Response of British in Europe and the3million to the second round of negotiations (week of July 17 2017)

Executive Summary

- **British in Europe** and **the3million** welcome the fact that the discussion of their rights has been constructive and positive. They also welcome the immediate post-negotiation round briefing on the outcome with us on July 20/21.
- Real concerns have arisen, however, over:
    - The EU position on Freedom of Movement for UK citizens in Europe;
    - The continued and confusing use of UK immigration law concepts in relation to residence rights.
    - Both sides' desire to limit the rights of a permanent resident to return after two years' absence.
    - The EU refusal to concede voting rights in local or European elections.
- Most of the concerns we expressed earlier remain, and we mention some further issues arising from the recent discussions.
- We are particularly concerned that the issue of ring-fencing the agreement on citizens' rights does not appear to have been discussed or to be tabled for future discussion.

Introduction

British in Europe and **the3million** welcome the consultation which has taken place with us, as representatives of the groups of citizens in both the UK and the EU27 directly affected, following this second round of the negotiations.

Both groups were also pleased to note that each negotiating team says the discussion of citizens' rights has been constructive and positive.

Our position on the negotiations as a whole, the formal offers that were made at the outset and the outcome which we are looking for is set out in detail in earlier documents[i]. We do not intend to repeat them here, but to focus on the issues which we are told have arisen during the first substantive round of discussions. In that respect the table of the positions adopted by each side on a list of issues ("the Table") is helpful but not always entirely clear.

General point by way of introduction

One issue of general concern to us is the language used by, and consequently the approach of, the negotiating parties in respect of our rights, particularly the UK. The Government of the UK has until recently repeatedly talked of making a "generous" offer to EU citizens living in that country, as though it were dealing with applications for some indulgence. Although that language has now been modified to "fair and serious", the approach remains fundamentally the same, as is evident from the requirement for EU citizens with a right of permanent residence to *apply* for a *grant* of a new status.

As we pointed out in our earlier submission[ii], permanent residence is a status achieved by a person that, by virtue of Art. 16.4 of Directive 2004/38/EC which still forms part of UK as well as EU law, can *only* be lost through an absence

exceeding two years. Both sides to some extent, and the UK in particular, are proposing to reduce the rights of those with permanent residence in flat contradiction of that law. The present document is addressed to the negotiators of a political settlement rather than to a court of law, and for that reason detailed legal argument is out of place[iii]. Suffice it to say that, in the context of proposals to deprive people of rights which they were assured by statute could only be lost by some other means, all talk of generosity or applications for a "grant" of status is entirely inappropriate.

EU position on freedom of movement

The biggest surprise of round 2 of the negotiations was the EU's apparent change of position on recognising the continued right of UK citizens in Europe ("UKinEU") to freedom of movement. It is clear from the item "Further movement rights" in the Table that the EU proposes that UKinEU should only have protected rights in the state in which they have residence rights on Brexit day. What is surprising about this is that in paragraph 21(b)(i) of the final Negotiating Directives approved by the European Council on 22nd May, **the** rights of free movement are expressly mentioned as among the minimum rights to be preserved, in addition to rights of residence, and that this was by way of amendment to the earlier draft Directives. We therefore look to the EU for an explanation and justification of this apparent change of heart, as it is difficult to understand what that wording means and where free movement rights arise if the aim is simply to protect the rights acquired by a UK citizen who has settled in another Member State to stay in that Member State.

