

Immigration and Social Security Co-ordination (EU Withdrawal) Bill

CAJ Evidence on the Bill's implications for the 'Associated Rights' of the UK- Ireland 'Common Travel Area' (CTA) – what gaps are left?

Committee Stage, House of Commons February 2019

About CAJ

The [Committee on the Administration of Justice \(CAJ\)](#) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ is the NGO partner in the [BrexitLawNI.org](#) project with the law schools of the Queen's University Belfast and Ulster University, and co-convenes the NI Equality Coalition with UNISON in Northern Ireland (NI).

Executive Summary

- Since the Brexit referendum, the UK government has consistently placed emphasis on the 'associated rights' of the CTA as already providing for reciprocal rights for British and Irish citizens in the alternate jurisdiction across six specified areas;
- However, independent legal analysis has highlighted that in most of these areas rights for Irish citizens in the UK are currently only provided for by virtue of EU free movement law and are not in fact provided for under separate CTA-linked provision. The statutory human rights commissions have described the CTA as presently 'written in sand';
- For example, there is no basis at present for an Irish citizen to enter and reside in the CTA but for the provisions of the European Economic Area (EEA) Regulations. There are also significant gaps in relation to social welfare, health service access and other CTA listed areas;
- The present bill provides the basis to repeal the relevant EU law that currently underpins the Government's CTA commitments, including social security coordination;
- Section 2 of the bill is designed to remedy the gap for Irish citizens being able to enter and reside in the UK from outside the CTA. However, there is no provision in the present bill to remedy other gaps in CTA provision once EU law is removed;
- Under the 1998 Belfast / Good Friday Agreement (Article 1 of the binding treaty) the UK recognised the birthright of the "people of Northern Ireland" to "be accepted as" Irish or British (or both) as they may choose and to equal treatment irrespective of that choice. There is nothing in the present bill to ensure such equal treatment in CTA provisions;

The Committee may wish therefore to seek clarification from Ministers as to how they intend to remedy the other gaps in CTA provision that will result from the present bill.

Members may wish to amend the bill to prevent the repeal of the EU derived law provisions that currently fulfil the CTA commitments if and until such commitments are otherwise fully replicated in domestic law.

CAJ Evidence

1. In general terms what have been termed the ‘associated rights’ of the CTA have been consistently described by Government since Brexit as including “reciprocal rights for UK and Irish nationals” in the following six areas:
 - the right to enter and reside in each other’s state without being subject to a requirement to obtain permission;
 - the right to work without being subject to a requirement to obtain permission;
 - the right to study;
 - access to social welfare entitlements and benefits;
 - access to health services; and
 - the right to vote in local and parliamentary elections.ⁱ
2. Government has articulated that such reciprocal rights are already in place regardless of EU law; the Home Office Minister as recently as 6 February 2019 told Parliament:

“... under the reciprocal Common Travel Area arrangements with Ireland, Irish citizens have a status in the UK separate from EU free movement rights that allows them to live, work, study and access benefits and services without being subject to a requirement to obtain leave to enter or remain in the UK.”ⁱⁱ
3. The position that the CTA is already provided for in domestic law is also articulated in Government’s Brexit Guidance; this states that even in the event of a ‘No Deal’:

“Irish citizens in the UK and British citizens in Ireland will continue to have the same associated rights and entitlements to public services, including access to employment, healthcare, education, social welfare and benefits, as well as the right to vote in certain elections.”ⁱⁱⁱ
4. The Home Office Settlement Scheme policy also states as fact that “Irish citizens enjoy a right of residence in the UK that is not reliant on the UK’s membership of the EU.”^{iv}
5. However, none of these statements are correct as a matter of law. With the exception of voting there are gaps in all of the above areas of provision that are only currently filled by EU Law. This includes there being no current basis for an Irish citizen to enter or reside in Northern Ireland (or Great Britain) from outside the CTA other than by virtue of the EEA regulations.^v Indeed, the present bill seeks to remedy this gap by virtue of clause 2 (as introduced) providing a freestanding right outside of EU law for Irish citizens to enter and remain in the UK without a requirement for leave.^{vi}
6. The bill however does not remedy gaps in a number of the other four areas of provision, but would regardless repeal the EU law that currently provides for their exercise and access in practice.
7. The Human Rights Commissions established further to the Belfast / Good Friday Agreement commissioned research that recently concluded the CTA was “written in sand, and its terms are much more limited than is often believed to be the case”. The report recommended greater legal certainty and a UK-Ireland Treaty.^{vii} An independent

legal analysis in 2017 uncovered a range of further significant gaps in the legal framework for the CTA rights across most of the above areas.^{viii}

