



# Vote Leave

## **A NOTE TO THE MEDIA REGARDING FACTUAL ERRORS REPEATED BY THE PRIME MINISTER AND CHANCELLOR**

We want to highlight ten objectively false statements made by the Prime Minister and Chancellor recently, including by the Chancellor this morning on the Peston show. We expect some of these statements to be repeated by the Prime Minister this evening. These cover bailouts, asylum, free movement, national security issues such as deportation, the powers of the ECJ, and the legal status of the Prime Minister's deal. The BBC should not allow the Prime Minister and Chancellor to continue to make these statements to millions of voters unchallenged.

Journalists should make clear the legal facts, in particular those concerning the EU's 'free movement' laws and the Prime Minister's repeated promises on immigration concerning 'tens of thousands' which - leaving aside the wisdom of it as a policy - is not achievable while we remain in the EU.

### **1 The supposed requirement for EU migrants to have a job offer**

The Chancellor of the Exchequer has claimed that EU migrants must have a job offer to come to the UK. Asked by Andrew Neil whether David Cameron's 'fallback then was to say that EU citizens couldn't just come here looking for work, they had to have a job, that's what he promised, and he bottled that too, because that's not the case?', George Osborne said: 'I'm afraid it is the case'. Asked to clarify this, the Chancellor reiterated that 'if you don't have a job, you have to go.'

This claim is false. As early as 1991, the European Court held that the 'Treaty entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment'.<sup>1</sup> Even David Cameron's own renegotiation agreement notes that EU citizens are 'entitled to reside... [in the UK] solely because of their job-search'.<sup>2</sup>

### **2 The purported inability of all EU migrants to claim unemployment benefit**

The Prime Minister has repeatedly asserted that EU migrants cannot claim unemployment benefit in the United Kingdom. On SkyNews on 2 June, he claimed 'if you come to our country

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<sup>1</sup> *R v Immigration Appeal Tribunal, Ex parte Antonissen* [1991] ECR I-745, summary para [1], [link](#).

<sup>2</sup> European Council, 19 February 2016, [link](#)

first of all you don't claim unemployment benefit'.<sup>3</sup> On ITV, he claimed: 'What I have secured is this idea, this proposal that if people come here, first of all they can't claim unemployment benefit'.

This claim is false. EU law gives EU nationals the same rights to jobseeker's allowance as UK nationals following a period of employment of a year in the UK, and an equivalent right for six months if they have been employed in the UK for less than a year.<sup>4</sup> It is certainly true that there is no requirement under EU law to pay non-contributory cash benefits designed to provide subsistence to persons who entered the UK seeking work and who have never found it. However, that was clear before the Prime Minister began his renegotiation.<sup>5</sup>

### **3 The length of time in which EU jobseekers can reside in the UK**

The Prime Minister has claimed EU migrants must leave the United Kingdom after six months. On SkyNews, he claimed that 'after six months if you haven't got a job you have to leave'.<sup>6</sup> On ITV, he alleged that 'if they don't have a job within six months, they have to go home'. George Osborne has told Andrew Neil that 'if you don't have a job after six months, you have to go.'

These claims are false. In 1991, the European Court of Justice ruled that article 45 of the Treaty on the Functioning of the European Union forbids the removal of jobseekers from another EU member state regardless of the duration of their stay if 'the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged'.<sup>7</sup> This applies regardless of the length of time that jobseekers have resided in the UK.

This ruling is incorporated in the Free Movement Directive. This provides that: 'an expulsion measure may in no case be adopted against Union citizens or their family members if... the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.<sup>8</sup> Contrary to the Prime Minister's claims, therefore, EU law precludes national rules under which all jobseekers are removed after six months.

