

Potential removal of EU nationals from the UK is not incompatible with the Human Rights Act

blogs.lse.ac.uk/brexit/2016/11/07/potential-removal-of-eu-nationals-from-the-uk-is-not-incompatible-with-the-human-rights-act/

07/11/2016

In an [earlier post on this blog](#), Professor Conor Gearty of LSE argued that even post-Brexit the UK will not be able to remove European Union citizens from the UK unless the country withdraws also from the European Convention on Human Rights. **Paul Skinner** does not consider that this conclusion is correct. He argues, in essence, that the protection afforded by, in particular, Article 8 of the Convention is considerably weaker than Professor Gearty assumes.



To start off, let us note that Professor Gearty's argument proceeds on the assumption that the UK will be unable to negotiate a satisfactory resolution in respect of EEA nationals presently in the UK. Some would take the view that this assumption is relatively unlikely to prove to be correct. The political pressure in relation to expats, whether those from other EU Member States in the UK or from British citizens in other EU Member States, is high. If they are right about that, the disagreement between Professor Gearty and me as to the scope of protections provided by Article 8 ECHR does not matter. Nevertheless, because the possibility of an agreement not being reached cannot be wholly discounted, and because in my view the errors of understanding demonstrated by Prof Gearty's post are fairly widespread, even among human rights lawyers, the debate is one that is worth having.

European Convention on Human Rights does not generally guarantee family life in any particular country

First, Gearty says that 'Article 8(1) of the European Convention on Human Rights guarantees among other things respect for family life' and that 'The case-law under the [Human Rights] Act...makes clear that forced expulsion of residents attracts the protection of this provision'. To that extent, I agree. Note though that what is guaranteed is 'respect' for family life, but not family life itself. The European Court of Human Rights has consistently held that the starting point in any analysis is that signatory states have the right, in accordance with international law, to control the entry of non-nationals into their territories and their residence there. In other words, Article 8 does not generally guarantee family life in any particular country.

Where Gearty and I part ways is his claim that 'there would be little doubt that the courts would not be willing to save such actions [to remove EU nationals] by reference to the reasonably tightly drawn exceptions to the right that are set out in Article 8(2)'. From that, it follows that I also disagree with his conclusions that the Human Rights Act would stop all government discretionary power designed to make a reality of such removals. Nor would it in my view lead the courts quickly to declare primary legislation designed with these expulsions in mind to be incompatible with the Convention.

Article 8 protects two distinct interests in the immigration context: (i) respect for family life, and (ii) respect for private life. They need to be considered separately. In relation to family life, it is usually determinative in the government's favour if a family can reasonably be expected to relocate as a whole to the country of origin of the person the government wishes to remove. It has long been held by the Strasbourg Court that it is only in exceptional cases that this will not be the case. What is reasonable varies according to whether the family member it is proposed should voluntarily relocate with the person being removed is an adult or a child:

- In relation to adults – so, spouses, partners, adult dependant relatives (normal adult family relationships are

excluded completely unless dependency can be shown: see *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31) – the question of what is reasonable is answered by asking whether there are “insurmountable obstacles” to that family member moving to the proposed destination. That is a very high threshold to surpass indeed and will usually involve something akin to persecution or serious ill-treatment of a group of which the individual is a member before it will be met.

- In relation to children, they can, under the Immigration Rules and section 117B of the Immigration, Asylum and Nationality Act 2002, be expected to relocate with their EU national parent unless they have been in the UK for 7 years and it would not be reasonable to expect the child to leave the UK. The Court of Appeal has recently considered what “reasonable to expect the child to leave the UK” means and has given it a relatively pro-removal approach: *MA (Pakistan) v Upper Tribunal* [2016] EWCA Civ 705 [Full disclosure: I appeared for the unsuccessful *Mr MA* and his family in the Court of Appeal]. Thus, it was reasonable to expect a 7-year-old child who had been born to Pakistani national parents in the UK, had lived here since birth, had left the UK only once at about the age of 3 for a few weeks, was in school, had many friends, but who could understand some Urdu which was spoken at home. By contrast, a severely autistic child who was still non-verbal by about the age of 10 could not reasonably be expected to relocate to Pakistan, principally because of the lack of facilities for autistic children there. I note that the “reasonable to expect the child to leave the UK” test is one which the Home Office have come up with (and which has now been adopted by Parliament), which does not derive from the Strasbourg courts, and there is, therefore, the possibility that it is too restrictive where children are concerned.

