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Claude Moraes MEP
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Beatriz Becerra MEP
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12th September 2017

Dear Ms Bearder, Ms in't Veld, Mr Dance, Mr Moraes, Ms Lambert, Ms Becerra and Ms Wikström,

Re: Response to Brexit Steering Group Comments on EU/UK Positions on Citizens' Rights

Please find enclosed my comments on the Response to Brexit Steering Group Comments on EU/UK Positions on Citizens' Rights.

Personal Scope¹

In relation to the issue of Personal Scope, and in addition to the Draft BSG comment (at p.1, second box), it is indeed the case the personal scope is much wider in the Commission's position paper on "Essential Principles on Citizens' Rights"² in that this covers

“(a) EU27 citizens who **reside** or have resided in the UK at the date of entry into force of the Withdrawal Agreement”.

Present or former **residence alone** was hence included in the personal scope. It is notable in that respect that (*inter alia* as a result of the UK's failure to comply with article 34 of Directive 2004/38/EC³ to “disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication” and e.g. the absence of a mandatory registration requirement during which EU nationals would have been informed of their rights and obligations under the Directive) there may be a substantial group of EU nationals who have been living in the UK but were not resident in accordance with provisions of the Directive 2004/38/EC.

This will also apply – in particular – to EU nationals who are **disabled** and unable to work or in receipt of benefits and carers/family members (both EU nationals and third country

¹ P.1 of the document

² https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_0.pdf

³ Article 34 provides as follows:

“Publicity: Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.”

nationals) who care⁴ for disabled family members (who may be either EU nationals or British citizens).

The European Parliament is also called upon to consider the inclusion of a further category of individuals within the **personal scope** of the document namely EU nationals (and family members – see also below) in whose cases a refusal of the right to residence would undermine their right to respect for private and/or family life in breach of Article 7 of the **Charter of Fundamental Rights of the European Union**. This category may – in individual cases - overlap with the category of carers and disabled EU nationals who have lived in the UK for many years.

Furthermore, the EU/UK Position has - so far - failed to clarify whether the definition of EU nationals includes **UK citizens** who have exercised treaty rights in the EU before returning to the UK (**Surinder Singh**⁵ cases) and who (in accordance with CJEU case law) should continue to be treated as EU nationals in the UK in particular in relation to (1) the status of their **current** family members (who should be treated as on an equal footing with family members of other EU nationals) and (2) in relation to family reunion rights with **future family members** under EC law.

Current Family members⁶

The list of current family members does not sufficiently reflect **all current categories of situations in which family members benefit from rights under EC law** (as per the jurisprudence of the CJEU).

The **first** category is those who hold **derivative rights** (**beyond** the cases of Chen and Texeira – referred to at page 3 of the document) and hence have a right to reside and work in the UK on the basis that their presence is currently required to enable an EU national (or British citizen – see Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09 (08 March 2011)) to remain in the UK or EU.

The **second** category is those of family members in whose cases a refusal of the right to residence would undermine their **right to respect for private and family life** provided for in Article 7 of the Charter of Fundamental Rights of the European Union.

Derivative Rights

Persons currently entitled to derivative rights include the following categories as set out in the Home Office Guidance document 'Processes and procedures for EEA documentation applications' (version 6.0 of 21st April 2017) which "applies and interprets the Immigration (European Economic Area) Regulations 2016". As stated on page 10:

“The following people can apply for a derivative residence card:

- people with a derivative right of residence as the **primary carer** of a:

⁴ And, as carers, may be in receipt of carer's allowance.

⁵ The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department (Freedom of movement for persons) [1992] EUECJ C-370/90 (7 July 1992)

⁶ P.2/3 of the document

- British citizen ('**Zambrano**' cases)
- self-sufficient EEA national child ('**Chen**' cases)
- child of an EEA national worker where that child is in education in the UK ('**Ibrahim** / **Teixeira**' cases)

□ **dependent children** of a **primary carer** in one of the above categories

□ children of EEA national workers who are in education in the UK ('Ibrahim/Teixeira' cases)"

The current document on EU/UK Positions on Citizens' Rights makes no express reference to the derivative rights of **primary carers** (of EEA or British citizens, of self-sufficient EEA national children and of children in education) and of **dependent children of primary carers**.

