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PARALLELS AND DIFFERENCES BETWEEN ENDING COMMONWEALTH AND EU CITIZEN FREE MOVEMENT RIGHTS

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EXECUTIVE SUMMARY

- Brexit presents a similar policy dilemma to that of the ending of Commonwealth immigration in the 1960s and 1970s. The determination to end free movement of people creates a need to distinguish between EU citizens currently resident in the UK and EU citizens who might wish to come to the UK at a later date.
- In the 1960s and 1970s the UK government decided to follow a declaratory route and simply continue the lawful residence of existing residents by operation of primary legislation. There was no need for existing residents to apply for a new immigration status. Today, the UK government has decided to force currently resident EU citizens who want to remain lawfully in the UK to apply for immigration status.
- Failure to apply for Settled Status will lead to a lawful EU resident becoming an unlawful resident as soon as the application deadline expires. This would impact negatively also on dependent children whose status relies on the parents applying on their behalf.
- The problem faced by the Windrush generation was surviving in the modern hostile environment when lawfully resident but without documentary proof. The problem faced by resident EU citizens who do not apply for immigration status is arguably worse: unlawful residence and therefore the accidental commission of ancillary criminal offences such as illegal working, renting accommodation without possession of the right to rent and driving without immigration status.
- The system of forcing EU residents to apply for Settled Status by a deadline ameliorates one potential problem — lots of lawful residents lacking proof of their lawful status — but creates arguably a worse problem: a significantly sized population of residents who are literally unlawful as well as undocumented.

INTRODUCTION

Free movement of people into and out of the United Kingdom is not the novelty it is sometimes presented as in contemporary Brexit debates. In reality, it is the historical norm. Other than the decade between 1962 and 1973, British businesses have been freely able to recruit workers from other countries, via first the Empire, then the Commonwealth and then from the European Union and its forerunners. Similarly, British businesses and workers alike have, other than during that decade, enjoyed privileged access to certain overseas markets.

The withdrawal of the United Kingdom from the economic bloc of the Empire then the Commonwealth was a prolonged process taking decades. The rapid, potentially overnight, departure of the United Kingdom from the European Union is unprecedented. As the fractious debate and negotiations since the outcome of the United Kingdom's referendum in 2016 have amply demonstrated, the issues involving withdrawal are extremely complex. This Eurochildren Brief examines one aspect in particular of these withdrawal processes, namely the parallels and differences between ending free movement and the related rights of Commonwealth and EU citizens.

The government of the day took the decision to limit the rights of inhabitants of the Empire then Commonwealth to relocate to the United Kingdom itself, but policy makers faced choices about how this might be achieved. It was recognised that those who had already relocated should have their existing residence rights preserved, at least in theory. Those who had not already relocated needed to be prevented from doing so. Both these groups held the same legal status, making it difficult to distinguish between the two. In both cases, existing residents and new entrants would hold the same kind of passport but an immigration officer at the border would have to find a way to admit one but not the other.

This is self-evidently the same policy problem arising from Brexit. How should the residence rights of EU citizens who have already relocated to the United Kingdom be preserved, and how can they be differentiated in future from EU citizens who have not relocated and are therefore to be excluded?

In the 1960s and 1970s, policy makers decided to confer residence rights on existing residents automatically, by operation of law. This is sometimes referred to as a "declaratory" system. A declaratory approach had the advantage of ensuring that no eligible person lost their legal right of residence and no-one was rendered illegal. However, it also meant that many affected residents did not acquire evidence of their rights. For decades this was not necessarily a problem as long as the person did not travel abroad; proof of immigration status was unnecessary within the United Kingdom.

The tentative introduction of immigration checks for the purposes of employment from 1996 onwards, the expansion of these checks from 2006 and then the widespread enforcement of immigration checks in all areas of life from 2012 onwards fundamentally changed that status quo, undermining the decision to follow a declaratory approach in the 1960s and 1970s and causing the Windrush scandal to bubble to the surface in 2018.

Today, policy makers have decided to require EU citizens to make an active application in order to acquire the new immigration status. This approach means that those who do apply will have a recognised status. But it is feared that many eligible residents will omit or even refuse to apply, potentially leaving hundreds of thousands of EU citizens without lawful residence status. Their under age children, whose legal status depends on that of their parents, may suffer the consequences of non-registration for years to come[1].

