

EUROCHILDREN RESEARCH BRIEF SERIES, NO.2

# THE IMPACT OF THE UK-EU AGREEMENT ON CITIZENSHIP RIGHTS FOR EU FAMILIES

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## Executive Summary

The current rules on acquisition of British citizenship originate in the British Nationality Act 1981. It has been amended by later Acts and supplemented by secondary legislation, but it is in the 1981 Act that basic rules reside. At the time that legislation was conceived and drafted, little if any thought will have been given to the situation of EU citizens and their family members, who were at that time treated the same as other migrants from outside the EU.

As EU law and UK implementation of EU law has changed and grown, the framework of British nationality law has remained the same. This has resulted in a number of difficulties that EU citizens and their families will face in acquiring or proving British citizenship.

Firstly, many children born in the UK to EU citizen parents will in theory be automatically born British. However, where neither of the parents was British or settled from outside the EU, it will be very hard or perhaps impossible for some of those children to prove their entitlement later in life. This is because they will be unable to produce proof that their parent possessed permanent residence because permanent residence is a status that is acquired automatically and does not depend on formal issuing of any particular document. Without such a document, proving that a parent possessed permanent residence will be very challenging.

Secondly, some children of EU citizens currently living in the UK will have been born abroad, perhaps before the parents moved to the UK or perhaps when the parents went on holiday or returned to be close to family members at the time of the birth. Where neither of the parents was British at the time of birth, a child born abroad cannot usually acquire British citizenship until adulthood.

Thirdly, there are substantial barriers to the acquisition of British citizenship by registration after birth for the children of EU citizens. These barriers are not unique to EU citizens and their families but will become more of an issue after the post-Brexit loss of free movement rights to enter and leave the UK freely over the course of one's life. The parents may not know or understand that a child could be registered as a British citizen once at least one of the parents is settled or the child has been resident for 10 years after being born in the UK. The fee for registration is now over £1,000 per child, which is unaffordable for many and a significant disincentive to all.

Finally, there are some potentially significant legal and procedural barriers to EU citizens wishing to naturalise as British citizens. The fee for naturalisation is high and EU citizens have been required since 2015 to apply first for a permanent residence document before being eligible to apply for naturalisation. The UK interpretation of EU law appears to mean that many EU citizens (for example stay at home parents, carers, low earners and part time workers, those who have experienced sickness or unemployment and "A8" citizens who did not register their employment) have not been lawfully resident and are therefore not eligible for naturalisation and, worse, may be excluded from naturalisation on the basis of unlawful stay. This applies to long term residents as well as recent arrivals.

The post-Brexit immigration statuses of temporary and settled status will ameliorate these problems for children born after Brexit and reduce the administrative barriers to naturalisation for adult EU citizens, but will not have retrospective effect. The historic problems with the interaction of British nationality law with the UK interpretation of EU law are likely to deprive many EU citizens of their entitlement to the acquisition of citizenship.

## Acknowledgements

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## Introduction

Before the Brexit referendum, EU citizens were told they had “rights” of residence. Some were even issued with documents stating they had a “permanent right” of residence. They are now told these “rights” were no such thing but instead were conditional, temporary and could be taken away.

The acquisition of British citizenship was not a major concern for EU citizens and family members prior to Brexit, as the relatively low numbers of applications prior to 2016 indicate. This can perhaps be explained by the enhanced security of status conferred by EU free movement law compared to other long term residents under UK law. After Brexit, the new vulnerability of EU citizens and family members to deportation under UK law compared to EU law, for example, means that barriers to British citizenship take on new significance.

At the time of writing, British citizenship is in fact the *only* form of permanent status currently available to EU citizens. EU citizens contacting the Home Office to ask how to apply for permanent status have been told there is nothing they can do. The process for applying for the new post-Brexit settled status is not yet available and the opening date for such applications is not yet known. The Home Office “expects” that it will be available before the end of 2018.<sup>1</sup>

Unsurprisingly, applications for British citizenship by EU nationals have risen sharply, more than doubling between 2016 and 2017.

This increase comes despite an additional barrier to British citizenship for EU citizens erected in November 2015, when the Home Office adjusted domestic UK law to require EU citizens and their family members who wish to naturalise as British to obtain a permanent residence document before applying. Prior to this, an EU citizen or family member could send proof of automatic acquisition of permanent residence with the naturalisation application. After the change, an applicant had to make two separate applications, first for the permanent residence document and, once that was obtained, then for naturalisation.

