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EU for People

Plate-forme pour la libre circulation et contre les expulsions

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Dear President,

Freedom of movement in the European Union is one of the most important achievements of the European integration process and one of the most visible benefits that the European Union bestows upon its citizens. Notwithstanding this, the German Bundestag and Bundesrat have adopted legislation which will allow new entry bans to be imposed on Union citizens. The new provisions are non-compliant with Article 15 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (Free Movement of Citizens Directive). I therefore propose that infringement proceedings be initiated against the Federal Republic of Germany.

Article 1(5a) of the German Act to Amend the Act on the General Freedom of Movement for EU Citizens and Further Provisions (**Annex 1**) defines three new categories in which entry bans can or shall be imposed on Union citizens:

- Union citizens and their family members, in respect of whom the loss of the right to free movement pursuant to Section 2(7) has been established, may be prohibited from re-entering and staying in the Federal territory (Section 7(2), sentence 2 of the Act on the General Freedom of Movement for EU Citizens, new version).
- Such a decision shall especially be taken in particularly serious cases, notably if said person(s) fraudulently and repeatedly feign a right of entry and stay (Section 7(2), sentence 3, alternative 1 of the new version of the Act);
- or if the presence of said person(s) constitutes a serious threat to public order and security (Section 7(2), sentence 3, alternative 2 of the new version of the Act).

Freizügigkeit retten c/o Volker Beck, MdB | Alliance 90/The Greens parliamentary group | Spokesperson for Home Affairs and Faith Issues

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In relation to the first two categories, the provisions go far beyond the entry ban on grounds of public order, safety or health provided for in Section 7(2), sentence 1 of the German Act on the General Freedom of Movement for EU Citizens, which transposes Article 32 of the Free Movement Directive into German law. On the other hand, the provisions relating to the third category are unlikely to have any independent scope of application beyond that of existing legislation.

I have pointed out to the German Government on various occasions that the entry bans applicable to the first two categories are non-compliant with Article 15 of the Free Movement of Citizens Directive (**Annexes 2-4**). My opinion is supported by the statements made by the German Trade Union Confederation (DGB), the *Paritätische*, an association of welfare organisations, and expert witness Dr Klaus Dienelt at the public hearing held by the German Bundestag's Committee on Internal Affairs on 13 October 2014 (**Annexes 5-7**) and by a report by the German Bundestag's European Affairs Research Section (**Annex 8**), which I append for your information.

Pursuant to Article 15 of the Free Movement of Citizens Directive, a decision restricting the free movement of Union citizens and their family members may be accompanied by an entry ban only if this is imposed on the grounds of public policy, public security or public health. These criteria are not met, however, in the case of the entry bans applicable to the first two categories.

There is no doubt that the establishment of the non-existence or loss of the right to free movement constitutes a restriction on free movement, as it requires the persons concerned to depart, thereby preventing the exercise of this right. Certainly, the non-existence or loss of this right may be established if the documents produced as evidence of the right to free movement prove to be false or counterfeit or if false information is presented. The same also applies to family members who are third-country nationals if they do not accompany or join their relatives who are Union citizens.

It is important to note, however, that these circumstances do not themselves constitute grounds of public policy or public security. Member States essentially retain the freedom to determine the requirements of public policy and public security; in making this autonomous decision, however, they must take proper account of the requirements of EU law. In accordance with the definition established in EU law, the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat to one of the fundamental interests of society (see, to that effect, the settled case-law of the Court of Justice of the European Union (ECJ): Case 41/74 - Van Duyn, paragraph 18; Case 36/75 – Rutili, paragraph 27; Case 30/77 – Bouchereau, paragraph 35; Case C-33/07 – Jipa, paragraph 23; Case C-348/09 – P.I., paragraph 23; Case C-434/10 – Aladzhev, paragraph 34). Pursuant to Article 27(2) of the Free Movement Directive, not even previous criminal convictions, in themselves, constitute grounds for taking such measures; that being the case, mere deception, which under some circumstances may have no relevance under criminal

law, can scarcely be regarded as a threat to one of the fundamental interests of society (cf. ECJ, Case C-371/08 – Ziebell, paragraph 83; Case C-348/09 – P.I., paragraph 29 ff.).

Nor can any other conclusion be drawn, in my view, from Article 35 of the Free Movement of Citizens Directive, which states that Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud. However, this Article does not give Member States *carte blanche* to disregard the provisions of Article 15 of the Directive. It allows a broad range of potentially freedom-restricting measures to be adopted, but these do not include the imposition of an entry ban other than on public policy or public security grounds, the existence of which must be determined in accordance with EU law. I believe my opinion to be substantiated by the elucidations provided by the *Commission Staff Working Document 'Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens'* (**Annex 9**).

Furthermore, the proposed entry bans are disproportionate in that individuals who have merely engaged in an act of deception of little or no relevance under criminal law are sanctioned to the same extent as persons whose stay in Germany poses a threat to public order and security.

In a resolution of 16 January 2014, the European Parliament called on the Member States to refrain from any actions that could affect Union citizens' right of free movement (**Annex 10**). It is regrettable that the governing majority in the Federal Republic of Germany has failed to comply with the European Parliament's demands.

The challenges pertaining to freedom of movement cannot be overcome with the adoption of restrictive policies. Instead, in order to achieve an ever closer union among the peoples of Europe, constructive and far-sighted policies on freedom of movement are required, together with broader protection against discrimination, faster progress towards recognition of professional qualifications, easier access to language learning opportunities, and, in the medium term, the establishment of minimum standards of social security in the European Union. The amendments to the German Act on the General Freedom of Movement for EU Citizens are a step in the wrong direction.

Yours sincerely,



Volker Beck



Annelie Buntenbach

EU for People - EU RIGHTS CLINIC - gisti - la Comune del Belgio

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