



BrexitLawNI

Policy Report:

**Brexit, Border Controls
and Free Movement**

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BrexitLawNI

Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences.

About BrexitLawNI:

BrexitLawNI is a collaborative ESRC-funded research project between the Law Schools of Queen's University Belfast and Ulster University, and the region's leading human rights organisation, the Committee on the Administration of Justice (CAJ). Our project examines the constitutional, conflict transformation, human rights and equality consequences of Brexit.

Northern Ireland (NI) (along with Scotland) voted to remain in the European Union (EU); it is the region of the United Kingdom (UK) most likely to be negatively affected by the decision to leave the EU. Many complex questions have been arising, with significant legal and constitutional consequences that demand considered reflection. This initiative has aimed to meet this need by disentangling the legal elements of Brexit with regard to Northern Ireland, and presenting and communicating the related implications for policy and practice in user-friendly formats.

The main outputs for this project are the policy reports covering the 6 themes of the project: the peace process; north-south relations; border controls and free movement in and between Northern Ireland, the Republic of Ireland and Britain; xenophobia and racism in Northern Ireland; the impact on socio-economic rights; and wider human rights and equality issues.

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Executive Summary

Movement of People has been a Marginal Issue

Whilst the issue of 'the border' has become centre stage in the Brexit discussions, the focus has been almost exclusively on the freedom of movement of goods. The implications for the freedom of movement of people have by contrast been quite marginal, despite the prominence of 'migration control' in the debate.

Progress in this area is very limited at EU-UK level. There has been no tangible bilateral (UK-Ireland) progress to legally formalise the Common Travel Area (CTA). There is also a lack of transparency in relation to post-Brexit operational planning for both CTA and internal immigration controls in NI, with immigration policy officials not permitted to engage with the research, and little clarity provided even to Westminster committees.

The direction of travel for post-Brexit arrangements carries serious risks of facilitating widespread racial discrimination and undermining confidence in and the framework for policing introduced by the peace process.

The CTA as a Passport Free Zone - and 'Non Routine' Controls

The official UK Brexit position is limited to ruling out 'routine' passport controls within the CTA. Government has regularly expressed its desire not to have infrastructure on the land border and also given frequent assurances that there will be 'no border in the Irish Sea'.

There is little clarity as to what 'non routine' controls in the CTA will look like. The concern is that there will be a resultant increase in selective checks that target persons on the basis of skin colour or other ethnic indicators – the form of discrimination known as racial profiling. Despite Ministerial assurances we have received testimony of this already happening.

We have also heard testimony of a detrimental shift in the treatment of NI-resident EU26 nationals returning to NI from journeys outside the CTA since the referendum;

The Lack of Codification of the Reciprocal 'Associated Rights' of the CTA

There is varied understanding of what and whether reciprocal rights for UK and Irish citizens/residents are underpinned by the CTA. The UK assertion that such CTA rights are already underpinned in NI legislation is misguided. There has been no visible progress on a UK-Ireland basis towards codification and legal underpinning of such arrangements.

In-country Immigration Checks - the Hostile/Compliant Environment and 'One Big Border'?

In addition to 'non regular' CTA checks, government's intention is also to regulate post-Brexit migration in NI through 'intensification' of hostile/compliant environment measures. We have already heard testimony of significant racial discrimination and detriment created by the application of existing 'hostile/compliant environment' measures, and strongly caution against this.

Implications for Peace Settlement Reforms of Law Enforcement in NI

The increased role of the UK Border Force and Home Office Immigration Enforcement Directorate has provided a new focus on the extent such bodies sit outside the NI-specific framework for policing accountability. There are significant differences in ethos, the culture of human rights compliance and legal certainty in powers, with real risks expanded post-Brexit operations will lead to a return of the use of arbitrary and discriminatory powers and damage confidence in policing overall.

