withdrawal from the EU:

- 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, as regards both those who have returned home before Brexit and those who are exercising free movement rights on the date of the UK's withdrawal from the EU and who will return to their home Member State after that date; and
- 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.

Moreover, the rights to continuous free movement of British citizens who are currently residing in an EU27 Member State have also been excluded from the scope of the deal reached at the end of the phase 1 negotiations, together with related rights to establishment

² Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, COM(2017) 784 final <https://ec.europa.eu/commission/sites/beta-political/files/1_en_act_communication.pdf>.

³ Email from Marie Simonsen to the EU Rights Clinic, 14 December 2017.

and the provision of cross-border services and other matters set out at point 58 of the joint technical note.⁴

Finally, certain other related issues have also been excluded from the scope of the deal reached at the end of the phase 1 negotiations which are likely to adversely affect the ability of EU citizens to protect their rights of residence after Brexit occurs:

- 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 taken on grounds of public policy or security related to conduct after the specified date will at the very least 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 therefore seeking your written assurance that, in its next set of negotiating guidelines and directives⁵, the European Council will explicitly call upon the Commission to ensure that:

⁴ Joint technical note expressing the detailed consensus of the UK and EU positions on Citizens’ Rights, 8 December 2017 <https://ec.europa.eu/commission/publications/joint-technical-note-expressing-detailed-consensus-uk-and-eu-positions-respect-citizens-rights_en>.

⁵ The proposals for these are contained in the Commission Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great

- the Commission will give priority to the continuation of negotiations on citizens’ rights as a distinct strand of the second phase of the negotiations in order to work on detailed arrangements required to enhance and extend the principles and commitments set out in the Joint Report, as will also be the case for the specific situation of the island of Ireland;⁶
- the Commission will negotiate to ensure the protection of the acquired rights of 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, as regards both those who have returned home before Brexit and those who are exercising free movement rights on the date of the UK’s withdrawal from the EU and who will return to their home Member State after that date;
- the Commission will negotiate to ensure the protection of the acquired rights of 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;
- the Commission will negotiate to ensure the continuing right of free movement in EU 27 Member States of British citizens who are currently residing in a host Member State other than the UK;
- the Commission will negotiate to ensure that the Withdrawal Agreement will contain specific wording addressing the commitments made by the UK on “comprehensive sickness insurance” and “genuine and effective work”; and
- the Commission will negotiate to ensure that the Withdrawal Agreement will contain specific wording to ensure that restrictions on grounds of public policy or security related to conduct after the specified date must 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.

There is a serious risk that, if the areas of concern that we have identified above remain unaddressed and are not the subject of explicit protections in the Withdrawal Agreement, those EU citizens and family members who are affected will become the victims of deportation after Brexit.

We are confident that you share our desire to prevent - post-Brexit - the occurrence of situations whereby EU citizens or family members will be deprived of the rights that they previously enjoyed as a matter of EU law before the UK’s withdrawal from the EU.

Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union and the associated Annex, COM(2017) 830 final.

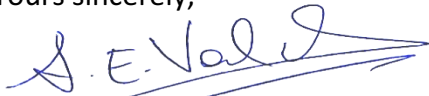
⁶ See Annex to the Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union COM(2017) 830 final, point 6.

We would be grateful to receive confirmation from yourself that the above issues will be the subject of explicit instructions to the Commission in the next set of negotiating guidelines and directives to be adopted by the European Council.

We stand ready to attend a meeting to discuss these issues in person with you, should you require further clarifications. We also remain at the disposal of the Commission to be able to lend our advice in the drafting of the final agreement and we hope you will encourage the Commission to consult us.

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

Diana Baxter, Partner, Wesley Gryk Solicitors LLP

Sue Bent, Chief Executive, Central England Law Centre

Lapo Bettarini, Founding Member, Europe4People

Julie Bishop, Director, Law Centres Network

Brad K. Blitz, Professor of International Politics, Middlesex University and London School of Economics

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

Noreen Burrows, Emeritus Professor of European Law, University of Glasgow

Roger Casale, Chief Executive Officer, New Europeans

Celia Clarke, Director, Bail for Immigration Detainees (BiD)

Irene Couzigou, Senior Lecturer in Law, University of Aberdeen

Scott Crosby, Avocat and, Adjunct Professor of Human Rights, Vesalius College

Dr Egle Dagilyte, Senior Lecturer in Law, Anglia Ruskin University

Seb Dance MEP, European Parliament

Dr Leyla De Amicis, Glasgow Caledonian University

Ellen Desmet, Assistant Professor of Migration Law, Human Rights and Migration Law Clinic, Ghent University