It should be noted that the Government admitted in December that many jobseekers could remain for longer than six months. The Home Office Minister, James Brokenshire, admitted in December that some EU migrants can 'keep the status of jobseeker for longer than six months'.<sup>9</sup> It is also the case that there is no mechanism for monitoring whether or not jobseekers remain in the UK for over six months. EU law forbids systematic verification of whether EU citizens are lawfully resident in the UK, providing that: 'this verification shall not be carried out systematically'.<sup>10</sup>

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<sup>3</sup> SkyNews, 2 June 2016, [link](#).

<sup>4</sup> Directive 2004/38/EC, art. 7(3), [link](#); Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg. 6, [link](#).

<sup>5</sup> Directive 2004/38/EC, art. 24(2), [link](#); *Dano v Jobcenter Leipzig*, Case C-333/13, [link](#); *Jobcenter Berlin Neukölln v Nazifa Alimanovic*, Case C-67/14, [link](#);

<sup>6</sup> SkyNews, 2 June 2016, [link](#).

<sup>7</sup> *R v Immigration Appeal Tribunal, Ex parte Antonissen* [1991] ECR I-745, operative para, [link](#).

<sup>8</sup> Directive 2004/38/EC, art. 14(4)(b), [link](#).

<sup>9</sup> 'EU Nationals: Employment: Written question – 17574', 2 December 2015, [link](#).

<sup>10</sup> Directive 2004/38/EC, art. 14(2), [link](#).

#### 4 The nature of proposed reforms to in-work benefits

The Prime Minister has stated that it is a certainty that proposed reforms to in-work benefits will take place and that these only apply to the United Kingdom. On ITV, he said: 'Uniquely in Britain, you are going to have to work here for four years paying into the system, contributing to our economy for four years before you get full access to our welfare system'.

This contains several errors. Leaving aside the very real question of the compatibility of the 'emergency brake' with the Treaties, there is no certainty that it will come into force. Since the new proposed new Regulation is to be adopted by co-decision, it could be vetoed by the European Parliament after the referendum. In addition, the European Council's conclusions make clear that the Council of Ministers 'could' authorise the UK to restrict the payment of non-contributory benefits, not that it *would* do so.<sup>11</sup> Contrary to the Prime Minister's claims, there is nothing in the renegotiation to suggest this applies 'uniquely' to Britain.

The Government has itself admitted that the 'emergency brake' may not come into force since it will be subject to 'further renegotiation'. Just after the renegotiation agreement of 19 February, the Commercial Secretary to the Treasury, Lord O'Neill of Gatley, conceded that: 'Details of the proposals for restricting in-work benefits for EU nationals will be subject to further negotiation and we cannot speculate on these'. The Minister was unable even to state which benefits the 'emergency brake' might apply to.<sup>12</sup>

#### 5 The supposed ability of the United Kingdom to exclude EU citizens

The Prime Minister has made several false statements about the UK's ability to exclude EU citizens from the UK. On SkyNews, he asserted 'of course it isn't freedom of movement if you are a criminal, it isn't freedom of movement if you are a terrorist'.<sup>13</sup> On ITV, he asserted 'we can stop anyone at our border, EU nationals included, and if we think they are a risk to our country, we don't have to let them in'.

It is false to suggest that those involved in terrorism cannot exercise free movement rights in the UK. ZZ was an Algerian-French national who had resided in the UK between 1990 and 2005. In 2005, the Home Secretary, Charles Clarke, refused him readmission on return from a trip to Algeria and expelled him on the grounds of public security. Following a series of legal challenges, including a reference to the European Court of Justice, in 2015, the Special Immigration Appeals Commission ruled the Home Secretary, Theresa May, could not exclude ZZ from the UK because of EU law. The Commission noted that:

*'We are confident that the Appellant was actively involved in the GIA [Algerian Armed Islamic Group], and was so involved well into 1996. He had broad contacts with GIA extremists in Europe. His accounts as to his trips to Europe are untrue. We conclude that his trips to the Continent were as a GIA activist'.<sup>14</sup>*

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<sup>11</sup> European Council, 19 February 2016, [link](#).