<sup>1</sup> [Oral evidence to Select Committee on the European Union Justice Sub-Committee by Brandon Lewis, then Minister for Immigration, on 12 December 2017](#)

Interest in British citizenship is not purely motivated by security of status. There are complex and overlapping issues of identity, desire to participate in general elections, desire to have the same status as other family members and wanting to be able to wait in the same passport inspection queue as family members when travelling.

For the purposes of this project, an EU family has been defined as a family with at least one partner born in an EU country and holding an EU passport. Families come in all shapes and sizes and the five variations covered by the project are:

Partner 1	Partner 2	Example
One EU27 partner	One UK partner	One French, one British
Same EU27 partner	Same EU27 partner	Both French or both Polish
Different EU27 partner	Different EU27 partner	One French, one Polish
One EU27 partner	One non EU partner	One French, one Indian
One EU27 partner		French lone parent

Where one of the parents is a British citizen, the nationality issues are ameliorated to some extent by two facts:

- A. The children will normally be born British citizens whether born in the UK or abroad; and
- B. It should be relatively straightforward for such children to obtain the British passport to which they are entitled through reliance on the birth certificate of the relevant parent.

Where both parents are EU citizens or one parent is an EU citizen and the other is a non-EU citizen, both these issues of entitlement and proof are much more likely to become problematic. These issues are the focus of this briefing paper, which examines the main routes to acquisition of British citizenship available to EU citizens and their children.

## 1. Nationality law is complex

Eligibility for British citizenship is not widely understood, even amongst immigration lawyers. British nationality law is complicated by historical factors and the slow British withdrawal from empire.

Prior to 1948 there was a single common law status of "British subject" which applied to all citizens of the British Empire. Between the British Nationality Acts of 1948 and 1981 the new form of status was that of a Citizen of the United Kingdom and Colonies. The value of this status was eroded for many non-white bearers through immigration legislation, particularly in 1961, 1968 and 1971, and it was eventually replaced with three new forms of British nationality, that of British citizen, British Overseas Territories Citizen and British Overseas Citizen.

Even aside from these historical complexities, the current rules on entitlement are not straightforward. The author is aware of several cases of EU citizens who applied for British citizenship only to lose their very substantial application fees (the current fee for naturalisation is £1,236 per person) because the application *could* have but in fact did not comply with Home Office requirements.

For example, many people wrongly assume that a child born in the UK is born British but this is not correct. Others assume that a child born outside the UK to a British parent is always born British, but this is also incorrect.

Lack of knowledge of nationality rules is a potentially very serious problem. Migrant children are reliant on their parents to protect their rights and make applications on their behalf. Where the parents fail to do so, perhaps through lack of knowledge or because of prohibitively high application fees, the child might well lose the opportunity to acquire British citizenship either for practical or legal reasons.

Before Brexit, this perhaps mattered little on a day to day level because as EU citizens, such children would possess rights of residence in the UK in any event. After Brexit, though, the situation of such children may potentially be very precarious.

## 2. Being born British within the United Kingdom

Any child born in the United Kingdom is automatically born British where one or both of the child's parents is settled in the United Kingdom at the date of birth.<sup>2</sup>

<sup>2</sup> [British Nationality Act 1981, section 1\(1\)](#). For definition of "settled" see section 50(2).

There are three main ways by which a parent might be considered settled:

- (i) by being British him or herself
- (ii) by holding Indefinite Leave to Remain immigration status or
- (iii) by possessing permanent residence in EU law, whether or not a permanent residence document is held.

Permanent residence is the relevant status for almost all EU citizens in the UK.

Permanent residence is a status that is under EU law automatically acquired if the qualifying criteria are met; it is not a status that is granted by a national or any other authority.

Where an EU citizen applies for a permanent residence document, the EU citizen already has the status of permanent residence and is applying for document confirming that, not a document conferring it. The permanent residence document is optional; in EU law there is no requirement to apply for one or to possess one in order to have and make use of the right of permanent residence.

Because permanent residence is automatic in nature many EU citizens already possess that status, whether they themselves know it or not. This means that a child born in the UK to EU citizen parents (or an EU citizen parent and a non EU citizen parent) may be born British but without the parents being aware of that fact. Such a child might grow up entitled to British citizenship but never know it, or might become aware of this entitlement later but be faced with the problem of trying to prove it.

### 2.1 Parent possesses permanent residence document

If one of the parents obtained an optional permanent residence document, this should make matters somewhat more straightforward. The child may be able to locate the permanent residence document itself and the Home Office should have records.

