To: Rt Hon Priti Patel MP, Secretary of State for the Home Department

CC: Kevin Foster MP, Minister for Future Borders and Immigration

16 June 2020

Dear Home Secretary,

We are writing to you on behalf of the EU citizens and family members who we represent. We wish to bring to your attention several urgent concerns relating to:

- acquisition of status under the EU Settlement Scheme
- value of the rights attached to status under the EU Settlement Scheme
- ability of *everyone* falling within the scope of the Withdrawal Agreement to demonstrate their rights under the Withdrawal Agreement

Given the urgency of these issues, we would appreciate a reply by 10 July 2020 which answers the three questions set out in the letter.

Acquisition of status under the EU Settlement Scheme

1. Broken continuity of residence due to travel restrictions during the Covid-19 pandemic

As you are aware, an absence from the UK of more than six months in any twelve-month period breaks a citizen's continuity of residence for the purposes of applying for status under the EU Settlement Scheme.

In recent months, many countries have introduced unprecedented travel restrictions due to the Covid-19 crisis. For people who are currently out of the UK, when they eventually return to the UK, many will inadvertently have been absent from the UK for more than six months in the preceding twelve months. They will thereby have broken their continuity of residence.

This affects citizens regardless of their current status under the EU Settlement Scheme:

a) Those who have **yet to apply** for status under the EU Settlement Scheme

Citizens may have been eligible for *settled* status before leaving the UK, but due to breaking their continuity of residence their clock will have been reset, resulting in only being eligible for *pre-settled* status. This has serious consequences, not least their access to social security and eligibility for an eventual naturalisation application – setting them back by at least five years.

b) Those who have **already been granted pre-settled status** under the EU Settlement Scheme

Citizens with pre-settled status who have broken their continuity of residence will have dramatically reduced their chance to acquire a secure immigration status in the UK, and may not realise it. Their pre-settled status will expire after five years from the date the status was

granted. At that point they will not be able to apply for settled status – since they will not be able to demonstrate five years of 'continuous residence'. They will also not be eligible to apply for a new pre-settled status at that future date, as this will be after the end of the transition period.

Their only way out of this quandary is to re-apply for pre-settled status *before the end of the grace period*. Many will not know to do so and will therefore face a cliff-edge loss of rights in four to five years' time without any way of mitigating this once December 2020 passes.

c) Those who were intending to **apply for British citizenship**

Anyone with settled status who wishes to apply for British citizenship must satisfy the absence requirements associated with naturalisation. These are stricter than the absence requirements for status under the EU Settlement Scheme. A citizen should not have spent more than 90 days outside the UK in the last 12 months, or more than 450 days outside the UK during the last 5 years.

If someone has been inadvertently stuck abroad for the last three months, this can easily disqualify them from applying for citizenship for a considerable period. This is an effective disenfranchisement, as without naturalisation they will be unable to participate in general elections.

Question 1: will you provide concessions for those who have inadvertently broken their continuity of residence, or broken naturalisation residence requirements, by being prevented from returning to the UK due to travel restrictions during the Covid-19 pandemic? If so, when will this be confirmed in published guidance?

Value of the rights attached to status under the EU Settlement Scheme

2. Pre-Settled Status not considered a "right to reside"

We wrote to you and the Secretary for Work and Pensions[1] on 19 April 2020 on this issue. The Secretary for Work and Pensions replied to us[2] on 30 April 2020, confirming that pre-settled status is not considered a 'right to reside' and that citizens will continue to need to demonstrate exercising a qualifying Treaty right to access income-related benefits.

We do not accept this policy and consider it to go against the spirit of the Withdrawal Agreement. The UK Government is with one hand literally granting a 'right to reside' in the United Kingdom, regardless of exercise of Treaty rights, and with the other hand saying this 'right to reside' is *not* a 'right to reside'.

[1] http://www.t3m.org.uk/t3m_letter_HO_WA_PreSettledStatus
[2] http://www.t3m.org.uk/DWP_letter_WA_PreSettledStatus

3. EU citizens with Settled Status refused naturalisation for being in breach of immigration laws

Naturalisation policy guidance was updated on 15 May 2020, to make clear that residence before the date of grant of settled status will be tested to see if the applicant was exercising treaty rights during the entire relevant period.

Many EU citizens in the UK will have **inadvertently** not been exercising treaty rights (and thereby been in breach of UK immigration laws) by not having Comprehensive Sickness Insurance (CSI) during periods of study or self-sufficiency. We emphasise inadvertently, because this insurance was not needed in everyday life, and it was not needed or requested when accessing the NHS. In fact, before the CSI 'scandal' broke in the media in 2017, it was not even advertised by universities to students checking lawful residence requirements.

CSI was only required at the first point of contact with the Home Office, when applying for Permanent Residence (PR) - required for naturalisation applications before the EU Settlement Scheme existed. During 2016 and 2017 around a third of PR applications were refused. Many other citizens did not even apply as by then they knew they would be refused for not having had CSI during periods of employment inactivity.