Recommendations:

- The UK and Ireland should initiate a process to **codify and legally underpin the CTA both in relation to free movement and reciprocal associated rights**. This should include a treaty with a clear dispute resolution mechanism, and be enshrined in domestic law including through the NI Bill of Rights.
- The CTA codification of rights of free movement should explicitly incorporate the existing UK policy position that there will be **no passport checks on the land border or Irish Sea and no racial profiling**. Both states should discontinue existing operations that lead to such checks (and racial profiling) and amend legislation to provide additional safeguards.
- The UK should **review and remedy the apparent misuse of Schedule 7 'Port and Border Control' powers under the Terrorism Act 2000**, and abandon attempts in Parliament under the guise of 'border security' to introduce an unfettered no suspicion power of examination on any person a mile from the land border.
- **The codification of CTA rights should ensure that as a minimum it reflects reciprocal rights currently provided under EU provisions**, and should not prejudice or preclude existing entitlements to other persons with residence in particular in border areas where public services may be used on alternate sides of the border. **Continued EU freedom of movement into NI should be returned to as an option** given as it appears to be the only solution that is not going to create multiple differentials in entitlements and make further racial profiling and broader discrimination even more widespread.
- The UK should **desist from its planned 'intensification' and roll out of 'hostile/compliant environment' measures in NI** and retract those already in place.
- Border Force and Home Office immigration enforcement teams insofar as they exercise functions in NI **should be made fully accountable to the law enforcement oversight architecture** put in place further to the Patten Commission.
- **Specific safeguards should be introduced, in accordance with international best practice, to prevent racial profiling across the public and private sectors.**

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A. Context

The 'Layers' of the Border and the Brexit Mobilisation

The land border on the island of Ireland received little attention in the lead up to the Brexit referendum.¹ Since then the issue of the land border, and the question of a border in the Irish Sea, have become a central focus of the Brexit negotiations. However, this discourse has almost exclusively focused on the freedom of movement of goods (and hence customs controls and trade) and not on the freedom of movement of people, which has remained a marginalised issue. Whilst the issues are linked² there are considerable differences. This report seeks to help address the gaps in analysis of developments in this area.

In Brexit discourse the term the 'border' is often used interchangeably without specification as to whether a: customs, immigration, security, or even animal health border is being referred to. A senior official interviewed by the project, emphasising that discussion on the border should not be confined to trade, helpfully introduced the conceptualisation of a 'layered' border, whereby 'the border' is conceived as consisting of various 'layers'.³ Taking the areas above, the distinct policies that have applied to different 'layers' are notable:

- **Immigration Border:** there has not been 'passport control' on the island of Ireland since partition due to the CTA arrangements (when the CTA was suspended - from 1939-1952 – due to World War II, such controls were introduced but in the Irish Sea and not the land border).
- **Customs Border:** controls operated on both sides of the border between 1923 and 1993, when the EU single market came into effect.⁴
- **Security/military border:** operated on the border including checkpoints and other physical infrastructure, until their dismantlement as part of the peace process.
- **Animal and plant health:** or phyto-sanitary border was cited by an interviewee as an example of a layer of a border that is currently on an all-island basis.

1 Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three Effects on 'the border in the mind' (2017) 19 *British Journal of Politics and International Relations* 508.

2 Notably the UK Border Force combines customs and immigration functions, checks on goods are likely to lead to checks on people.

3 BrexitLawNI, Interview with Senior Official (26 October 2017).

4 EU Committee, *Brexit: UK-Irish Relations* (HL Paper 76, 12 December 2016) 23.

An official joint (north-south) mapping exercise on the land border determined there were 208 border crossings. This is notably more than the 137 crossings on the EU's eastern frontier.⁵ The UK estimates there around 110 million annual crossings in total and the Centre for Cross Border studies estimates that between 23,000 and 30,000 people work across the border.⁶ It is fair to describe most of these journeys as 'local' journeys.⁷

A (if not the) central plank of the main Leave campaigns was the notion of 'taking back control' of borders and on increased migration control. The current Prime Minister Theresa May, as Home Secretary, was responsible for the 'hostile/compliant environment' policy (a series of far reaching duties on the public and private sectors targeting perceived irregular migrants), and has characterised the referendum as 'a vote to take control of our borders, laws and money' whilst advocating that the terms of Brexit 'must respect this'.⁸ The Democratic Unionist Party (DUP), who support the government in a Confidence and Supply arrangement, have also been advocates of 'tougher' migration controls.⁹ It is this context, and in particular the nature of the Brexit mobilisation, that has shaped the parameters of the type of Brexit the UK is prepared to pursue. Notably, neither government nor opposition are willing to support continued single market membership in the context of this requiring continued EU freedom of movement.

