Recognition after All: Irish Citizens in Immigration Law after Brexit

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Abstract

This article is concerned with the position of Irish citizens in British immigration law, both historically, and once the free movement of persons regime ceases. Drawing on legal and archival material, it traces the status of Irish citizens in British immigration law since the establishment of the Irish state in 1921-1922. Until the early 1960s, Irish citizens were treated as British subjects, or as if they were, and therefore benefitted from right to enter and reside in the United Kingdom, and immunity from deportation from it. When the Commonwealth Immigrants Act 1962 and Immigration Act 1971 introduced immigration restrictions and deportation for British subjects from the colonies and Commonwealth, the policy was to exempt Irish citizens in practice. Although the common travel area appears to have been the primary reason for that policy, it was highly controversial at the time, as it reinforced the view that that legislation was racially discriminatory. The legacy of that controversy, however, was inadequate provision for Irish citizens in immigration law after 1 January 1973, something which was masked by the availability of EU free movement rights as an alternative. These inadequacies are being addressed as the free movement of persons regime ceases, through an exemption from requirements to obtain leave to enter and remain in the Immigration and Social Security Co-ordination (EU Withdrawal) Bill. It is linked to the wider normalisation of the two states' relationship, which has enabled full recognition of the established patterns of migration and mobility between them.

Introduction

What will be the position of Irish citizens in immigration law after Brexit is completed? In the period after Britain and Ireland joined what became the European Union on 1 January 1973, the immigration status of Irish citizens was largely an academic question, as they had EU rights *vis-à-vis* the United Kingdom concerning entry, residence, economic activity, equal treatment, exclusion and deportation.[1] Once the free movement of persons regime ceases to apply – in all probability, on 31 December 2020 - the EU-UK Withdrawal Agreement will guarantee the rights of Irish citizens, and their family members, who were previously resident in the United Kingdom in accordance with that regime.[2] Irish

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[1] The term 'Ireland' is now the legally correct name of that state. Depending on the context, the terms 'Eire', 'Irish Free State', 'Irish state' and 'Republic of Ireland' are also used here. 'United Kingdom' and 'Britain' are treated as synonyms.

[2] Agreement on the withdrawal of the United Kingdom from the European Union [2020] OJ L 29/7, Part 2.

citizens will also benefit from the expansive approach taken in the EU settlement scheme, which protects prior EEA residents and their family members, irrespective of prior qualifying residence.[3] What though will be the immigration status of Irish citizens who arrive in the United Kingdom subsequently to the cut-off date?

In the aftermath of the 2016 referendum, the British and Irish Governments agreed to protect the open-borders approach of the common travel area between the two states, once Britain had left the EU.[4] The consensus between the two Governments was later reflected in a *Memorandum of Understanding concerning the Common Travel Area and associated reciprocal rights and privileges*, published on 8 May 2019, which recognised a range of rights of British and Irish citizens in the other state, including in respect of entry and residence.[5] Within the United Kingdom, once the free movement of persons ends, that result is to be guaranteed through amendments to the Immigration Act 1971, which were set out in the Immigration and Social Security Co-ordination (EU Withdrawal) Bills published on 20 December 2018 and 6 March 2020.[6] Assuming the second Bill passes into law, those amendments will create, for the first time, an express exemption from requirements to obtain leave to enter and remain for Irish citizens as a category.

This article will show why legislative change is necessary to recognise Irish citizens in British immigration law, and will explain why that is occurring only now. To do so, it will trace the status of Irish citizens in immigration law since the establishment of the Irish state in 1921-1922, based on an original synthesis of legal and archival material. [7] Section 1 covers the period from the foundation of the Irish state to the early 1960s, when the United Kingdom either treated Irish citizens *as* British subjects, or treated them *as if* they were. Throughout that period, Irish citizens therefore benefitted from British subjects' freedom to enter and reside in the United Kingdom, and their immunity from deportation from it. The second section examines the position of Irish citizens when the Commonwealth Immigrants Act 1962 and Immigration Act 1971 introduced immigration restrictions and deportation for British subjects from the colonies and independent Commonwealth states. In that period, Irish citizens were given preferential treatment – in large part because of the common travel area - which was highly controversial, as it reinforced the critique that the legislation had a racially discriminatory purpose. Section 3 then shows how the legacy of that controversy was incomplete and untransparent provision for Irish citizens in immigration law in the period from 1 January 1973,

[3] In line with the approach in United Kingdom immigration law, the term 'European Economic Area' (or 'EEA') is used to cover all EU27 member states, Iceland, Liechtenstein, Norway and Switzerland.

[4] *The United Kingdom's Exit from and New Partnership with the European Union*, *Cm*. 9417 (February 2017), para 4.6. and para 4.7. On the history of the common travel area, see Bernard Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *Modern Law Review* 855.

[5] Text at https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta.

[6] See (2017-2019) *HC Bills* 309 and (2019-2021) HC Bills 104. The first Bill passed the committee stage in the House of Commons, but lapsed with the eventual prorogation of the 2017-2019 Parliament. The second Bill is essentially identical. At the time of writing, it had passed the House of Commons, and was before the House of Lords.

[7] In footnotes, 'NA' refers to the National Archives (London), and 'NAI' to the National Archives of Ireland (Dublin).

notwithstanding that EU free movement law was available as an alternative. The fourth section examines the significant developments in immigration law in anticipation of Brexit, when Irish citizens have had some advantages under the EU settlement scheme, and more fundamentally will benefit from the clause concerning leave to enter and remain in the current Bill. The article will conclude that this new provision for Irish citizens within immigration law is linked to the wider normalisation of the two states' relationship, as that has enabled full recognition of the established patterns of migration and mobility between them.

1. Irish citizens and British subjects, 1921-1949

In the formative period of the Irish state from 1921, its constitutional relationship to the United Kingdom was a matter of protracted disagreement, which would be resolved only with Ireland's final break with the Commonwealth in 1949. We shall see in this section that the status of Irish citizens as British subjects was the subject of dispute and evolution during this period, which would culminate in legislation in 1948 and 1949 conferring a separate status upon them. Nevertheless, the default position in immigration law was that Irish citizens retained freedom to enter, and to reside in, the United Kingdom, and immunity from deportation, with the only exceptions arising from anti-terrorism legislation in 1939 and wartime restrictions on travel (1940-1947).

1921-1947: Irish citizens as British subjects

The story of the status of Irish citizens in United Kingdom law begins with the Anglo-Irish Treaty, agreed in December 1921 by representatives of the British Government and of the Executive Council chosen by the separatist *Dáil Éireann*. The Treaty would lead to the establishment of the Irish Free State on 6 December 1922 as a dominion within the British Commonwealth.[8] On that date, the Irish state also acquired its own citizenship, based on Article 3 of its 1922 constitution. Nevertheless, under British nationality law, dominion status meant the continued application of British subject status to those born in the Irish Free State, or whose fathers had been so, whether before or after 6 December 1922.[9] In 1921, an alternative model of British-Irish relations had been advanced by Éamon de Valera – the President of the Executive Council, who did not participate in the negotiations - based on the full independence of the Irish state, together with a form of "external association" with the Commonwealth. During the negotiations, the Irish side made an unsuccessful proposal along those lines, which included provision for a "mutual agreement" concerning "reciprocity of civic rights".[10] That idea of reciprocity was also included in de Valera's elaboration of external association as an alternative

[8] Nicholas Mansergh, *The Unresolved Question: The Anglo-Irish Settlement and its Undoing 1912-1972* (1991), Ch. 7.

[9] British Nationality and Status of Aliens Act 1914, section 1. The exceptions concerned a small number of persons who became Irish citizens automatically under Article 3, but who (a) had been born outside the Commonwealth, or (b) had lost British subject status through naturalisation in a 'foreign' state.

