

Lawful residence rather than the possession of a particular passport should generate the right to vote

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By Democratic Audit UK

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*In this post **Dr. Heather Green**, Senior Lecturer, considers the law setting the franchise for the referendum on the UK's membership of the European Union, which takes place on 23 June of this year. She argues that lawful residence should determine the right to vote, rather than the possession of a UK passport.*



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Mrs Thatcher's government was the first to legislate for expatriate voting rights, creating rules in the [Representation of the People Act 1985](#) that permitted citizens overseas to continue to rely on their last UK electoral registration for up to 5 years after leaving for the purposes of voting in Parliamentary and European Parliamentary elections. The time period has since been varied: to 20 years in 1989; and then to [15 years](#) in 2000. The [European Union Referendum Act 2015, section 2](#) adopts this scheme. This was challenged in the courts by expatriates disenfranchised by the rule.

Harry Shindler, a 94 year old Second World War veteran, has lived in Italy since the 1980s. Jacquelyn MacLennan, a partner in a law firm in Brussels, has lived there since 1987. Both are British nationals, and neither holds another nationality. Their challenge was based on EU law, arguing that section 2 of the EU Referendum Act 2015 interfered with their rights to freedom of movement under EU law by effectively punishing them for choosing to exercise those rights for longer than the 15 years during which voting rights are enjoyed. The European Convention on Human Rights could not help their claim in this case, as the Convention right to free elections (found in Article 3, Protocol 1) does not extend to referendums. The Supreme Court confirmed this reading of Strasbourg doctrine in 2014, rejecting attempts to deploy it by prisoners disenfranchised in the [Scottish independence referendum](#). (Strasbourg is where the European Court of Human Rights sits, so it is the decisions of that court that make up Strasbourg doctrine.)

Mr Shindler has conducted a long-running legal campaign to acquire the right to vote in UK elections. In 2013, he [lost an earlier case](#) before the European Court of Human Rights arguing that the 15 year time bar breached [A3P1](#).

The Court considered that it was within the margin of appreciation enjoyed by the UK to set this cut-off point as an approximate means of measuring the likely strength of the bond between expatriates and the UK. Case by case assessments of individuals' links to the UK were not feasible. The Convention permits states to employ "[bright-line](#)" rules such as the 15 year time bar.

The EU Referendum Challenge

The first hurdle in this case relating to the impending EU referendum was to establish that EU law is engaged by the franchise law in the 2015 Act. In the [Court of Appeal](#) the government succeeded in its argument that it is not so engaged. [Article 50 of the Treaty on European Union](#) provides that "Any Member may decide to withdraw from the EU in accordance with its own constitutional requirements." The Court of Appeal took the view that the 2015 Act forms part of those constitutional requirements, and as such the government was free to design the electorate for the referendum without considering the constraints imposed by EU law guarantees.

That would have been enough, but the court went on to consider the position if EU law was assumed to be engaged. the Court of Appeal endorsed the reasoning of the [Divisional Court](#) that the 15 year time bar did not interfere with free movement rights: the court did not accept that disenfranchisement in a one-off referendum was a factor likely to influence the decision to settle or remain in another EU state.

Aware of the difficulties of establishing the EU law argument, counsel for the expatriates included in the case put to the Court of Appeal the additional claim that voting is a common law constitutional right which judges have a duty to protect against statutory restrictions of the sort included in the 2015 Act. The Master of the Rolls dismissed this argument as 'hopeless' [para. 50], considering that the Supreme Court's dicta on common law protections of the franchise in [Moohan v Lord Advocate](#) were confined to hypothesising about political abuses by a Parliament intent passing a statute effecting mass disenfranchisements. There was nothing so contrary to principles of democracy in section 2 of the 2015 Act.