We also urge the EU to confirm that the free movement rights that UKinEU currently have as EU citizens are covered for the following reasons:

- Very many UK citizens who have moved to Europe did so in fulfilment of the very purpose for which the EU was created. They see themselves predominantly as European rather than as nationals of their member state of origin or of current residence, and they moved in exercise of European rights and in assertion of a European identity. Freedom of movement is of the essence of the rights of a European and to remove it is a slap in the face to those UK citizens who voted with their feet *for* Europe long before a small majority of their co-nationals cast a paper vote the other way.
- The proposed deprivation of rights will cause real hardship to many UK citizens living in the EU, particularly those living and working in border areas and those who have moved freely around Europe during their working lives. Many will need those rights to continue on a career path that is now set. See for example the case studies on pp.9-10 of (https://britishineurope.org/case-studies-of-brits-in-europe/).
- Some of those may even have acquired property in an EU 27 country other than that in which they now reside and may now face difficulties returning to the EU 27 country in which that property is located.
- Michel Barnier is on record as saying, *"Notre objectif est clair: ces hommes, ces femmes, ces familles doivent pouvoir continuer à vivre comme aujourd'hui, et cela pour la durée de leur vie."*

- To deprive UKinEU of rights of free movement is to discriminate against those citizens who have moved from the UK to other EU Member States as opposed to those who have moved in the other direction. The latter group of course retain their free movement rights as citizens of EU27 countries, although we note below serious issues as regards free movement to the UK for this group.

UK position on "settled status" and "permanent residence"

We understand from both sides and the technical Table that the UK has made a proposal which is not clear from its written position paper of June 26th. This is that its concept of "settled" status should be interpreted by reference to EU law concepts in Directive 2004/38 and that "settled" should not be substantially different to having "permanent residence", save obviously where the UK is proposing a clear reduction in rights such as in the case of family reunification.

Whilst naturally welcoming the UK's desire to narrow the gap between the two sides on this crucial issue, we regard this particular attempt as misconceived for three reasons. It is unnecessary, likely at best to create confusion and at worst to lead to a diminution in the rights of EUinUK which may not be perceived by all at the outset.

Unnecessary: It is unnecessary because the UK legal systems (i.e. those of England and Wales, Scotland and Northern Ireland) are perfectly capable of applying EU law without modification or cosmetic re-labelling. EU law has formed part of UK law for over 40 years without difficulty. Indeed, the very suggestion that concepts from the Free Movement Directive should be used to interpret the proposed UK law only confirms that there is no difficulty about this. Hence, interpreting UK 'settled status' partially in light of EU permanent status is a confusing detour. The UK can apply EU permanent residence status directly.

Likely to create confusion: The use of the UK term "settled", another word for having indefinite leave to remain (**https://www.gov.uk/settle-in-the-uk**), can only cause confusion, because there will inevitably be arguments over the extent to which it imports UK rules and case law as opposed to the EU rules of construction which are said to apply, and how the one set of rules marries up with the other. These arguments will lead to litigation and anxiety not only for those involved but also for those affected by the outcome, thus continuing the uncertainty we face potentially for many more years.

Likely to cause unexpected diminution in rights: this point is the corollary of the last. UK immigration law is both restrictive and of Byzantine complexity. In those circumstances the risk of a case-law decision in reduction of rights which was foreseen by neither side in the negotiations is too high to be acceptable. To give but one example, indefinite leave to remain ("settled status") must be refused to someone who has, "within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they have received a non-custodial sentence" or a caution.[iv] Would this very low UK immigration law hurdle be used to refuse permanent residence, in contradistinction to EU law? Would there even be a right of appeal against refusal on this ground?[v]

The solution: The solution is simple and clear. The parties should agree that the

rights of citizens who have moved should be unchanged: i.e. they should be the EU rights which they enjoy at present, expressed as such and not re-labelled. This presents no legal difficulty at all for the UK. Whilst the latter shies away from this solution in relation to immigration, it willingly accepts this approach in relation to other matters, e.g. healthcare – ". the UK will seek to protect the healthcare arrangements currently set out in EU Regulations and domestic UK law…"[vi].

To protect the rights EU citizens have legitimately built up in the UK, the concept of 'EU permanent residence' set out in EU Directive 2004/38 and CJEU case law should be enshrined in the Withdrawal Agreement, and subsequently in any UK law implementing the Agreement.