If the child cannot find the permanent residence document, for example because the parent lost it or the child and parent are estranged, the Home Office may not be willing to access those records on request, however. Officials generally take the line that it is for an applicant to present proof of eligibility.



## 2.2 Parent possesses permanent residence but not documented

If the parents did not obtain a permanent residence document but had automatically acquired permanent residence nonetheless, the child will have been born British. However, to make a successful passport application to obtain proof of his or her citizenship status, the child will need somehow to locate, perhaps many years later in adulthood, evidence that the parent in question pursued a qualifying activity for a period of five continuous years.

This is likely to prove impossible for many such children.

### Example

*Olaf* is Swedish and came to work in the UK in 2006 with his wife, who is also Swedish. Their son, *Sven*, was born in 2012. By that time *Olaf* held permanent residence, although he has never applied for a permanent residence document.

If *Olaf* and his wife know they can do so and want to do so, they can simply apply for a British passport for *Sven*, who was born British whether *Olaf* and his wife know it or not. They will need to find evidence such as five continuous years of P60 certificates to make the application on *Sven's* behalf. If the parent was in full time and permanent employment this may be feasible. It will be very difficult if the parent was self employed or worked cash in hand.

If *Olaf* and his wife do not apply on *Sven's* behalf, *Sven* may go through his whole life being British but without knowing it. Or he may go through his whole life correctly assuming he is British but when required to prove it later, for example for employment, renting or banking purposes or if in contact with the police for some reason, he will be unable to do so. It will become increasingly hard to prove his entitlement over time as it becomes less and less likely he will be able to find the necessary paperwork to prove his case.

Even if *Olaf* and his wife remain in the UK after Brexit and obtain permanent status, that will not assist *Sven* as he needs to prove that *Olaf* and his wife were settled in the UK at the time of *Sven's* birth in 2012.

It is impossible accurately to quantify how many children are affected by this issue but it is highly

likely to be a substantial number, running to tens of thousands.

## 3. Being born British outside the United Kingdom

A child born outside the United Kingdom is automatically born British where one or both of the child's parents is British.<sup>3</sup> If the British parent was also born outside the UK different rules may apply.

Where there is no British parent and the child is born abroad, the child does not obtain British citizenship at birth. This will include a child born on holiday or during a short stay abroad.

Where the child is born abroad, it does not make any difference in British nationality law if one or both of the parents were settled in the UK at the time of birth. Possession of permanent residence, with or without a permanent residence document, is not sufficient for the child to obtain British nationality where that child is born outside the UK.

In addition, because the child was born abroad there is no other statutory route to British citizenship for that child. The child will have to wait until adulthood to naturalise as British or, in some very limited circumstances, may be able to apply for a discretionary registration as British before turning 18, for example if taken into care.<sup>4</sup>

### Example

*Maria* and *Pierre* are both French. They have been living in the UK for years and have acquired permanent residence. When their two children were born in 2009 and 2011 they wanted to ensure they were born in France for sentimental reasons and so that they were close to their families.

Neither of their children was born British and nor can they be registered as British. If the children want to acquire British citizenship they will have to naturalise once they turn 18, assuming they then qualify (five years residence, settled for one year at date of application, no excess absences from the UK, knowledge of life in the UK test, good character etc).

<sup>3</sup> [British Nationality Act 1981](#), section 2(1).

<sup>4</sup> See [Nationality Policy Guidance document Registration as a British citizen: children for Home Office policy on discretionary registrations of children as British citizens](#)

## 4. Registering a child as a British citizen

Where a child is not born British there are several ways by which that child can become a British citizen by means of a process called registration:

- (i) If born in UK and lived continuously for first ten years of life in UK, can be registered at any age including as an adult
- (ii) If born in UK and one or both parents become settled in the UK after birth of the child, can be registered if application made before child turns 18
- (iii) If born in UK or abroad and Secretary of State exercises general discretion to register a child as British, for example where their future clearly lies in the UK.

Registration, though, is a process where the child only becomes British after a positive decision is made. This is not a case of the child being British from birth and only later being recognised as such when a passport is issued; the child is only British from the moment the registration decision is made.

### 4.1 Barriers to registration of children as British

The fee for applications for children to register as British citizens is from 6 April 2018 set at £1,012 per child.