[10] 'Memorandum of the proposals of the Irish delegates to the British representatives', 24 October 1921, in Ronan Fanning et al (eds), *Documents on Irish Foreign Policy: Vol I* (1998), pp. 288-290.

to the Treaty: "citizens of Ireland in [Commonwealth] States shall not be subject to any disabilities which a citizen of one of the component States of the British Commonwealth would not be subject to, and reciprocally for citizens of these States in Ireland."[11]

The external association model became much more significant after the 1931 Statute of Westminster granted the dominions autonomy in law-making. That legislation permitted Fianna Fáil Governments under de Valera, in power from 1932, to implement external association in a gradual and unilateral manner.[12] As part of that process, the Irish Nationality and Citizenship Act 1935 set out the first code of rules concerning Irish Free State citizenship. The 1935 Act included a total repeal of statute and common law concerning British nationality in the Free State, backed-up by the statement that "the facts or events by reason of which a person is at any time a natural-born citizen of [the Irish Free State] shall not of themselves operate to confer on such person any other citizenship or nationality". [13] This attempt to reject British subject status for Irish citizens was not though accepted by the British Government: in its view, as long as the Free State remained within the Commonwealth, the British Nationality and Status of Aliens Act 1914 continued to apply.[14] Britain would also maintain that the Irish state remained in the Commonwealth notwithstanding more fundamental constitutional reforms in subsequent years, including the Executive Authority (External Relations) Act 1936, which provided for the Irish state merely to be "associated with" the states of the British Commonwealth, and a new Constitution of Ireland in 1937, which made no reference to the Commonwealth. On the day the 1937 Constitution came into effect, the British Government declared that it was "prepared to treat the new Constitution as not effecting a fundamental alteration in the position of the Irish Free State … as a member of the British Commonwealth".[15] One consequence of the British position was that Irish citizens continued to be treated *as* British subjects. Accordingly, they remained free to enter and reside in the United Kingdom, and were not subject to immigration restrictions under the Aliens Restriction Acts 1914-1919 and the related Aliens Orders.[16]

Free entry by Irish citizens to Great Britain was questioned at various moments in British Government circles in the late 1920s and during the 1930s.[17] In 1927-1929, the perceived effects of Irish migration upon labour markets, pauperism and criminality led to calls for restriction from Scotland, though these were rejected because there was little evidence of social problems due to new immigration.[18] There were also Commonwealth considerations in play at that time: any change would have had to apply to all the dominions, and would have implied a departure from the principle of free movement for British

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[11] 'Proposed Alternative Treaty of Association between Ireland and the British Commonwealth', 14 December 1921, para. 5: *ibid*, pp 362-367.
[12] Mansergh (above, n. 8), Ch. 13.
[13] Irish Nationality and Citizenship Act 1935, section 33.
[14] See statement by the Dominions Secretary, J.H. Thomas, *House of Commons Debates*, 27 November 1934, col 645.
[15] 'Constitution of Eire: Official Empire Attitude: No Vital Change in Status' *Times*, 30 December 1937.
[16] At that time, the main rules were in the Aliens Order 1920 (SR&O 1920, No. 448).
[17] See Sean Glynn, 'Irish Immigration to Britain, 1911-1951: Patterns and Policy' (1981) 8 *Irish Economic and Social History* 50, 61-68.
[18] 'Irish immigration: Memorandum by the Home Secretary', 20 February 1929 (NA CP 45 (29)), and Cabinet Conclusions, 6 March 1929 (NA CC 10 (29)) and Delaney, 'Helots' (n.7, above), pp 242-244.

subjects, which the British Government wished to defend.[19] De Valera's post-1932 constitutional reform agenda also led to discussion of possible restrictions upon free immigration for Irish citizens, but that option was not pursued, lest it give de Valera an excuse for "extreme measures, such as the declaration of a republic".[20] In 1939, the introduction of a passport and visa system between both parts of Ireland and Great Britain was contemplated in response to an IRA bombing campaign in England, but that idea was rejected by the Home Secretary on the grounds of cost, disruption to holiday and business traffic, and the possibility of evasion.[21] Instead, the Prevention of Violence (Temporary Provisions) Act 1939 created powers of expulsion and prohibition from Great Britain of persons directly or indirectly involved in acts of violence relating to "Irish affairs".[22] As these provisions probably only affected persons entitled to reside on the island of Ireland, they can be seen as the first example of a restriction affecting Irish citizens.

The second world war then led to new and systematic immigration controls and restrictions upon persons arriving in Great Britain from the Irish state. On 1 September 1939, two days before war was declared, the United Kingdom introduced controls on travel between the island of Ireland and Great Britain for both aliens and British subjects.[23] Substantive restrictions upon entry and residence by all British subjects travelling from either part of Ireland followed in June 1940, which included a requirement to obtain leave to enter on arrival from an immigration officer. It was a precondition to the granting of leave that the person possessed a permit issued in Great Britain or Northern Ireland, or a visa issued by a new United Kingdom Permit office in Dublin.[24] This was the first occasion on which a category of British subject had faced limits upon entry to the United Kingdom, and the only period when such restrictions have applied to persons arriving from the Irish state. The Passenger Traffic Orders which contained these requirements upon British subjects would be allowed to lapse at the end of 1947. Controls on aliens arriving in Great Britain from the island of Ireland would though remain in place until April 1952, when an agreement on immigration control concerning aliens was reached with the Irish state, which is the origin of the contemporary 'common travel area'.[25]

1948-1949: a separate status

[19] 'Irish migration: Memorandum by Dominions Secretary', 10 April 1929 (NA CP 109 (29)).
[20] Cabinet Conclusions, 15 January 1934 (NA CC 1 (34)) and Delaney, 'Helots' (n.7, above), pp 248-250.
[21] 'IRA outrages: Memorandum by the Home Secretary', 30 June 1939 (NA CP 147 (39)).
[22] In the period from 28 July 1939 to 30 June 1940, 158 persons were subject to expulsion orders and 17 to prohibition orders: 'Prevention of Violence (Temporary Provisions) Act, 1939' (1939-1940) *HC Papers* 151.
[23] Aliens Order 1939 (SR&O 1939 No. 994), Aliens (Approved Ports) Order 1939 (SR&O 1939 No. 1057) and Passenger Traffic Order 1939 (SR&O 1939 No. 1096).
[24] Passenger Traffic Order 1940 (SR&O 1940 No. 1060, 21 June 1940).
[25] Ryan (n. 4, above), p. 858. The change was made by the Aliens (No. 2) Order 1952, SI 1952 No. 636. The term 'common travel area' was first used in 1953 to refer to the control-free area comprising the United Kingdom, the Channel Islands, the Isle of Man, and the Republic of Ireland: Aliens Order 1953 (SI 1953 No. 1671), Art 3.

A formally distinct status for Irish citizens, separate from British subjects, would emerge in the post-war period, while leaving their position in immigration law intact. The initial source of change was a fundamental revision of British nationality law after the Canadian Government proposed legislation in 1945 under which British subject status would follow from its own nationality. That proposal would have overturned the previous approach, based upon a 'common code' governing the acquisition of British subject status throughout the Commonwealth, set out in Westminster legislation. Faced with the Canadian proposal, the British Government concluded that all Commonwealth states should adopt the new model, so that the nationality of each of them would be the gateway to British subject status.[26] That necessitated the creation of a separate nationality covering the United Kingdom and its remaining colonies ('citizen of the United Kingdom and colonies', or 'CUKC'). The gateway model would be put in place by the British Nationality Act 1948, with effect from 1 January 1949.

The disputes concerning the status of Irish citizens presented a difficulty for the gateway model, however. In Cabinet discussions, it was recognised that there was "no prospect that Eire will now legislate to provide that Eire citizens are British subjects".[27] That was confirmed by the Irish Government's response to an outline of the legislation, which it transmitted in January 1947.[28] That document reflected the external association approach, stating that "the Irish people can acknowledge no other nationality or allegiance" than to the Irish nation and Irish state, and advocating "enjoyment of reciprocal rights" as "the only sound basis for dealing with the problem of British subjects in Ireland and of Irish citizens in Great Britain". Faced with this position, the 1948 Act separated British and Irish nationality, by omitting Ireland from the list of states whose nationalities conferred British subject status and its new equivalent, 'Commonwealth citizenship'.[29] It followed that from 1 January 1949, persons born in Irish state territory, or to a father who had been born in that territory, would no longer become British subjects. As regards those born before 1949, the 1948 Act allowed an Irish citizen who desired to retain British subject status to give notice to that effect and set out three possible grounds: that they were or had been in Crown service under the United Kingdom government; that they held a British passport issued by the United Kingdom government or that of a British territory; or, that they had "associations by way of descent, residence or otherwise" with the United Kingdom or a British territory.[30] A successor to this provision remains in force.[31]

In parallel, the 1948 Act created a distinct status for Irish citizens. For the purposes of that Act, Irish citizens were not classed as British subjects, yet were also excluded from the category of "aliens", while the Irish state was excluded from the category of "foreign country.[32] The future legal status of Irish citizens was addressed by section 3(2) of the Act (which remains in force). Section 3(2) provided that

[26] 'Changes in Nationality Law', joint memorandum by the Home Secretary and Dominion Affairs Secretary, 29 July 1946 (NA CP (46) 305) and 'British Nationality Law', memorandum by the Home Secretary, 30 August 1946 (NA CP (46) 331).
[27] 'Changes in Nationality Law', 29 July 1946 (n. 26, above), p. 4.
[28] Department of External Affairs, 'Aide-Mémoire', 23 January 1947 in Crowe *et al* (eds), *Documents on Irish Foreign Policy, Vol VIII: 1945-1948* (2012), pp 323-324.
[29] For the list of 'gateway' states, see British Nationality Act 1948, section 1(3).
[30] British Nationality Act 1948, section 2(1).
[31] British Nationality Act 1981, section 31.
[32] British Nationality Act 1948, section 32(1).

any law in force on the cut-off date when the Act came into effect (i.e., 1 January 1949), would continue to apply to Irish citizens "in like manner" as to British subjects.[33] As that principle covered both common law and statute law, Irish citizens continued to benefit from the existing common law rights of British subjects concerning freedom of entry and residence, and immunity from deportation, in relation to the United Kingdom.