Home Office website

We were also surprised to discover that, although the issue of status/permanent residence remains unresolved in the negotiations, the Home Office has pre-empted the outcome by asserting on its website, "If you already have a permanent residence document it won't be valid after the UK leaves the EU… A new scheme will be available for EU citizens and their family members to apply to stay in the UK after it leaves the EU." We would ask that this misrepresentation of a position which is not agreed be removed forthwith.

Loss of permanent residence after 2 years – both sides' positions

Both sides propose the continued application of the rule that permanent residence is lost after an absence of 2 years.

Neither side's position adequately reflects the context, to which we made reference in our paper of July 1st in relation to the UK offer [vii], that it will no longer be possible for a citizen with permanent residence in the UK to exercise a free movement right to return and build up 5 years residence again. According to the technical note, the EU position as regards a citizen with permanent residence in the EU would be the same. Therefore, loss of permanent residence in what has been one's home means the loss of any guaranteed automatic right to return there.

The EU's position, coupled with its stance on freedom of movement referred to above, will cause real hardship. Obvious examples of those who need to return despite an absence of over two years are students or those who have to return to their country of origin for a lengthy period to look after an elderly parent, but there are many many more.

The UK appears to propose some flexibility in the application of this rule for those with strong ties with the UK, such as students studying abroad. However, we have real fears that this is in practice no more than a chimera. The UK's actual proposals for EU residents who wish to return are wholly unclear and, since the analogous UK immigration rules for those with indefinite leave to remain who wish to return after a period of two years' absence are very restrictive, we fear that they will be insufficient to cater appropriately for the myriad situations in which an EU national who has made their home in the UK needs to leave their home for a lengthy period. If the UK's intention is to mirror the provisions of its existing immigration system here, whereby a person is only likely to be allowed to return after two years if they have lived in the UK for most

of their life, with virtually no right of appeal save on human rights grounds, then this would be wholly unacceptable. If the current position under EU law applied, including free movement rights, persons who left for two years would be able to return and resume their residence.

In short, the two-year absence rule applied under EU Directive 2004/38 is simply not appropriate applied out of a context, namely when rights of free movement no longer apply.

The logical way for both sides to deal with this issue is to say that those who have established and retain permanent residence at any time before Brexit (including those resident before Brexit but who only achieve 5 years' residence afterwards) should have a life-long right to return or that those who have exercised a right of free movement should continue to have that right.

Tests of "residence" – EU position

In the interests of achieving certainty, the UK's proposal to include in the Withdrawal Agreement details such as not requiring Comprehensive Sickness Insurance and not testing for "genuine and effective" work is to be welcomed, and preferred to the more open-ended approach of the EU. However, it would be helpful for the Agreement to state expressly that any such criteria are not necessarily exhaustive, so as to leave room for other situations not presently contemplated.

Personal scope - posted workers – EU position

The UK is happy to include the rights of posted workers in the Withdrawal Agreement but the EU says that this is inappropriate as the issue is linked to the provision of cross-border services. We strongly support the UK approach to the inclusion of posted workers in the current negotiation. The aim of this stage of the negotiation is to provide certainty to all individuals who have moved abroad in exercise of EU rights, and posted workers are among these. They are human, have families, and suffer as much as anyone else from the continuing uncertainty over their future.

Personal scope – frontier workers

There is no clear definition of frontier workers arising from the negotiations to date and we understand that this will be discussed during the next round. Given in particular the EU's current position on free movement rights for UKinEU, it is critical to consider carefully all possible variants of cross-border working/careers currently pursued by UKinEU and to ensure that this definition is flexible enough to cover them. Otherwise, many of those who work cross-border may find their ability to pursue their careers and provide for their family severely curtailed. In short, they will not be able to continue their lives as if Brexit had not happened.

Personal scope – current family members

The EU proposes that family members should be within the scope of the Agreement *as family members*, but the UK that they should do so as *independent right holders*. We are told that these positions are to be clarified and reserve the right to comment when that has been done. We note that while the interpretation as family member under EU law is well established, a new

conceptualisation of 'family members as independent right holders' holds the risk of undermining established rights.