A SHORT HISTORY OF FREE MOVEMENT: BRITISH SUBJECTS AND THE EMPIRE: PRIOR TO 1948

In the centuries prior to 1914, common law defined "British subjects" by reference to their allegiance to the Crown. If a person was born in the Crown's "dominions and allegiance" then the person was born a British subject. In common law, the "dominions" referred to all the territories of the British Empire save for certain protected places. All British subjects across the Empire had the same status, therefore. They could also then, at least in law and in theory, freely move from one part of the Empire to another.

[1] See Yeo (2018) 'The impact of the UK-EU agreement on citizenship rights for EU families', *Eurochildren Research Brief Series*, no. 2

When the common law concept of a British subject was first codified, in the British Nationality and Status of Aliens Act 1914, the language and basis of subject status was explicitly preserved.

Few British subjects chose to make use of their hypothetical rights at that time. Even the authorities in the United Kingdom seem not to have understood the legal situation because there are examples of attempts to forestall and prevent movement into the UK by some colonial British subjects.[2]

COMMONWEALTH MIGRATION: 1948 TO 1962

The great shift in terminology from subject to citizen occurred with the British Nationality Act 1948. The label of "British subject" remained in place for all Commonwealth citizens as a type of umbrella status but the principal status of a resident of the United Kingdom under this legislation became that of the "Citizen of the United Kingdom and Colonies", or CUKC.

Exactly the same legal status was held by residents of the UK and all the colonies, which in 1948 was a vast number of people. The residents of Swindon and Swaziland had the same right to live in the United Kingdom, or in Swaziland, or in St Vincent, as one another.

Even as more and more countries achieved independence and their residents lost their status as Citizens of the United Kingdom and Colonies, where those countries remained within the Commonwealth their citizens remained British subjects and retained a right to enter, live and work in the United Kingdom.

It seems unlikely that the British Nationality Act 1948 and the creation of the status of Citizen of the United Kingdom and Colonies played an active role in encouraging or prompting the migration of the "Windrush generation" from the colonies and Commonwealth into the United Kingdom. The right of British subjects to move to the United Kingdom was a historic one, not a new one and the initial migration was driven principally by the involvement of British colonial subjects in World War 2 efforts on multiple fronts across the globe, and post-war demand for labour in Britain (including active recruitment initiatives by British companies in the Commonwealth countries). Family members arrived later, particularly when it became apparent just prior to the Commonwealth Immigrants Act 1962 (see below) that migration policy was tightening.

Nevertheless, the nationality legislation in place meant that the authorities were initially powerless to prevent migration. Steps were taken to discourage new arrivals, such as advertising campaigns, but these appear to have had little impact. But as the numbers grew, the visible difference of the new arrivals and prevalent racism led to demands on the government to take concrete action to restrict new arrivals.

RESTRICTING THE RIGHTS OF CITIZENS: 1962 TO 1981

The Commonwealth Immigrants' Act 1962 ended the right of entry for Commonwealth citizens. They were still "British subjects" under the British Nationality Act 1948 but that status was now hollow. A system of government-issued vouchers for work was created to regulate the entry of future immigrants from the Commonwealth and entry for the purpose of study or self-sufficiency was permitted.[3]

Those Commonwealth citizens who had already moved to the United Kingdom could register as Citizens of the United Kingdom and Colonies after 12 months of ordinary residence[4] or otherwise could re-enter the United Kingdom if able to persuade an Immigration Officer on arrival that they were ordinarily resident or had been during the previous two years.[5] Even if they were ordinarily resident, or had been, they were subject to a new system enabling deportation of those who had committed criminal offences.[6]

The 1962 Act also removed the right of entry of Citizens of the United Kingdom and Colonies whose passports had been issued by colonial authorities. This meant that the vast majority of CUKCs outside the UK itself lost their right of residence.

As well as curbing immigration flows by Commonwealth countries, the Act also thus created an explicitly two tier, racialised system of citizenship. Citizens of the United Kingdom and Colonies notionally possessed the same legal status but in fact some had very different residence rights to others. The introduction of immigration control without

[2] https://www.runnymedetrust.org/blog/british-citizenship-and-the-windrush-generation
[3] Commonwealth Immigrants Act, section 2(3)
[4] British Nationality Act 1948, section 6
[5] Commonwealth Immigrants Act 1962, section 2(2)
[6] Commonwealth Immigrants Act 1962, Part 2

reform of citizenship has been described as a "revolutionary moment" in the history of British nationality law.[7]

Citizens who resided outside the United Kingdom and whose parentage also lay outside the United Kingdom generally had no right of residence in the United Kingdom. This measure affected disproportionally non-White CUKCs. Citizens who resided in the United Kingdom or whose parentage lay within the United Kingdom generally did have a right of residence in the United Kingdom. These citizens were mainly white.

