Joint Committee on Human Rights

What are the human rights implications of Brexit?

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Privacy and Family Life

What is the potential impact of Article 8 of the European Convention on Human Rights, which protects privacy and family life, on EU nationals living in the UK and UK nationals living in other EU member states in terms of their right to stay?

Article 8 provides a right to respect for privacy and family life. It is enshrined in the European Convention on Human Rights and Fundamental Freedoms that came into force in 1953. The subscribing states are the members of the Council of Europe which includes the United Kingdom.

Article 8 provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Convention allows for a right of direct complaint by an individual affected by an alleged breach of the convention to the European Court of Human Rights when domestic remedies have been exhausted. Further, the Human Rights Act 1998 (HRA) which came into force on 2 October 2000 requires that Courts interpret United Kingdom law in accordance with the Convention. Section 2 of the HRA requires a court or tribunal determining a question in connection with a Convention right to take into account relevant judgments, decisions, declarations and opinions made or given by the Commission and Court of Human Rights and the Committee of Ministers of the Council of Europe. Primary and subordinate legislation are to be read, wherever possible, as being compatible with Convention Rights. Finally whilst the provisions of the HRA are only directly applicable against public authorities they do also impact on proceedings against private employers because of the requirements on courts and tribunals under section 2.

It is important to note at the outset that all of this will continue to be applicable in the United Kingdom notwithstanding the decision reached in the referendum on 23 June 2016 and notwithstanding the situation when the United Kingdom's membership of the European Union finally expires. On this basis it may initially be assumed that there is no impact on an individual's Article 8 rights when the United Kingdom leaves the European Union. However that would over-simplify what is in fact a very complex situation.

As has been noted in the briefing which launched this inquiry there is a great deal of detailed EU legislation which protects Human Rights and which is currently effective in the United Kingdom. These fall into three strands:

- Articles of EU Treaties and EU Regulations which have direct effect so that workers can enforce those rights in the UK courts;
- EU Directives and other obligations are applied in the UK by way of primary or secondary legislation and are subject to interpretation by UK courts. Workers can therefore enforce those rights in the domestic court.
- Judicial determination – the UK courts must interpret domestic legislation by reference to all EU law (i.e Treaties and Directives) and judgments of the European Court of Justice are binding on the UK courts.

In this way EU legislation and case law builds upon and strengthens the obligations on the UK afforded by Article 8.

Subject to the provisions of the withdrawal arrangement or any subsequent trade agreement, employment rights derived from EU law would no longer be guaranteed. Therefore any post-Brexit government could seek to amend or remove any one of them.

We set out some examples below where the law has built upon and qualified the obligations that are imposed by Article 8 and which a potential Brexit could reverse. The mechanics for doing this would vary depending on whether the right is enshrined in primary legislation, secondary legislation or is directly effective as a result of EU law but has no domestic legislation to support it. Primary legislation would remain on the statute book post-Brexit and would require a new act of parliament to repeal or amend any of its provisions. In respect of secondary legislation the position depends on whether it has been made under the European Communities Act 1972 or under a power contained in another act of parliament. If it has been made entirely under the former it is unlikely to have any effect once the United Kingdom leaves the European Union unless something is done to change that in the intervening period. Finally any rights that are directly effective without any domestic legislation to support them would automatically cease to apply upon exit from the EU.

1. EU Rights currently in Primary Legislation which qualify Article 8

The right to a private life encompasses, amongst other things, respect for individual sexuality and respect for private and confidential information, particularly the storing and sharing of such information. The Data Protection Act 1998 (DPA) was designed to implement the EU Data Protection Directive (95/46). The DPA regulates the use of "personal data" and "sensitive personal data" which includes the "sexual life" of any individual. Sensitive personal data needs to be treated with greater care than other personal data. In order to lawfully process sensitive personal data, one of the conditions in schedule 3 of the DPA must be met which means an individual's consent is required unless there are specific prescribed circumstances. The provisions of the DPA are complex. However, the key point is it plays an important role in protecting the rights of workers against infringements of their Article 8 rights, such as their right to privacy in respect of their sexuality. This includes, for example, placing requirements on the monitoring of communications at work (including communications containing sensitive personal data) as prescribed in the detail of the Information Commissioner's Employment Practices Data Protection Code.