Costanza de Toma, Co-Chair, Advocacy Group, the3million

Mo Egan, Solicitor and Lecturer in Law, University of Stirling

Matthew Evans, Director, The AIRE Centre

Michael Fawole, Centre Director, North East Law Centre

Maria Fletcher, Senior Lecturer in Law, University of Glasgow

Jane Golding, Solicitor and Chair, British in Europe

Elspeth Guild, Jean Monnet Professor ad personam, Queen Mary University of London and Radboud University Nijmegen
Nicolas Hatton, Founding Co-Chair, the3million
Erica Howard, Associate Professor of Law, Middlesex University
Assya Kavrakova, Director, European Citizen Action Service (ECAS)
Eleonore Kofman, Professor of Gender, Migration and Citizenship, Middlesex University and London School of Economics
Jean-Michel Lafleur, Associate Director, Centre for Ethnic and Migration Studies, Université de Liège
Jean Lambert MEP, European Parliament
Thorsten Lauterbach, Teaching Fellow, Robert Gordon University Aberdeen
Carole Lyons, Lecturer in Law, Robert Gordon University Aberdeen
Willem Maas, Jean Monnet Chair of Political Science, Glendon College, York University
Dr Sandra Mantu, Centre for Migration Law, Radboud University Nijmegen
Patrick Marples, Chief Executive Officer, South West London Law Centres
Joylon Maugham QC, Director, Good Law Project
Nicolas Maulet, Lecturer in Law, Robert Gordon University Aberdeen
Dr Clare Frances Moran, Lecturer in Law, Edinburgh Napier University
Elisa Morgera, Professor of Global Environmental Law, Strathclyde University
Dr Charlotte O'Brien, Senior Lecturer in Law, University of York
Laurent Pech, Professor of European Law, Middlesex University
Steve Peers, Professor of EU, Human Rights & World Trade Law, Essex University
Rosa Pérez Monclús, Senior Policy Officer, Culture Action Europe
Dr Anni Poes, Rechtsanwältin and Lecturer in Law, University of Glasgow
Nazek Ramadan, Director, Migrant Voice
Dr Pierre Schammo, Reader in Law, Durham University
Annette Schrauwen, Professor of European integration, University of Amsterdam
Molly Scott Cato MEP, European Parliament
Jo Shaw, Professor of Law, Salvesen Chair of European Institutions, University of Edinburgh
Stijn Smismans, Professor of Law, Jean Monnet Chair in European Law and Governance, Cardiff University
Iyiola Solanke, Professor of EU Law and Social Justice, University of Leeds
Eleanor Spaventa, Professor of European Law, Durham University
Freek Spinnewijn, Director, FEANTSA
Dr Bernard Steunenberg, Professor in Public Administration and Ad Personam Jean Monnet Chair in European Politics, Leiden University
Dr Jeff Turk, Research Fellow, KU Leuven
Dr Anthony Valcke, Supervising Solicitor, EU Rights Clinic
Yannis Vardakastanis, President, European Disability Forum
Herwig Verschueren, Professor of International and European Labour and Social Security Law, University of Antwerp
Leanne Wood AM, Welsh Assembly
Colin Yeo, Barrister, Garden Court Chambers
Ruvi Ziegler, Associate Professor in International Refugee Law, University of Reading

Annex: Legal Background

It is necessary to ensure that all free movement rights that currently exist as a matter of law 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”, together with the Council’s directives of 22 May 2017 which recognised that “[t]he [Withdrawal] Agreement should safeguard the status and rights derived from Union law at the withdrawal date”.

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” (our emphasis). These 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” (our emphasis).

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).

Surinder Singh rights should be explicitly covered by the Withdrawal Agreement because these enable family members to rely upon EU law to claim a right of residence in their EU relative’s country of origin and the Withdrawal Agreement should provide the same level of protection as set out in Union law at the date of withdrawal of EU27 citizen.

In practice this means that beneficiaries of *Surinder Singh* rights have been able to obtain a residence right under the same conditions that apply for family members of EU citizens as contained in Directive 2004/38.

In the event that beneficiaries of *Surinder Singh* rights are not included within the scope of the Withdrawal Agreement, there is currently nothing in UK law that would enable them to automatically retain a right to reside in the UK. Such family members are therefore at serious risk of expulsion.

While we do not know precisely how many family members currently benefit from *Surinder Singh* rights in the UK because the Home Office does not keep such information in an easily extractable format⁷, we estimate that this is likely to affect tens of thousands of family members who are currently lawfully residing in the UK.

However, it is not only family members of UK nationals who stand to lose protection following Brexit if *Surinder Singh* rights are not included within the scope of the Withdrawal Agreement. Family members of EU citizens currently living in the UK who decide to return home after Brexit are also unlikely to be able claim a right to return home under EU law, since their residence in the UK would no longer constitute residence in another Member State.

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 case law, as well as those who will do so after the UK has withdrawn from the EU.