This approach, which treated Irish citizens *as if* they were British subjects, at least for the time being, would be developed further in late 1948 and 1949, when the Irish state ended its constitutional links to the Commonwealth, by repealing the Executive Authority (External Relations) Act 1936, and adopting legislation describing itself as a republic.[34] Initially, the legal advice to the British Government was that the repeal of the 1936 Act would oblige the United Kingdom and the dominions to treat the Irish state as 'foreign' for trade and citizenship matters, to avoid the invocation of 'most favoured nation' clauses by non-Commonwealth states.[35] The risks as regards trade came to be considered less significant, because the United Kingdom's preferential trade agreements with the Irish state were protected under the General Agreement on Tariffs and Trade.[36] As regards citizenship, a political agreement - drawing upon the language of external association - was reached in November 1948: a "reciprocal exchange of citizenship rights" between the Irish state on the one hand, and Australia, Canada, New Zealand and the United Kingdom on the other.[37] In light of that agreement, the Prime Minister, Clement Attlee declared to the House of Commons that, despite the Irish state's changed status, the British Government would not treat it as a foreign country, or its citizens as foreigners.[38] At the request of the Irish ministers who participated in the negotiations, the existence of this agreement was not made public by the two Governments.[39]

The distinct status of Irish citizens was now developed within the Ireland Act 1949. That confirmed the equation of Irish citizens to British subjects in section 3(2) of the British Nationality Acy 1948, while extending the cut-off date under it by one year (i.e. to laws in force on 1 January 1950).[40] More importantly, section 2 of the 1949 Act – which remains in force - stated that "the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom … whether by virtue of a rule of law or of an Act of Parliament or any other enactment or instrument whatsoever,

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[33] An exception was made for the extraterritorial effect of criminal offences: see British Nationality Act 1948, section 3(1), which remains in force.
[34] Republic of Ireland Act 1948, which came into effect on 18 April 1949.
[35] Jowitt to Attlee, 9 October 1948 (NA CAB 1/46).
[36] 'Repeal of the Eire Executive Authority (External Relations) Act 1936: Effect on Special Privileges Accorded to Eire: Note by the Lord Chancellor', 10 November 1948 (NA CP (48) 264).
[37] 'Eire's Future Relations with the Commonwealth: Memorandum by the Lord Chancellor and the Secretary of State for Commonwealth relations' (NA CP (48) 272, 17 November 1948), para. 7. On the negotiations, see Ronan Fanning, 'The Response of the London and Belfast Governments to the Declaration of the Republic of Ireland, 1948-49' (1981) 58 *International Affairs* 95, 97-103.
[38] *House of Commons Debates*, 25 November 1948, col. 1414.
[39] 'Eire's Future Relations with the Commonwealth' (n. 37, above), para. 7, according to which "For political reasons .. they were anxious to avoid any implication that this [i.e. granting reciprocity of rights] was being done as part of a bargain with other Commonwealth Governments".
[40] Ireland Act 1949, section 3(1)(a)(i) and section 4.

whether passed or made before or after the passing of this Act". It then set out a rule of interpretation concerning Irish citizens, that "references in any Act of Parliament, other enactment or instrument whatsoever, whether passed or made before or after the passing of this Act, to foreigners, aliens, foreign countries, and foreign or foreign-built ships or aircraft shall be construed accordingly". These statements differed from those in the 1948 Act by being applicable into the future. In relation to immigration law, the effect of section 2 of the 1949 Act was to ensure that Irish citizens not only benefitted from the *existing* rules on freedom of movement for British subjects, but also that they had an *ongoing* exemption from any immigration laws specifically applicable to aliens.[41]

2. Preferential status for Irish citizens in 1962 and 1971

The freedom of Irish citizens from immigration restrictions, based on their being equated with British subjects in the legislation of 1948 and 1949, would not provide an enduring solution. It came into question from the mid-1950s onwards, as limits to immigration on colonial and Commonwealth citizens – who were British subjects – came to be debated, and then introduced through legislation from 1962 to 1971.[42] As we shall see, in this period, Irish citizens obtained a complicated and controversial preferential position, so that they were subject to restrictions in theory, while being exempt in practice.

The 1950s: towards restriction of Commonwealth migration

For a decade from 1952, Conservative Governments under Churchill, Eden and MacMillan debated restrictions upon what they described as "coloured" immigration. For many years, such legislation was constrained by their wish to avoid the appearance of racial discrimination, coupled with a reluctance to impose controls upon the predominantly white populations of the 'old' dominions.[43] These considerations would lead the Cabinet not to take forward draft legislation proposed in 1955 by the Home Secretary, Gwilym Lloyd George.[44]

Because of the sensitivity concerning appearances, the position of Irish citizens presented a conundrum in these Cabinet discussions: would they be exempt from immigration restrictions, or

[41] The Irish Government would reciprocate through the Citizens of United Kingdom and Colonies (Irish Citizenship Rights) Order 1949 (SI No. 1 of 1949) and related Orders adopted as SI No. 2 of 1949 (New Zealand), SI No. 18 of 1949 (Australia), SI No. 198 of 1950 (South Africa), SI No. 11 of 1951 (Southern Rhodesia) and SI No. 89 of 1951 (Canada).

[42] This section covers the Commonwealth Immigrants Act 1962 and the Immigration Act 1971. The important legal developments in the Commonwealth Immigrants Act 1968 are not discussed, as they did not impact upon the relative position of Irish citizens.

[43] See D. W. Dean, 'Conservative Government and the Restriction of Commonwealth Immigration in the 1950s: The Problems of Constraint' (1992) 35 *Historical Journal* 171-194 and Randall Hansen *Citizenship and Immigration in Post-War Britain* (2000), pp 62-100.

[44] For the proposals, see 'Memorandum on the Bill' and the text of the draft Bill, attached to 'Colonial Immigrants', 29 October 1955 (NA CP (55) 166).

treated favourably in the application of any new law? As they were not British subjects, special treatment for Irish citizens, relative to colonial and Commonwealth citizens, would be anomalous in constitutional terms, and would expose the Government to the - essentially correct - criticism that the core purpose of legislation was to restrict non-white immigration. Lloyd George in particular would highlight the potential for "political objections" on these points in the 1955 discussions.[45] In 1956, a Cabinet committee on immigration legislation, under the Lord Chancellor, Lord Kilmuir, would make various arguments for special arrangements for Irish citizens, including the 1948-1949 precedents, and the disruptive effect of controls upon travel between the two islands and upon "the ready flow of Irish labour".[46] In its report, the situation of Northern Ireland was a significant consideration: as immigration control was impracticable at the Irish land border, it could not be applied to Irish citizens arriving from the Republic of Ireland without extending it to Northern Ireland, which "would be offensive to the sentiments of the patriotic and loyalist majority of the population, who would have to be required to carry documents of identity".[47]

As immigration legislation was being drafted in the 1950s, fear of political objections to special treatment of Irish citizens, coupled with the desire to avoid immigration control on arrivals to Great Britain from the island of Ireland, resulted in an apparently illogical outcome: Irish citizens would be covered by the legislation, without any intention to apply the powers to anyone arriving from the Irish state. The Bill considered in Cabinet in 1955 would have permitted restrictions upon the entry, and the deportation, of British subjects, other than those born in the United Kingdom, the Channel Islands and the Isle of Man, or possessing a passport issued by the Government of one of those.[48] That draft Bill expressly extended to Irish citizens, subject to an exemption for any British subjects or Irish citizens who were ordinarily resident in the area of 'British Islands' – including both parts of Ireland - when they travelled within that area. It followed that Irish citizens would have been potentially subject to restrictions on arrival in the United Kingdom from outside the common travel area. Irish citizens were also covered by a draft Bill to permit the deportation of British subjects, considered in Cabinet in 1959, but not taken forward.[49] That had an exemption for persons born in the United Kingdom, or whose father had been so, or either of whose parents was ordinarily resident in the United Kingdom at the time of their birth. It would have permitted the deportation of (non-exempt) persons who had been ordinarily resident in the United Kingdom for less than five years, upon the recommendation of a court, after conviction for a criminal offence for which imprisonment was possible. Nevertheless, the report to Cabinet stated that Irish citizens were included merely for "presentational reasons", as "in practice … it would be impossible to prevent their re-entry".[50]

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[45] Ibid.
[46] 'Colonial Immigrants: supplementary Report of the Committee of Ministers', 14 November 1956 (NA CP (56) 263), paras 3 and 4.
[47] Ibid, para 4(c).
[48] Clause 1 of the draft Bill, attached to 'Colonial Immigrants' (n. 44, above).
[49] The draft Bill is attached to 'Commonwealth Immigrants', 20 January 1959 (NA C (59) 7). Deportation would also have been possible for offences involving unlicensed premises or prostitution.
[50] Ibid.

