

Our ref: JHL
Date: 13 September 2019

Věra Jourová
EU Commissioner (Justice, Consumers and Gender Equality)

By e mail only to vera-jourova-contact@ec.europa.eu

cc. Renate Nikolay, Head of Cabinet renate.nikolay@ec.europa.eu

Dear Ms Jourová,

Disenfranchisement of British Citizens exercising free movement rights in the 2019 European Parliament Elections

1. We are instructed by British in Europe, which is a coalition of groups representing British Citizens living and working in Europe.
2. As you know from our previous correspondence on behalf the 3million, we have seen reported in the *Guardian* of 21 June 2019 that you have written to the UK Government setting out the Commission's concerns about disenfranchisement of EU Citizens resident in the UK in the 2019 European Parliament Elections ('the 2019 Elections'). The *Guardian* quotes your letter as stating:

"The commission identified four main bureaucratic problems encountered by EU Citizens in the UK: councils failed to inform EU citizens about the two-step registration process; councils did not send out forms on time to people who requested them; or forms were not registered despite being sent. Finally, the letter states, staff at polling stations "failed in many cases to adequately respond to EU citizens' complaints" after they were unable to vote, despite taking all the necessary steps."

3. These are, of course, serious problems. However, assuming the report is accurate, a further, related set of problems appears to have been overlooked by your office. This affected another group of EU citizens during the 2019 Elections, specifically British Citizens resident elsewhere in the EU in exercise of freedom of movement rights who wished to exercise their rights to vote for UK MEP candidates standing in the UK, but were prevented from doing so. This letter seeks confirmation that the Commission will investigate the resulting breaches of those British Citizens' voting rights alongside the breach of the rights of their fellow EU 27 citizens, make findings on what occurred and take appropriate measures against the UK.

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4. Below, we briefly summarise the rights at issue then discuss how they were breached.
5. Appended by way of supporting evidence is a compilation of media reports of British Citizens being disenfranchised. British in Europe has also undertaken a survey undertaken by to capture details of the experiences of some those who were prevented from voting. There were 479 respondents. At a high level, what the survey indicates is that:
 - (1) 316 of these people were registered and 163 were unable to register in time;
 - (2) of the 316, 250 could not vote and 20 were uncertain that their vote had been counted;
 - (3) 100 applied to vote by post, but did not receive ballot papers in time to return them, most significantly those who wished to vote in Durham, Bedford, Birmingham, Bradford, Calderdale, Tower Hamlets and Windsor & Maidenhead;
 - (4) 97 applied to vote by post but did not receive ballot papers at all, most significantly those who wished to vote in Bassetlaw, Colchester, Canterbury and Southwark; and
 - (5) others applied for a proxy vote, but their proxies did not receive ballot papers in time.
6. British in Europe representatives are willing to meet and discuss this research and other empirical evidence of the issue with you and your staff. It should also be possible to put you or your staff in touch with individuals whose circumstances are representative of those who were disenfranchised.

The rights at issue

7. The right to vote under EU law is an important aspect of EU citizenship. Article 10(3) TEU states:

“Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.”

8. Articles 20(2)(b) and 22(2) TFEU make clear that the right is to be guaranteed to all without discrimination on the grounds of nationality:

“Article 20

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: ...

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as Citizens of that State.

Article 22

2. ... [E]very citizen of the Union residing in a Member State of which he is not a national shall have the right to vote ... in elections to the European Parliament in the Member State in which he resides, under the same conditions as Citizens of that State."

9. Articles 20 and 22 TFEU have direct effect and are directly enforceable by individuals before national courts: *Case C-184/99 Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve* [2002] 1 CMLR 19 at §31. The Member State's exercise of its competence and powers in the area of national citizenship and associated political rights, in so far as it affects the rights conferred and protected by the EU legal order, is amenable to judicial review carried out in the light of EU law: *Case C-135/08 Rottman v Freistaat Bayern* [2010] QB 761 at §48.
10. These rights are reinforced by Article 39(1) of the EU Charter which states "*Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament...*"

Impediments on the exercise of these rights by British Citizens resident in other EU Member States

11. British Citizens only enjoy the right to vote from abroad for 15 years, but even those who fall on the right side of this arbitrary line face multiple barriers to exercising their rights.

Registration requirements

12. Registration to vote from abroad is more complex than for UK-based UK Citizens. For instance, in cases where National Insurance information is considered insufficient, the would-be voter's identity must be verified by another registered British Citizen overseas voter. Many attempted registrations in the last General Election were not successful and British in Europe believe the problem reoccurred in the 2019 Elections.
13. These problems were especially acute for those voting in the 2019 Elections for the first time who turned 18 when resident outside the UK. This group no longer automatically receive a UK National Insurance number at age 16. As that number is normally required to register to vote, those registering must be aware of this requirement and apply sufficiently in advance of the deadline for registration to secure the National Insurance number in time. For many this is impractical. Anecdotally, British in Europe is aware of this first hurdle operating to prevent many would-be first time voters getting as far as registering.