<sup>12</sup> 'Social Security Benefits: EU Nationals: Written question - HL5972', 8 February 2016, [link](#).

<sup>13</sup> SkyNews, 2 June 2016, [link](#).

<sup>14</sup> ZZ (France) v Secretary of State for the Home Department [2015] UKSIAC SC\_63\_2007, [link](#).

It is also wrong to suggest there is no free movement for criminals. The Free Movement Directive (which in this respect is unchanged by the renegotiation) provides that persons can only be removed for reasons ‘based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.’<sup>15</sup> Recently, the UK was required to readmit a Romanian rapist, Mircea Gheorghiu, whom the Home Secretary had expelled, and grant him permanent residence.<sup>16</sup> It is notable that the Government has in the past conceded there is ‘free movement of criminals’.<sup>17</sup>

It is also false to suggest that the UK can turn away anyone who we think is a risk to the country. EU law requires that ‘the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.’<sup>18</sup> This is patently a much higher threshold than mere ‘risk’.

## **6 The effect of the renegotiation on the UK’s ability to exclude EU citizens**

The Prime Minister claimed he had strengthened the ability of the UK to exclude EU citizens during his renegotiation. On ITV he stated: ‘in my renegotiation, I strengthened that [the ability to exclude EU citizens] to give us more freedom to do that... my renegotiation means we have more freedom to stop people coming in in the first place’.

This is false. As part of the renegotiation, there is no proposal to amend the Treaties or the 2004 Free Movement Directive in this respect. The proposals agreed at the European Council will be contained ‘in a Communication’ to be issued by the European Commission.<sup>19</sup> As the Commission accepts, a ‘Communication is a policy document with no mandatory authority. The Commission takes the initiative of publishing a Communication when it wishes to set out its own thinking on a topical issue. A Communication has no legal effect.’<sup>20</sup> The European Court has held that a declaration of member states which purports to limit rights under EU law has ‘no legal significance’ unless and until it is incorporated in EU law.<sup>21</sup>

The Commission’s declaration states that the UK ‘may take into account past conduct of an individual in the determination of whether a Union citizen’s conduct poses a “present” threat to public policy or security’.<sup>22</sup> Yet the European Court has already ruled that a previous conviction can ‘be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat’.<sup>23</sup>

The Commission’s declaration also states that member states ‘may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned’.<sup>24</sup> Yet the European Court ruled it was possible

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<sup>15</sup> Directive 2004/38/EC, art. 27(2), [link](#).

<sup>16</sup> *Gheorghiu v Secretary of State for the Home Department* [2016] UKUT 24, [link](#).

<sup>17</sup> Home Office, 8 November 2014, [link](#).

<sup>18</sup> Directive 2004/38/EC, art. 27(2), [link](#).

<sup>19</sup> European Council, 19 February 2016, [link](#).

<sup>20</sup> European Commission, 2006, [link](#).

<sup>21</sup> *R v Immigration Appeal Tribunal, Ex parte Antonissen* [1991] ECR I-745, para [18], [link](#).

<sup>22</sup> European Council, 19 February 2016, [link](#).

<sup>23</sup> *R v Bouchereau* [1977] ECR 1999, para [28], [link](#).

<sup>24</sup> European Council, 19 February 2016, [link](#).

to remove persons in the absence of a criminal conviction in 1974 in the first case referred to that court after the UK joined the EU.<sup>25</sup>

## 7 The UK's supposed exemption from Eurozone bailouts

The Prime Minister has said that the UK can never be required to contribute to a Eurozone bailout. On SkyNews, he said 'we can never be asked to bail out eurozone countries'.<sup>26</sup>

This is false. Article 122(2) of the Treaty on the Functioning of the EU (which was not, and could not be changed by David Cameron's renegotiation) permits the Council of Ministers by qualified majority to 'grant... Union financial assistance' as part of ad hoc bailouts of the Eurozone.<sup>27</sup> It was article 122 which was used as the legal basis for the creation of the European Financial Stabilisation Mechanism in 2010, which was subsequently used to bail out Ireland and Portugal.<sup>28</sup> There is nothing in EU law which would prevent its use to create another fund, financed out of the EU budget, to which the UK would be obliged to contribute.