Furthermore, additional CJEU case law has interpreted in detail the requirements which need to be met to give rise to **derivative rights** and I believe it would be advisable that reference be made not only to Chen and Teixeira cases but also to other applicable CJEU cases on the correct interpretation of derivative rights such as Chavez-Vilchez and Others v Netherlands C-133/15 (10 May 2017), Ibrahim (European citizenship) [2010] EUECJ C-310/08 (23 February 2010), Alarape & Anor v Secretary of State for the Home Department [2013] EUECJ C-529/11 (08 May 2013), Adzo Domenyo Alokpa, v Ministre du Travail, de l'Emploi et de l'Immigration [2013] EUECJ C-86/12 (10 October 2013), Dereci & Ors (European citizenship) [2011] EUECJ C-256/11 (15 November 2011), Zambrano C-34-/09 [2011] ECR I-0000 etc.

Furthermore, UK Courts have accepted that the Zambrano principle equally gives rise to derivative rights as the **primary carer** of **EEA nationals** (as decided in the case of Ahmed (Amos; Zambrano; reg 15A(3) (c) 2006 EEA Regs) Pakistan (Rev 1) [2013] UKUT 89).⁷

The Zambrano principle would – in general – presuppose that the UK or EEA national is a **child** or **dependent adult**.

⁷ http://www.bailii.org/uk/cases/UKUT/IAC/2013/00089_ukut_iac_2013_na_pakistan.html. See headnote and para.68: Headnote "2. The principles established by the Court of Justice in Zambrano Case C-34-/09 [2011] ECR I-0000 and subsequent cases dealing with Article 20 of the Treaty on the Functioning of the European Union (TFEU) have potential application even where the EEA national/Union citizen child of a third-country national is not a national of the host Member State: the test in all cases is whether the adverse decision would require the child to leave the territory of the Union.", "68. **We accept that nothing said by the Court of Justice in any of the Article 20 TFEU cases excludes the potential application of Zambrano principles to third-country national parents if the practical effect of a refusal decision is that the children are obligated to leave the territory of the Union as a whole, notwithstanding that the children are not, as in Zambrano, citizens of the host member state.** That was also the stated position of Mr Deller [representing the Secretary of State for the Home Department], Ms Asanovich and Mr Weiss. Ordinarily in such a case it would be necessary for applicants to prove that the children concerned were prevented from living in the territory of their host Member State (of nationality) together with their parent(s) and that may not be easy to do, given that for a child to have acquired citizenship of a Member State his or her third-country national parent will often have lived there lawfully in the past. In the appellant's case, however, there is no suggestion of the children being able to live with the father and Mr Deller said that he accepted that it was not realistic to expect that she could live in Germany with her children. He also accepted that for her and her children there was no alternative Union territory location other than the UK. In our view Mr Deller was right to make that concession. The appellant did not have any immigration status in Germany nor could she rely in Germany on any EU right of residence (to our understanding she would only be entitled to reside in Germany as a matter of EU law if able to show (as she clearly could not) that she was a self-sufficient parent in accordance with the principles set out by the Court of Justice in Chen [2004] ECR I-9925). Accordingly, in our judgment the appellant is able to rely on her children's Article 20 right of Union citizenship under the Treaty."

It is submitted that all those persons who currently hold derivative rights as per the jurisprudence of the CJEU (or as per the UK's practice and/or case law in cases where this goes beyond current CJEU jurisprudence) on the UK's exit date (or at any stage prior) should be included within the Personal Scope of the Withdrawal Agreement (as 'independent rights holders eligible for settled status') and that an additional category be added of those where removal would be in breach of article 7 (respect for private and family life) of the Charter of Fundamental Rights of the European Union.

