

Research Briefing

1 June 2023

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British Nationality (Regularisation of Past Practice) Bill 2022-23



Summary

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Summary

For the past 40 years, the Home Office has been issuing British passports to people who may not be British citizens. The British Nationality (Regularisation of Past Practice) Bill, introduced on 24 May, would retroactively change citizenship laws to ensure that those affected are and always were British citizens, bringing the law into line with long-running executive practice.

UK-born children of EU citizens may not have been British following High Court judgment

A child born in the UK will not necessarily be a British citizen. Under the British Nationality Act 1981, they must have a parent who is British or “settled”. Being settled requires being free of immigration restrictions, such as having indefinite leave to remain.

Between 1983 and 2000, the Home Office treated EU citizens in the UK as free of immigration restrictions if exercising free movement rights. They were not required to have indefinite leave. On that interpretation, the UK-born children of EU citizens would be British citizens (and entitled to British passports).

In October 2022, the Home Office changed its position. It now understands that this policy was “incorrect” because EU citizens could not, under the 1981 Act, have been free of immigration restrictions unless they had indefinite leave (or another permanent immigration status). This was confirmed in a High Court judgment handed down in January 2023.

The implication is that some people born to EU citizens between 1983 and 2000 are not British citizens after all, despite being treated as such. The Home Office has stopped issuing British passports to first-time applicants affected by this issue.

The bill would ensure that children born to EU citizens between 1983 and 2000 are British

The bill contains a single substantive clause. It would amend the 1981 Act so that people exercising free movement rights to live in the UK between 1983 and 2000 were always free of immigration restrictions for the purposes of nationality law.

This retroactive measure would ensure that children born to EU citizens ordinarily resident during that period are, and always were, British citizens.

The government wants the bill to be “fast-tracked” through Parliament

All remaining Commons stages (second reading, committee and report) are to be taken on 6 June 2023. The government also proposes that committee stage in both Commons and Lords will be in Committees of the Whole House.

The Home Office argues that fact-tracking is justified because this is a simple bill that preserves what was, in practice, the status quo. It says it needs to act quickly to put the citizenship of those affected beyond doubt.

1 Background to the bill

The United Kingdom does not offer automatic birthright citizenship.¹ The status of someone born in the UK depends on the status of their parents. A UK-born child is automatically a British citizen only if at least one parent is British, in the armed forces or “settled” in the UK.²

If a child is born in the UK to two foreign national parents, neither of whom are settled (or in the armed forces), that child will not be born a British citizen. If one parent is settled, the child will be born British. As such, what it means to be “settled” is very important.

The British Nationality Act 1981 defines “settled” as meaning “ordinarily resident in the United Kingdom [...] without being subject under the immigration laws to any restriction on the period for which he may remain”.³ Ordinary residence is not generally an issue. The main requirement for being settled is therefore to be free of immigration restrictions.

This was designed to work with the Immigration Act 1971, under which most migrants are granted permission to be in the UK either for a limited or indefinite period.⁴ Someone whose permission expires on a certain date (‘limited leave’) is not free of immigration restrictions, so cannot be settled for nationality law purposes.⁵ Someone whose permission does not expire (‘indefinite leave’) is free of immigration restrictions, and so is settled provided they remain ordinarily resident.⁶ It is typically possible to upgrade from limited leave to indefinite leave after five years.

1.1 When are EU citizens “settled” under nationality law?

Membership of the European Union complicated matters. Foreign nationals exercising their EU free movement rights to move to the UK were not required

¹ Nor does any European Union country, [according to the European University Institute](#), whereas most countries in the Americas do allow unconditional birthright or ‘jus soli’ citizenship

² [British Nationality Act 1981, s1\(1\)-\(1A\)](#). The same applies to someone born in a British overseas territory, except the Sovereign Base Areas of Akrotiri and Dhekelia.

³ [British Nationality Act 1981, s50\(2\)](#)

⁴ [Immigration Act 1971, s3\(1\)\(b\)](#)

⁵ UK Visas and Immigration, [Nationality Policy: general information – all British nationals](#), version 4.0, 16 May 2023, p33

⁶ Laurie Fransman KC, Adrian Berry and Alison Harvey, *Fransman’s British Nationality Law*, 3rd edition, 2011, para 13.2.5.2

to have leave at all.⁷ From the outset, the Home Office believed that such people were free of immigration restrictions for nationality law purposes.⁸ On that interpretation, a child born in the UK to an EU citizen exercising free movement rights would be a British citizen.⁹ The parent was not thought to require indefinite leave.