14. Further, under domestic law, a British Citizen who wishes to vote in the UK, but from another EU member state must register annually (as well as if there is a change in place of registration) by making an ‘overseas elector’s declaration’, whereas their UK-based British Citizen comparators must simply register to vote once and only need re-register if they are no longer resident in the place in which they were registered. This requirement is found in section 2(2) of the Representation of the People Act 1985.
15. Both requirements impact heavily on British Citizens exercising free movement rights. There is no obvious good reason to impose them. They are not required by the Treaties or the Council Directive 93/109/EC (“the Voting Directive”) and, as a matter of EU law, they unlawfully impede the exercise of the rights those instruments create.

Requirement to make repeated applications to vote by post or proxy

16. A registered British Citizen who is resident in the UK and wishes to vote here can seek and be granted an indefinite postal vote (subject to 5 yearly renewals of signature verification).
17. By contrast, a registered British Citizen who is resident in another EU Member State must apply annually for a postal or proxy vote .
18. Again, there is no obvious justification under EU law for imposing these additional requirements on British Citizens who happen to have chosen to exercise free movement rights. Imposing them undermines the Treaty and Voting Directive rights

The UK Government was on notice of some of the resulting difficulties

19. The problems resulting from these requirements were drawn to the UK Government’s attention after the last European Parliament Election (as were similar problems experienced by UK-based postal voters).
20. The Election Commission reported in 2014 that:

“British expatriates are a particularly difficult audience to target. This year we did a number of things differently for this aspect of the campaign, including working more closely with partners and holding an Overseas Registration Day. We achieved a total of 7,097 overseas registration form downloads from our website, which exceeded the number of forms downloaded during the campaigns undertaken prior to the European Parliamentary elections in 2009 (5,566) but fell well short of our target of 25,000 forms.”

adding:

“Our guidance to [returning officers] was clear that they should send out postal votes as early as practicable in all cases, and in particular should prioritise the issue of postal ballot packs to overseas electors.

While we are aware that some ROs sent out postal ballot packs earlier than they would previously have done, others opted to follow a similar timetable to that used for previous elections...”

See:

https://www.electoralcommission.org.uk/sites/default/files/pdf_file/EP-and-local-elections-report-May-2014.pdf

21. [Concerns were also raised by and on behalf of overseas voters as part of the 2014 consultation on Balance of Competencies between the UK and EU.](#)

The impediments are compounded by the UK Government’s approach to the 2019 Elections

22. Council Decision (EU, Euratom) 2018/767 of 22 May 2018 confirmed 23 to 26 May 2019 as the period for the 2019 Elections (which could also have been calculated from the 2014 European Parliament Elections).
23. However, following the 2016 EU Referendum, the Government adopted a public position that the UK would not be participating. For example, when asked on 19 February 2019 about preparations, Cabinet Office Minister, Chloe Smith MP told the House of Commons that *“we will not be taking part in future European Parliamentary elections”*. On 19 March 2019 she said, *“the Government is not contingency planning to hold European Parliamentary Elections”*. On 1 April 2019, the Cabinet Office Minister, David Lidington, wrote to the Electoral Commission stating *“the Government’s position is that it remains the intention for the UK to leave the EU with a deal and not take part in the European Parliamentary Elections in May”*, though he went on to indicate that some preparatory expenditure had been authorised. He then laid the European Parliamentary Elections (Appointed Day of Poll) Order 2019 on 8 April 2019, but this was subject to the negative resolution procedure and, on 24 April 2019, his Cabinet Office colleague, Kevin Foster MP, Parliamentary Under-Secretary of State for Wales (‘Mr Foster’), told the House *“[i]t remains the Government’s intention to leave the EU with a deal before the 23 May, so we do not need to participate in European Parliamentary elections.”*
24. The Electoral Commission’s view on this was that resulting uncertainty was very problematic. Its then Chair, Sir Bob Holmes wrote in a blog of 24 April 2019:

“...this is of course far from a normal situation. The government has said it does not want these elections to happen. If the Brexit withdrawal agreement is agreed by Parliament by 22 May, they say the elections could be cancelled, even at the eleventh hour...”

This is an unprecedented level of uncertainty in a mature democracy.”

and in a 24 May 2019 blog added:

“... we and the wider electoral community raised concerns with the government, with rising urgency in the first months of this year. While a general election follows a well-trodden path and can be delivered relatively comfortably - albeit not without considerable effort - within eight weeks, the same is not true of the European parliament elections. The ongoing delays to confirming the poll continued to escalate the risks.”