Those citizens who had already moved to the United Kingdom had to either already possess or if not then apply for a passport issued by the United Kingdom authorities. Failing that, they would have to re-enter the United Kingdom under the system for other Commonwealth citizens.

Further restrictions followed with the Commonwealth Immigrants' Act 1968, which further limited the right of entry of CUKCs. A citizen could only live and work in the UK if they, or at least one of their parents or grandparents, had been born, adopted, registered or naturalised in the UK. This ended the system of entry based on where a passport had been issued and excluded almost all of the East African Asians who were at that time seeking entry to the UK due to hostility in their home countries.

Finally, the Immigration Act 1971 overhauled the system of immigration law and control completely, ended the preferential system of labour vouchers and student entry for Commonwealth citizens and introduced the concept of "patriality" and "right of abode" for Citizens of the United Kingdom and Colonies. A "patrial" was generally (i) a Citizen of the United Kingdom and Colonies who held that citizenship through birth, adoption, naturalisation or registration in the UK or (ii) a Citizen of the United Kingdom and Colonies who acquired citizenship outside the UK but who had lived in the UK for a continuous five-year period. These "patrials" held the right of abode in the United Kingdom; "non patrials" did not. There was no longer any significant immigration advantage in being a Commonwealth citizen without patriality.

INTO THE EUROPEAN ECONOMIC COMMUNITY

At the same time that the United Kingdom was withdrawing from the Commonwealth free movement area from 1962 onwards, the United Kingdom was also attempting to join the new European Economic Community (EEC) free movement area.

The United Kingdom made unsuccessful applications in 1961 and 1967 before finally succeeding in 1971 and formally joining on 1 January 1973. Symbolically, perhaps, this was also the date of commencement of the Immigration Act 1971, which ended preferential Commonwealth migration.

Both at the time of entry and the time of the 1975 ECC membership referendum, immigration from EEC countries into the United Kingdom was barely discussed at all, despite free movement of workers being one of the founding principles of the Community.[8]

Free movement rights were far less evolved and developed in 1975 compared to 2016, but we might also speculate that the lack of salience for this issue was in part because sovereignty was considered more important at the time, and inward migration to the underperforming UK economy of the 1970s was not considered likely to be as much of an issue as emigration to higher performing EEC economies, and because European workers were perceived to be ethnically white, meaning that the racial dimension of immigration debate was less prominent overall, with some looking at the 'whiteness' of Europeans preferentially[9].

In any event, data certainly suggest that net migration from EEC countries was relatively low until the early 2000s.

BRITISH CITIZENS: 1981 ONWARDS

Preferential citizenship status for Commonwealth citizens was killed off in practice by the Commonwealth Immigrants Act 1962 but the funeral was delayed nearly twenty years, until the British Nationality Act 1981. This legislation abolished the status of Citizen of the United Kingdom and Colonies

[7] Randall Hansen, Citizenship and Immigration in Post-war Britain (Oxford, 2000). See chapter 5.

[8] Robert Saunders, *Yes to Europe! The 1975 Referendum and Seventies Britain* (2018)

[9] Solomos, J. (2003) 'The Politics of Race and Immigration since 1945', in Race and Racism in Britain, Basingstoke: Palgrave Macmillan, pp. 48-75.

and replaced it with three new forms of citizenship: British citizenship, British Dependent Territories Citizenship and British Overseas Citizenship. These new forms of status came into being on 1 January 1983.

Access to the status of British citizen was, right from the start, deliberately restrictive.[10] Many existing Commonwealth residents of the United Kingdom at the time the Act came into force were prevented from automatically acquiring the new status by the "patriality" requirement. A route to registration was created for those Commonwealth citizens with five years' of accrued ordinary residence, but a five-year deadline to register was set.[11] Ostensibly, according to the Minister defending the deadline in debate in the House of Lords, it was intended at least in part to encourage take up of registration.[12] That effort was plainly unsuccessful; otherwise the Windrush generation would have been British citizens and immune to the effects of the modern hostile environment introduced from 2012 onwards.

The reasons for non-registration are probably manifold: lack of awareness of the need to register, lack of awareness of the deadline and the consequence of not meeting it, inability or reluctance to pay the necessary fee, distrust of bureaucracy or even plain refusal to take a step they felt should not have been forced upon them, having arrived as British subjects in the first place.