There have long been questions about whether this was legally correct. In 1994, the Immigration Appeal Tribunal held that an EU citizen exercising free movement rights was not, in fact, settled for nationality law purposes because the period for which they could remain was subject to a restriction. While not restricted in terms of an expiry date, their right to remain was conditional on them continuing to qualify for free movement rights and so was not equivalent to indefinite leave, according to the tribunal.¹⁰

Change of rules after 2000

The Home Office initially declined to change its approach, despite accepting that treating EU citizens without indefinite leave as settled was “at variance” with the 1994 judgment.¹¹ But in 2000, it introduced regulations stating that someone exercising free movement rights was only to be regarded as free of immigration restrictions if they had indefinite leave (plus several immaterial exceptions). Someone exercising free movement rights but without having indefinite leave was **not** regarded as free of immigration restrictions.¹²

These regulations took effect on 2 October 2000. They were not retroactive. But the Home Office continued to regard people exercising EU free movement rights before 2 October 2000 as free of immigration restrictions, even if they did not have indefinite leave.¹³ The practical upshot was that their UK-born children could be issued with British passports.

⁷ Home Office, Statement of changes in Immigration Rules, HC 169, 9 February 1983, Part VI. The exemption from leave was formalised in primary legislation by [section 7 of the Immigration Act 1988](#), in force from 20 July 1994.

⁸ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – explanatory notes \(PDF\)](#), 24 May 2023, para 4

⁹ This briefing uses “EU citizens” as a shorthand for “citizens of European Economic Area countries and Switzerland”

¹⁰ Laurie Fransman KC, Adrian Berry and Alison Harvey, *Fransman’s British Nationality Law*, 3rd edition, 2011, para 13.2.5.5; *R (Roehrig) v Secretary of State for the Home Department* [2023] EWHC 31 (Admin), 20 January 2023, para 99

¹¹ Fransman’s para 13.2.5.5, as above

¹² [The Immigration \(European Economic Area\) Regulations 2000, SI 2000/2326, reg 8](#). After 30 April 2006, acquiring the EU law status of ‘permanent residence’ was also regarded as making someone free of immigration restrictions: see [The Immigration \(European Economic Area\) Regulations 2006, SI 2006/1003, schedule 2, paragraph 2](#)

¹³ UK Border Agency, [Nationality Instructions, volume 2, section 2, European Economic Area and Swiss nationals \(PDF\)](#), 12 April 2010, para 8.1

1.2

Why might UK-born children of EU citizens not be British?

The issue reached the High Court in a case decided in January 2023. The litigation concerned the British citizenship, or otherwise, of a man born in the UK to a French mother on 20 October 2000 – soon after the 2000 Regulations took effect. The mother was exercising free movement rights but did not have indefinite leave.

Before the court, the Home Office took the position that someone in this position was not free of immigration restrictions, and therefore not settled.¹⁴ Consistent with this argument, but at variance with past practice, the department told the court that it had now ‘paused’ its previous policy of accepting that the UK-born children of EU citizens born before 2 October 2000 were automatically British.¹⁵

Mr Justice Eyre ultimately agreed that the exercise of EU free movement rights was [not sufficient to make somebody free of immigration restrictions](#). This calls into question the British citizenship of people born between 1 January 1983 and 2 October 2000 to an EU citizen parent.¹⁶ If the parent was not settled, and the child did not have a second British or settled parent, the child would not be a British citizen.

Similarly, if someone in this position has since had children of their own, the British citizenship of those grandchildren is also open to question.

Even if the Home Office had previously treated such people as British citizens, and issued them with UK passports, that would not mean they are British citizens as a matter of law. As barrister Colin Yeo put it, “British citizenship is conferred by law, not executive fiat”.¹⁷

As such, the department has stopped issuing British passports to people affected who are applying for the first time.¹⁸ This is said to be a “small number”.¹⁹ But many more people who have already been issued with British passports on the understanding that they are British citizens may not, legally speaking, be entitled to them (through no fault of their own).