Primary legislation would be required to repeal the provisions of the DPA, and it is unclear if there is a real appetite for this, but as the current provisions are derived from EU law it would be an option open to a post Brexit government. Repealing the provision in the DPA relating to sensitive personal data would significantly undermine Article 8 rights and create a situation where those living in EU member states would have very different rights as regards to their personal sensitive data in comparison to those living in the United Kingdom.

2. EU Rights currently in Primary Legislation and Secondary Legislation which qualify Article 8

The Parental Leave (EU) Regulations 2013 were made on the 13 February 2013 under the powers conferred by the ECA 1972 to implement the revised Parental Leave Directive 2010/18 EU 2013.

Specifically the Parental Leave Directive put into effect the Framework Agreement on parental leave which sets out minimum requirements designed to facilitate parental and professional responsibilities for working families taking into account the diversity of family structures. The agreement applies to all workers who have an employment contract or employment relationship. It provides an entitlement to at least a period of four months non-transferable leave for both women and men workers. It also provides for access to flexible working arrangements to make it easier for parents to combine work and parental responsibilities.

As a consequence, amendments were required to be made to both primary domestic legislation and secondary domestic legislation as follows:

- Section 80F of the Employment Rights Act was amended to give an entitlement for agency workers to apply for flexible working on return from parental leave;
- Regulation 14 of the Maternity and Parental Leave Regulations 1999 was amended to provide for the minimum period of parental leave by increasing this to 18 weeks.

As regards to the provisions for agency workers, they are now enshrined in the Employment Rights Act 1996 and therefore could only be removed or amended through further primary legislation enacted following the expiry of the United Kingdom's membership of the European Union. However, if this was to happen it would mean that agency workers would lose entitlement to an important family right that engages Article 8.

As regards to the entitlement to increased parental leave of 8 weeks this could be amended or removed through secondary legislation (it was not implemented through the European Communities Act) assuming the proposed Great Repeal Bill does not move all employment rights into primary legislation, making it considerably easier for any post-Brexit Government to repeal the provisions. This would mean working families in Great Britain would be denied the same level of parental leave than those in other European Countries. A point recognised in the Government's Impact Assessment on the Parental Leave (EU Directive) Regulations 2013 dated November 2012.

3. EU Rights with Direct Effect but no Domestic Legislation which qualify Article 8 Rights

Article 141 of the TFEU (previously Article 118a of the EU Treaty) provides that the Council of Europe shall adopt by means of directives minimum requirements for encouraging improvements in the working environment to protect the health and safety of workers.

The Pregnant Workers Directive 92/85/EC implements those health and safety protections specifically for pregnant workers.

The Directive includes an important principle namely "that there should be no reduction in the levels of protection already achieved in individual member states, the member states being committed under the Treaty to encouraging improvements in conditions in this area and to harmonising conditions while maintaining improvements made."

The provisions to protect the health and safety of pregnant workers, workers who have recently given birth or who are breastfeeding are provided for in secondary domestic legislation.

Specifically regulation 16 (1) (b) of the Management of Health and Safety at Work Regulations 1999 requires an employer to carry out a risk assessment where he engages women of child-bearing age and the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents "including those specified in Annexes I and II of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding".

These Annexes prescribe a non-exhaustive list of physical agents which are regarded as agents causing foetal lesions and/or likely to disrupt placental attachment; biological agents so far as it is are known that such agents or the therapeutic measures necessitated by them endanger the health of pregnant women and the unborn child; and chemical agents so far as it is known that they endanger the health of pregnant women and the unborn child and in so far as they do not appear in Annex II which lists specific agents of risk to pregnant and breast feeding mothers.

