BRITISH IN EUROPE

THE COALITION OF UK CITIZENS IN EUROPE

British in Europe: Comments on the Commission Implementing Decision of 21 February 2020 C(2020) 1114

We refer to the Commission Implementing Decision of 21 February 2020 C(2020) 1114 No. 1114 of 2020 which prescribes the format of residence document to be issued by Member States to those UK nationals and their family members who have rights guaranteed by the Withdrawal Agreement.

We note the following:

1. The format is mandatory throughout the EU.
2. Recital (1) correctly records that Art. 18.1 of the WA establishes a system of applications for a new residence status "and a document evidencing such status".
3. Recital (2) correctly records that, in States which have opted for the declaratory system, Art. 18.4 of the WA entitles "those eligible for residence rights under this Title ... to receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document.."
4. Recital (7) records that the prescribed documents "will serve to evidence rights provided under Title II of the Agreement".
5. Art. 1 of the Decision requires that the Type of Permit is to be stated as "Art. 50 TEU" and that the Remarks field should state whether the document is issued under Art. 18.1 or 18.4 of the WA.
6. There is however no provision for recording whether the holder has the right of permanent residence pursuant to Art. 15 of the WA.
7. Nor do Member States have the right to add such information should they wish to do so. Council Reg.(EC) No. 1030/2002, which prescribes the format which is varied by the Implementing Decision, permits Member States to add in the Remarks fields details "in the light of their *national* provisions on third country nationals", but permanent residence is not a national provision but a mandatory EU-wide provision.

As a prescribed document intended "to evidence rights provided under Title II of the Agreement" the proposed format fails to include an essential element, namely whether or not the holder has the status of permanent residence.

The differences between the status of permanent residence under Art. 15 WA (Art. 16 Directive 2004/38) and ordinary residence (Art. 7 of the Directive) are absolutely fundamental. The holder of permanent residence no longer has to satisfy the conditions as to work/study/having sufficient independent means and, save for workers, having health insurance and continues to be entitled to permanent residence even when s/he no longer satisfies those conditions. The holder of permanent residence is entitled to be absent from the State of residence for up to 5 years, whereas those without permanent residence lose all rights under the WA if they are absent for as little as 6 months in a year (except in the special circumstances of Art. 16(3) of the Directive, in which case they are entitled to slightly longer absences).

Accordingly it is essential that a document intended to evidence rights under Title II makes it clear whether the rights in question are those of a permanent resident or not.

In our view, the format dictated by the Implementing Decision puts Member States in an impossible position legally and creates unnecessary practical difficulties.

As to legality, Member States are obliged both to apply Council Reg. 1030/2002 as amended by the Implementing Decision and to implement the Withdrawal Agreement. Constitutive States which use the format of the Implementing Decision will be in breach of Art. 18.1 of the WA because, for those with the status of permanent residence, they will not be issuing a document "evidencing such status". Declaratory countries which use the format of the Implementing Decision will be in breach of Art. 18.4 because they will not be issuing a residence document "in accordance with the conditions set out in Directive 2004/38/EC", a Directive which includes a right under Art. 19 to a document certifying permanent residence status.

The most obvious practical difficulty if the Implementing Decision is applied is that, at best, Member States will have to issue two residence documents to those entitled to permanent residence, one in the common format of the Decision and another purely national document. This simply creates pointless bureaucracy. At worst Member States will take the view that if the Commission does not see the need for a document evidencing permanent residence they should not follow a different path, and those with a clear right of permanent residence will have no means of proving it. We note that Italy, one of the first countries to publish a scheme for implementation, has not drawn a distinction in its form of Attestazione between ordinary and permanent residence[1]. If acquiring permanent residence were simply a matter of proving that one has been resident for 5 years, this might not be an insuperable problem. But one has to prove that s/he has satisfied the conditions of Art. 7 of Dir. 2004/38 for 5 years, and that is a far more complex process.

The common format is also clearly intended for, inter alia, border control purposes. However it completely fails to enable a border guard to distinguish between those with the permanent residence right of absences up to 5 years and those who can lose all right of entry after as little as 6 months absence.

Clearly, though, this is not just a question of border control but also affects WA rights being exercised within a Member State. For example, under the terms of Directive 2004/38 a person with ordinary (less than 5 years) residence has to have separate comprehensive health insurance unless s/he is working or the family member of a worker. However once such a person has acquired permanent residence s/he is entitled to healthcare on the same terms as nationals of the State of residence and, in the case of Italy and Spain, for example, that does not involve paying into health insurance schemes at all. How does the British citizen prove to the health authority with which they are trying to register that they have permanent, as opposed to ordinary residence, if the document which is supposed to "evidence" their rights under the WA does not do so?

There is plenty of time left to amend the Implementing Decision before its application becomes mandatory, and we therefore ask the Commission to do so.

There also remains the issue, for both UK citizens in the EU and EU citizens in the UK, which has not been dealt with either in the UK or at EU level, as regards how dual citizens covered by the WA would be able to prove their status and rights under the WA where they need to rely on them. Clearly, applying for a third country national residence card would not be appropriate for this group, which is growing rapidly, particularly in some countries such as Germany and Luxembourg. In any event, it is our understanding that dual citizens will not

[1] See Ministero dell'Interno Circolare n.3 del 11/2/2020 - https://dait.interno.gov.it/documenti/circ-003-servdemo-11-02-2020.pdf

have the option to apply for the status under the WA under national schemes e.g. the UK has already confirmed this, and this is also our information as regards certain EU countries.

British in Europe **4 March 2020**