

Our Reference: MAU001/01/SMcG

Your Reference:

12 January 2017

Ms Máire R. Whelan S.C.
Attorney General
Office of the Attorney General
Government Buildings
Upper Merrion Street
Dublin 2.
D02 R583.

By hand and email

Re: Article 50 of The Treaty on European Union (“Brexit”)
Our Client: Mr Jolyon Maugham

Dear Attorney,

We write further to the above. Our clients are European citizens and more particularly citizens of the United Kingdom of Great Britain and Northern Ireland (“**the UK**”). As you are aware the United Kingdom held an advisory referendum on the 23 June 2016 last. The result of the advisory referendum has led to the UK Government announcing its intention to leave the European Union (“**the EU**”) with a written formal notification to be issued to the European Council in or around 23 March 2017.

The legal mechanism by which the UK proposes to exit the EU involves invoking Article 50 of the Treaty on European Union (“**TEU**”). The invocation of Article 50 places at risk the acquired rights and interests of Irish citizens resident in the UK, as well as the acquired rights and interests of UK citizens located in any of the other remaining 27 EU Member States of the EU.

Our clients have instructed us to initiate public interest proceedings before the Irish Courts against Ireland and the Attorney General in order to seek clarificatory and declaratory reliefs with an end to achieving legal certainty on a number of serious questions that our clients say affect all European Citizens, the proper functioning of the EU institutions and formal operation of the European Treaties.

In particular our clients seek to litigate before the Irish Courts in circumstances where the UK was excluded from a number of significant EU Council meetings and other EU institution operating functions in a manner premature to the formal notification requirements set out in Article 50 TEU. Accordingly Ireland is and was a party to the actions taken within the European Council to the exclusion of the UK and its citizens in contravention of the European Treaties.

At those Council meetings the European Council took certain steps prescribed by Article 50 TEU prematurely and to the exclusion of the UK and its citizens. In the alternative, if the conditions for notification by a member state of an intention to withdraw from the EU under Article 50 have been met by the UK, such exclusion would be lawful. However, in that event, the ongoing refusal by the European Council to commence negotiations with the EU represents a significant and ongoing breach of the European Treaties.

It is our clients' case that various Articles of the TEU and the Treaty for the Functioning of the European Union ("TFEU") were breached and or compromised by the State and the other 27 EU Member States in flagrant disregard of their obligations in advance of a formal Article 50 notification being presented by the UK to the European Council. Our clients also say that legal clarity is required with regard to the European Economic Area Agreement ("the EEA Agreement") and whether or not the EEA Agreement continues in force after any formal Article 50 notification.

Litigating this matter before a UK court is impossible or non-justiciable given the UK's exclusion from the European Council meetings in question. As Ireland and the remaining 27 EU Member States and Council Members appear to have operated as though Article 50 had been formally invoked, our clients say that this behaviour has occasioned various actual breaches of the EU Treaties on our clients and has compromised their acquired rights as EU citizens. This situation has also caused the UK Home Office to adopt a position with regard to EU citizens resident in the UK that is entirely contrary to the still apposite and functional European Treaties in advance of formal notice being given by the UK pursuant to Article 50 TEU and the mandated 2 year exit term set out in TEU.

Since the absence of the UK from the European Council meetings the UK has attempted to negotiate with the EU. The UK cannot force or coerce the EU into an exit negotiating position. The UK is therefore not responsible in EU law for the loss and damage that will be occasioned by the withdrawal of the UK by operation of law and a refusal by the European Council to negotiate. Moreover, our clients' case concerns the treatment of acquired rights of British nationals in the EU, the maintenance of acquired rights of Irish national in the UK, and *vice versa*, a matter of significant concern and controversy in the context of Ireland and Irish citizens considering *inter alia* the Common Travel Area and the Belfast Agreement.

Our clients are aware of the decision of the divisional UK High Court of the 22 November 2016,¹ and the appeal decision awaited from the UK Supreme Court. This is due in the coming weeks in the linked cases of:

(1) *R (on the application of Miller and Dos Santos) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*;

(2) *Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review*; and

(3) *Reference by the Court of Appeal (Northern Ireland) - In the matter of an application by Raymond McCord for Judicial Review*.

The above cases concern issues of parliamentary sovereignty and an advisory referendum as opposed to the operation and functioning of the European Treaties, European citizens acquired rights, the EEA Agreement and the Irish question that our clients are most concerned about.

¹ [2016] EWHC 2768 (Admin)

Our clients' instruction is to issue proceedings against the State seeking declaratory reliefs and interpretations of European Law that are not so *acte clair* or clear enough to be determinable by an Irish Court alone. A Preliminary Reference pursuant to Article 267 TFEU will be sought to the Court of Justice of the European Union ("the CJEU") seeking clarity and interpretations within these proceedings. Your consent to such a Preliminary Reference will be sought at an early stage.

Any Preliminary Reference in the circumstances would seek *inter alia* clarification on three major themes:

1. Whether it is certain that their rights as European citizens will be lost?
2. Clarification from the CJEU on what rights as EU citizens will be lost?
3. When will UK citizens lose their rights as European citizens? This arises from the question of whether Article 50 has already been triggered.

There are other very obvious consequences for Ireland and Irish citizens in the context of Brexit such that certain other matters arising from Protocols 2, 3, and 4 to the Treaty on European Union, and to the Treaty establishing the European Community (as amended), as well as the principle of subsidiarity will also likely be addressed in this litigation.

Our clients are acutely conscious that the entire subject of Brexit is contentious and it is not our intention to burden the State or the Courts with matters that are political, irrelevant or of such controversy that they should not be ventilated.

As we have noted above this is public interest litigation. We point out that our clients stand to make no personal gain from the proposed litigation and it is our intention to issue a motion in early course seeking a Protective Costs Order. Your consent to such a Protective Costs Order will be sought at an early stage.

Our clients are aware that the Irish Courts have and frequently do permit various forms of public interest litigation and in that context our clients look forward to hearing from the Attorney General if it is possible to consensually seek the clarifications sought as matters of EU law by bringing these issues to the High Court in as an expedient and in as cooperative a manner as possible. This of course will be subject to the High Court being satisfied as a matter of law that there are *bona fide* issues of EU law requiring interpretation and clarification such as those that our clients will seek clarification of and that those matters are not so *acte clair* as to render these proceedings locally determinable without a reference to the CJEU.

We hereby notify you that we are instructed to issue proceedings against the State in the name of Mr. Maugham and several UK elected representatives not later than the 27th January 2017 and we invite the Attorney General and the Chief State Solicitor to engage with us on such matters addressed above as are within their immediate power in the intervening period.

Yours faithfully

McGarr Solicitors