The European Court has consistently ruled that the establishment of Eurozone-only bailout mechanisms does not affect the Council of Ministers' powers under article 122(2). In 2012, it ruled that:

'The establishment of the ESM [European Stability Mechanism, a eurozone-only fund] does not affect the power of the Union to grant, on the basis of art.122(2) TFEU, ad hoc financial assistance to a Member State when it is found that that Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'.<sup>29</sup>

In September 2015, the General Court confirmed that article 122(2) 'enables the Union to grant ad hoc financial assistance to a Member State'.<sup>30</sup> Unless and until article 122(2) is amended, the UK remains liable to bail out the Eurozone.

## 8 The VAT lock and last year's judgment of the European Court

The Prime Minister has claimed that the European Court has not overruled his 'VAT lock'. When asked on SkyNews whether the European Court was 'overruling the sense of one of your promises in a Queen's Speech to decide what British VAT was', the Prime Minister said: 'I don't accept that'.<sup>31</sup>

This claim is false. The Prime Minister made a clear commitment before the last election that there would be 'no increases in VAT - nor an extension of its scope'.<sup>32</sup> Parliament legislated to give effect to this soon after the election. On 18 November 2015, the Finance (No.2) Act 2015 became law. Section 2 of the Act contains the 'VAT lock'. It provides that no item subject to the

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<sup>25</sup> *Van Duyn v Home Office* [1974] ECR 1337, [link](#).

<sup>26</sup> *SkyNews*, 2 June 2016, [link](#).

<sup>27</sup> TFEU, art. 122(2), [link](#).

<sup>28</sup> Regulation 2010/407/EU, [link](#).

<sup>29</sup> *Pringle v Government of Ireland*, Case C-370/12, para [104], [link](#).

<sup>30</sup> *Anagnostakis v Commission* Case T-450/12, para [48], [link](#).

<sup>31</sup> *SkyNews*, 2 June 2016, [link](#).

<sup>32</sup> David Cameron, *Twitter*, 28 April 2015, [link](#).

reduced rate of VAT on the date the Act became law may be made subject to the standard rate of VAT before the next general election.<sup>33</sup>

On 4 June 2015, the European Court upheld an action by the European Commission against the United Kingdom that the UK's reduced rate of VAT on energy saving materials was contrary to EU law.<sup>34</sup> HMRC has admitted that 'the UK is required to implement judgments of the CJEU without any undue delay' and is proposing an increase in VAT as a consequence.<sup>35</sup> The UK is therefore obliged to raise VAT on the installation of some energy saving products in direct breach of the VAT lock set out in the Finance (No.2) Act 2015.

## **9 The supposed absolute requirement for a referendum before further transfers of powers to the EU**

The Prime Minister has asserted it is impossible for further powers to be transferred to the EU without a referendum being held. On SkyNews, he alleged: 'Any powers passed from Britain to Brussels have to be put to a referendum of the British people so Labour could not join or no other government could join the euro without asking the British people in a referendum... you can't transfer further powers from Britain to Brussels without asking the British people first in a referendum'.<sup>36</sup> On ITV, he alleged 'if there is any proposal to pass further powers from our Parliament to Brussels, automatically there has to be a referendum. So there's a lock on whether more powers can be passed.'

These claims are false. It is an established constitutional principle that no Parliament can bind its successor.<sup>37</sup> As a result, the European Union Act 2011 (to which the Prime Minister must be referring) does not bind future Parliaments. It is therefore inaccurate and misleading to suggest there is any legal guarantee of a referendum in case of a future Treaty conferring new competences on the European Union.