The criteria for acquiring British citizenship status were always tough and have become tougher over time. Continuous residence of five years has always been required in order to naturalise for those not married to a British citizen but a shorter three-year route available to those who were married to British citizens was effectively scrapped in 2012. New language and citizenship tests were introduced in 2002 and later toughened. Over this period, the cost of making an application increased sharply from £575 in 2008 to £1,330 in 2018. All of this has served to keep the numbers of new British citizens relatively low and to create a significant population of settled residents without citizenship.

THE GRADUAL THEN SUDDEN FAILURE OF THE DECLARATORY APPROACH

We have seen that the Immigration Act 1971 brought preferential Commonwealth migration to a definitive close. In doing so, there were broadly three ways in which policy makers could deal with the need imposed by that policy to distinguish between Commonwealth citizens who were already resident in the UK and Commonwealth citizens who were not. These were:

1. Remove rights from all Commonwealth citizens, in effect expelling existing residents as well we preventing new arrivals, or
2. Force existing residents to apply for a new status in order that they could be easily distinguished from new arrivals, or
3. Maintain and continue the lawful residence of existing residents and tolerate the fact that it was difficult to distinguish between existing residents and new arrivals.

Policy makers chose the third of these options. The first two possibilities were considered to be unacceptable or unachievable. The Immigration Act 1971 duly conferred lawful status automatically on resident Commonwealth citizens without any need for them to make an immigration application or obtain documentary proof.[13]

For many years this historic choice appeared to have been a wise one. Settled residents without citizenship mainly acquired documentary proof of their status over time and those who did not were able to continue with their lives without interference.

In 1996, a new criminal offence was introduced of employing a person who did not have permission to work. This was the tentative precursor to today's hostile environment, but it had little initial impact. Firstly, a long-resident Commonwealth citizen did possess permission to work but lacked proof, so in theory the employer of such a person could not be prosecuted. Secondly, there were very few attempts to enforce the new criminal offence, prosecutions

[10] An urgent memorandum to the Home Secretary and Immigration Minister of the day in 2002 from a senior civil servant openly stated that "The basic parameters of British nationality policy were established in the early 1980s … Nationality policy has been driven mainly by the immigration implications for the UK" and argued strongly against resolving historic injustices in British nationality law because of the numbers who would potentially benefit. See https://publications.parliament.uk/pa/ld200506/ldlwa/60503wa1.pdf

[11] Section 7 BNA 1981

[12] Lord Belstead, Minister of State, Hansard HL, 21 July 1981 : Col 173-4

[13] Immigration Act 1971, section 34

were almost unknown and awareness was therefore limited.

The basic structure of modern hostile environment policies was built into the 1996 law, however. An employer who had checked and kept a copy of certain listed immigration documents would have a defence to prosecution. This was significant, because it created an incentive for a risk-averse employer only to employ workers who possessed proof of their immigration status. At that stage, the incentive remained little known or little understood and its impact was therefore limited.

The 1996 law was reformed in 2006 and supplemented by a new system of more easily enforceable civil penalties. Now, rather than imposing a criminal record on an employer, the Home Office could fine employers who were found to have employed a person without permission to work where the employer had not checked and kept a copy of one of the specified forms of immigration status. Enforcement of the new civil penalties was taken more seriously by Ministers and officials than the old criminal offence and employers started to feel the effects. A culture of compliance by employers was gradually established and immigration document checks started to become common for new employees with large or well-informed employers[14].

From around 2012 onwards, enforcement was significantly increased, the level of penalty increased sharply and a raft of similar policies requiring document checks in other walks of life were introduced[15].

Those lawful residents without documents started to find their lives constrained by the spreading "hostile environment" policies requiring employers, landlords, banks, doctors and others to conduct immigration document checks. At the heart of this policy was the introduction of routine immigration document checks into as many aspects of everyday life as possible, introduced by a combination of primary legislation (the Immigration Acts 2014 and 2016), secondary legislation (for example to regulations governing National Health Service charges), bureaucratic changes (such as embedding of immigration officials at police stations and in local authorities) and data sharing agreements between government departments (such as memorandums of understanding between the Home Office and Department for Education and the Department for Health).[16]

The consequences of failing these checks can be disastrous for those affected, as media coverage has subsequently shown.

Government policy is at the time of writing to assist those affected to acquire documentation through a specially created "Windrush Taskforce"[17]. It has belatedly been recognised that subsequent laws and policies introduced since 2012, but with their origins going back to legislation in 1996 and 2006, make it impossible for a lawful resident, whether citizen or not, to survive in the modern United Kingdom without proof of residency status.