¹⁴ *R (Roehrig) v Secretary of State for the Home Department* [2023] EWHC 31 (Admin), 20 January 2023, para 93

¹⁵ Project for the Registration of Children as British Citizens, [Practitioner’s note on R \(Roehrig\) v Secretary of State for the Home Department \[2023\] EWHC 31 \(Admin\) \(PDF\)](#), 20 January 2023; Home Office, [British citizenship: automatic acquisition](#), version 6.0, 24 March 2023, p3

¹⁶ Kingsley Napley, [Born in the UK to a European parent and think you’re British? Time to think again](#), 1 February 2023

¹⁷ Free Movement, [High Court casts doubt on British citizenship of children of EU citizens](#), 26 January 2023

¹⁸ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – explanatory notes \(PDF\)](#), para 21

¹⁹ As above, para 10

1.3

How many people are possibly not British citizens after all?

There is no hard data on the number of people definitely affected. Not all children of EU citizens born between 1983 and 2000 will inevitably be without citizenship; some may have had a British parent as well as an EU parent, or an EU parent with indefinite leave.

There were “in the region of 167,000 children” born to EU citizens between 1983 and 2000, according to the accompanying equality impact assessment. This is not presented as a definitive statistic: it relies on the assumption that because EU citizens represented 11.2% of immigrants in that period, they accounted for 11.2% of births to non-UK mothers in the same period. Nor does it account for the unknown proportion of people who did have a settled or British parent.

The impact assessment comments: “These are people who could have been affected by this issue, although not all might have been if they had an alternative claim to citizenship, for example, via a British citizen father”.²⁰

The department does not attempt to estimate the number of grandchildren potentially affected.

People born to EU parents before 1 January 1983 are not affected because anyone born in the UK at that time was automatically a British citizen, irrespective of their parents’ status.²¹

What about naturalised EU citizens?

Under the 1981 Act, someone applying to become a British citizen by naturalisation must be free of immigration restrictions on the date of application.²² On the face of it, this statutory requirement also calls into question the British citizenship of EU adults who naturalised before 2000, if they did so without indefinite leave.²³

The Home Office says this is not the case: “if you naturalised as a British citizen on the basis that you were a settled EEA or Swiss national during the relevant period, you are still British. Decisions made by the secretary of state are not affected”.²⁴

²⁰ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – Equality Impact Assessment \(PDF\)](#), p4

²¹ [British Nationality Act 1948, s4](#), subject to immaterial exceptions, Technically a ‘Citizen of the United Kingdom and Colonies’: British citizenship as such was a creation of the 1981 Act.

²² [British Nationality Act 1981, sch 1](#), para 1(2)(c) read with para 2(1)(c), and para 3(c); Home Office, [Naturalisation as a British citizen: caseworker guidance](#), 10 January 2023, p13

²³ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – explanatory notes \(PDF\)](#), paras 16-17

²⁴ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill: factsheet](#), 24 May 2023

2 Contents of the bill

The [British Nationality \(Regularisation of Past Practice\) Bill](#) was introduced in the Commons on 24 May 2023 and is due to pass all remaining Commons stages on 6 June.²⁵

The bill is a remedial measure intended to deal with the situation outlined in section 1 above. It was not part of the government’s planned legislative programme.

The long title is:

A Bill to Make provision for immigration restrictions to be disregarded for the purposes of the British Nationality Act 1981 in historical cases in which such restrictions were in practice disregarded.

The Home Office has published [explanatory notes, a human rights memorandum and an equality impact assessment](#) alongside the text of the bill. A [departmental ‘factsheet’ is also available](#).

2.1 Substance of the bill

The bill contains a single substantive clause. This would provide that someone exercising EU free movement rights between 1983 and 2000 was free of immigration restrictions for nationality law purposes during that period, and always has been.

Clause 1(1) would insert a new section 50B into the British Nationality Act 1981.

Section 50B(1) would provide that someone exercising an EU free movement right during a “remedial period” is treated as free of immigration restrictions. The 1981 Act already provides that someone who is free of immigration restrictions and ordinarily resident in the UK is “settled”, meaning that a child born in the UK to that person is automatically a British citizen.

