

Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020 (as initiated) - Clause 109

Passport controls in the Common Travel Area (CTA): the land border, Good Friday Agreement (GFA) compliance, and avoiding racial discrimination (S508)

Second Stage, 11-12 November 2020

Summary

- Clause 109 of the bill would amend s11 of the Immigration Act 2004, the statutory basis for passport control into the State. The issue of GFA compliance and avoiding a ‘hard border’ on the island of Ireland has been central to the Brexit arrangements;
- The current s11 provisions exempt persons entering the State from NI over land (as well as other Common Travel Area (CTA) journeys) from passport control. However, the legislation then provides an exception to this exemption obliging ‘non nationals’ to carry and produce passports on such journeys, including over the land border;
- ‘Non nationals’ in this instance are largely defined as persons who are neither Irish citizens nor other EU nationals. It is clearly not possible to ‘know’ who is an Irish or other EU citizen from those who are ‘non-nationals’, and hence who is required to carry and produce a passport and who is not. This leads to a deeply unsatisfactory situation of passport checks being conducted on the land border, particularly on cross border bus services, on the basis of (at times quite blatant) racial profiling;¹
- In the context of its post-Brexit immigration policy the UK has now committed to their being no passport control ‘whatsoever’ on the northern side of land border;²
- Clause 109 of the present bill does not however end passport checks on the southern side of the land border. Rather the provision is limited to amending the definition of ‘non nationals’ to ensure British citizens (who will cease to be EU nationals) continue to be exempt from requirements to carry and produce passports on CTA journeys;
- Whilst this change is entirely necessary to ensure there is no differential treatment for British and Irish citizens from NI in accordance with the GFA, it does not address the existing problems of racial discrimination and a hardened land border;
- As clause 109 brings sections 11 & 12 of the 2004 Immigration Act into ambit the present clause, if amended, could instead end selective duties to carry and produce passports over the land border;

¹ The form of racial discrimination whereby persons are singled out by law enforcement for questioning, checks or detention on the basis of skin colour or other ethnic indicators.

² UK Home Office [“The UK’s Points-Based Immigration System Further Details”](#) July 2020 CP258, para 4.

The existing passport control provisions: the 2004 Act

Section 11 of the Immigration Act 2004 (as revised) provides the statutory basis for conducting passport checks within the CTA by Irish authorities.³ This power “does not apply to any person (‘other than a non-national’) coming from, or embarking for, a place in the State, Great Britain or Northern Ireland”. A related power in s12 places a duty on ‘non-nationals’ to produce passports on request when in the State.

A ‘non-national’ (for the purposes of s11 & s12) is defined as someone who is not an Irish citizen, nor a person who has established a right to enter and be present in the State under the European Communities (Aliens) Regulations 1977, the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 or the European Communities (Free Movement of Persons) Regulations 2006 and 2008. (Together these broadly cover EU nationals.)

The effect of clause 109 of the present bill

Clause 109 of Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020 would amend s11 of the 2004 Act by revising the definition of ‘non-national’ to ensure that British citizens are not defined as non-nationals once the UK has exited the EU (and British citizens cease to be EU citizens). This will exempt UK nationals from the selective duties to carry and produce a passport when crossing the land border or otherwise landing in the State from elsewhere in the CTA.

The impact of selective passport checks on the land border

The Committee on the Administration of Justice and the Irish Council for Civil Liberties and others have long had significant concerns regarding passport checks being carried out on journeys within the CTA, particularly on cross border bus services.⁴ As the powers under the 2004 Act allow Gardaí and immigration officers to require production of the passport or I.D of any ‘non-national’ travelling on such routes but not from Irish or other EU citizens, the question arises- how can officers tell who is a ‘non-national’ in order to know who is required to carry and produce passports?

Checks are frequently conducted on the basis of (at times quite blatant) racial profiling. The Migrant Rights Centre Ireland report ‘Singled Out’ studied incidents of racial profiling for people travelling across the land border. The report raises concerns that officers targeted people on the basis of their ethnicity. This included Irish citizens and other EU nationals who were not required to carry or produce passports.⁵ The issue was more recently raised by the Irish Human Rights and Equality Commission (IHREC) and the Irish Network Against Racism (INAR)⁶ before the UN Committee on the Elimination of Racial Discrimination (ICERD). Unless changed we are concerned this situation will only worsen in the ‘Brexit’ context.

We would therefore urge TDs to seek changes to Clause 109 in order to remove entirely the provisions for passport checks on the land border.

³<https://revisedacts.lawreform.ie/eli/2004/act/1/section/11/revised/en/html>

⁴ <https://www.thejournal.ie/cross-border-immigration-racial-profiling-checks-4814767-Sep2019/>
<https://www.thejournal.ie/people-stopped-ireland-land-border-visas-4824722-Sep2019/>
<https://www.irishexaminer.com/news/arid-30951825.html>

⁵ <https://www.irishexaminer.com/news/arid-20149685.html>

⁶ <https://www.ihrec.ie/documents/ireland-and-the-convention-on-the-elimination-of-racial-discrimination/>
<https://www.iccl.ie/wp-content/uploads/2019/11/INAR-ALTERNATIVE-REPORT-to-CERD-WEB-1.pdf>