WHEN FREE MOVEMENT ENDS: MANAGING THE LOSS OF STATUS OF COMMONWEALTH AND EU CITIZENS

Brexit presents a similar policy dilemma to that of the ending of Commonwealth immigration in the 1960s and 1970s. The implementation of the UK exit from the European Union pursued by the UK Government, in particular the determination to end free movement of people, creates a need to distinguish between EU citizens currently resident in the UK and EU citizens who might wish to come to the UK later.

In the 1960s and 1970s the UK government decided to follow a declaratory route and simply continue the lawful residence of existing residents by operation of primary legislation. There was no need for existing residents to apply for a new immigration status. Today, the UK government has decided to force currently resident EU citizens who want to remain lawfully in the UK to apply for immigration status. Failure to apply will lead to a lawful resident becoming an unlawful resident as soon as the application deadline expires. This would impact also on dependent children whose status relies on that of the parents. At the time of writing that deadline is set

[14] Flynn, D. (2005) 'New borders, new management: the dilemmas of modern immigration policies', Ethnic and Racial Studies, 28(3), pp. 463–490.

[15] Yuval-Davis, N. et al (2018) "Everyday Bordering, Belonging and the Reorientation of British Immigration Legislation", *Sociology* 52(2). https://doi.org/10.1177/0038038517702599

[16] Griffiths, M. and Yeo, C (under review) 'Hostile Environment: The Outsourcing of Immigration Control'.

[17] https://www.gov.uk/guidance/windrush-scheme#the-windrush-taskforce

at the end of 2020 in the event of a "no deal" Brexit or in July 2021 if there is an exit deal agreed.

On the face of it, the UK government is permitting all existing EU citizen residents to remain on condition that they apply, other than those with relatively serious criminal convictions[18]. However, it is inevitable that many EU citizens who are entitled to apply will not do so, for potentially myriad reasons. Some will be unaware of the need to do so, some may lack capacity as mentally ill or very old or very young persons, some will refuse to do so on principle, others may be aware of the need but be afraid of applying or fail to apply because they lack the understanding, skills, resources or motivation to do so. It is impossible to estimate the percentage take up of what has become known as the settled status scheme, but there is a broad consensus that tens or hundreds of thousands of EU citizens will be left unlawfully resident once the deadline expires.[19]

The problem faced by the Windrush generation was surviving in the modern hostile environment when lawfully resident (because of section 34 of the Immigration Act 1971) but without documentary proof. The problem faced by resident EU citizens who do not apply for immigration status is arguably worse: unlawful residence and therefore the accidental commission of ancillary criminal offences such as illegal working, renting accommodation without possession of the right to rent and driving without immigration status.

It is one thing to be lawfully resident but need to apply for proof of that status. It is quite another to be illegally resident, committing one or more criminal offences in the process, and to have to apply for a new status.

Until the scandal was highlighted by the media in 2018, a member of the Windrush generation faced severe problems obtaining documentary proof of lawful status. An unlawfully resident long-term EU citizen will need to apply for lawful residence, assuming that there is even a route to do so available after the deadline for applications has expired. All that we know at the time of writing is that "good reason" will need to be given for missing the deadline.

The system of forcing immigration applications by a deadline ameliorates one potential problem — lots of lawful residents lacking proof of their lawful status — but creates arguably a worse problem: a significantly sized population of residents who are literally unlawful as well as undocumented.

Finally, many children of EU citizens are also at risk of becoming unlawful and undocumented unless one of their parents make the application on their behalf. Overall, information about the EU settlement scheme and the status of European national children is lacking with parents often unaware that they have to apply for their children (either UK or EU-born). This has some resonance with the case of some of the children of the Windrush generation who were recently forced to prove their status despite having been in the UK legally for half a century[20].

Most importantly, in problematic cases when the child's application is linked to the application of his parents facing difficulties to proof their right to reside in the UK, a spillover effect of this uncertain parental legal status is taking place with short and possibly long-term term consequences on the future of these children in the UK. The case of European national children in care is even more worrying[21] (see Coram CIC Report, 2018).

[18] https://www.freemovement.org.uk/eu-settled-status-criminal-convictions/

[19] Migration Observatory, *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* (12 April 2018)

[20] See "The children of Windrush: 'I'm here legally, but they're asking me to prove I'm British", The Guardian.

[21] See recent Coram CIC report

ABOUT THE PROJECT

EU families and Eurochildren in Brexiting Britain investigates the impact of the EU referendum on the EU families living in the UK. It is funded by the Economic and Social Research Council (ESRC) as part of *The UK in Changing Europe*.

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