

EU-UK future relationship cliff edge: Outstanding issues around access to EU and human rights in the Northern Ireland context

CAJ briefing note

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This briefing note focuses on a number of imminent rights protections gaps that will result from Brexit. Some such areas were to be addressed in the context of the EU-UK future relationship negotiations yet seem to have fallen off the agenda as the end of the transition period approaches.

The pandemic, alongside a perception such matters have already been addressed in the NI Protocol or limited Common Travel Area provision, has removed necessary focus on remedial measures.

There is now very limited time for such matters to be addressed either in a future relationship treaty or, in a 'no deal' scenario, by unilateral measures by taken the EU, Irish government, or UK government. It is likely that only sustained pressure from the new Irish government within the EU side is likely to lead to movement.

Issues include:

EU-UK future relationship

- **'Paragraph 52' commitments to 'continued access to and exercise of EU rights opportunities and benefits' for Irish citizens in NI:** In recognising Irish citizens in NI retain EU citizenship but would lose access to most EU rights, opportunities and benefits beyond basic free movement with Brexit, commitments were made in the EU-UK Joint Report in relation to the 'arrangements required' for continued access and exercise of such EU rights. However, this commitment was ultimately not taken forward in the Withdrawal Agreement. The sole reference to it was ultimately found in the non-binding preamble to the NI Protocol. At the time TF50 stated that such matters were instead "a matter for the negotiations on the future relationship with the UK."¹
- To date there is **no indication of any progress or discussion to take forward the 'Paragraph 52' commitments** within the negotiations on the UK-EU future relationship. The Irish government has made some welcome unilateral commitments, including to continued provision of the **European Health Insurance Card (EHIC)** for citizens in NI. However, most issues, ranging from student fees, future family reunification rights, EU political rights and participation in other EU programmes remain outstanding. A detailed analysis

¹ Correspondence from TF50 to CAJ, December 2018 cited– along with further detail – in BrexitLawNI [‘What happened to the ‘paragraph 52’ commitments for Irish citizens to continue to exercise EU rights, opportunities and benefits where residing in Northern Ireland?’](#) Briefing Paper 9 April 2019.

and recommendations on these issues are found in a recent report commissioned by the NI and Irish Human Rights Commissions;²

- The UK was ultimately compelled by the **DeSouza case** to amend immigration rules to remove its restrictions preventing NI-born Irish citizens from applying to the EU Settlement Scheme to retain EU citizens rights under Part II of the Withdrawal Agreement. This means among other provisions EU rights to family reunification will be retained in NI, but it is time limited within the timeframe of the Settlement Scheme. The post-DeSouza changes also succeed in embedding the GFA principle of **equality of treatment for British and Irish citizens in NI** as the provision to retain such EU rights via the Settlement Scheme were extended to NI born British Citizens too. This sets a precedent to explore mechanisms to extend any ‘paragraph 52’ provision across the community;
- **ECHR:** incorporation of the ECHR into NI law is a core component of the GFA, including direct access to the courts and remedies for breaches. ECHR adherence was also protected by UK membership of the EU. Whilst the October 2019 UK-EU Political Declaration affirmed a UK commitment to the ECHR, this was quickly rolled back on.³ In addition in March, the UK Government introduced the Overseas (Service Personnel and Veterans) Bill to limit liability for UK war crimes (including torture) abroad. The Bill -in relation to war crimes- would already regress ECHR incorporation through the Human Rights Act, limiting direct access to the courts and remedies for breaches;
- **Workers’ Rights:** common ‘level playing field’ provisions on labour and social standards were stripped out of the original NI Backstop and not replicated in the current Protocol. There is no indication they will be addressed for NI as part of the future relationship.

Withdrawal Agreement: implementation gaps

- **Frontier Workers:** the Withdrawal Agreement allows the retention of EU rights both for EU citizens resident in the UK prior to Brexit but also for Frontier Workers. This is particularly relevant to persons working in NI but resident in the Republic. However, the Home Office is yet to make any administrative arrangement for Frontier Workers equivalent to the Settlement Scheme and it remains unclear how such retained EU rights will be accessed in practice. Irish citizen frontier workers would retain a right to enter and work in NI under the (UK) Immigration and Social Security Coordination (EU Withdrawal) Bill. The situation of other EU citizens frontier workers resident in the south and working in NI remains uncertain and precarious at this late stage in the transition period;
- **Dedicated Mechanisms: UK commitment to ‘no diminution’ of some GFA rights as a result of Brexit.** This commitment in Article 2 and Annex 1 of the NI Protocol was legislated for under the European Union (Withdrawal Agreement)