The Commonwealth Immigrants Act 1962

In response to growing public and parliamentary pressure for legislation, powers to restrict entry and residence by persons from colonies and independent Commonwealth states, and to permit their deportation, were put in place by the Commonwealth Immigrants Act 1962, with effect from 1 July 1962.[51] The same political considerations as before would lead to the inclusion of Irish citizens within the scope of the powers. In 1958, Rab Butler, the Home Secretary responsible for the Bill in 1961, had stated that "to leave the Republic of Ireland outside the scope of the Bill and to bring the whole Commonwealth within it would invite attack".[52] In 1960, he maintained the position that "such legislation would clearly have to apply to the whole Commonwealth and the Irish Republic", but that "it would be impracticable to enforce it against the Irish in the absence of any immigration control between the United Kingdom and the Irish Republic".[53] After the Bill had been published, press and parliamentary reaction concerning its application to the Republic of Ireland led Butler to present a specific memorandum to the Cabinet on the topic.[54] It was agreed that he would make a statement concerning the practical difficulties of control towards arrivals from the Republic of Ireland in the second reading debate on the Bill.[55] That he did in the following terms:

> "if we are to operate a control against the citizens of the Irish Republic we should have to institute a control within the United Kingdom itself …. The Government take the view that this would be an intolerable imposition upon British citizens, and would be treated as such."[56]

Much as in 1956, the Government's core argument for avoiding controls upon arrivals from the Republic of Ireland to Great Britain was therefore based on the unacceptability of controls upon arrivals from Northern Ireland.

If there was to be no immigration control on arrivals from the Irish state to the United Kingdom, it followed that its Government's co-operation was needed in upholding the new restrictions upon colonial and Commonwealth migration. Accordingly, in October 1961, a Home Office representative outlined the proposals to officials in Dublin, with a view to obtaining their co-operation in preventing the Irish state from being an "open back-door".[57] It was explained that, although Irish citizens would

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[51] For a discussion, see Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (1997), pp. 155-166, and Hansen (n. 43, above) pp. 100-121.
[52] 'Commonwealth Immigrants', 25 June 1958 (NA C (58) 132).
[53] 'Coloured Immigration: Memorandum by the Secretary of State for the Home Department', 19 July 1960 (NA C(60) 128).
[54] 'Commonwealth Immigrants Bill: Application to the Irish Republic', 8 November 1961 (NA C (61) 180).
[55] Cabinet Conclusions, 9 November 1961 (NA CC (61) 55).
[56] *House of Commons Debates*, 16 November 1961, col. 701. See too Butler's remarks at the Committee stage: *House of Commons Debates*, 5 December 1961, col. 1184.
[57] Department of Justice, 'Discussion with Mr Chin-Chen of the British Home Office in the Department of Justice on 19th October', 20 October 1961 (NAI DT S15273B). The meeting was referred to in Butler's subsequent Cabinet memorandum (n. 54, above).

be covered by the legislation, immigration control would not be applied to arrivals from the Irish state, and that Irish citizens arriving from elsewhere would not be subject to immigration restrictions. The following month, the Irish Government confirmed its willingness to adapt its law and policy to reflect the new British legislation.[58] It appears therefore that the *quid pro quo* for the Irish Government's support for the new immigration restrictions was freedom of movement for Irish citizens, irrespective of where they arrived in the United Kingdom from.

Part I of the 1962 Act conferred a new discretionary power upon immigration officers, acting in accordance with instructions by the Home Secretary, to refuse admission to the United Kingdom, or to impose conditions upon admission, of "Commonwealth citizens".[59] Part II of the Act introduced a new power of deportation of Commonwealth citizens who had been convicted of criminal offences, on the terms contemplated in 1959.[60] Although the starting-point was that these new powers applied to *all* British subjects, all persons born in the United Kingdom were exempt from them, as were certain other persons with a close connection to it (though this was formulated differently in the two Parts).[61] Irish citizens were expressly equated to Commonwealth citizens in both Parts, so that they were covered by the powers concerning both admission and deportation.[62] In the operation of the legislation, however, the discretionary nature of the 1962 Act powers concerning admission enabled a preferential policy. Immigration controls were never applied to anyone travelling from the Irish state to Great Britain or Northern Ireland. As regards Irish citizens arriving from elsewhere, the practice under the 1962 Act was to admit them with a passport stamp recording the date and port of arrival.[63] The new deportation powers were though relied upon: by October 1967, some 1538 recommendations for deportation, and 872 deportation orders had been made against Irish citizens.[64]

Political controversy, 1961-1970

In Parliament in 1961, the Labour opposition had criticised the preferential treatment of Irish citizens, as evidence of race discrimination, and for weakening Commonwealth principles. Labour leader Hugh Gaitskell pithily summarised the two arguments as follows: "with the Irish out all pretence has gone. It is a plain anti-Commonwealth measure in theory and it is a plain anti-colour measure in practice."[65] The accuracy of this critique of the legislation itself appears undeniable. For example, in a Cabinet

[58] *Dáil Debates*, 15 November 1961. The corresponding Irish legislation was the Aliens (Amendment) Order 1962 (SI 1962 No. 112), Article 3 and the Aliens (Exemption) Order 1935 (Revocation) Order, 1962 (SI 1962 No. 113).
[59] Commonwealth Immigrants Act 1962, section 2(1) ("an immigration officer may …") and section 16(3).
[60] Commonwealth Immigrants Act 1962, sections 6 and 7.
[61] See Commonwealth Immigrants Act 1962, sections 1(2) and 6(2).
[62] Commonwealth Immigrants Act 1962, sections 1(4) and 6(3), respectively.
[63] This conclusion based on the author's examination of such passport stamps from 1967 to 1971.
[64] Home Office, 'Memorandum on returning Irish deportees', December 1967 (NA HO 344/74). These amounted to 61% of the 2511 recommendations for deportation, and 63% of the 1360 deportation orders, under the Act.
[65] *House of Commons Debates*, 16 November 1961, col. 799.

memorandum in 1960, Butler wrote of the legislation that "in practice, it would probably be necessary to use it only against coloured immigrants".[66] What may be doubted is that the special treatment of Irish citizens can be reduced to this explanation, given the political imperative within the United Kingdom to avoid controls on arrivals from the island of Ireland.[67]

After the adoption of the legislation, the Home Office appears to have been fearful of re-opening any controversy concerning the relative position of Irish citizens. That was seen in 1964 when Frank Soskice, the new Home Secretary in a Labour Government, asked for information concerning the Irish arrangements. The Home Office advice explained the link between the treatment of Irish citizens and co-operation in immigration control with the Irish authorities, and concluded that "it would surely be a pity to disturb these convenient arrangements simply to meet the view that the special treatment of the Irish is proof of a 'colour bar' mentality on our part".[68] The same reflex against disrupting the existing arrangements can be seen in a 1967 review of policy concerning deportation of Irish citizens, which showed that they often simply returned to the United Kingdom.[69] Nevertheless, the Home Office view was that it would have been unacceptable to suspend the deportation of Irish citizens administratively, as that would have put them in a better position than persons from other parts of the Commonwealth.[70]

The policy of preferential treatment of Irish citizens would continue when the Immigration Act 1971 brought aliens and those covered by the Commonwealth Immigrants Act 1962 under a single legislative scheme, covering entry, residence and deportation, with effect from 1 January 1973. Prior to the June 1970 election, the Conservative leader, Ted Heath, had declared to the *Irish Post* (a newspaper aimed at the Irish community in Britain) that there was no intention to change the legal status of Irish persons as the aliens and Commonwealth parts of immigration law were brought together.[71] The same message was given to the Irish Government before and after the Immigration Bill was published.[72]

The controversy surrounding the treatment of Irish citizens and racial discrimination would continue to exercise the Home Office. When the Immigration Bill was published in 1970, organisations engaged with Commonwealth migrants were critical of the special arrangements being made for Irish citizens.[73]

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[66] 'Coloured Immigration', 19 July 1960 (n. 53, above).
[67] The same considerations were at the heart of the post-1952 common travel area arrangements: see Ryan, n. 4, above.
[68] 'Commonwealth Immigrants Act: The Irish Problem', November 1964 (NA HO 344/ 284).
[69] According to the 'Memorandum on returning Irish deportees' (n. 64, above), nearly one-third of those subject to deportation orders (233 of 713 individuals) had subsequently been detected in the United Kingdom.
[70] *Ibid*.
[71] 'Outrage among the Irish: Are the Irish Foreigners?' *Times*, 11 November 1970 referring to a letter by Edward Heath printed in the *Irish Post* earlier in 1970.
[72] Telegram from Douglas-Home to Dublin Embassy, 10 November 1970 (NA HO 394/59) and undated 'note of meeting with O'Toole of the Department of Justice on 12 March 1971' (NA HO 394/237).
[73] See the comments of representatives of the Joint Council for the Welfare of Immigrants and of the Committee on UK citizenship quoted in 'Report on permit for Irish discounted', *Times*, 11 November 1970.