2. EU citizens and family members: Ruiz Zambrano rights

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

This ruling provides corresponding protections to EU minors in their home Member State as that enjoyed by EU minors and their carers in other Member States as recognised by the Court in Case C-200/02 *Chen*. This latter case has already been the subject of agreement in the Joint Report. There is no legitimate reason why *Ruiz Zambrano* rights should be excluded from the scope of the Withdrawal Agreement.

⁷ Response of the Home Office to A. McKay, FOI request 43085, 22 March 2017; Response of the Home Office to A. Maqsood, FOI request 43085, 25 February 2014.

It is therefore necessary to ensure these rights are explicitly covered by the Withdrawal Agreement 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 or source of rights.

Although we do not know precisely how many family members currently benefit from *Ruiz Zambrano* rights in the UK because the Home Office does not keep such information in an easily extractable format,⁸ we estimate that this is likely to affect tens of thousands of family members who are currently lawfully residing in the UK, given that every year over 80,000 children born in England and Wales are born to a couple where one parent was British and the other born outside the UK⁹.

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.

3. Lawful residence

"Lawful residence" should mean that residence complies with the conditions laid down in EU law.

⁸ Response of the Home Office to the EU Rights Clinic, FOI request 46559, 4 January 2018: "Derivative residence card cases are not separately identifiable in the data available regarding EEA residence document decisions and are not recorded in a reportable analysable format within UKVI electronic systems or UKVI's casework data bases."

⁹ UK Statistics Authority, dataset 'Live births in England and Wales by parents' country of birth'. In 2016, 89,566 children were born to a couple where one parent was British and the other born outside the UK. Similar figures are reported for previous years:
<<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/datasets/parents-countryofbirth>>.

The problem is that the UK interprets those conditions restrictively, as made clear by various studies and reports of the EU institutions¹⁰, civil society¹¹ and the Commission's open infringement proceedings regarding residence rights in the UK¹².

¹⁰ See for example, European Parliament, 'Report on the EU Citizenship Report 2017: Strengthening Citizens' Rights in a Union of Democratic Change' (2017/2069(INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGMML+REPORT+A8-2017-0385+0+DOC+PDF+V0//EN>>; European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 of the TFEU on progress towards effective EU Citizenship 2013-2016', COM(2017) 32 final <http://ec.europa.eu/newsroom/document.cfm?doc_id=41930> Stephanie Reynolds, Nathalie Meurens and Gillian Kelly, 'Obstacles to the Right of Free Movement and Residence for EU Citizens and their Families': Country Report for the United Kingdom (PE 556.967, European Parliament 2016) <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556967/IPOL_STU%282016%29556967_EN.pdf>; European Parliament, 'Resolution of 12 March 2014 on the EU Citizenship Report 2013. EU citizens: your rights, your future' (2013/2186(INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGMML+TA+P7-TA-2014-0233+0+DOC+PDF+V0//EN>> European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 of the TFEU on progress towards effective EU Citizenship 2011-2013', COM(2013) 270 final <http://ec.europa.eu/justice/citizen/files/com_2013_270_en.pdf> ; Commission, 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights', COM (2010) 603 final <http://ec.europa.eu/justice/citizen/files/com_2010_603_en.pdf>; European Parliament, 'Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' (2008/2184(INI), 2009) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGMML+REPORT+A6-2009-0186+0+DOC+PDF+V0//EN>>; ECAS, 'Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States', (PE 410.650, European Parliament 2009) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET%282009%29410650_EN.pdf>; European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' COM(2008) 840 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF>>; Milieu Ltd. and Edinburgh University's Europa Institute, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union - Final Report I: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' (Commission 2008) <<https://200438ecstudy.wordpress.com/>>.

¹¹ See for example, Egle Dagilyte and Margaret Greenfields, 'United Kingdom welfare benefit reforms in 2013–2014: Roma between the pillory, the precipice and the slippery slope' (2015) 37 *Journal of Social Welfare and Family Law* 476-495; Charlotte O'Brien 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37 *Journal of Social Welfare and Family Law* 111-136; Sylvia de Mars, 'Economically inactive EU migrants and the United Kingdom's National Health Service: unreasonable burdens without real links?' 39 *European Law Review* 2014 770-789; Jo Shaw and Nina Miller, 'When Legal Worlds Collide: An Exploration of What Happens when EU Free Movement Law Meets UK Immigration Law' (2013) 38 *European Law Review Volume* 137-166; ; Anthony Valcke, 'Five Years of the Citizens Directive – Part 2' (2011) 25 *Journal of Immigration Asylum and Nationality Law* 331-357; Sergio Carrera and Anaïs Faurer Atger, 'Implementation of Directive 2004/38 in the context of EU enlargement', (Centre for European Policy Studies 2009) <<http://aei.pitt.edu/10758/1/1827.pdf>>.