After a great many debates in Parliament about CSI, the EU Settlement Scheme when it was finally launched had eligibility requirements consisting only of identity, **residence** and criminality checks. In March 2019 Caroline Nokes, then Immigration Minister, confirmed in the Commons Chamber[3]:

> "*The Government have been clear from the beginning that we would not be testing for comprehensive sickness insurance. We made that clear as early as June 2017, when we published our public document on safeguarding the position of EU citizens, and the Prime Minister reiterated it in October 2017 in her open letter to EU citizens. Appendix EU to the immigration rules does not contain a requirement to have held comprehensive sickness insurance, and that will not change. Eligibility for the scheme will continue to be based on residence and not permitted activity.*"

Many EU citizens will now have applied for Settled Status and have taken at face value the Government's removal of the CSI barrier.

However, it now appears that once again the Government is giving a status with the one hand, along with the oft-repeated soundbite "You are our friends, neighbours and colleagues and we want you to stay", yet with the other hand saying "but we will continue to put up hurdles if you want to take the ultimate step of naturalising as a British citizen".

4. EU citizens with Settled Status who naturalise and are denied family reunion rights

A final example of the same principle that rights under the EU Settlement Scheme are not what they appear at first sight is another obscure trap that EU citizens may inadvertently fall into.

Consider the example of an EU citizen married to a British citizen. The EU citizen was self-sufficient, without having CSI, because they were a non-working parent financially supported by their British partner. After being granted settled status, they wait for a period of three years before applying for British citizenship (to get around the problem described in point 3 above).

[3] https://bit.ly/36Sa4TC

Once granted citizenship, they find they have inadvertently lost the right to be joined by family members (for example an elderly parent), because of the construction of the Immigration Rules. Before naturalisation, they had this right without question, but after naturalisation they fall outside the definition of a 'relevant naturalised British citizen'. This is explained in detail in this news article[4].

The requirement is yet again a historic testing of exercising Treaty rights, and checking that the applicant was in possession of the elusive CSI during periods of economic inactivity.

Question 2: will you amend your policies both under both the British Nationality Act and the Immigration Rules such that any period of residence inside the UK by those with residence status, as described under Article 18(1) of the Withdrawal Agreement, shall be considered **lawful** residence?

Ability of everyone falling within the scope of the Withdrawal Agreement to demonstrate their rights under the Withdrawal Agreement

5. Dual Nationals without Article 1(a) Document accessing their Withdrawal Agreement rights

It is confirmed both in the Withdrawal Agreement and in letters to constituents from the Home Office, that Lounes dual nationals (EU citizens who exercised free movement before naturalising as British and thereby becoming dual EU-British citizens) are within scope of the Withdrawal Agreement.

They therefore should be able to access all the relevant rights within the Withdrawal Agreement.

However, they are prevented from applying to the EU Settlement Scheme since British citizens are unable to apply for a status under the Immigration Rules.

The Withdrawal Agreement provides a choice between a constitutive system (Article 18(1)) and a declaratory system (Article 18(4)). Since the UK has chosen to adopt a constitutive system, this means that citizens must apply and be granted a document under Article 18(1) in order to be granted the rights under the Withdrawal Agreement. Recent Guidance published by the European Commission[5] confirms this under paragraph 2.6 (our bold):

> *In a constitutive residence scheme, beneficiaries acquire residence status **only** if they make an application for the status and the application is granted. In other words, the 'source' of the residence status and **entitlements stemming thereof** is the decision of national authorities granting the status.*

For a Lounes dual national this poses a serious problem.

Firstly, without status they arguably have not been granted the rights under the Withdrawal Agreement.

However, the same Guidance states clearly in paragraph 1.2.1 that:

[4] https://europestreet.news/how-settled-status-can-become-a-trap-for-non-eu-family-members-of-dual-eu-british-citizens/

[5] https://ec.europa.eu/info/publications/guidance-note-citizens-rights_en

Dual EU/UK nationals, whether by birth or by naturalisation, are covered by the Agreement if, by the end of the transition period, they have exercised free movement residence rights in the host State of which they hold nationality (case C-165/16 Lounes).

There is therefore already a contradiction between having the rights but not being able to apply for an Article 18(1) document.

Secondly, the absence of an Article 18(1) document will create practical administrative problems for Lounes dual nationals. There will be numerous points at which they will need to prove that they fall within the scope of the Withdrawal Agreement. Some examples are given below:

- When wishing to exercise their right to be joined in the UK by a family member in future
- When applying for an EHIC card after the end of the transition period or wishing to use such an EHIC card in one of the EU member states after the end of the transition period. A recent issue of an EHIC card came with the wording (our bold):

  "Some people will continue to be entitled to an EHIC after the 31 December 2020 ***if they fall within the scope of the provisions of the Withdrawal Agreement****. Future arrangements for other people travelling to the EU after 31 December 2020 are subject to negotiations with the EU."*

  The rights of those falling within the scope of the Withdrawal Agreement cannot be affected by the current negotiations of the future EU-UK relationship. Therefore, it must be possible to distinguish those who fall within scope of the Withdrawal Agreement and those who do not, as per above wording.

  How will Lounes dual nationals prove they can apply for an EHIC card or use such an EHIC card after 31 December 2020 when they have no Article 18(1) document?

Question 3: will you create a process whereby Lounes dual nationals can obtain an Article 18(1) document?

Yours faithfully,

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