8. The approach to date from Government has been to offer reassurance that the CTA will be in place whilst undertaking a piecemeal and unclear approach to ensuring that the CTA is maintained on a clear legal footing.
9. In February 2019 an announcement was made that a UK-Ireland Agreement had been reached on social security provisions under the CTA.^{ix} At the time of writing this is unavailable, as is information on proposed legislative changes on other areas.
10. In the absence of further detail there is a need for clarity as to the scope of a number of areas of provision. For example: does social welfare cover housing? Does it cover all areas currently covered by EU social security cooperation? Does study cover schooling – including cross border schooling – will provision for cross border schooling now be restricted to British and Irish citizens? Will Irish citizens still be able to vote in referendums – including any Border Poll held under the terms of the Belfast Agreement?
11. Under Article 1(vi) of the British-Irish Agreement (the treaty that forms part of the Belfast/Good Friday Agreement) the UK recognised the birthright of the people of Northern Ireland to be accepted as Irish or British (or both).^x When read with other binding provisions of the Agreement this duty encompasses ensuring this choice does not result in detrimental treatment. This interpretation is reiterated by the UK in its Brexit position papers, which allude to the birthright of the people of Northern Ireland: *“...to identify themselves and be accepted as British or Irish or both, as they may so choose; [and] to equal treatment irrespective of their choice.”*^{xi} The lack of clarity over the scope of the CTA makes it unclear as to whether equal provision will be ensured across the areas it covers; there is nothing currently in the bill that would ensure this.
12. At present therefore the present bill will empower the repealing of EU law that in practice access to and exercise of many CTA rights currently depends on. Save the provisions of clause 2 on entry and residence the bill as it stands does not remedy, or require remedy for the other gaps that may be left as a result.

The Committee may wish therefore to seek clarification from Ministers as to how they intend to remedy the other gaps in CTA provision that will result from the present bill.

Members may wish to amend the bill to prevent the repeal of the EU derived law provisions that currently fulfil the CTA commitments if and until such commitments are otherwise fully replicated in domestic law.

CAJ, 7 February 2019

ⁱ HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017, Paragraph 23.

ⁱⁱ [Caroline Nokes MP Immigration: EU Nationals: Written question from John Grogan MP– 213222 5 February 2019.](#)

ⁱⁱⁱ Home Office: Guidance: Travelling within the Common Travel Area and the associated rights of British and Irish citizens if there is no Brexit deal, Updated 19 December 2018
<https://www.gov.uk/government/publications/travelling-in-the-common-travel-area-if-theres-no-brex-it-deal/travelling-within-the-common-travel-area-and-the-associated-rights-of-british-and-irish-citizens-if-there-is-no-brex-it-deal>

^{iv} Home Office, ‘EU Settlement Scheme: Statement of Intent’ 21 June 2018 paragraph 2.6

^v Namely, The Immigration (European Economic Area) Regulations 2016 – see the Home Office ‘factsheet 3’ on the Bill on the Status of Irish citizens for further information.

<https://www.gov.uk/government/publications/immigration-and-social-security-co-ordination-eu-withdrawal-bill/factsheet-3-status-of-irish-citizens>

^{vi} Whilst clause 2 of the current bill introduces a right for Irish citizens to enter and reside in the UK, it may also, on the face of the legislation, diminish the current safeguards on exclusion of such persons that are provided for under EEA regulations. Section 3za(3) which clause 2 would insert into the Immigration Act 1972 would allow the exclusion of any Irish citizen on the basis of such an exclusion being conducive to the public good. Currently exclusion under regulation 27 of The Immigration (European Economic Area) Regulations 2016 contains a number of safeguards on the face of the legislation.

^{vii} NIHR Statement ‘New Research Recommends UK-Irish treaty is best solution to ensure Common Travel Area Rights’ 13 November 2018 <http://www.nihrc.org/news/detail/new-research-recommends-uk-irish-treaty-is-best-solution-to-ensure-common-t>

^{viii} Simon Cox, Traveller Movement, Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future (December 2017) paragraphs 34 & 35.

^{ix} DWP “Government agrees deal to protect social security rights of UK and Irish citizens living and working in each other’s state” 4 February 2019 <https://www.gov.uk/government/news/government-agrees-deal-to-protect-social-security-rights-of-uk-and-irish-citizens-living-and-working-in-each-other-s-state>

^x British Irish Agreement Article 1(vi) (UK Treaty Series no. 50 Cm 4705)

^{xi} HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017, Paragraph 12 (emphasis added).