There is no corresponding or equivalent list of agents specified in domestic legislation setting out the specific risks to pregnant and breastfeeding mothers. Therefore the specific risks identified and contained in the Directive would be repealed with immediate effect on withdrawal from the EU.

As a consequence, women working in Britain would lose this specific protection. They would then be exposed to physical, biological and chemical agents which are known to cause harm to themselves and their unborn or new baby and so adversely affect their Article 8 rights to respect for family life.

4. European Court of Justice decisions which qualify Article 8 rights

Decisions of the European Court are binding as to the meaning of, or effect of, any directly effective Treaties and other EU law including Directives on the domestic courts.

The decisions of the ECJ in Mangold v Helm [2006] IRLR 143 ; Kucukdeveci v Sweden GmbH und Co KG [2010] IRLR 346 have ruled that the principle of equal treatment set out in Articles 8 and 10 (previously Articles 2 and 3) are so fundamental that they are directly effective in the same way as Article 157 which provides for equal pay.

Following withdrawal, UK courts would no longer be required to follow ECJ decisions. Although they may be regarded as having persuasive force, the consequence is that working parents would lose the protection from discrimination in respect of any interpretation of their Article 8 rights.

5. The Future

In November 2015 the European Union Commission launched a new social partner consultation on how to improve work-life balance and reduce obstacles to woman's participation in the labour market. The identified options for improving the EU legislative framework include: inviting social partners to assess the Parental Leave, Fixed-Term Worker and Part-Time Worker Directives with the objective of achieving a better work-family life balance for parents; new incentives for fathers to take leave, including the possibility of a new EU right to paternity leave; the introduction of a right to carers' leave; and better protections from dismissal for new and expectant mothers and new rights for breastfeeding mothers on return to work. Further consultation on this issue then ensued on 12 July 2016.

Any consequent EU legislation that may emerge from this process is very likely to engage Article 8 rights. However in a post-Brexit United Kingdom a government will be free to choose whether it wishes to enact similar legislation domestically or not (subject to any provisions in the exit arrangements or in specific trade agreements). On this basis Article 8 rights are unlikely to evolve as fluently without the necessary domestic political will.

International trade

"As part of the EU the UK is currently party to trade deals with human rights clauses written into them. What are the implications and how important are they? As the UK withdraws from the EU and begins to negotiate its own trade deals, what human rights requirements should it write into them? Should it model them on the current wording in EU trade deals or should the UK be setting higher standards?"

This response to the Committee's inquiry is from the perspective of labour rights.

The starting point is to identify exactly which future 'trade deals' are addressed by the Committee's inquiry. It seems that there are at least three potential categories: (i) the agreement between the UK and the EU for the termination of the UK's membership of the EU (assuming one is reached); (ii) an agreement between the UK and a continuing Member State of the EU; and (iii) an agreement between the UK and a State outside of the EU (with which there may be already be an agreement with the EU).

It is assumed that the Committee's inquiry is not focused on (i). As to (ii), there seem to us to be sound economic and social reasons why a trade agreement between the UK and a continuing Member State should contain provisions that the contracting parties will replicate the labour standards provided for under the EU Treaties. That would (i) increase the prospects that UK businesses could compete with businesses from continuing Member States on an equal footing; (ii) contribute to the protection of the EU labour and social rights enjoyed currently by UK workers; and (iii) make sense from the perspective of legislative and administrative simplicity.

However, we understand the Committee's inquiry to be more directed at the UK's future trade agreements with States with which the UK's current trading arrangements are negotiated through the EU.