The UK Supreme Court

The case, reported as *R (on the application of Shindler and another) (Appellants) v Chancellor of the Duchy of Lancaster and another (Respondents)* [UKSC 2016/0105](#), reached the Supreme Court last week. The Court held an oral hearing for application for [permission to appeal](#). This failed. Lady Hale expressed sympathy for Shindler and MacLennan, but announced the Court's decision that, assuming EU law to apply, it is not arguable that the 2015 Act interferes with free movement rights. As the hearing was confined to seeking leave to appeal, the Supreme Court did not engage in review of the Court of Appeal's stance on Art 50, TEU. Nor did it accept the bold invitation of counsel for the appellants, put during the oral hearing, to declare the 15 year time bar unconstitutional on common law grounds. Aidan O'Neill QC drew the Court's attention to the government's plans, announced in the May 2015 Queen's Speech, to abolish the 15 year time bar, which it has conceded to be arbitrary. The planned [Votes for Life Bill](#) has not materialised.

The difficulty for litigants invoking the common law in such cases lies in persuading a court to build on the acknowledged constitutional foundations of the franchise as a political liberty to articulate a concrete – actionable – common law right to vote. The constitutional principle the Supreme Court articulated in *Moohan v Lord Advocate*, echoed in the Court of Appeal in this case, indicates the potential readiness of the courts to step in to block attempts by Parliament to retract voting rights in some dramatic, discriminatory or blanket way: stripping the franchise from certain racial or religious groups for example, or setting the voting age at 45. There is little trace in the dicta on the nature of the common law right to vote indicating any willingness on the part of the judiciary to deploy the common law to police other sorts of disenfranchisements (of prisoners; of long-term expatriates) which appear less blatantly unacceptable on constitutional grounds. The common law protects a right to vote in the sense that it offers a broader constitutional assurance that judges would oppose political attempts to retreat significantly from the law's commitment to universal suffrage. Judges are unlikely ever to be persuaded to regard the common law as a sound basis for claims seeking to recalibrate franchise laws that respect in broad terms the constitutional commitment to

universal suffrage. This poses a structural obstacle for groups like prisoners and expatriates who find themselves currently situated beyond prevailing political understandings of the limits of the idea of universal suffrage. And a sceptic might think that a common law right to vote that merely tracks the statutory expressions of it which Parliament chooses to offer is not much of a legal right at all.

Another dimension of the issue that this litigation highlights (as does ongoing [constitutional litigation in Canada](#)) is the zeal with which constitutional law and politics remain committed to the idea that national citizenship is relevant to the distribution of voting rights. There is another group disenfranchised in the EU referendum: EU citizens lawfully resident in the UK. Though they enjoyed the right to vote in the Scottish referendum, they have no say in this momentous political choice concerning their rights to remain settled in their homes, jobs and lives here. Yet Commonwealth citizens residing here have the right to vote. This group includes those from Malta, who are also EU citizens. Cypriots might find themselves in a similar position. Separately, Irish citizens are in the privileged position of enjoying full UK voting rights, so they too can vote in the referendum by virtue of those laws if not in consequence of their EU citizenship.

Comment

We should consider reforming election law to endorse the principle that lawful residence, not the happenstance of the particular passport we possess, generates the right to vote. And though we may share Lady Hale's sympathy with the expatriates who feel left out by their disenfranchisement, there are [powerful arguments](#) against including any expatriates in the electorate. Voting is not, after all, an act concerned with a person's emotional attachments to a place they may never return to live in. It is a right related to the stake a person has presently in the polity. We should not allow respect for feelings of Britishness to dictate something as fundamental as the terms of our laws governing the franchise.

Instead of a Votes for Life Bill, how about a Votes for All Lawful Residents Bill, extending the franchise to resident non-citizens (perhaps after a one year settlement period) and retracting it from all non-resident citizens? The claims of the former to the right to vote are at least as strong as those of expatriates. [New Zealand](#) has led the way with reforms granting all permanent residents full voting rights. We should follow this model. The franchise ought not to be characterised as a lifelong free gift to privileged groups of people holding favoured passports. Perhaps one day norms will evolve that will condemn our present day willingness to disenfranchise large tracts of the population on the basis of their passport status as we now reject the historic denial of votes to women. Identity, whether tied to gender or nationality, ought not to be used to distribute or deny the right to vote. Those expatriates who have a legal right to vote on June 23rd are the beneficiaries of policies and election laws that seek to universalize suffrage extra-territorially while fencing out of the electorate many deserving domestic residents. This sort of practice is an injustice politics is unlikely to remedy soon, and one our courts are not equipped to cure.

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