ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

Response to the Joint Committee on Human Rights inquiry into the EU Settlement Scheme by the Immigration Law Practitioners' Association (ILPA)

Summary

EU nationals are not currently given the protections against detention and deportation that they are entitled to owing to several issues on the Home Office's part; the Government's proposals will not ameliorate the problem; the Home Office does not have the capacity to ensure that EU citizens will be able to evidence their settled status without problems.

Whether EU nationals are currently given the protections against detention and deportation that they are entitled to?

1. The protection against detention comes from the constraints in Article 27 of Directive 2004/38, which applies to any restriction on free movement. Neither the power of detention in the 2016 EEA Regulations/the 1971 Act nor Home Office policy on detention recognise those constraints as applying to the detention of EU nationals. That is despite several High Court, Court of Appeal and Supreme Court cases which make it clear that they should: *Nouazli*, *Lauzikas*.
2. Similarly, Home Office policy makes no distinction between the enhanced protection regarding detention and expulsion which should apply to EU citizens, and that applicable to third country nationals.
3. Concerning deportation, although the constraints in Articles 27 and 28 of the Directive are included in the EEA Regulations, in practice those are not applied when deportation decisions are taken. Decisions are regularly taken, for example, without regard to whether the individual poses the 'genuine, present and sufficiently serious risk' required for deportation, and/or without consideration of whether deportation is proportionate. The previous policy which prevented deportation of an EU citizen who had not been sentenced to at least 12 months' imprisonment was dropped, with the result that EU nationals can be and are being subject to deportation action at much lower thresholds of criminality than non-EU citizens.
4. The 'deport first, appeal later' certification policy in Regulation 33 of the EEA Regulations has been widely used for EU citizens when it is no longer used regarding non-EU citizens. In practice, this means an individual can be served with a certified deportation decision and deported shortly afterwards, and then must negotiate from abroad exercising his/her appeal right, instructing a representative and preparing his/her appeal, and returning for his/her appeal hearing.

5. These problems are compounded by lack of access to legal advice and representation, particularly for those detained in prisons, which have no immigration advice surgeries. This means many who would be able to successfully challenge detention and/or removal decisions, often deficiently made, cannot do so.[1]
6. Under EU law, EU citizens cannot be deported for the first month after a removal decision is made. The Home Office regularly take this as a basis for keeping the EU citizen in detention for that whole time. This almost blanket approach is extremely distressing for the detainee and any family members and hampers access to justice. It cannot be the purpose of the Directive for EU citizens not to be removed for the first month but to be detained for that time as a matter of course. Notwithstanding the above, those who are to be deported should be allowed to put their affairs in order - e.g. sell their car and pack up their possessions. They cannot do this from detention.
7. The Directive is intended to provide tiered protection: only 'imperative grounds of public security' justify deportation of those resident for at least 10 years, and 'serious grounds of public policy or public security' for those with permanent residence. The Home Office's blanket approach to detention often prevents the EU citizen tracing crucial evidence to show that they are permanently resident or have lived in the U.K. for 10 years, while in practice the Home Office will almost always dispute whether such residence has been accrued and properly evidenced.
8. The following examples show how EU law protection against detention and deportation is not being applied in practice (all these examples are cases of an ILPA member)

- A Romanian national with historic serious conviction in country of origin, but no convictions in the UK, was detained and subject to deportation action. The deportation decision was clearly unlawful as contrary to Article 27 (historic offending only) and there was no consideration of whether he posed a current risk;
- A Portuguese national with no offending in the UK had a mental health breakdown and was detained under the MHA 1983. On discharge from hospital she was served with deportation papers despite having no convictions in the UK and was actively exercising Treaty rights;
- A Romanian national on his way to work was arrested in a park and detained under the 'rough sleepers' policy later found to be unlawful. Despite offering to show immigration officers his payslips and evidence of accommodation, he was detained for two months and removed to

[1] For evidence of poor decision making, note that roughly half of all EEA decisions appealed are allowed at tribunal: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740313/Tribunal_and_GRC_statistics_Q1_201819_.pdf p.4

Romania in a decision later acknowledged to be unlawful. When he attempted to return to the UK he was refused re-entry despite having evidence of employment;

- A Polish national with a learning disability was persuaded to waive his right to appeal deportation and removed to Poland despite his Youth Offending Officer and an expert psychologist warning the Home Office that he did not have the mental capacity to give informed consent;
- A victim of trafficking released as part of police anti-trafficking operation was arrested at his safe house, detained and subject to deportation action on the basis of a historic offence in Poland.

How the UK's immigration detention policy will affect EU citizens post Brexit and whether the Government's proposals, outlined in the policy paper, EU Settlement Scheme: statement of intent, offer EU citizens adequate protection against detention and deportation?

9. The settled status scheme as currently framed excludes individuals from either indefinite leave or limited leave where they are the subject of an 'extant' decision to deport/remove/exclude them from the UK. This is so regardless of whether that decision is subsequently upheld on appeal and/or found to be unlawful or withdrawn by the Home Office. 'Extant' is not defined in the Rules.
10. There is a significant risk that the poor quality decision-making which has characterised Home Office policy towards EU nationals may continue, thereby putting a significant number of individuals outside the settled status scheme altogether.
11. An example of how this might work in practice: a Polish national has been here since 2006 and acquired permanent residence as a child, but has subsequently been sentenced to 2 weeks' imprisonment and had a deportation decision taken against him (not applying the imperative grounds protection to which he is entitled) which he is appealing. He applies for settled status but is not eligible, because there is an extant decision. He wins his appeal but the Home Office (as is often the case in deportation cases) appeals to the Upper Tribunal. Regardless of the fact that the deportation decision is unlawful (because it does not apply the right threshold), he will be ineligible for leave under the scheme whilst his appeal is pending, and may arguably be ineligible unless and until the deportation decision is formally withdrawn. If his case is certified and he is removed under the 'deport first, appeal later' scheme then he will be unable to apply at all because there is no provision for out-of-country applications.

Given the deficiencies in the handling of the *Windrush* generation, does the Home Office have the ability, capacity and resources to ensure that EU nationals will be able to evidence their settled status without problems?

12. No. Vulnerable individuals, including victims of trafficking, victims of domestic violence, those with mental illness or learning disability, those lacking mental capacity to assert their rights, and children in care are all likely to find it difficult to access the settlement scheme or to prove their entitlement to settled status.
13. Individuals (including family members of EU citizens) whose relationship has broken down or who have been victims of domestic violence are much less likely to be capable of evidencing the residence requirement.
14. The Home Office responses to concerns by practitioners about whether an application for settled status might itself trigger a deportation/removal decision have been equivocal and contradictory.