At the same time there has been a commitment not to 'harden' the land border, or at least to keep it as 'frictionless' or 'seamless' as possible. In this context, this report will explore and set out the narrative as to how the interface between these two conflicting policy agendas has manifested itself, with a focus on both future border and 'in country' immigration controls in NI; and an exploration of the implications of the associated rights attached to freedom of movement both into NI and from NI into the broader EU. In doing so we have recorded both the testimony of officials and political actors, along with those who will be, and have already been, affected by resultant changes. The findings in this report were also informed by a major conference held in partnership with STEP and others in Dungannon, County Tyrone, focusing on the implications of Brexit for migrant workers.¹⁰

To the extent these issues engage racism and xenophobia, or the impact on the peace process and North-South cooperation, they are further covered in those BrexitLawNI Policy Reports.

5 Brian Hutton, 'Ireland has 208 border crossings, officials from North and South agree' *Irish Times* (26 April 2018) <<https://www.irishtimes.com/news/ireland/irish-news/ireland-has-208-border-crossings-officials-from-north-and-south-agree-1.3474246>>.

6 Northern Ireland Affairs Committee, 'The land border between Northern Ireland and Ireland' (16 March 2018) 6-7 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmniaf/329/329.pdf>>.

7 See, for example, the respondents in a study listing the following reasons 'social reasons (visiting family or friends), shopping, work or business, sports and entertainment, holiday and travel, healthcare, and education' in Katy Hayward, 'Bordering on Brexit: Views from Local Communities in the Central Border Region of Ireland/Northern Ireland' (November 2017, Centre for International Borders Research & Queen's University Belfast) 47 <<https://www.qub.ac.uk/brexit/Brexitfilestore/Fileupload,780606,en.pdf>>.

8 Theresa May, 'Our Future Partnership' Speech (2 March 2018, Mansion House London) <<https://blogs.spectator.co.uk/2018/03/theresa-mays-our-future/>>.

9 For example, the DUP 'Northern Ireland Plan' included among their 'wants' from Westminster: "proper border controls and a tougher immigration policy" see DUP, 'The Northern Ireland Plan' (2015) 9 <<http://www.mydup.com/publications/view/the-northern-ireland-plan>>.

10 'The implications of BREXIT for migrant workers: what to watch out for' (Conference, STEP Dungannon, 13 February 2018).

The Common Travel Area, the Border, and the Belfast/Good Friday Agreement (B/GFA)

The CTA in a general sense is a passport-free zone between the UK and Ireland (as well as the Channel Islands and Isle of Man- which are not in the EU). It is a loose administrative arrangement not underpinned by a treaty or overarching legislative instrument. The central provision in UK law is found in the Immigration Act 1971, which provides that that arrival in and departure from the UK from elsewhere in the CTA cannot be subject to (passport) control.¹¹

Whilst the CTA pre-dates EU freedom of movement, its existence has been far from secure. As recently as 2008 the then UK government sought to amend the 1971 Act to permit full border controls. The proposed policy was to introduce ‘ad hoc’ checkpoints targeting non British and Irish citizens on the land border. Assurances were simultaneously given that *British and Irish citizens* would still not have to carry passports.¹² There was also to be passport control at NI ports and airports on domestic journeys to Britain. The NI Human Rights Commission raised concerns the ‘ad hoc’ checks would lead to widespread racial discrimination and coupled with unionist opposition to this and the air and sea checks, the provision was defeated in Parliament.¹³