The above ‘tests’ in relation to family life are found in the UK’s immigration rules and they are not uncontroversial. They do however broadly follow (save as I have mentioned above) the factors which the Strasbourg court takes into account in determining whether a removal is compliant or not with Article 8. It, therefore, seems to me very unlikely that many EU nationals will be able successfully to argue that their right to respect for their family life prevents their removal. I find it very difficult to conceive of an example where it could be shown that the spouse or other relevant adult relative of an EU national would be able to show that there were insurmountable obstacles to their living in that EU national’s home state. British husbands could, for example, follow their Italian wives back to Italy. Maybe there do exist examples, but they will not be many. Likewise, where EU nationals have children, they will not assist the EU national to remain in the UK until they have reached the age of 7, even if by virtue of the other parent’s British nationality, the child is a UK citizen. Those who have children over the age of 7 may be able to show that it is unreasonable to expect the child to relocate to the ‘home’ EU country, but this will certainly not protect all of them. For example, linguistic skills and a familiarity with their home country by reason of frequent trips to see grandparents will not assist such a case.

So what about the right to respect for private life? This is wider in scope because its protections are afforded to all EU nationals, not just those with families. The Immigration Rules provide that you have sufficiently developed private life in the UK so as to be able to remain if:

- you have lived *continuously* in the UK for 20 years, or
- you have been *lawfully resident* in the UK for 10 years (strictly, this is not counted under Private Life in the Immigration Rules but under Long Residence, but this is the result of the way in which the Immigration Rules have developed rather than because of any principled distinction, as far as I can see), or
- you are between the ages of 18 and 25 and have lived continuously over half your life in the UK, or
- you are aged below 18 and have lived continuously in the UK for 7 years and it would not be reasonable to expect you to leave the UK, or
- there would be very significant obstacles to your integration into the country to which you would have to go if required to leave the UK.

The two italicised phrases in the previous paragraph need a little explanation: ‘live continuously’ means residence in

the UK for an unbroken period, and residence is broken if you leave the UK for 6 months in one go, or (among other probably less relevant qualifications) 18 months in total during the relevant period. 'Lawfully resident' means live continuously and lawfully.



So how would this work in practice?

The 10-year lawful residence requirement may well assist some EU nationals who it is proposed to remove by the Home Office. However, because of the need to have lived continuously in the UK, the right to respect for private life, at least as it is given effect by the Immigration Rules, will not assist any EU national who has during the past 10 years spent more than 18 months outside the UK, or returned home (or e.g. gone travelling elsewhere, spent a year on an exchange programme etc.) for a 6 month period in one go. Although I have not seen any data in relation to this issue, it seems to me quite likely that this will prevent many EU nationals from taking advantage of the protections of the provisions relating to private life. Likewise, young adults will generally have had to have been in the UK for their teenage years at least, and those under 18 will have to show that it would not be reasonable for them to return to their country of nationality, which provisions are not likely to be of benefit to many.

In light of the above, I do not consider that the Human Rights Act 1998 provides the protections that EU nationals in the UK would, I am sure, hope for. However, it follows from the limited scope of these protections that Prof Gearty is wrong that it would be necessary to repeal the Act in order to remove EU nationals from the UK. There is unlikely to be any inconsistency between the power to remove and the Act.

There is unlikely to be any inconsistency between the power to remove EU nationals from the UK and the Human Rights Act

It should be noted that some of the Immigration Rules relating to Article 8 are currently the subject of challenges before the Supreme Court and which were heard by an expanded 7-member Court. We have been waiting for judgment for a long time in these cases, which may indicate a degree of disagreement between the Justices. However, to date, the challenges to the rules have all failed at Court of Appeal level.

Finally, I disagree with Professor Gearty's view on two further short points: First, that there is a prospect of a

declaration of incompatibility between Article 8 and deportation of EU nationals, and second, that there would be any unlawful discrimination.

In relation to the declaration of incompatibility, there is no need for the UK to pass new primary legislation, as the field is covered by secondary legislation, currently the Immigration (European Economic Area) Regulations 2006, but more likely the Immigration Rules, but more likely in due course Immigration Rules, which are a form of secondary legislation passed under the Immigration Act 1971, which would simply be unlawful and void if non-compliant with Article 8. Further, regardless of whether the relevant legislation is in primary or secondary legislation, the Secretary of State retains a discretion which would enable her to grant visas to those who do not qualify under the relevant rules but whose removal would violate Article 8. Provided that she does so, it will not be able to be said that the rules themselves do not comply: see *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).

In relation to discrimination, the relevant comparator seems to me plainly to be non-EU national foreign nationals, who receive the same treatment under the Immigration Rules as would apply to EU nationals. There would therefore in my view be no discrimination.

To conclude, Article 8 is broadly drafted and, without reference to the detailed case law on its precise scope, can be misinterpreted as providing more support to EU nationals than it in fact gives. Unfortunately for those wishing to stay, however, it does not provide the panacea hoped for. Accordingly, in my view, the removal of EU nationals does not present the (additional) threat to the Human Rights Act that Professor Gearty suggests.

This post represents the views of the author and not those of the Brexit blog, nor the LSE. Image source [North East Law Talk](#) (CC BY-SA 2.0).

***Paul Skinner** is a specialist public and commercial law barrister at [Henderson Chambers](#) in London.*

Professor Gearty's post can be found [here](#):

| [The UK will have to withdraw from the Human Rights Convention if it wants to deport EU citizens](#)

- Copyright © 2015 London School of Economics