



EU citizens' rights and the European Convention on Human Rights

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The human rights argument presented in this brief was also developed orally by Dr Giannouloupoulos during the [May 11 European Parliament hearing](#).

The BiE brief incorporates expert commentary provided in recent BiE events, including a roundtable event at the British Academy on [Brexit and Human Rights](#) (23 February 2017) addressing the question of ECHR and the rights of EU citizens in the UK.

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The legal argument for unilateral recognition of the rights of UK citizens in the EU (and those of non-UK EU citizens in the UK) has strong roots in fundamental rights enshrined in the European Convention on Human Rights (ECHR), most notably the right to private and family life protected under Article 8 ECHR.

It is therefore indefensible for the EU to purport to prioritise the protection of citizens' fundamental rights, and yet to entertain action – i.e. treating EU citizens' rights as part of the negotiation – that accommodates, at least in theory, the possibility of the violation of such rights.

By treating EU citizens' rights as part of the negotiations, the EU seems to accept in principle that it might not recognise the rights of UK citizens in the EU (if the UK fails to recognise the rights of non-UK EU citizens in the UK or if it decides to leave the Union without a deal). However, doing so could result in direct breaches of the ECHR by all EU-27 member states that would not recognise the rights of UK nationals living in these member states.

The EU institutions themselves are not directly bound by the ECHR as such. However, Article 6 § 3 of the Treaty on European Union refers to the ECHR as part of the general principles of Community law, and the European Union's Courts apply the ECHR as part of the general principles of the Union's law.

Entertaining the possibility of not recognising the rights of UK citizens in the EU-27 is therefore inconsistent with general principles of EU law, in all these cases where non-recognition would be in breach of ECHR rights.

The EU institutions *are* directly bound by the EU Charter of Fundamental Rights, which entrenches all the rights and freedoms enshrined in the ECHR, including the right to respect for private and family life (Article 7 of the EU Charter). When the Charter contains rights that stem from the Convention, their meaning and scope are the same. When interpreting these rights, the Court of Justice of the European Union utilises European Court of Human Rights (ECtHR) case law.

The [‘Britain in Europe’ \(BiE\) think tank](#) – a think tank based at Brunel University London, whose membership comprises academic experts, legal professionals and NGO members from across the UK – has undertaken detailed investigations of the issue of whether non-recognition

of the rights of EU citizens' would violate the ECHR. Many BiE experts, and external participants that have contributed to recent BiE debates and research events, have addressed this question in recent months. They all agree that *Article 8 of the European Convention on Human Rights provides considerable level of protection to residence rights of EU citizens.*

Analysis of ECtHR case law supports the conclusion that the forced deportation of EU citizens from a member state (non-UK EU citizens in the UK or UK citizens in the EU) would trigger Article 8 ECHR. Discrimination on grounds such as nationality, length of residence or level of income will also bring into play Article 14 of the ECHR.

The point of departure for legal analysis here is that Article 8 is not an absolute right. It is a qualified right, which requires an examination of the circumstances under which interference with the right might be seen as necessary (and therefore legal). Factors that could be taken into consideration to establish whether Article 8 might be breached would include *whether the person has settled in the country* (even if he or she is not working), *what their family life is like*, for example if they have family in the country, whether their children go to nursery or school, what associations they have developed, what contributions they make to their communities, but also factors relating to *whether family life could be continued in the new, receiving states* (once the EU citizen would be deported) and what the effect might be on a new life for the family there.

The more embedded a citizen – and his or her family – are in the life of the country, the more difficult it would be to deny any of them the right to stay and exercise the equivalent of residence rights. The less embedded the citizen and his/her family, the more justified the government's interference with the (qualified) right to stay under Article 8 might appear to be.

But the government would need to go a long way to show that interference with Article 8 – in the form of non-recognition of the right to stay and possible deportation – would be necessary. A legislative basis would probably be required.

The applicability of Article 8 to immigration control has been accepted since the decision of the ECtHR in *Abdulaziz, Cabales and Balkandali v United Kingdom*.¹ Even if the ECHR does not guarantee the right of an alien to enter or reside in a country, the ECtHR has on many

¹ (1985) 7 EHRR 471, 493.

occasions held that the removal of a person from a country where close members of his or her family are living may amount to a violation of Article 8.²

In the case of *Berrehab v the Netherlands*, in reflecting on whether interference with Article 8 would be ‘necessary in a democratic society’ (and therefore justified, in accordance with Article 8 para 2), the ECtHR distinguished between someone seeking admission to a country for the first time and someone who had already been living there, and examined whether there were close family ties that needed to be protected:

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehad already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.³

It emerges from a finding of a violation of Article 8 in this case that where the person is already living in the country, and there are close family ties, interference with an individual’s right to private and family life is very likely to be found to be in breach of Article 8.