That may explain the concern within the Home Office to minimise the visibility of the special treatment for Irish citizens. That can be seen in advice to the drafters of the Immigration Bill, in relation to powers over arrivals from the Republic of Ireland:

> "The intention is to impose … restrictions on all persons subject to control except citizens of the Republic, and the enabling provision should (unobtrusively, if possible) permit this measure of discrimination".[74]

As we shall see in the next section, that approach of having a favourable policy, but doing so "unobtrusively" to avoid political criticism, would lead to a lack of transparency and comprehensiveness in the legal provision for Irish citizens.

3. The uncertain legal status of Irish citizens, 1973-2020

The unwillingness to state plainly on the face of legislation in 1971 that Irish citizens were to be exempt from restrictions on entry and residence would ultimately generate a series of legal problems. These are explored here, by considering in turn the position under the 1971 Act, in EU free movement law and in relation to the acquisition of British citizenship.

Irish citizens and the Immigration Act 1971

An analysis of the legal position of Irish citizens under the Immigration Act 1971 must start from the fact that, unlike the *discretionary* powers concerning admission in the 1962 Act, which could be waived administratively, the Immigration Act 1971 imposes *obligations* on individuals, which cannot be waived. Persons with the right of abode are excluded entirely from restrictions under the 1971 Act, and that category now covers British citizens and a narrow class of other Commonwealth citizens.[75] Under section 3(1) of the 1971 Act, a person without the right of abode may not enter the United Kingdom unless they obtain leave on an individual basis, or are in a category which is exempt from the requirement (e.g. diplomats or members of the armed forces). As Irish citizens as a class have never had the right of abode, they have always been covered by the requirement in section 3(1) of the 1971 Act. Nor does the legislation of the late 1940s assist them: section 3(2) of the British Nationality Act 1948 does not apply to laws adopted on or after 1 January 1950, while section 2 of the Ireland Act 1949 is inapplicable, as the 1971 Act does not distinguish between "foreigners" or "aliens" and others, but rather applies to all persons who lack the right of abode.

The initial regime under the 1971 Act did establish an exemption for Irish citizens, but in a roundabout way, and only if they arrived from the Republic of Ireland. Under section 1(3) of the Act - still in force, without alteration - immigration controls do not apply to those arriving in the United Kingdom from

[74] 'Immigration Bill: Instructions to Parliamentary Counsel', 2 October 1970 (NA HO 394/3), para 2.331.
[75] Immigration Act 1971, section 2.

the Channel Islands, the Isle of Man, and the Republic of Ireland, i.e. elsewhere in the common travel area.[76] Section 1(3) goes on to provide that persons who arrive from those places do not require leave to enter, except where the person has been excluded from the benefit of that principle under the Act. Section 9 of the Act then contains two order-making powers in respect of arrivals from the Republic of Ireland, which were the basis for the Immigration (Control of Entry through Republic of Ireland) Order 1972 (still in force, with amendments).[77] One power enables section 1(3) to be excluded altogether "for such purposes as may be specified".[78] That is the basis for Article 3 of the 1972 Order, which *inter alia* denies the benefit of section 1(3) to any person who has been excluded from the United Kingdom by the Secretary of State, on "conducive to the public good" grounds, or using public policy powers deriving from EU law.[79] The other power permits conditions to be imposed upon persons arriving from the Republic of Ireland *inter alia* where they previously entered it from outside the common travel area.[80] That power is the basis of Article 4 of the Order, which confers a form of deemed leave for a period of three months upon persons who lawfully entered the United Kingdom from the Republic of Ireland, having previously come from elsewhere. In the 1972 version of Article 4, Irish citizens alone were stated to be exempt from this deemed leave arrangement, and it was this provision, read together with section 1(3) of the Act, that "unobtrusively" established an exemption from the leave to enter requirement for them. The specific reference to Irish citizens would be removed in 2014, when the benefit of the Article 4 exemption was extended to *all* persons possessing an EEA nationality - including Irish citizens - or family members, with rights to enter based upon free movement of persons rules.[81]

None of this affected the position of Irish citizens arriving in the United Kingdom from *outside the common travel area*, however. Because of section 3(1) of the 1971 Act, as the law stood on 1 January 1973, they required leave to enter in all circumstances. The policy of permitting entry and residence by Irish citizens arriving from outside the common travel area was not written into law in 1973, but was instead reflected in a statement excluding them from the scope of Immigration Rules for EEC nationals. In its words

> The rules contained in this statement do not … extend to citizens of the Irish Republic, who because the Republic forms part of the Common Travel Area … are admitted freely to the United Kingdom, whether coming from within or outside that Area, except in cases

[76] The case of an Irish citizen entering the United Kingdom from the Isle of Man or the Channel Islands is not examined, as it does not appear to raise distinct issues.
[77] SI 1972 No. 1610. A further power, in section 10 of the 1971 Act, to exclude section 1(3) in relation to arrivals across the Irish land frontier "either generally or for any specified purpose", has not been used.
[78] Immigration Act 1971, section 9(6).
[79] Article 3 of the 1972 Order, as amended by the Immigration (Control of Entry through Republic of Ireland) (Amendment) Order 2014 (SI 2014 No. 2475).
[80] Immigration Act 1971, section 9(2)(a).
[81] Article 4 of the 1972 Order, as amended by the 2014 Order. It is not yet known what the position will be after the end of the Brexit transition period.

where the Secretary of State decides that the exclusion of a particular person is conducive to the public good.[82]

In practice, it appears that the passports of Irish citizens arriving from outside the common travel area were stamped with the date and port of arrival, as they had been prior to the coming into force of the 1971 Act.[83] This was also the practice as regards returning residents to the United Kingdom who had previously been granted indefinite leave, for whom such passport stamps were construed as conferring indefinite leave to enter.[84] We may speculate therefore that the statement about Irish citizens in the Immigration Rules, coupled with these stamps, were taken by the Home Office to confer indefinite leave to enter, outside the Rules.

Whether the notion of conferral of indefinite leave to enter through date stamps was ever legally sustainable - or would be so now - must be considered highly uncertain. In *Bagga* in 1990 the Court of Appeal expressed scepticism about this possibility, because of the requirement in section 4(1) of the 1971 Act that decisions of immigration officers concerning leave should be "exercised by notice in writing".[85] The legal position on this point must be considered unresolved: while Parker LJ was open to allowing a date stamp to confer indefinite leave to enter, where that was clearly the decision-maker's intention, Glidewell LJ would have ruled it out in all circumstances.[86] A further difficulty, of more recent origin, is presented by the Supreme Court's conclusion in *Munir* in 2012 that policies which are in the nature of rules must be published as such in the Immigration Rules.[87] That would seem to preclude a policy or practice today of conferring indefinite leave to enter on Irish citizens, unless that was expressly provided for within the Rules.

EU free movement rights

From 1 January 1973, EU free movement rights provided an alternative legal basis for Irish citizens' entry and residence which – for the reasons indicated - was of particular relevance to those arriving from outside the common travel area. The EU regime would though have a paradoxical effect in practice, as it led to the ending of date stamps – which at least arguably conferred indefinite leave to enter - without offering comprehensive protection in all cases.

To understand why, it is necessary to consider the changing way in which EU rights have been given effect within United Kingdom immigration law. In 1973, the approach taken in the Immigration Rules

[82] *Statement of Immigration Rules for Control on Entry: EEC and other Non-Commonwealth Nationals* (HC 81, 25 January 1973), p. 5.
[83] This conclusion is based on the author's examination of such passport stamps for 1973 and 1985.
[84] See Ian MacDonald and Nicholas Blake, *Macdonald's Immigration Law and Practice* (4th edition, 1995), para 3.59. I am grateful to Simon Cox for having pointed me to this source. Note that the legal position until 30 July 2000 was that *all* leave lapsed once a person left the common travel area: Immigration Act 1971, section 3(4).
[85] *R* v. *Secretary of State for the Home Department, ex parte Bagga* [1991] 1 QB 485.
[86] *Bagga*, at pp. 500 and 507, respectively.
[87] *R (Munir)* v. *Secretary of State for the Home Department* [2012] UKSC 32, para 46 (per Lord Dyson).

was that nationals of the other member states and their family members – but not Irish citizens, as explained above - who arrived in the United Kingdom were granted leave to enter, and later a residence permit by way of variation of that leave.[88] In *Pieck* in 1980, the Court of Justice found that approach contrary to the prohibition on entry visas and equivalents in EU secondary legislation relating to workers and their family members.[89] Accordingly, in December 1982, the United Kingdom changed the Immigration Rules so that qualifying EU nationals and family members became "entitled to admission", rather than requiring leave to enter.[90] The tension with the 1971 Act requirement to obtain leave would only be fully resolved when three inter-related developments took effect on 20 July 1994. The first was section 7 of the Immigration Act 1988: it provided that a person entitled to enter or reside because of directly effective free movement rights, or under a statutory instrument implementing EU free movement law, did not require leave to enter or remain under the 1971 Act. The second was the Immigration (European Economic Area) Order 1994, the first such statutory instrument implementing free movement rights in the United Kingdom. Thirdly, a complete new statement of the Immigration Rules, known as 'HC 395', was adopted, which omitted the previous provision concerning the admission of nationals of other member states and their families.[91]