Comment on the Brexit Steering Group's comment re derivative rights holders as 'independent rights holders':

Contrary to the (unannotated) document 'EU/UK Positions on Citizens' Rights' (which indicates **green** as agreement), I do not share the concerns of the Brexit Steering Group in relation to treating those with derivative rights and their family members as "independent right holders eligible for permanent residence" as – at present – (1) the EU rights to reside and work of a derivative rights holder come to an end as soon as the situation giving rise to the derivative right comes to an end⁸ and (2) do not allow the aggregation of leave **nor** the opportunity to acquire permanent residence.

Equally, an EU citizen's child's right to pursue education only extends until the end of the education (after which the child neither possesses a continuing – or automatic - right to remain nor an opportunity to acquire permanent residence under EC law).

This has also clearly been confirmed in the Home Office European operational policy team guidance on '*Derivative rights of residence – Ibrahim/Teixeira cases revised*' of 08/08/2012 (as well as in the equivalent guidance '*Derivative rights of residence – Chen cases revised*' of 8th August 2012) which states at paras.4 and 29:

4. This right of residence is not a Free Movement right but is a "derivative right". This means that the recognition of this right by the UK is not equal to rights under Directive 2004/38/EC ("the Directive"). Recognition of a derivative right does not result in the beneficiary of that right being treated as a qualified person for the purposes of the Regulations and therefore such a person cannot sponsor family members under the Regulations. Nor does recognition of such a derivative right attract the public policy protection against removal or deportation from the United Kingdom that is given to those exercising free movement rights **or entitle the beneficiary to rights of permanent residence in the UK. ...**

Permanent residence

29. There is **no** right to permanent residence for persons claiming to have a derivative right of residence. Documents issued to persons with a derivative right should be issued for a period of 5 years at a time (subject to the guidance in paragraph 22 above)."⁹

⁸ See, *inter alia*, para.25 of the Home Office European operational policy team guidance on '*Derivative rights of residence – Ibrahim/Teixeira cases revised*' of 08/08/2012 which states "Right to work 25. A person who has a derivative right of residence under new regulation 15A is not subject to any restriction on taking employment in the UK. Possession of a derivative residence card evidences the fact that the holder had a derivative right at the time at which the card was issued, **but only confers a right to work for as long as the holder continues to enjoy the underlying right to reside.**"

⁹ The same paragraph is contained at para.33 of the guidance '*Derivative rights of residence – Chen cases revised*' of 8th August 2012.

The UK's envisaged plan to treat those with derivative rights (pursuant to the Chen and Teixeira cases as mentioned at p.3 of the 'EU/UK Positions on Citizens Rights' document) as 'independent rights holders' hence not only guarantees their EC law right to work and reside but goes **beyond** the rights accorded by EC law by offering the option of settled status after 5 years (which would constitute a significant additional benefit to those rights holders which – in fact – would add certainty in relation to their future status in the UK).

Future Family Members¹⁰

I would fully endorse the Brexit Steering Group's comment that the UK position is an "unacceptable retrograde step for EU citizens compared to the current situation" and would call on the Parliament to make this a "non-negotiable" point.

The Brexit Steering Group's comment fails to omit a reference to **dependent family members in the ascending line** pursuant to article 2(2)(d) of the Directive 2004/38/EC (e.g. parents and grand-parents) and refers only to children and spouses.

As set out in the attached table juxtaposing the provisions within the current Immigration Rules (which the UK applies to British citizens and those with settled status and is currently intending to apply to EU nationals with settled status as per page 4¹¹ of the document) with EC law rights in relation to be joined by Adult Dependent Relatives (over 18) also clearly illustrate that "(t)he more restrictive criteria drastically undermine current rights of EU citizens" also in relation to relatives in the ascending line (as well as children aged 18 or over).