This is a very considerable sum for some families, particularly where there are several children and the adults also wish to make paid citizenship applications at a cost of £1,330 each. The cost of applying for British citizenship for all members of a family of four would be £4,684.

Registration is not quite an entitlement where the child meets the qualifying criteria. A good character test is applied to children over the age of 10.

The barriers to the registration of EU citizen children therefore include:

- Parents wrongly believe the child is already British, for example through birth in the UK
- Lack of awareness of the benefits or importance of registration by parents
- Parents are not well informed or well organised or simply forget; child turns 18 and thus permanently loses the opportunity

- The child is eligible to be registered but the proof is lost, for example of residence in UK for first ten years of life or that parents had automatically acquired permanent residence through five years of qualifying activity
- Parents unable or unwilling to pay the required fee
- Parents are (rightly or wrongly) concerned that the child will lose the inherited nationality of the parents because of dual citizenship rules of the country concerned
- The child ends up in trouble with the police and loses eligibility on grounds of poor character

The issue of children obtaining proof of their right to register is a serious one. A very considerable number of children who are entitled to be registered as British will lose that entitlement. After Brexit, this will present them with very serious problems because they may not acquire the new post-Brexit rights of residence and may therefore end up living undocumented and unlawfully and facing removal.

### 4.2 Parent never acquired permanent residence

There are several problems with the acquisition of permanent residence in EU law (see Eurochildren Research Brief no. 1). These problems could be largely overlooked prior to Brexit as they affected entitlement to benefits rather than the right to be physically present in the UK. They also affect acquisition of British citizenship by the children of those affected, however.

Gaps in employment, gaps in residence in the UK or the absence of comprehensive sickness insurance can mean a parent never becomes settled in the legal sense required by British nationality law in order for a child born in the UK to acquire British citizenship. These issues are particularly acute for carers, stay-at-home parents, the disabled and some other groups.

These cracks in EU residence are being smoothed over to some extent by the UK for the purpose of allowing EU citizens to acquire the new temporary or permanent status. As long as an EU citizen can show presence in the UK for five years (some will still struggle with this but presumably a small minority) then the EU citizen can obtain permanent status. The cracks will persist for the purpose of children born before Brexit acquiring British citizenship, however.



**Example**

Rosa is German and came to the UK in 2003. She met Reza, who is Pakistani and was a student when they met. They have two children born in the UK in 2006 and 2009. Rosa gave up work in 2008 and has not worked since. She has never possessed private health insurance.

Rosa should have acquired permanent residence in 2008. She was working for five years before giving up work and since then Reza has supported the family. She may have difficulty proving this because she would need to find old documents proving that she worked continuously for five years back then.

This should not be a problem for Rosa personally after Brexit because she will be able to show five years of living in the UK, which is all the UK authorities say they will require in order for a person to obtain permanent status. Reza should also qualify for status.

However, the first child born in 2006 did not have a settled parent at the time of birth and was therefore definitively not born British. She will be able to apply for registration as British after 10 years of residence in the UK, however, assuming that she knows she can and can afford the fees.

The second child born in 2009 may be able to show she is British but depends on Rosa finding the old evidence of five continuous years of work.

The family may have three nationalities between them in various combinations: Rosa remains German, Reza remains Pakistan, the first child may be German and Pakistani and the second child may be British, German and Pakistani

## 5. Naturalising as British as an adult

The criteria for naturalising as a British citizen are that the applicant is:

- (i) 18 or over;
- (ii) of "good character";
- (iii) has an intention to continue to live in the UK;
- (iv) meets the knowledge of English and life in the UK requirements; and
- (v) meets the residency requirement.

These criteria are set out in the British Nationality Act 1981 and apply to all applicants for

naturalisation. There are some issues that which may represent barriers to naturalisation specifically for EU citizens and their family members.

### 5.1 Good character exclusions

A criminal conviction will normally exclude a person from naturalising as British on the grounds of poor character, but conduct short of criminal behaviour can also disqualify a person. For example, deception in dealings with the Home Office or with other government departments can amount to grounds for refusal on this basis as can spent criminal convictions. Home Office policy on applying the good character requirement is set out in the Nationality Policy Guidance document entitled Good character requirement.

Since late 2014, Home Office policy on good character has been amended to exclude from naturalisation on the grounds of good character migrants who are considered to previously to have breached immigration laws. Where the breach is considered by a Home Office official to be sufficiently serious, this bars the applicant from naturalising for a ten year period beginning from the time of the breach in question.