In *Moustaquim v Belgium*,⁴ the ECtHR accepted that the applicant’s family life was seriously disrupted by the deportation measures taken against him, and that interference with family life was disproportionate even if deportation was sought on the basis that the applicant had committed criminal offences and the deportation measures were required to maintain public order.

In *Maslov v Austria*, another expulsion case, the Court held that where a settled migrant had spent the major part of his or her childhood and youth in the host country ‘very serious reasons are required to justify expulsion’ (it found a violation of Article 8 in this case).⁵

To move on to an application of this jurisprudence by UK national courts, we can discuss *Huang v Secretary of State for the Home Department*, a judgment that is ‘widely regarded as

² R. Stone, *Civil Liberties & Human Rights*, 8th edn, para 8.385.

³ *ibid*, para 29.

⁴ Application 12313/86, 18 February 1991, para 45.

⁵ Judgment of 23 June 2008, [2008] ECHR.

the triumph of the rule of law over executive power'.⁶ In this case, the House of Lords went so far as describe human beings as 'social animals' who 'depend on others', sketching the fundamental importance of family life (it even spoke of a 'positive duty' to respect family life, let alone pointing a 'negative duty' to refrain from interference with the right) and individuals' intrinsic connection with the social environment in which they develop their lives:

It is unnecessary for present purposes to attempt to summarise the Convention jurisprudence on article 8, save to record that the article imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it. The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.⁷

More generally, the ECtHR accepts that an interference with Article 8 will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need', and, in particular, if it is proportionate to the legitimate aim pursued. Applied to the issue of EU citizens, it would be very difficult to see how the expulsion of citizens who would have already developed their lives in particular EU-27 member states would answer a pressing social need, and, even if it did, how expulsion could ever be perceived as an interference 'proportionate' to that aim.

In *Amrollahi v Denmark*, the ECtHR examined the crucial issue of whether the family of a deported individual could go elsewhere to start a new life and whether return to the country of origin would be a suitable alternative accommodation. The Court noted that the seriousness of the difficulties which family persons of the deported are likely to encounter in the country of origin should be taken into consideration, 'though the mere fact that a person might face certain

⁶ M. Ockelton, 'Article 8 ECHR, the UK and Strasbourg: Compliance, Cooperation or Clash? A Judicial Perspective' in K. Ziegler, E. Wicks and L. Hodson, *The UK and European Human Rights – A Strained Relationship?* (Oxford, Hart Publishing, 2015) 215, at 218.

⁷ *Huang v Secretary of State for the Home Department* [2007] UKHL 11, para 18.

difficulties in accompanying her or his spouse cannot in itself exclude an expulsion'.⁸ Other factors included how long previously to deportation the applicant had left the country of origin, and whether the family could establish a new life there.

At this point, it is difficult to imagine how national authorities or the ECtHR could reach the conclusion that expulsion to the country of origin would be a suitable alternative accommodation in cases where the EU citizen would be embedded in the EU member state of residence (which could also go to show his or her disconnect from the country of origin or other EU member state with which the EU citizen may be connected).

On the other hand, for those UK citizens who may have only recently moved to an EU member state (and conversely, EU citizens who may have only recently arrived at the UK), national authorities might be able to convincingly argue that return to the member state of origin *would be* a suitable alternative.

In any case, the above should not make us blind to the fact that Brexit is an entirely different beast, which means existing case law must be taken for what it's worth; an application of relevant Article 8 principles to situations that have some resemblance to, but are infinitely less dramatic than, Brexit. It is impossible to underestimate the impact of a potential break in Brexit negotiations leading to non-recognition of the rights of EU citizens, which would have a devastating impact upon the lives of the nearly 4.5 million people affected by Brexit in the EU; the sheer number of people automatically and simultaneously affected, and the lack of any similar precedent in the modern history of Europe, militates for taking an altogether fresh approach to the issue of potential Article 8 breaches as a result of Brexit.