From 20 July 1994, Irish citizens entering from outside the common travel area could rely upon EU rights as implemented in United Kingdom law – i.e. the 1994 Order, and subsequent statutory instruments, and section 7 of the 1988 Act. As HC 395 had also omitted the previous statement which had excluded them from the scope of the Immigration Rules, it followed that such Irish citizens were *dependent upon* those rights. By then, date stamps were anyway no longer being applied to the passports of Irish citizens, which meant that it could no longer be said that they acquired indefinite leave to enter through such a stamp.[92] Though extensive, EU rights were not comprehensive. An Irish citizen might not meet the requirements of qualifying residence under EU free movement law, because they were not, or no longer, engaged in economic activity, or in possession of sufficient resources, or the qualifying family member of an EEA national from another member state who satisfied one of those two tests. The effect of the requirement of qualifying residence was somewhat attenuated from 30 April 2006, when EU law and its implementation in the United Kingdom recognised a right of permanent residence. Nevertheless, acquisition of that right itself depended upon five years' qualifying residence at some point in time, which a long-term Irish resident might not ever have had. EU free movement rights could not therefore ensure that *all* Irish residents were exempt from a requirement

[88] *Statement of Immigration Rules for Control on Entry: EEC and other Non-Commonwealth Nationals* (HC 81, 25 January 1973), paras 50-54 and *Statement of Immigration Rules for Control after Entry: EEC and other Non-Commonwealth Nationals* (HC 82, 25 January 1973), paras 32-39.
[89] *R* v. *Pieck* Case 157/79 [1980] ECR 2171, paras 3-10, with reference to Article 3(2) of Directive 68/360 on the free movement of workers [1968] OJ L 257/ 13. The same restriction on entry formalities arose under Directive 73/148 on freedom of establishment and the provision of services [1973] OJ L 172/ 14.
[90] *Statement of Changes in Immigration Rules*, HC 66, 6 December 1982, paras 66-68.
[91] *Statement of Changes in Immigration Rules*, HC 395, 23 May 1994. HC 395 remains the foundation of the current Immigration Rules.
[92] The author has been unable to determine when the practice of stamping Irish passports ceased, though it appears to have been in the late 1980s.

to obtain leave under section 7 of the 1988 Act.[93] For Irish citizens who last entered from outside the common travel area, there was therefore a gap in relation to those who possessed neither qualifying residence nor (after 30 April 2006) a right of permanent residence.

Issues in nationality law

The lack of comprehensive provision for Irish citizens in immigration law would lead on to uncertainty in the two cases where a person's immigration status is relevant to the acquisition of British citizenship. The first of these concerns a child born in the United Kingdom, neither of whose parents is a British citizen: such a child obtains British citizenship automatically if either parent is "settled" in the United Kingdom on that date, and may be registered as a British citizen while a minor if either parent becomes "settled" later.[94] The other case is naturalisation as a British citizen by an adult, where there are specific requirements concerning immigration status.[95] In each case, the acquisition of British citizenship requires that the relevant person (the parent or the adult) has been in the United Kingdom without being "subject under the immigration laws to any restriction on the period for which [they] may remain," and that that person has not been "present in the United Kingdom in breach of the immigration laws" for a specified period.[96]

Home Office policy has long been to treat *all* Irish citizens as meeting the first requirement - 'no time limits' - once they take up residence in the United Kingdom. That is seen in past statements in the Nationality Instructions that "Citizens of the Irish Republic, whether exercising EEA free movement rights or not, are not normally subject to any form of immigration control on arrival in the UK because of the Republic's inclusion in the Common Travel Area", and that persons who "as Irish nationals … benefit under the Common Travel Area provisions" … "should be regarded as having been free from any restriction under the immigration laws on the period for which they may remain."[97] That approach is defensible for Irish residents who last arrived from the Republic of Ireland: we have seen that they have always had an exemption from the combination of section 1(3) of the 1971 Act and Article 4 of the 1972 Order, and that must be thought to imply that they are without time limits in the United Kingdom.[98] For those who last arrived from outside the common travel area, in contrast, the Home

[93] Statements requiring that non-qualifying EEA nationals instead obtain leave to remain appeared in Article 20 of the 1994 Order, and in Immigration (European Economic Area) Regulations 2006 (SI 2006 No. 1003), Schedule 2, para 1. Equivalent statements were not included in the Immigration (European Economic Area) Regulations 2000 (SI 2000 No. 2326) or the Immigration (European Economic Area) Regulations 2016 (SI 2016 No. 1052, the current instrument). The implications of these differences are outside the scope of this article.

[94] British Nationality Act 1981, section 1(1) and 1(3).

[95] British Nationality Act 1981, Schedule 1.

[96] For the detailed rules, see British Nationality Act 1981, section 50(2), 50(5) and Schedule 1, para. 1(2)(c) and (3)(c).

[97] Nationality Instructions, vol 2, 'European Economic Area and Swiss nationals' as at 31 January 2008 and 3 November 2015, paras 5.3, 8.3 and 8.5.

[98] It should be noted that this is also true for all EEA nationals and family members under the 2014 amendment to Article 4 of the 1972 Order (n. 81, above.)

Office approach was at best based on the questionable theory that Irish citizens were granted indefinite leave to enter at a port. That theory was anyway unsustainable once passport stamps ceased to be issued, and Irish citizens were covered only by EU free movement rights, which may not have protected them in individual cases.

The requirement not to have been present in breach of the immigration laws was given a statutory definition by the Borders, Immigration and Citizenship Act 2009, with effect from 13 January 2010.[99] The amendments introduced by the 2009 Act permit that requirement to be met *inter alia* through having a "qualifying common travel area entitlement". That concept is defined as follows:

> the person— (a) is a citizen of the Republic of Ireland, (b) last arrived in the United Kingdom on a local journey … from the Republic of Ireland, and (c) on that arrival, was a citizen of the Republic of Ireland and was entitled to enter without leave by virtue of section 1(3) of the Immigration Act 1971 (entry from the common travel area).[100]

It is striking that this definition only covers Irish citizens after they arrive from the Republic of Ireland, and is silent about Irish citizens who last arrived from outside the common travel area.[101] What then has been the legal position of an Irish citizen who last arrived from outside the common travel area, and who at some relevant time lacked either qualifying residence or a right of permanent residence derived from EU free movement law?[102] The basis on which such a person could be said *not* to have been in breach of the immigration laws must be considered quite uncertain. That said, given the position set out in the Nationality Instructions (above), that Irish citizens have "not normally" been "subject to any form of immigration control", it appears unlikely that a passport or nationality application involving an Irish citizen has ever been refused for this reason.

4. Developments related to Brexit

The Government position that, because of the common travel area arrangements, it would maintain the policy of allowing entry and residence by Irish citizens after the free movement of persons came to an end, implied two more detailed questions. How would Irish citizens fit into arrangements to protect the right to stay of all EEA nationals and family members who were resident before the end of the transition period? More fundamentally, would there be changes to immigration legislation to address the flaws in the post-1971 arrangements? We will see in this section how the answers to both questions would lead to unprecedented developments within immigration law.

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[99] British Nationality Act 1981, section 50A, inserted by Borders, Citizenship and Immigration Act 2010, section 48.

[100] British Nationality Act 1981, section 50A(5).

[101] Note that the entitlement does not benefit other EEA nationals and family members who were exempted under Article 4 of the 1972 Order in 2014.

[102] This lacuna in the definition was highlighted by Lord Avebury during the passage of the legislation: *House of Lords Debates*, 2 March 2009, cols 521-523. I am grateful to Alison Harvey for having drawn this to my attention.

Irish citizens and the EU settlement scheme

In June 2017, when the Government announced its plans concerning the post-Brexit rights of residence of EEA nationals and family members, it indicated that Irish citizens would be free to apply, but that they would not need to do so.[103] In a subsequent statement, it added that the eligible family members of Irish citizens would be able to obtain a status under the EU settlement scheme without the Irish sponsor doing so.[104] This policy would result in two special provisions for the family members of Irish citizens. The first concerns the possibility under Appendix EU for a non-EEA national child of an EEA parent to obtain indefinite leave, without completing five years' residence. In this case, it is generally a requirement that the parent(s) in question have been granted indefinite leave under Appendix EU, or be applying for it. That requirement is though disapplied in relation to Irish parents (only): in such a case, it is sufficient for the child's application to succeed to show that the Irish parent would be granted indefinite leave if they applied for it.[105]

The second special provision concerns entry clearance for Irish citizens' family members under Appendix EU (Family Permit). Whereas the general rule is that a sponsoring EEA national must already possess indefinite leave or limited leave under Appendix EU, Irish citizens' non-EEA family members may obtain a family permit without that, by satisfying the entry clearance officer that the Irish citizen would be granted such leave, were they to make an application.[106]

