

The Right to Remain of EU Nationals

Dr Kirsty Hughes, University of Cambridge

On the 24th June 2016 EU nationals living in the UK awoke to discover that the UK had voted to withdraw from the EU and that the Government was unwilling to clarify what this meant for their residency in the UK. Months later the status of the three million EU nationals living in the UK remains hanging. Many have partners, children, friends, and employment here, but fear they will have to leave it all behind. Although the Government has been urged to safeguard EU nationals' residency, it has steadfastly refused, declaring instead that this is a matter for withdrawal negotiations and that it will be contingent upon the rights afforded to UK nationals resident in other EU member states. This notion was propagated further by the Government's rejection of an amendment to the EU (Notification of Withdrawal) Bill aimed at secured residency. The Government's stance has thus perpetuated the idea that EU nationals are a 'bargaining chip' for other interests of the UK. In the meantime many EU nationals have sought to secure their status by applying for permanent residency, unfortunately, many of those that have embarked on this process have found themselves embroiled in a Kafkaesque bureaucratic nightmare with the Home Office. Up to a third have had their applications declined, and have received letters declaring that they should now make plans to leave the UK. This has further obscured the status of EU nationals.

What has not been made clear to the public in all of this is that EU nationals living in the UK are protected by the UK's obligations under international human rights law. Indeed regardless of what negotiating tools Government ministers think they have at their disposal human rights law clearly precludes mass deportation. The relevant right is Article 8 of the European Convention on Human Rights (ECHR). This treaty derives from the Council of Europe, a separate organization from the EU, hence the treaty will continue to apply even after withdrawal from the EU. Article 8 ECHR protects the right to respect for private and family life. The Prime Minister frequently opposed the application of this right as Home Secretary, famously misrepresenting what it entailed by declaring at the Conservative Party Conference that it precludes deportation where an individual has a pet cat, this was patently untrue, and was firmly refuted by the judiciary. What the right actually provides is that an individual has a right to remain in a country where he or she has developed *family* or *personal* ties to that state. There is no sharp definition of family ties in the Convention case law but it includes having a spouse or children in the host state. Personal ties are formed where the individual has lived for a long period of time in the host state and is integrated into that state, again there are no fixed criteria and this is open to interpretation. Although either family or personal ties must be established on a case-by-case basis the Court has declared that: it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8.

The right to remain is not absolute meaning that a state can sometimes justify expulsion, however, the cases where states have been able to do so usually involve individuals that have been convicted of serious crimes or individuals who entered a state unlawfully, and even in those cases the state has not always been able to justify expulsion. Thus it is unrealistic that the UK would be able to justify expulsion of all EU nationals resident in the UK.

If the state wished to deport EU nationals it would need to satisfy three criteria: (i) that there is a legal framework governing expulsion, (ii) that expulsion is in pursuit of a legitimate aim, and (iii) that expulsion is necessary in a democratic society (that it is a proportionate response). Although the state could satisfy the first criterion by putting in place a suitable legal framework, it is highly unlikely that it could satisfy the second and improbable that it would satisfy the third.

The second criterion which requires any interference to be in pursuit of a legitimate aim is specified in the Convention as: interests of national security; public safety or the economic wellbeing of the country; the prevention of disorder or crime; the protection of health or morals; or the protection of the rights and freedoms of others. As most deportation cases involve expulsion of those convicted of criminal offences the state usually relies upon national security or the prevention of disorder or crime, however, neither of these would be applicable to the general expulsion of EU nationals. Moreover, it is difficult to see how any of the other legitimate aims would apply. An argument based upon economic wellbeing is unfeasible given that the economic wellbeing of the country favours retaining EU nationals. Nor is there a realistic argument that deportation would further the protection of health or morals, or the protection of the rights and freedoms of others. Thus any alleged 'legitimate aim' would be highly contentious and speculative. It must, however, be conceded that the Court tends to be rather deferential when it comes to the legitimate aim criterion and that states do not generally fail on this ground.

Yet even if the state could satisfy that criterion it would also have to establish that expulsion is proportionate. The Court has identified the following criteria as relevant to that assessment: (i) duration of the applicant's stay in the UK; (ii) applicant's family situation, such as the length of the marriage; (iii) whether the couple lead a real and genuine family life; (iv) whether there are children in the marriage and, if so, their age; (v) seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin; (vi) best interests and well-being of the children; (vii) solidity of social, cultural and family ties with the host country and with the country of destination. The Court has also held that where a state knowingly allowed an individual that entered unlawfully to remain then it is much more difficult to justify expulsion. In the context of EU nationals the argument is even stronger as EU nationals lawfully entered and established ties in the UK. Thus applying these criteria it is implausible that the UK could justify mass expulsion of EU nationals currently resident in the UK as a proportionate measure. The same is likely to apply to EU nationals entering the UK after the referendum, but before withdrawal. They are entitled to enter and there is nothing to preclude them from developing personal and family ties in the intervening period.

Conclusion

EU nationals resident in the UK are rightly concerned about their legal status in the UK and the Government has done nothing to reassure them. There are uncertainties ahead, however, one thing is clear and that is that the UK would be in breach of its obligations under the European Convention on Human Rights if it sought to deport all EU nationals living in the UK. The Government is well aware of this as the Parliamentary Joint Committee on Human Rights reported as such in its December 2016 report. Putting aside all the political, economic and moral reasons why the Government would not, or should not, seek to exclude EU nationals, the legal position is clear, thus the Government's stance that residency is some sort of *quid pro quo* for withdrawal negotiations is simply insensitive posturing.