25. Finally, on 7 May 2019, Mr Lidington made a widely-reported statement to the BBC indicating the UK would be participating in the 2019 Elections after all. This was the same day that the deadline for registration to vote (albeit those registered by the could still vote later).
26. The poll itself took place in the UK on 23 May 2019 and concluded in other Member States three days later. There was a greater turnout of those who were eligible to vote in the UK in the 2019 Elections than in the 2014 European Parliament Elections. This is unsurprising because the 2019 Elections were seen by many UK and EU citizens as an important opportunity to express their view on the positioning of various UK parties on the political spectrum and their policies of on whether the UK should leave the EU and, if so, when and on what terms.
27. However, a large number of British Citizens exercising free movement rights in other EU Member States who wanted to vote could not. There were five main categories of people affected.
28. First, there were British Citizens who were registered to vote and applied for a postal vote in good time, but did not receive ballot papers at all. Some local authorities took responsibility for this happening but blamed the problems on the late notification that the elections would be happening (see e.g. <https://www.theguardian.com/politics/2019/may/23/three-councils-fail-to-send-out-postal-ballots-in-time-for-eu-elections>).
29. Secondly, there were British Citizens who had registered to vote and applied for a postal vote in good time, but received ballot papers too late to return them or who returned them but cannot be confident they were counted.
30. Thirdly, there were British Citizens who had registered to vote and applied for a proxy vote in good time, but whose proxies did not receive ballot papers at all.
31. Fourthly, there were British Citizens who had applied to register to vote in good time, but whose applications were not dealt with sufficiently quickly so, by the time they were registered, it was too late to complete the postal or proxy vote process, and so they could not vote.

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32. Last, there were would-be first time voters who could not complete the cumulative processes of obtaining a National Insurance number, then registering to vote and obtaining a postal vote in time.
 33. Examples are found in British in Europe's research (and can be discussed in detail with you as part of the requested investigation).

Systemic breaches of EU law

34. The combined effects of the impediments to the exercise of the right to vote discussed above at paragraphs 12 to **Error! Reference source not found.** and the way the 2019 Elections were confirmed then administered fatally compromised the ability of a great many British Citizens exercising free movement rights to exercise their voting rights in comparison to their UK-based compatriots.
35. That was unlawful in two respects.
36. First, as explained in *Case C-145/04 Spain v United Kingdom* [2006] ECR I-7961 at §93, it is not open to Member States to “curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness” and any conditions imposed on the exercise of the right:

“must pursue a legitimate aim and the means employed must not be disproportionate (see also the judgments of the ECHR in Mathieu-Mohin and Clerfayt v Belgium (A/113) (1988) 10 E.H.R.R. 1 at [52], and Melnychenko v Ukraine (17707/02) (2006) 42 E.H.R.R. 39 at [54]).”
37. Secondly, provisions of national law relating to the right may not be applied in a manner incompatible with general principles of EU law, particularly the principle of equal treatment or non-discrimination contained in Articles 18 and 45 TFEU. It is therefore unlawful for a Member State to discriminate between those who have chosen to exercise free movement rights and those who have not: *Case C-34/09 Ruiz Zambrano v Office national de l'emploi* [2012] QB 265 at §§41-42. This is reinforced by European Commission Recommendation of 29 January 2014 (C (2014)391 Final) and EESC Opinion SOC/504. Announcing guidance to assist member states to comply with the recommendation, your predecessor, Vice-President Viviane Reding, stated:
 38.

“The right to vote is one of the fundamental political rights of citizenship. It is part of the very fabric of democracy. Depriving citizens of their right to vote once they move to another EU country is effectively tantamount to punishing citizens for having exercised their right to free movement. Such practices risk making them second-class citizens.”
 39. This basic principle is also emphasised in the recitals to Council Directive 93/109/EC:

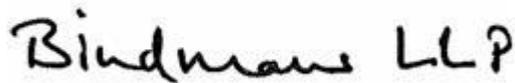
“Whereas the right to vote and to stand as a candidate in elections to the European Parliament in the Member State of residence, laid down in Article 8b (2) of the Treaty establishing the European Community,[] is an instance of the application of the principle of non-discrimination between Citizens and non-Citizens and a corollary of the right to move and reside freely enshrined in Article 8a of that Treaty”

40. None of this should be considered academic because UK Government’s still intends that the UK will leave the EU. The right to vote, and the equal exercise of that right by all citizens, are fundamental to the operation of a democracy. Under EU law, the right of all eligible EU citizens to vote in European Parliament Elections is not only guaranteed by law, but also has particular significance as part of the fundamental status of EU citizenship, which is common to all nationals of the EU28 Member States as conferred by the Treaties. The right to elect MEPs who form the European Parliament underpins the democratic accountability of EU institutions and ensures that decisions are taken as closely as possible to the citizen. The 2019 Elections were of particular importance, given their timing in relation to Brexit. The European Parliament is, and will be, a key decision-maker in relation to the UK’s departure from the EU, not least because any further draft EU/UK Withdrawal Agreement will need the European Parliament’s approval under Article 50(2) of the Treaty on European Union as will other, future EU-UK agreements.

Concluding remarks

41. Please confirm receipt of this letter by return and provide a substantive response within 15 working days. We trust that you will to investigate British in Europe’s concerns, but if you will not, please give full reasons.
42. We look forward to hearing from you shortly.

Yours faithfully,



Bindmans LLP