Despite the maintenance of a legislative prohibition on passport control on local journeys in the CTA, the UK Border Force has nevertheless conducted checks. This has included asking passengers for passports or other ID at NI ports and airports to and from domestic journeys to Britain. The concerns about racial profiling have been borne out.¹⁴ Statistics published for the year of the referendum (2016) for ‘Operation Gull’, (an operation in NI ports involving officers targeting entry over the land border), record the ‘interception’ of 775 suspected irregular migrants in the 2015/2016 year, an increase of 66% on the previous year.¹⁵

11 Immigration Act 1971, s 1(3). The CTA is not as wide-reaching as the Schengen area arrangement elsewhere in the EU that has abolished internal borders in favour of a single external border and has common rules and procedures for short stay visas and other matters.

12 The Home Office set out their policy intention that: ‘There will be no fixed document requirement for the land border for CTA nationals [British and Irish citizens] ... [but] ... individuals who are unable to satisfy the [UK Border Agency] that they are CTA nationals will be subject to investigation in the same manner as in land detections’. Correspondence to the NI Human Rights Commission from Lyn Homer, Chief Executive, UKBA (9 October 2008) cited in NIHRC ‘Submission on the Borders, Citizenship, and Immigration Bill for the House of Lords Second Reading’ (11 February 2009) footnote 18.

13 See CAJ ‘One Big Border? BREXIT and passport and Border Controls in Northern Ireland - A Briefing Note for the House of Lords Report Stage of the EU Withdrawal Bill’ (April 2018) <<https://caj.org.uk/2018/04/25/one-big-border-brexit-passport-and-border-controls-in-northern-ireland-a-caj-briefing-note-for-the-house-of-lords-hl-report-stage-debate-on-the-e-u-withdrawal-bill-april-2018/>>.

14 In one high profile case, supported by the Equality Commission, the Home Office settled a case (for £2000 without admission of liability) brought by a British woman who was stopped at Belfast City Airport by an immigration officer. The victim, who was not even a passenger but was dropping off a relative in the airport, reports she was told by the immigration officer she had been singled out as she ‘looked foreign and not from here’. In her view she was stopped because she is black. See BBC, ‘Belfast City Airport: Black woman “stopped for looking foreign”’ *BBC News* (20 July 2016) <<https://www.bbc.co.uk/news/uk-northern-ireland-36846314>>.

15 These figures, the majority of which relate to persons suspected of routine immigration offences rather than crimes, were nevertheless included in an organised crime annual threat assessment report. See Organised Crime Task Force, ‘Annual Report and Threat Assessment 2016’ DoJ NI (June 2016) 13 <<https://www.octf.gov.uk/Publications/OCTF-Annual-Report-And-Threat-Assessment/OCTF-Annual-Report-Threat-Assessment-2016>>.

Ireland did change its laws on the CTA in 2004. Section 11 of the Immigration Act 2004 contained a requirement for anyone embarking or landing in the Irish state (including over the 'land frontier') to carry a passport or equivalent document. The provision applies to CTA journeys but only to 'non-nationals', with nationals defined as Irish or British citizens. This therefore legislates for the concerning scenario whereby only non-Irish/British citizens have to carry documents, begging the question as to what criteria immigration officers and Gardaí use to tell the difference. A provision in Section 12 of the same Act required non-nationals to carry and produce passports at all times, although this was subsequently found to be unconstitutional.¹⁶ In relation to CTA passport checks, both the Irish Human Rights Commission and National Consultative Committee on Racism and Interculturalism (NCCRI – a national equality body) subsequently raised concerns about racial profiling, with the latter urging victims to record such instances as racist incidents.¹⁷

In relation to freedom of movement in the CTA there is also the question of reciprocal rights for British and Irish citizens to reside, work, access services, whilst in the alternate jurisdiction. At times these have been referred to as rights derived from the CTA, although there is no formal instrument which provides for this, and as elaborated later in this report, most of these rights are currently provided for through EU-originated provisions that will cease with Brexit.