I furthermore believe that the wording of paras.11¹² and 20¹³ of the Annex to the Recommendation for a Council decision of 3rd May 2017 provides a strong argument that the safeguarding of the "**status** and rights of the EU27 citizens" also requires **derivative rights** to be maintained in the **future** in cases where a denial to be joined by a family member who is a carer would result in an EU national having to leave the UK.

Individual Enforcement of Rights, Role of CJEU and Future CJEU case law¹⁴

I wholeheartedly support the Brexit Steering Group's comments on the enforceability of rights. There is likely to be a vital need for the CJEU to be able to continue its interpretation and

¹⁰ P.4 of the document

¹¹ "Future family members will be subject to the same rules that apply to non-EU nationals joining British citizens, or alternatively to the post-exit immigration arrangements for the EU citizens who arrive after the specified date."

¹² "11. Safeguarding the status and rights of the EU27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU27 Member States is the first priority for the negotiations because of the number of people directly affected and of the seriousness of the consequences of the withdrawal for them."

¹³ 20. The Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) both for EU27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and for United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU27. Guarantees to that effect in the Agreement should be reciprocal and should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to United Kingdom citizens, as set out in the relevant Union acquis. Those rights should be protected as directly enforceable vested rights for the life time of those concerned."

¹⁴ P.5-7 of the document

enforcement role including in relation to interpreting and determining the personal scope of entitlements to remain post the WA (such as in the interpretation of derivative rights). To **exclude** future CJEU case law risks leading to the establishment of a body of “pseudo-EU” case law developed through the interpretation by national courts which does not constitute EU case law and would risk being at odds with **real** EU case law.

Loss of Permanent Residence¹⁵

This is a vital and pertinent comment by the Brexit Steering Group which I entirely support.

In fact, I would go so far as to state that “(i)n this new context, the two-year absence rule **would** lead to a more restrictive outcome” in that loss of permanent residence would mean a loss of any right to a reside (unless a right to reside based on past residence were agreed as per the Commission’s position paper on "Essential Principles on Citizens' Rights" which seeks to also cover EU27 citizens “who ... **have resided** in the UK at the date of entry into force of the Withdrawal Agreement” – see quote above).

The UK position on enabling “further **flexibilities**” would (undoubtedly) be read by Home Office case workers in a restrictive **manner in practice** and would require affected individuals to seek legal redress before national courts in order to enforce this provision.

An agreed entitlement to **permanent residence** of individuals who have held it in the past would (in most cases) obviate the need for judicial redress.

Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,



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Enc: Attachment

¹⁵ P.8 of the document

Immigration Rules v EC Law - Adult Dependent Relatives

Immigration Rules – Appendix FM Adult Dependent Relative Rule (fee £3,250)

Directive 2004/38/EC Immigration (EEA) Regulations 2016

Family members:

- Grandparents, parents, brothers, sisters, son/daughter over 18 (E-ECDR.2.1).
- must as a result of age, illness or disability require **long-term personal care** to perform **everyday tasks**. (E-ECDR.2.4.)
- must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-
- (a) it is **not available** and there is no person in that country who can reasonably provide it; or
- (b) it is **not affordable**. (E-ECDR.2.5)
- E-ECDR.3.1. The applicant must provide evidence that they can be **adequately maintained, accommodated and cared** for in the UK by the sponsor without recourse to public funds (E-ECDR.3.1). Undertaking for a period of **5 years** (E-ECDR.3.2).

Family members:

- A's direct descendants, or the direct descendants of A's spouse/civil partner who are either—
 - (i) **aged under 21**; or
 - (ii) **dependants** of A, or of A's spouse/civil partner (Reg 7(1)(b))
 - **dependent** direct relatives in A's **ascending line**, or in that of A's spouse or civil partner (Reg 7(1)(c))
- Extended Family members (regs 8(2)-(5):**
A relative of EEA national (A) who is
- residing in a country other than the UK, **dependent** upon **or** a member of A's **household**; **or**
 - on serious health grounds, strictly requires A's personal care; **or**
 - would meet the requirements in the immigration rules on adult dependent relatives (of EU national)