Section 50B(2) would define a “freedom of movement right” as a right to reside in the UK by virtue of section 2 of the European Communities Act 1972. This act has been repealed as a consequence of Brexit.²⁶ So have EU free movement rights for immigration law purposes, but with saving provisions

²⁵ Bill 313 of 2022-23

²⁶ [European Union \(Withdrawal\) Act 2018, s1](#)

allowing people to invoke such rights where relevant to a period of residence before Brexit.²⁷

Section 50B(2) would go on to define the “remedial period” during which a person exercising free movement rights is considered to have been free of immigration restrictions. For England, Scotland, Wales and Northern Ireland, the remedial period is 1 January 1983 to 1 October 2000. This is the period between the British Nationality Act 1981 coming into force, and the introduction by regulations of the requirement for EU citizen to have indefinite leave to be regarded as free of immigration restrictions.

The remedial periods would be different in the Bailiwick of Jersey, Bailiwick of Guernsey and Isle of Man. The 1981 Act applies to these jurisdictions – [collectively referred to as the Crown Dependencies](#) – so people born there are British citizens.²⁸ But the Crown Dependencies are not part of the UK and have their own legal systems, meaning that there are variations in when they treated EU citizens as free of immigration restrictions.²⁹

Retroactive effect

Clause 1(2) would provide that new section 50B always had effect.

Territorial extent

Clause 2 would provide that the bill’s territorial extent is the entire United Kingdom, the British Overseas Territories and the Crown Dependencies.

Amendments

As this is a single-purpose bill, any amendments must be closely connected to the substantive clause. For more information, contact the Public Bill Office.

Commencement

The bill does not contain a proposed commencement date. Accordingly, it would come into force on the date of Royal Assent under the Interpretation Act 1978.³⁰

²⁷ Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, [s1](#) and [sch 1](#); [The Immigration and Social Security Co-ordination \(EU Withdrawal\) Act 2020 \(Consequential, Saving, Transitional and Transitory Provisions\) \(EU Exit\) Regulations 2020, SI 2020/1309](#); *Geci (EEA Regs: transitional provisions, appeal rights) Albania* [2021] UKUT 285 (IAC), 29 September 2021

²⁸ Under [section 50\(1\) of the 1981 Act](#), the United Kingdom is defined as including the Crown Dependencies (referred to as “the Islands”) for nationality law purposes

²⁹ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – explanatory notes \(PDF\)](#), para 8

³⁰ [Interpretation Act 1978, s4](#)

2.2

Fast-tracking the bill

The government wishes the bill to be “fast-tracked” through Parliament.³¹

The Leader of the House said on 25 May that the government intends to table an allocation of time motion providing for all remaining Commons stages (second reading, committee and report) to be taken on the same day, 6 June 2023.³² The government also proposes that committee stage in both Commons and Lords will be in Committees of the Whole House.³³

The House of Lords Constitution Committee highlighted the constitutional issues and concerns that arise with fast-track legislation in a 2009 report.³⁴ The bill’s explanatory notes accordingly provide some information about the justification for fast-tracking. The Home Office argues:

- The government needs to act “quickly and proactively” to put the citizenship of the affected cohort “beyond doubt”
- British passports cannot be issued to first-time applicants until their British citizenship is put beyond doubt
- The bill preserves what was, in practice, the status quo
- The bill has no financial or devolution implications
- The bill is simple³⁵

The equality impact assessment says the bill has been “well received” by external stakeholders consulted, including nationality law experts.³⁶ One such expert, barrister Adrian Berry, has commented that the bill is “retrospective but in a beneficial way”.³⁷

This would be the eleventh public bill of the 2022-23 session to be fast-tracked, in the sense of having second and third reading on the same day.³⁸

³¹ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – explanatory notes \(PDF\)](#), para 19

³² [HC Deb 25 May 2023 c444](#)

³³ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – explanatory notes \(PDF\)](#), para 23

³⁴ Select Committee on the Constitution, [Fast-track Legislation: Constitutional Implications and Safeguards \(PDF\)](#), 7 July 2009, HL 116-I 2008-09

³⁵ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – explanatory notes \(PDF\)](#), paras 19-27

³⁶ Home Office, [British Nationality \(Regularisation of Past Practice\) Bill – equality impact assessment \(PDF\)](#), pp4-5

³⁷ Nationality and Citizenship Law blog, [New British Nationality \(Regularisation of Past Practice\) Bill confirms status of UK-born children of EU Citizens](#), 25 May 2023

³⁸ See Commons Library briefing SNO4974, [Expedited legislation: Public bills receiving their Second and Third Readings on the same day in the House of Commons](#)

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