Family reunification – UK position

There have been no developments in the negotiations on positions in relation to family reunification, and we have already made clear our serious concerns about the UK position[viii]. We would only add by way of answer to the UK position that it does not wish to grant EU citizens rights greater than those enjoyed by British citizens living in the UK:

- That UK immigration law already distinguishes between different groups of people for the purpose of family reunification. People who applied for visas before July 2012 enjoy a less restrictive regime than those who did not and the spouses of refugees do not face the same restrictions[ix].
- That the UK's position on family reunification is not one to be proud of. It came 38th out of 38 developed countries in a recent study on the subject[x].

Criminality post-exit – UK position

The EU position is that expulsion on the grounds of criminality committed post-Brexit should continue to be assessed in accordance with Directive 2004/38. The UK wishes to apply its own rules. Given the point made above about permanent residence being a status achieved while the UK remained in the EU, the EU's position is surely correct.

Administrative procedures

We do not comment in detail on the proposed administrative procedures as we agree with the EU that it is wrong to require those with a right of permanent residence to go through a different procedure now. Again this reflects our overriding position that we are not being "granted" anything: we have protected rights. For this reason, matters such as a criminal record check which is not required by existing EU law are inappropriate. This is not, of course, to grant carte blanche to serious criminals to remain in a Member State. EU law already has adequate provisions to expel where appropriate.

We do not, of course, have any difficulty with a scheme of certificates of permanent residence: these are available now in accordance with Directive 2004/38 but, as the Directive makes clear, they *recognise* existing rights.

Nature and enforcement of the Withdrawal Agreement

Both sides accept that the Withdrawal Agreement should be binding in international law. Questions arise, however, as to how this is to be effectively achieved.

It has to be acknowledged that, as the citizens whose rights and future rights are in issue, we do have fears that some future government(s) might wish to reduce our rights to achieve some domestic political advantage, and for that reason it is essential that the rights enshrined in the Withdrawal Agreement should be clear and incapable of diminution.

The EU proposes that the Agreement should have direct effect but the UK proposes instead to introduce domestic legislation to implement the Agreement. Direct effect is the simplest way to achieve the desired result, and the fact that

the UK has given direct effect to EU law in the past through the mechanism of the European Communities Act 1972 makes clear that direct effect in a limited area such as citizens' rights could be achieved by further legislation now.

Direct effect is also crucial to ensure that individuals are able to invoke rights set out in the Withdrawal Agreement before national and European courts, independently of national law, and without waiting for the relevant countries that are parties to this international agreement to adopt it in their internal legal systems. In any event it is essential that the rights contained in the Withdrawal Agreement be spelled out with a degree of clarity and certainty which will limit as far as possible any room for argument, and that it be expressly agreed that neither the UK, the EU nor any of the EU27 should be able to repeal, limit or reduce these in future by legislation of any sort or by executive or judicial decision, action or direction. In summary the rights retained under the Withdrawal Agreement should be directly enforceable, with courts able to refer questions of interpretation to the CJEU, or whatever other adjudicating body is agreed.

The jurisdiction of the CJEU remains a bone of contention and we have made clear our views in the past[xi]. At this stage we simply draw attention, in support of the argument for the CJEU as ultimate arbiter, possibly with UK judges on relevant issues, to the views of Lord Brown of Eaton-under-Heywood[xii] in the recent debate in the House of Lords[xiii] in which he said,

> *"Let me focus on that last sentence: "We will of course continue to honour our international commitments and follow international law", which, of course, is what the Government now say in the present context of safeguarding citizen's rights, but how confident of this can the other 27 states be? We have an international law commitment under the European Convention on Human Rights to give effect to Strasbourg court judgments, but we are in flagrant breach of that commitment on prisoner voting, for example."*

The Table highlights some differences between the sides on the question of monitoring the system of implementation of citizens' rights. We are not entirely sure from the Table what detail is now proposed by either side. However, it seems to us sensible that there should be a Joint Committee of both sides to monitor the arrangements, as proposed by the EU Task Force in its position paper on Governance dated 28 June 2017.