This policy could prove problematic for some EU citizens seeking naturalisation. EU citizens or their family members who are not considered by the Home Office to have been lawfully resident in compliance with Home Office interpretation of EU law could potentially face refusal on the grounds of breach of immigration laws. Non-compliance with the Workers Registration Scheme for arrivals from "A8" EU accession countries could also potentially lead to refusal on this basis.<sup>5</sup>

It is not possible to state the likelihood or otherwise of refusal on these grounds, unfortunately, as data is not published and anecdotal evidence is almost non-existent either way.

### 5.2 Residence requirements

The residence requirements for naturalisation as a British citizen differ depending on whether the applicant is married to a British citizen or not. In brief, the main requirements are:

<sup>5</sup> The Workers Registration Scheme allowed citizens from A8 countries to seek employment in the UK but required them to register with the Home Office. Anecdotal evidence suggests that the scheme was not widely understood at the time and that a considerable number of A8 citizens did not register.

- Three years' residence for spouses of British citizens plus settled at date of application
- Five years' residence for non spouses plus settled for at least one year at date of application
- Only a certain number of absences from the UK are permitted during those periods, usually 270 days in total for spouses of British citizens or 450 days in total for others and no more than 90 days in final year in both cases
- The qualifying residence must be lawful.

Since November 2015 an EU citizen (or family member of EU citizen) seeking naturalisation must first apply for a permanent residence document, otherwise the naturalisation application will automatically be refused and the application fee of £1,236 will not be refunded. Until 1 August 2016 the Home Office would return applications made by EU citizens or family members without a permanent residence document and refund the fee.

The requirement that residence be lawful residence in accordance with the UK interpretation of EU law and that an EU citizen must acquire permanent residence could prove to be problematic for some EU citizens seeking the security of naturalising as British.

This is because of the gaps in EU law on acquiring permanent residence, principally where there are gaps in employment, gaps in residence in the UK or comprehensive sickness insurance is required. Stay-at-home parents, carers, the disabled and other vulnerable groups are those most likely to be affected by these rules and disqualified from becoming British.

After Brexit this problem will be ameliorated for adults seeking naturalisation because those affected will mainly be able to apply for the new temporary and permanent status. Nevertheless, it will take three to six years from Brexit for affected EU citizens to qualify.

### 5.3 Dual citizenship

In British nationality law there is no problem with dual nationality, which is where a person holds the nationality of two or more countries. This is not the case in all countries. Some countries only permit their citizens to hold one citizenship, their own. If a

person acquires another nationality, that person may automatically lose their existing nationality.

While this is not a problem which can be addressed in British nationality law, it represents a real barrier to naturalisation as British by EU citizens of countries that do prohibit dual citizenship. For the reasons already explored, such barriers matter more after Brexit than they did before.

## Conclusion

British nationality laws on the acquisition of British citizenship were written long before the advent of the automatic right of permanent residence by EU citizens. The way that EU law interacts with domestic UK nationality legislation has not always been clear, but it is notable that the Home Office has since the year 2000 repeatedly made policy choices to make it harder for EU citizens and their children to acquire or qualify for British citizenship, most recently in November 2015 with the change to the documentation EU citizens are required to submit if applying for naturalisation.

The consequences for children of two EU citizen parents or an EU citizen and non-EU citizen parent are potentially more severe. Where neither of the parents is British at the time of the child's birth, a child will later struggle to prove the British citizenship to which he or she was entitled from birth, struggle to show that he or she meets the criteria for registration or be at risk of simply being overlooked by parents who do not consider applying for British citizenship for their children or who cannot or will not pay the substantial fees required.

Meanwhile, those children of EU citizens living in the UK but born abroad will never qualify for British citizenship as children and will have to wait until adulthood in order to apply for naturalisation in their own right. By the time they reach adulthood, they may face new difficulties, for example if they spent part of their late childhood abroad, for example in education abroad, have acquired criminal convictions or cannot afford the necessary fees.

The legacy of the problems in acquiring permanent residence and therefore British citizenship are likely to result in significant problems for the children of many EU families many years, sometimes decades, down the line.

## ABOUT THE PROJECT

*EU families and 'Eurochildren' in Brexiting Britain* is funded by the Economic and Social Research Council (ESRC) as part of *The UK in a Changing Europe* initiative. The study is carried out by a team at the Institute for Research into Superdiversity at the University of Birmingham in partnership with The 3 Million and Migrant Voice. Its aim is to investigate the impact of the EU referendum on EU families and their children living in the UK.

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