For example, the UK authorities presently engage in the following practices that do not comply with EU law:¹³

- a restrictive interpretation of the concept of "worker" by imposing a weekly earnings threshold of £157 per week (the primary earnings threshold above which national insurance contributions become payable 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 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.

¹² Commission 'Free movement: Commission asks the UK to uphold EU citizens' rights', Press release IP/12/417, 26 April 2012 <http://europa.eu/rapid/press-release_IP-12-417_en.htm>.

¹³ 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.

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 members¹⁴.

4. “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>

Without such explicit wording, there would be nothing to stop the UK authorities from renegeing on these commitments after Brexit and little that the EU institutions could do to enforce such commitments.

It should also be noted that this problem is not limited to the UK. Similar problems have also been reported by EU citizens and their family members as regards the application of the “comprehensive sickness insurance” requirement in other Member States, including France, Italy, Spain, Sweden and Norway.¹⁵

¹⁴ Sandra Mantu, Egle Dagilyte, Matthew Evans, Elspeth Guild, Kathrin Hamenstädt, Alessandra Lang, Elsa Mescoli, Annette Schrauwen, Eleanor Spaventa and Anthony Valcke, ‘EU citizenship and Expulsion’ (2017) Radboud University Centre for Migration Law Working Paper Series, No 2017/02.

¹⁵ See Single Market Scoreboard, Performance per governance tool: SOLVIT and Your Europe Advice <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/index_en.htm>.

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 rules¹⁶ 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

¹⁶ Articles 27-32 of Directive 2004/38.

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.

Moreover, it will be recalled that the Court of Justice has confirmed that similar procedural safeguards also apply in the context of measures taken on grounds of public policy or security against third-country nationals.¹⁷ These minimal procedural safeguards operate as a minimum level of standards which the Withdrawal Agreement cannot derogate from as a matter of EU law.¹⁸ To allow otherwise will mean that measures taken on grounds of public policy or security related to conduct after the specified date against persons falling within the scope of the Withdrawal Agreement will enjoy procedural safeguards which fall well below the current safeguards that currently apply to third country nationals in 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.

7. Continuing rights of free movement for British nationals residing in EU27

The terms of the Withdrawal Agreement should ensure that British nationals who are presently residing in an EU27 Member State are able to move to another EU Member State after Brexit, as well as continue to benefit from existing rights to establishment and the provision of cross-border services and other matters set out at point 58 of the joint technical note.¹⁹

Among the current panoply of existing EU rights, British nationals who are presently residing in an EU27 Member State are able to move to another EU Member State for short or long stays pursuant to Articles 5-7 of Directive 2004/38. They also have a right to work in a Member State other than their country of residence pursuant to Article 45 TFEU as frontier workers or posted workers. They may establish themselves in another Member State under Article 49

¹⁷ See for example, Case C-240/17 *E*; C-554/13 *Zh And O*; Case C-126/03 *Dörr and Ünal*; Case C467/02 *Cetinkaya*; Case C-340/97 *Nazli*.

¹⁸ See to that effect Joined Cases C-402/05 and C-415/05, *Kadi and Al Barakat International Foundation*.

¹⁹ Joint technical note expressing the detailed consensus of the UK and EU positions on Citizens' Rights, 8 December 2017 <https://ec.europa.eu/commission/publications/joint-technical-note-expressing-detailed-consensus-uk-and-eu-positions-respect-citizens-rights_en>.

TFEU and provide cross-border services pursuant to Article 56 TFEU. In addition, British citizens have the right to seek recognition of their professional qualifications in any EU Member State in accordance with Directive 2005/36. All these rights necessitate British citizens being able to move to an EU Member State other than their country of residence.

In this connection, it must also be pointed out that Directive 2003/109 on long-term residence cannot in any way be considered to provide an adequate legal basis to cover the rights of continuous free movement which British citizens who currently reside in an EU27 Member State are able to benefit from. Indeed, under Directive 2003/109, the right of long-term residents to move to another Member State is conditional upon meeting additional requirements which do not apply to EU citizens and their family members under Article 21 TFEU and Directive 2004/38.²⁰

In order to preserve the rights of continuous free movement of British nationals who are currently residing in an EU27 Member State, it is therefore necessary for the terms of the Withdrawal Agreement should ensure that British nationals who are presently residing in an EU27 Member State are able to move to another EU Member State after Brexit, as well as continue to benefit from existing rights to establishment and the provision of cross-border services and other matters set out at point 58 of the joint technical note.

²⁰ See further, Elspeth Guild, Steve Peers and Jonathan Kingham, 'After a Hard BREXIT - British citizens and residence in the EU' (2017) 31 *Journal of Immigration Asylum and Nationality Law* 121-130.