Voting rights

The UK rightly proposes that the right to stand and/or vote in local elections in the country of residence should remain. The EU objects "because this arises from EU citizenship rights". The reasons for the EU stance are, with respect, not understood and it is inconsistent with its own Negotiating Directives, para. 20 of which open, "The Agreement should safeguard the status and rights derived from Union law at the withdrawal date." For that reason, not only should the right to vote in local elections be continued but also the right to vote in European elections.

It appears in practice to be an issue as regards the scope of the EU's competence to deal with this issue as part of the Article 50 withdrawal negotiations, and if

this is the case, the agreement of the EU 27 should simply be sought to allow the guarantee of these rights going forward.

Social security coordination

We do not comment on those issues of social security where further clarification is promised. However, we restate our strong concern in the UK's lack of clear commitment to recognise contributions made after Brexit for issues of aggregation. Not doing so can have a dramatic impact on people's life as it limits the possibilities to return to the country of origin.

Moreover, in what is possibly a clerical error in preparation of the Table, there is no indication in that document of the EU position on healthcare. We seek confirmation that it is as set out in para. 21(b)(i) and (ii) of the Negotiating Directives. More particularly, while both the UK and EU commit to non-discrimination in relation to healthcare provision, the situation in relation to continued use of EHIC remains unclear. Having families in another EU country than their country of residence, EUinUK and UKinEU are bound to travel proportionally much more than other citizens. Not being able to rely on the EHIC can have a dramatic effect, particularly for those with chronic health conditions who cannot afford private travel insurance.

Frontier workers, students, professional qualifications and social security

It is our intention to comment on all of these matters in detail and update this document when discussions on those issues are are completed (as currently expected) during the next round of negotiations.

Ring-fencing

We have previously stressed the importance of ring-fencing any agreement which is reached on citizens' rights so that we do not have to live with the continued risk of it all falling apart because the differences between the parties in the more contentious areas of the negotiation prove insuperable. Indeed, we understand that the EU itself wants to see progress in all three areas of financial settlement, Irish border issue and citizens' rights in order to confirm "sufficient progress" and move on to the second phase of the first stage of negotiations.

We note with disappointment, however, that ring-fencing does not appear to have been discussed and does not appear to be on the agenda for future discussion. We strongly urge the parties to reconsider this and to make ring-fencing an essential element of the agreement in order to bring to an end what is already over a year of uncertainty and anxiety over our futures;

2 August 2017

British in Europe the3million

[i] BiE Alternative White Paper https://bit.ly/BiE_AlternativeWhitePaper
t3m Alternative White Paper https://bit.ly/t3m_AlternativeWhitePaper

Joint response to EU final negotiating directives https://bit.ly/t3m_BiE_EUNegotiationDirectives
Joint Response to UK Proposals https://bit.ly/t3m_BiE_UKProposal

[ii] Joint Response to UK, p.6.

[iii] Our rights collectively and individually to challenge the result of this negotiation are of course reserved.

[iv] Immigration Rules para. 322(1C)(i)(iv).

[v] At present you can appeal a decision under EEA Regulations but, unless special provision is made, post-Brexit an EU/EEA citizen refused permanent residence/settled status will only be able to appeal by demonstrating a breach of his/her human rights.

[vi] UK Proposal para. 49.

[vii] Joint Response to UK, p.7.

[viii] Joint Response to UK, p.5.

[ix] Compare Part 8 of the Immigration Rules with Appendix FM https://www.gov.uk/guidance/immigration-rules/immigration-rules-index See also less restrictive rules for refugee family reunion (Paragraph 352A https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum).

[x] http://www.mipex.eu/family-reunion.

[xi] Joint Response UK, pp.3-4.

[xii] Not only a retired judge of the Supreme Court, but also a former First Junior Treasury Counsel, the barrister who represents the Government in its most important cases: not, then, the views of a dangerous radical.

[xiii] July 4th 2017, 7.28pm.