We can therefore examine the Article 8 claim at a normative level, freed from precedent. From such a normative vista, it can be claimed that the ECtHR would be well placed, and would indeed have the duty, to read Article 8 widely, casting a wide safety net to safeguard the rights of UK citizens in the EU and those of non-UK EU citizens in the UK. Explaining in detail why the ECtHR should adopt such an approach is beyond the scope of this brief, but it suffices to quickly reflect on what it would mean for the right to private and family life, and for European human rights more generally, if the rights of nearly 4.5 million were affected at once, as a result of a process that is, at the end of the day, regulated by the EU treaties. It is difficult to see how

⁸ *Amrollahi v Denmark*, Application 56811/00, 11 July 2002, para 35.

irreparable damage to the integrity of the Treaties, and the architecture of European human rights law more generally, would be avoided.

Perhaps the case that could open the way towards such a wider interpretation of Article 8 in cases relating to Brexit is *Ariztimuno Mendizabal v France*,⁹ where the Court held that ‘the uncertainty and precariousness of the applicant’s situation affected the network of her personal, social and economic relations that make up her private life and did thus constitute an infringement of Article 8 ECHR’.¹⁰ The case concerned the failure of the French authorities to deliver a residence permit, which continued over a long period. It is important to note that the applicant was not threatened with deportation, and yet the ECtHR found a violation of Article 8, noting that the ‘precarious state of affairs and the uncertainty over her future had important consequences for her in material and psychological terms (precarious and uncertain employment, social and financial difficulties, impossibility to open a bar in default of a residence card required for the exercise of the profession she was trained for)’.¹¹

As evidence from EU citizens cited in this report illustrates, the precarious and uncertain future of UK residents in the EU, and non-UK EU residents in the UK, has important consequences for them ‘in material and psychological terms’. In other words, there is evidence here that could support an expansive interpretation of Article 8 ECHR in relation to the EU-27 and UK failure to unilaterally recognise the rights of EU citizens in respective member states. To the extent that this failure can be linked to material and psychological consequences for the EU citizens affected, the relevant EU member states are acting in violation of Article 8 ECHR. Unilateral recognition of the rights of EU citizens can substantially reduce the effect of these consequences for EU citizens, if not remove them altogether.

At a practical level, we must, also, take note of the fact that Article 8 ECHR requires individual treatment. This would make it practically impossible to ask anyone to leave, even if the negotiations between the UK and the EU collapsed. This is because each case of potential violation of Article 8 would have to be assessed on its own facts. Now, given that deportation poses serious logistical problems, and requires the civil service to devote considerable time to it, it is highly unlikely that the government would pursue this in practice. The UK Joint

⁹ Application 51431/99, 17 January 2006.

¹⁰ See D. Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57 *International & Comparative Law Quarterly* 87, 97.

¹¹ Application 51431/99, 17 January 2006, para 71.

Committee on Human Rights reached this conclusion about the UK civil service, but practical realities in the EU-27 would probably provide support to the same conclusion there. In other words, Article 8 litigation could take years to conclude, it could have significant financial costs and would risk overwhelming national courts' systems in the EU-27. This litigation would be in addition to, and independent from, litigation that would derive from violations of relevant EU legislation, which would naturally exacerbate the logistical burdens that would derive from a decision to remove EU nationals.

In view of all the above, we can reiterate that Article 8 provides strong support to the argument that the EU must now unilaterally recognise the rights of UK citizens in the EU. Unless it does so, it risks causing irreparable damage upon the right to private and family life of 4.5 million Europeans, bringing disrepute to the system of human rights protection in Europe and overwhelming the administration of justice in affected EU countries. The EU would also bring its own law into disrepute, to the extent that this incorporates the rights enshrined in the ECHR and ECtHR jurisprudence.

On the other hand, we should not lose sight of the fact that the ECtHR does not provide a detailed framework for the protection of EU citizens' rights. The above analysis has already brought to the surface the limitations of an approach to EU citizens' rights that would exclusively revolve around the right to private and family life. Put simply, many citizens would slip through the cracks of a framework that would make private and family life the main axis for protection. We may ask ourselves: what would happen to citizens who may have only recently arrived at a member state, citizens whose family remains in the member state of origin and citizens who may be residing in a member state but keep close ties with the member state of origin? The scope for protecting their residence rights under Article 8 would probably be particularly narrow.

These questions require the EU institutions' immediate attention. By unilaterally recognising the rights of UK citizens in the EU, EU institutions can put an end to the distressing feelings of anxiety and uncertainty about the future experienced by UK citizens in the EU (and EU citizens in the UK) as illustrated in this report.

While the ECHR and European human rights law can provide substantial levels of protection, they are not a tailor-made system for the protection of citizens' rights in the EU. It is imperative – legally, politically and pragmatically – that EU institutions fill this gap.



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