A sponsor's possession of both British and Irish citizenship is though a significant potential impediment to applications under the EU settlement scheme by the non-EEA family members of Irish citizens. In *McCarthy* (2011), the Court of Justice held that a person who possesses the nationality of one EU state may not invoke rights under the Citizens Directive against another, where they also hold the latter's nationality.[107] That led the United Kingdom to exclude dual British/ EEA nationals from the benefit of EU free movement rules – including in relation to family sponsorship - with effect from 16 October 2012, subject to transitional provision for family members who had already obtained residence documents.[108] The 2012 change was particularly relevant to Irish citizens resident in the United

[103] Home Office, *Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU* (*Cm* 9464, June 2017), para 5.
[104] Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018), para 2.6.
[105] Immigration Rules, Appendix EU, para EU11, Condition 7(b)(ii). This route to settled status is not required by the Withdrawal Agreement, and has presumably been inserted to ensure equivalence with the position under Part 8 of the Immigration Rules. At the time of writing, this is the only situation in which an application by a non-EEA family member under the EU settlement scheme requires the EEA sponsor to have obtained a status, or to be applying for one.
[106] See Immigration Rules, Appendix EU (Family Permit), Annex I, definition of 'relevant EEA citizen'. The initial version in *Statement of Changes in Immigration Rules* HC 1919 (7 March 2019) did not make provision for Irish citizens, but that oversight was addressed in *Statement of Changes in Immigration Rules* HC 170 (24 October 2019). I am grateful to Rosie Keane for having drawn this to my attention.
[107] *McCarthy v. Secretary of State for the Home Department*, Case C-434/09, [2011] ECR I-03375.
[108] Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012 No 1547).

Kingdom, who would often have acquired both Irish and British citizenship through birth in the United Kingdom to an Irish parent (such as the sponsor in *McCarthy*), or through birth in Northern Ireland. Moreover, Irish citizens are unlikely to benefit from the exception in *Lounes* (2017), that EU citizens who exercise free movement rights, and then obtain the nationality of the member state of residence through naturalisation or registration, may continue to rely upon free movement rights.[109] It follows that Irish citizens are likely to be especially affected by the exclusion of family members of dual British/ EEA nationals from the EU settlement scheme, unless the applicant is covered by the transitional arrangements of 2012, or the sponsor acquired British citizenship after the exercise of EU free movement rights.[110]

The exclusion of dual nationals has itself been modified in relation to persons born in Northern Ireland. The underlying reason is the statement in Article 1(vi) of the British-Irish Agreement 1998 that

> the two Governments … recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments ...[111]

For this purpose, the two Governments also declared that the term "the people of Northern Ireland" meant "all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence."

After the 2016 referendum, the question arose whether it was compatible with the 1998 Agreement to preclude dual British/ Irish nationals from Northern Ireland from sponsoring family members under EU free movement law and the EU settlement scheme. That question was at the heart of litigation involving Emma de Souza, a Northern Ireland-born woman who identified as an Irish citizen, and Jake de Souza, her US national husband, after he was refused a residence document confirming his EU rights, because she was a dual national.[112] Their legal challenge to that decision was unsuccessful in the Upper Tribunal, which concluded that the 1998 Agreement did not confer a right to choose nationality, and anyway could not affect the interpretation of the British Nationality Act 1981, under which Emma de Souza was a British citizen.[113] In a change of direction, on 8 January 2020, as part of proposals aimed at securing the resumption of Northern Ireland's devolved institutions, the British Government announced that "eligible family members of the people of Northern Ireland [would] be

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[109] *Lounes v. Secretary of State for the Home Department*, Case C-165/16, [2018] 2 CMLR 9. For the corresponding amendments to United Kingdom law, see Immigration (European Economic Area) (Amendment) Regulations 2018 (SI 2018 No. 1801).

[110] Definitions of 'EEA citizen' and 'relevant naturalised British citizen' in Immigration Rules, Appendix EU, Annex I.

[111] *Cm* 4705. The terms of Article 1(vi) were endorsed by the Northern Irish political parties which agreed to the multi-party Belfast/ Good Friday Agreement.

[112] 'Belfast tribunal hears arguments on citizens' identity', *Irish Times*, 11 September 2019.

[113] *De Souza* [2019] UKUT 355.

able to apply for UK immigration status on broadly the same terms as the family members of Irish citizens in the UK."[114] That was followed by changes to the Immigration Rules to enable the family members of a "person of Northern Ireland" – defined in line with the declaration of the two Governments in 1998 - to apply under Appendix EU, with effect from 24 August 2020.[115] The effect of this change is that the family members of all 'persons of Northern Ireland' are in the same position as the family members of Irish citizens who are not British citizens. As a result, a person from Northern Ireland need not renounce British citizenship for a family member to be sponsored under Appendix EU. It is significant here because it implies that the family members of persons from Northern Ireland who identify as Irish citizens may rely upon Appendix EU, notwithstanding that they possess British citizenship. It is moreover a precedent for other forms of recognition of 'persons of Northern Ireland', both within immigration law – especially in relation to exclusion and deportation, discussed below - and in other spheres – such as proof of identity.

Recognition for Irish citizens in UK Immigration law

A further, more general, development would address the anomalies of 1962-1971, through express recognition in legislation of the right of all Irish citizens to enter and reside in the United Kingdom. The expected end of the free movement of persons made it imperative to address the inadequacies in the legal provision for Irish citizens explained in section 3.[116] At that point, the lack of transparency to the arrangements in the 1971 Act and 1972 Order would become manifest, while the uncertainty concerning the legal position of arrivals from outside the common travel area would be of far greater practical importance.

Initially, the Government was reluctant to state openly that a general exemption for Irish citizens would be required. That was exemplified in a December 2017 letter on the subject of immigration rights by Lord Callanan, a minister in the Department for Exiting the European Union, which stated that "the Immigration Act 1971 sets out the basic principle of free movement for Irish citizens between the UK and Ireland". [117] That statement was incorrect in its own terms, as the 1971 Act itself contained no express provision concerning Irish citizens' rights of entry. Moreover, the letter's focus on the position as regards arrivals from the Republic of Ireland avoided discussion of the legal problems posed by entry from outside the common travel area. It was the possibility of a 'no deal' Brexit on 29 March 2019 which prompted the Government to address the position of Irish citizens in immigration law. The first hint of such legislation came in a 'no deal technical notice' concerning the common travel area,

[114] Northern Ireland Office, *New Decade, New Approach* (January 2020), Annex A.
[115] *Statement of changes in Immigration Rules* (CP 232, May 2020). This change would lead to the withdrawal of the appeal against the Upper Tribunal ruling: 'Emma De Souza withdraws immigration case after British government concession', *Irish Times*, 21 May 2020.
[116] The case for legislation was set out in a report by Simon Cox and Traveller Movement, *Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future* (4 December 2017), to which the present author contributed.
[117] Lord Callanan letter to Lord Alton, 6 December 2017, deposited in the House of Lords library (available at https://www.parliament.uk/depositedpapers, reference DEP2017-0771). This was a response to the publication of the Cox/ Traveller Movement report (n. 116, above).

published by the Home Office in September 2018, which stated that the common travel area "ensures that British and Irish citizens can move freely between and reside in these islands", and promised that "where required domestic legislation and [bilateral] agreements would be updated to ensure that CTA rights would have a clear legal basis". [118] That was followed by the publication of the first Immigration and Social Security Co-ordination (EU Withdrawal) Bill on 20 December 2018.

The core of clause 2 of the - now second - Immigration and Social Security Co-ordination (EU Withdrawal) Bill concerning Irish citizens is a planned new section 3ZA(1) to the Immigration Act 1971, which would exempt Irish citizens from the requirement to possess leave to enter or remain in the United Kingdom. Crucially, that exemption is to apply to all Irish citizens, irrespective of where they most recently arrived from. This general exemption for Irish citizens is supported by amendments to the 1971 Act provisions relating to the common travel area: where these provisions currently apply to persons other than British citizens, in future they will not apply to Irish citizens either.[119] The only exceptions to the section 3ZA provision are to be where an Irish citizen is subject to a deportation order, or has been excluded from the United Kingdom, and these are considered in turn here.[120]

The deportation of Irish citizens from the United Kingdom is legally possible, but is restricted by immigration law and policy. Firstly, there is an exception from deportation for pre-1973 Irish residents who are ordinarily resident in the United Kingdom for the five years previous to a relevant decision.[121] Secondly, in 2007, the Government made public that Irish citizens were only considered for deportation where a court recommended it, or where "the Secretary of State conclude[d], due to the exceptional circumstances of the case, the public interest require[d]" it.[122] The Immigration Minister reiterated that policy in the House of Commons debates on each version of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.[123] Thirdly, in line with that policy, from the end of the transition period, the UK Borders Act 2007 will be amended to exempt Irish citizens from its provisions concerning automatic deportation, which apply after a sentence of imprisonment of at least 12 months, or any sentence of imprisonment after conviction for a designated serious offence.[124] At that point, Irish citizens will be liable for deportation only under the discretionary powers provided for in the Immigration Act 1971.

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[118] 'Travelling in the Common Travel Area if there's no Brexit deal' (13 September 2018), available from https://webarchive.nationalarchives.gov.uk.