² Sylvia de Mars, Colin Murray, Aoife O’Donoghue & Ben Warwick ‘[Continuing EU Citizenship “Rights, Opportunities and Benefits” in Northern Ireland after Brexit](#)’ (NIHRC & IHREC, MARCH 2020)

³ For a narrative on the ECHR and Brexit see: Lucy Moxham & Oliver Garner (Bingham Centre for the Rule of Law) ‘[Will the UK uphold its commitment to human rights?](#)’ LSE Blogs 30 June 2020 < />

Act 2020, and the UK recently produced an ‘Explainer’ document.⁴ Annex 1 contains a non-exhaustive list of six EU equality directives, although other directives (Parental Leave Directive and Pregnant Workers Directive etc) are within scope of the specified ‘Rights, Safeguards and Equality of Opportunity’ sections of the GFA. It remains to be seen if the NI Human Rights and Equality Commissions will receive adequate resources to discharge their functions, and as to whether interpretive attempts will be made to restrict the scope of the commitment to limit its enforcement.

Free movement in the UK-Ireland Common Travel Area (CTA)

- At present **UK law** expressly provides there will be **no immigration/passport control** on journeys in the CTA, including the land border. **Irish law** also exempts **Irish citizens** and all other persons exercising **EU rights** from duties to carry and present passports on crossing the land border. In practice, there have long been concerns regarding irregular passport requests with no clear legal basis targeting persons on the basis of at times quite blatant racial discrimination. On the UK side this has manifested itself most often in ‘ad hoc’ checks in NI ports and airports on domestic flights to Great Britain; on the Irish side the law itself is inherently discriminatory permitting passport checks on non-EU but not EU citizens, and is most often manifest in irregular checks cross border bus services;
- In relation to **post-Brexit policy** the UK has stated as a matter of policy there will be **“no immigration controls whatsoever”** on the land border as part of future border arrangements.⁵ No similar commitment has however been made by the Irish government whose duties to carry passports over the land border will **de facto be extended to British citizens** once they cease to be treated as EU citizens after the transition period, creating a community differential for NI residents as to who has to carry a passport;
- Despite the express provisions of UK immigration law the UK has not made commitments to discontinue **ad hoc passport checks on NI-GB routes**, limiting its commitment to stating there will be no ‘regular’ controls on such routes.⁶ Coupled with the UK policy direction of rolling out ‘hostile environment’ measures to EU citizens and ‘in country’ immigration checks already proportionally four times higher in Belfast than London,⁷ our fears of NI becoming ‘one big border’ post-Brexit are already surfacing;
- **UK Electronic Travel Authorisation (ETA):** The present policy direction (inconsistent with past practice) is of restricting CTA free movement to British and Irish citizens.⁸ The UK does not propose any provision -even for other permanent residents- in the context of the island of Ireland. This risks creating a ‘hard border’ for many EU citizens and other non-visa nationals who presently

⁴ [UK Government commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?](#) (NIO, 7 August 2020)

⁵ HM Government [“The UK’s Points-Based Immigration System Further Details”](#) July 2020 CP258, para 4.

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⁷ Maresa Fagan & Luke Butterly [‘Scale of immigration checks higher in Belfast than London’](#) *The Detail* 8 June 2020.

⁸ See for example (UK-Ireland) [Memorandum of Understanding concerning the Common Travel Area and associated reciprocal rights and privileges](#), 8 May 2019, para 6.

move freely into NI local journeys across the land border as part of their daily lives, whether this is for shopping, visiting friends, part of a shared care arrangement etc. This problem is manifest in the Home Office 'ETA' proposals to introduce an electronic pre-clearance requirement, similar to the US ESTA system, for travel to the UK. The ETA system will exempt Irish (and British citizens) but usually require EU citizens and non EU citizens who do not require visas (e.g. Brazilians, US citizens etc) to obtain ETA pre-clearance before travel. There is no plan to exempt local journeys in the CTA, including those across the land border. EU citizens with 'settled status' in the UK should be exempt (but may face difficulties in proving same). Yet this will not be an option for EU citizens who live and work south of the border but regularly travel into NI. This reflects an existing problem for non EU nationals who require visas and cannot travel between NI and the border counties. Far from being addressed this exclusion will now be extended to much larger numbers of persons who may have long lived lives on both sides of the border. Whilst the 'hard border' is to remain invisible, crossing it without an ETA could lead to arrest, detention and consequent removal or subsequent refusal of permission to enter the UK.⁹