Further, it is unarguable that the European Court of Justice can issue judgments that remove powers from the UK. It routinely does so. There is no appeal. There is no referendum. In many respects the remorseless weight of the European Court's judgments over time is one of the most significant ways in which the EU undermines British democracy.

## **10 The supposedly 'legally binding' nature of the Prime Minister's deal**

The Prime Minister has claimed that the renegotiation agreement is 'legally binding and irreversible'.<sup>38</sup> The justification for this claim was set out by the Government in its White Paper on the renegotiation, which states: 'As the European Court of Justice has confirmed in the case of *Rottmann*, it is required to take these provisions into account when interpreting the Treaties in the future, giving our decision force before the courts.'<sup>39</sup>

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<sup>33</sup> Finance (No.2) Act 2015, s. 2(3), [link](#).

<sup>34</sup> *Commission v United Kingdom*, Case C-161/14, [link](#).

<sup>35</sup> HMRC, 9 December 2016, [link](#).

<sup>36</sup> *SkyNews*, 2 June 2016, [link](#).

<sup>37</sup> See, for example, *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722-723 (per Lord Reid).

<sup>38</sup> *Hansard*, 22 February 2016, col. 34, [link](#).

<sup>39</sup> HM Government, February 2016, [link](#).

This is extremely misleading. In order to assess the substance of the claim, it is necessary to consider the fate of the Danish renegotiation of 1992, which was cited in the case of *Rottmann* by the European Court.

In 1992, Denmark was promised - via exactly the same type of deal that the UK is now being offered - that EU citizenship would 'not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned'.<sup>40</sup> The Prime Minister, John Major, said the Danish deal was 'a legally binding decision'.<sup>41</sup> Less than a decade later, *the European Court broke this agreement*, declaring EU citizenship would 'be the fundamental status of nationals of the Member States'.<sup>42</sup>

The European Court explicitly ignored the Danish renegotiation in the only case in which it has been cited, *Rottmann*. In that case, the European Court said that 'Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law', blocking member states from automatically stripping national citizenship from those who acquire it fraudulently, in direct breach of the Danish deal.<sup>43</sup> The European Court took the Danish renegotiation into account (as the Government says), *but nonetheless ignored it*.

Our own Supreme Court has said the Danish renegotiation has been ignored by the European Court. Last year, Lord Mance JSC said, with the concurrence of a majority of the court, that the decision in *Rottmann* is 'in the face of the clear language' of promises made to Denmark.<sup>44</sup> Several leading lawyers have also made clear that the deal will not bind the European Court. These include Lord Pannick QC, Marina Wheeler QC and John Howell QC.<sup>45</sup>

It is therefore false to claim that the Prime Minister's deal will bind the European Court, just as Michael Gove pointed out in February. The ECJ itself will decide which parts of Cameron's deal it will uphold, if any. There is no appeal from its decisions.

## Conclusion

The Prime Minister and Chancellor have said repeatedly that the British public should not expect another vote on the EU for at least a generation. The voters are being asked by them to vote to maintain the current supremacy of EU law with all that entails for the democratic legitimacy of policies as diverse as immigration, tax, and terrorism.

It is therefore vital that false statements made by the Prime Minister and Chancellor are challenged particularly by trusted public broadcasters and that their statements do not continue to mislead the public.

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<sup>40</sup> Edinburgh European Council, 12 December 1992, [link](#).

<sup>41</sup> John Major Doorstep Interview with Jacques Delors, 12 December 1992, [link](#).

<sup>42</sup> *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para [31], [link](#).

<sup>43</sup> *Rottmann v Freistaat Bayern* [2010] ECR I-1449, [link](#).

<sup>44</sup> *Pham v Home Secretary* [2015] UKSC 19, para [90], [link](#).

<sup>45</sup> *The Times*, 25 February 2016, [link](#); *The Times*, 25 February 2016, [link](#); *The Times*, 26 February 2016, [link](#).