[119] Amendments to Immigration Act section 9(2), section 9(4) and Schedule 4, paras 1 and 4, proposed by Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-20, clause 2(4).

[120] Irish citizens who were resident prior to the free movement of persons cut-off date will have the protection of EU law standards with respect to any potential deportation or exclusion relating to conduct prior to that date: EU-UK Withdrawal Agreement, Article 20, to be reflected in Immigration Act 1971, section 3(5A) and (6A) and Appendix EU, para EU16(d).

[121] Immigration Act 1971, section 7.

[122] Immigration Minister, Liam Byrne, *House of Commons Written Ministerial Statement*, 19 February 2007.

[123] Caroline Noakes, *Immigration and Social Security Coordination (EU Withdrawal) Bill: Fifth sitting*, 26 February 2019, cols. 174-175 and Kevin Foster, *Immigration and Social Security Coordination (EU Withdrawal) Bill: Third sitting*, 11 June 2020, col. 93.

[124] Amendment of UK Borders Act 2007, section 32, by Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019 No. 745), Reg 17.

As regards exclusion, the planned section 3ZA(3) will permit the Secretary of State to issue directions excluding an Irish citizen from the United Kingdom on the ground that that is conducive to the public good.[125] This new power is made necessary by the planned section 3ZA exemption, as it would take Irish citizens outside the scope of the Immigration Rules which permit the refusal of leave on 'conducive' grounds to persons arriving from outside the common travel area.[126] The amendment would also remedy an inconsistency in the law concerning exclusion on 'conducive' grounds of persons arriving *from* the Republic of Ireland: at present, the 1971 Act permits the exclusion of a person arriving from elsewhere in the common travel area only on national security grounds, whereas the 1972 Order contains no such limitation.[127] Where either exception applies, the person in question will lose not only the benefit of the planned section 3ZA, but also that of section 1(3) of the 1971 Act – i.e. they will not be able to lawfully enter the United Kingdom from the Republic of Ireland under common travel area rules either.[128]

There are two limitations to the planned amendments. The first concerns equal treatment for Irish citizens in respect of future family sponsorship. In the House of Commons debates on each of the two Immigration and Social Security Co-ordination (EU Withdrawal) Bills, the Immigration Minister indicated that the policy was that Irish citizens would be able to sponsor family members on the same terms as British citizens.[129] After the free movement of persons ends, Irish citizens who are covered by the EU settlement scheme will be able to sponsor pre-cut-off date partners and parents, and all children. Other resident Irish citizens can expect to be treated as settled, and to be permitted to sponsor family members on the same terms as British citizens under the Immigration Rules. Where a potential difficulty arises is in relation to Irish citizens who wish to *move to* the United Kingdom with family members who are neither British nor Irish citizens: in their case, there is no express provision in the Rules for sponsorship.

The other issue is that the expected provisions as regards deportation and exclusion on 'conducive' grounds, and potential differences in family sponsorship rules, may not fully respect the right of persons from Northern Ireland to identify as Irish citizens, set out in the 1998 Agreement. They may therefore need to retain and to assert British citizenship to obtain the fullest possible protection. Following the precedent of the recent amendments to Appendix EU, provision could be made to

[125] Section 3ZA would also permit exclusion of an Irish citizen who is an "excluded person" under the United Kingdom's international obligations, reflected in section 8B of the Immigration Act 1971. These concern United Nations and European Union sanctions measures, and related regulations adopted under the Sanctions and Anti-Money Laundering Act 2018.
[126] See Immigration Rules, para 320(6) and (19) and para 321A (4) and (5).
[127] Compare Immigration Act 1971, section 9(4)(a) with Immigration (Control of Entry through Republic of Ireland) Order 1972, Art 3(1)(b)(iv). When the 1972 Order was being drafted, it was considered arguable that its provision for exclusion was *ultra vires* the 1971 Act: see 'Immigration (Control of Entry through Republic of Ireland) Order 1972', note by Bohan, 4 August 1972 (NA HO 394/ 237).
[128] The exclusion of section 1(3) rights is in the proposed section 3ZA(5) to the Immigration Act 1971.
[129] Caroline Noakes, *Immigration and Social Security Coordination (EU Withdrawal) Bill: Fifth sitting*, 26 February 2019, col 174, and Kevin Foster, *Immigration and Social Security Coordination (EU Withdrawal) Bill: Third sitting*, 11 June 2020, col. 94.

exempt 'persons of Northern Ireland' from deportation and exclusion, and to guarantee them equal treatment with British citizens in respect of family sponsorship.[130]

Conclusion

This article has traced the evolution of Irish citizens' position in British immigration law from 1921 to the present day. From the 1920s until 1947 the treatment of Irish citizens as British subjects, despite the opposition of Irish Governments, ensured their freedom of movement, save in the wartime period. That was followed by the creation of a distinct status for Irish citizens in the legislation of 1948-1949: although no longer classed as British subjects, they benefitted from the same rights as regards entry, residence and immunity from deportation. When immigration laws were applied to Commonwealth citizens by the legislation of 1962 and 1971, Irish citizens acquired a preferential status in immigration policy, which reinforced the critique that that legislation was racially discriminatory, and so was not fully reflected in legislation. From 1 January 1973, there would as a result be a long period when the position of Irish citizens in immigration law lacked transparency and comprehensiveness. EU free movement rights offered an incomplete solution – as they ultimately depended on qualifying residence - and ironically undermined the potential argument that Irish citizens were being granted indefinite leave to enter when they arrived from outside the common travel area. The significance of clause 2 of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill is that it would remedy those flaws in the 1971 Act regime, by expressly recognising Irish citizens' entitlement to enter, from all locations, and to reside, while leaving them subject to powers of exclusion and deportation as before.

How is the preferential treatment of Irish citizens to be explained? A critique linking it to the race discrimination underlying the 1962-1971 legislation has been made in academic literature.[131] The racially discriminatory purpose of that legislation is undeniable, and the favourable treatment of Irish citizens was undoubtedly consistent with it. The material presented here suggests an additional and essential factor: political constraints upon immigration control as between Northern Ireland and Great Britain. The unviability of the Irish land border as an immigration frontier led the British Government to conclude that there could not be controls on anyone arriving in Great Britain from the Republic of Ireland, as otherwise controls would be necessary on travel from Northern Ireland too. In that context, a general exemption from restrictions for all Irish citizens was the price to be paid for Irish co-operation in United Kingdom controls. There would anyway have been large practical problems in attempting to operate a system of restrictions upon Irish citizens arriving from outside the common travel area, while exempting those arriving from the Republic of Ireland.[132]

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[130] This result could be achieved by conferring the right of abode upon 'persons of Northern Ireland': see Alison Harvey, *A Legal Analysis of Incorporating Into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998* (Irish Human Rights and Equality Commission/ Northern Ireland Human Rights Commission, March 2020).

[131] Paul (n. 51, above), pp 105-110.

[132] There is no evidence of these types of problem ever having been explored by policy-makers, presumably because the policy of not having restrictions has never been questioned.

The current reform, giving express recognition to Irish citizens within immigration law, appears to reflect still wider considerations. A first factor is the scale of migration and mobility from the Irish state. As of 2019, an estimated 320,000 United Kingdom residents were recorded as relying upon Irish citizenship.[133] It has moreover been estimated that individuals crossed the Irish land border 110 million times in 2017, and that there were 15.4 million journeys by sea or air between the Republic of Ireland and Great Britain.[134] A second factor is the transformation of the British-Irish relationship in the period of common EU membership, because of economic development in the Irish state, and the two governments' political co-operation in a range of settings, including in relation to Northern Ireland. The two states have moved away from the unequal and often tense interactions which persisted until the 1980s, and now engage on a more equal and "normalised" footing.[135] That political context has made it possible for Britain and Ireland to address rights and status as neighbouring states linked by geography, migration and mobility. The 2019 *Memorandum of Understanding* is one indication of the new context, as there is no precedent in the history of British-Irish relations for such a public agreement concerning citizens' rights. The related reform recognising Irish citizens within British immigration law for the first time confirms that "normalised" relationship. Ironically, in relation to citizens' rights at least, Britain and Ireland appear to have arrived at something akin to the external association model first outlined in 1921, based not on constitutional ties, but on recognition of reciprocal treatment.

[133] Office for National Statistics, *Population of the United Kingdom by Country of Birth and Nationality*, 21 May 2020, Table 2.3. This figure includes only 27,000 persons resident in Northern Ireland: *ibid*, Table 2.4. It appears therefore that persons born in Northern Ireland who identify as Irish are not counted within it.

[134] HM Government, *Additional Data Paper: Common Travel Area Data and Statistics* (August 2017), paras 2 and 3. There appear to be no published date on the number of Irish citizens entering the United Kingdom from outside the common travel area.

[135] Paul Gillespie, 'The Complexity of British–Irish Interdependence' (2014) 29 *Irish Political Studies* 37 and John Coakley, 'The British-Irish Relationship in the Twenty-First Century' (2018) 17 *Ethnopolitics* 1, 13-15, each of whom uses the language of "normalisation".