'Reciprocal' or 'Associated Rights' of the CTA

- **Limited 'reciprocal rights' of the CTA are not a solution to ensure the GFA requirement of equality of treatment for Irish and British citizens in NI¹⁰ currently provided for by EU law:** Since the Brexit referendum the hitherto unknown concept of 'reciprocal rights' of the CTA has been regularly talked up. For both States this concept admittedly provides a solution for continued entry and residence of Irish citizens into Britain and British Citizens into the Republic of Ireland respectively once EU law (the legal basis for such free movement for almost the past half century) ceases to have effect. EU free movement law has to date has been the legislative underpinning for compliance with the core GFA principle of equality of treatment for British and Irish citizens in NI across a broad range of provision. The far more limited (in terms of scope and legal force) 'reciprocal rights' of the CTA fall well short of replacing this in many areas leaving significant gaps;
- **CTA progress has been welcome but limited:** progress has included the 2019 (non-binding) bilateral Memorandum of Understanding and a welcome treaty and primary legislation on social security coordination.¹¹ There are however many gaps, e.g. there is no provision for cross-border health care, reciprocal voting rights exclude referendums, and rights to be joined by family members are not covered. Ongoing bilateral discussions and the CTA Forum have largely

⁹ For a detailed narrative on passport and immigration checks in the CTA see: CAJ briefing paper June 2019 – CTA border checks; and specifically on ETA: "Electronic Travel Authorisation and the Common Travel Area: How can proposals for pre-travel authorisation work on the Ireland/NI land border? CAJ Briefing August 2020.

¹⁰ UK Brexit position papers have openly acknowledged GFA birthrights to the people of NI "...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." HM Government, 'Northern Ireland and Ireland Position Paper' 16 August 2017, Paragraph 12.

¹¹ UK/Ireland: Convention on Social Security [CS Ireland No.1/2019]

<https://www.gov.uk/government/publications/cs-ireland-no12019-ukireland-convention-on-social-security>

met in secret. The present CTA provision falls well short of an overarching treaty recommended by the Human Rights Commissions.¹²

- **Restrictions to British and Irish citizens:** the ‘reciprocal rights’ model taken forward by both States has restricted CTA provision to British and Irish citizens. It does not consider even other permanent residents resident in the border area. This includes (non Irish) EU citizens living on the southern side of the land border who have lived fluidly within the CTA due to EU rights which will now be abruptly removed. Consequently such persons may no longer be able to continue to access services such as cross border education;
- The **Bill of Rights for Northern Ireland** was to enshrine such equality of treatment in the “right of the people of Northern Ireland to hold **British or Irish citizenship or both**” ... “**with no detriment or differential treatment of any kind.**”¹³ The failure to implement this and other provisions to date has further undermined legal protections that would have prevented the present Brexit. Further to New Decade New Approach an Assembly Committee on the Bill of Rights has now been established, but the UK has not committed to legislating further to its duties under the GFA. Its protections are urgently needed not least to cover new gaps and vulnerabilities that will derive from Brexit;

Divided by the Rules: Hardening the boundaries between different groups of citizens

- An overall outcome of Brexit will be the fragmentation of the existing paradigm of two main citizenship categories (EU and non-EU) into over a dozen or more different categories of entitlements with numerous complex differentials and sub categories. Differentials will exist between British and Irish citizens, reversing the convergence sought by the GFA, generating conflict when persons interface with bureaucracy and find they no longer have entitlements they understood they had retained. For migrants (and perceived migrants) deepening racial discrimination in accessing services and the real risk of Windrush-type refusals may ensue. There is very limited time to address the matters put forward in this paper that would provide at least some mitigation against the impending hardened boundaries between different groups of citizens.

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¹² <https://www.nihrc.org/index.php?/news/detail/new-research-recommends-uk-irish-treaty-is-best-solution-to-ensure-common-t>

¹³ NIHRC ‘[A Bill of Rights for Northern Ireland: Advice to the Secretary of State](#)’ (NIHRC, 2008), page 99.