In this context, 'human rights' clauses are of fundamental importance. They will play a significant role in the attainment of the goals 8 and 16 of the UN's 2015 Sustainable Development Goals ('Decent Work and Economic Growth' and 'Peace, Justice and Strong Institutions'). The contribution of human rights clauses to employment and wages, and as a control on the decline of freedom of association brought about by trade liberalisation are recorded in the ILO study 'Studies on Growth with Equity: Social Dimensions of Free Trade Agreements'.

As a minimum, the labour provisions should require compliance with the principles contained in the ILO's Declaration on Fundamental Principles and Rights at Work. The four categories protected are freedom of association and the effective right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the discrimination in respect of employment and occupation. A further contribution should be goals 8 and 16 of the UN's 2015 Sustainable Development Goals.

The precise content of the 'human rights' clauses can be debated. But there are a number of further considerations which are equally important, not least of which is that any suggestion that 'human rights' clauses be subsumed into 'Sustainable Development' chapters should be treated with great caution.

'Human rights' clauses in trade agreements must not be seen as a replacement for effective labour rights and legislation in the UK and the State with which it contracting. It is critical that labour protection is not perceived as being devolved to the negotiators of free trade agreements. A part of that will be the role of 'human rights' clauses in improving labour standards in developing countries.

The content of the 'human rights' clauses must not be viewed in isolation. 'Human rights' clauses must be given a prominent positioning in the trade agreement so that their operation is not subordinated to matters such as financial arrangements. The impact of the remainder of the trade agreement on labour rights and opportunities, and, in particular the effect of limitation on a State's capacity to legislate for itself. The more a trade agreement limits the ability of to use other (industrial policy) instruments to protect domestic industries or promote their competitiveness, the greater the chance for social dumping in those countries.

Whilst the State's ability to legislate needs to be preserved, it is to be balanced with the desirability of including provisions in the trade agreement concerning the non-lowering of domestic labour standards.

The trade agreement must also make appropriate provision in the event of non-compliance. This should include (i) appropriate sanctions based conditionality systems; and (ii) mechanisms for individual enforcement. It may be possible for some provisions to be enforced through cooperation and dialogue. However this should not apply to compliance with the principles contained in the ILO Declaration on Fundamental Principles at Work.

Other human rights protected by EU law

"What is the potential impact of withdrawal on other human rights protected by EU law? These include labour rights, disability rights and rights to freedom from discrimination on grounds of eg sexual orientation……?"

It is important to appreciate that the scope, and nature, of the protection of labour rights is different under EU law and international human rights instruments. EU law provides protection in relation to pay and working time, whereas the European Convention on Human Rights does not, for example.

Partly because the European Convention is primarily concerned with civil and political rights, it does not provide a detailed mechanism for the enforcement of rights as between individuals and either other private actors or the State. It is true that some mechanism for individual enforcement is provide for in the Human Rights Act, but that mechanism fails to make the same detailed requirements as to implementation and process found in EU law. Primary legislation not compatibility with rights under the European Convention may not struck down, but are instead capable only of being the subject of a declaration of incompatibility.

The additional protections under EU law are the requirements for (i) sufficiency of domestic remedy; (ii) effective protection of EU law rights (the 'effectiveness principle'); and (iii) the principle that rules for enforcing EU obligations must be not less favourable than those for enforcing comparable domestic rights (the 'equivalence principle'). These intrusive protections are not replicated in international human rights instruments.

In consequence, protections under EU law are much more powerful than, for example the protections under the European Convention on Human Rights and ILO Conventions, in terms of increased justiciability and the depth of enforcement procedures. A particularly good example is the many facets of protection against sex discrimination available under EU law.

Of the many areas where individual labour rights would be non-existent in the absence of EU law, it is possible to highlight protection for working time and annual leave, part-time, fixed terms and agency workers.

At the collective level, it is possible to highlight the detailed collective rights under EU law in connection under the Collective Redundancies Directive, the Acquired Rights Directive, the Framework Directive on Health and Safety, the Europeans Works Council Directive and the Information and Consultation Directive.