There has been some discussion and contestation as to the extent the B/GFA requires there to be a 'seamless' border on the island of Ireland. This has been the interpretation of the UK government, but it has been contested by unionism.¹⁸ CAJ has argued that human rights are engaged where there is racial discrimination or internal border controls impacting on freedom of movement within a state¹⁹ and has added:

The complex constitutional context of Northern Ireland in light of the CTA and the mutual recognition of rights regarding Irish or British citizenship, as well as the north-south and east-west arrangements under the GFA, provide an arguable case that the right to freedom of movement should be considered as applying across the CTA.²⁰

16 *Dokie v DPP*, [2010] IEHC 110, See 'Section 12 of Immigration Act 2004 not constitutional, judge finds' *Irish Times* (16 May 2011) < <https://www.octf.gov.uk/Publications/OCTF-Annual-Report-And-Threat-Assessment/OCTF-Annual-Report-Threat-Assessment-2016>>. These changes occurred at a time which could be characterised as Ireland's own 'Brexit moment' when a referendum changed the basis of birth rights to Irish citizenship on the island of Ireland from a *jus soli* (place of birth) to a *jus sanguinis* (dependent on parentage) approach, which itself led to a reinterpretation of the B/GFA.

17 See Irish Human Rights Commission, *IHRC Observations on the Immigration, Residence and Protection Bill 2008* (March 2008) part III, para 8 <<https://www.ihrec.ie/ihrc-observations-on-immigration-residence-protection-bill-2008/>>; NCCRI 'Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights: Immigration, Residence and Protection Bill 2008' (March 2008) para 4 cited in NI Human Rights Commission 'Submission on the Borders, Citizenship, and Immigration Bill for the House of Lords Second Reading' (11 February 2009) para 30.

18 See, for example, Lord Empey and Jeffery Donaldson MP's reaction to this position by the UK Prime Minister at a Speech in the Waterfront Hall in Belfast in July 2018 in Stephen Gamble, 'Seamless Irish border not specified in Belfast Agreement: DUP' *Newsletter* (23 July 2018).

19 See UN International Covenant on Civil and Political Rights (ICCPR) Art 12, on freedom of movement which is binding on the UK.

20 CAJ, 'S478 Written Evidence to the Northern Ireland Affairs Committee on its inquiry into the 'Future of the land border with the Republic of Ireland' (October 2016) para 8.

The UK's own NI Brexit Position Paper states that although the CTA precedes the GFA,

...the principle of free movement between the UK and Ireland carries symbolic significance in implementing the Agreement's commitment to the continued respect of the civil, political, social and cultural rights of the communities in Northern Ireland. It is a tangible example of East-West cooperation between the UK and Ireland...²¹

A government Minister, in debating the EU (Withdrawal) Bill also stated that the CTA is 'an integral element—not a symbolic but an integral element—of the Belfast/Good Friday agreement. That should not be underestimated'.²² It should also be noted that the B/GFA implementation agreements themselves, under provisions on security 'normalisation', contain detailed provisions on the dismantlement of border checkpoint infrastructure.²³

Border Controls and Law Enforcement Accountability in NI

A further contextual consideration are the arrangements for the accountability for law enforcement agencies in NI, which flow from the Independent Commission on Policing (the Patten Commission) established further to the B/GFA.²⁴ As part of the bilateral agreements of the peace process, the UK committed to the full implementation of the Patten Report.²⁵

The Commission has internationally become a much-examined blueprint for policing reform. The reforms entailed a new framework for human rights compliance, including new binding codes of ethics and powerful accountability bodies including the NI Policing Board and Police Ombudsman. The model did not envisage 'tiered' law enforcement in NI and there has been considerable controversy in recent years regarding attempts to introduce new tiers of law enforcement into NI that circumvent the Patten accountability architecture. This was particularly the case with the National Crime Agency (NCA) whose operational policing powers were blocked in NI for around a year by the NI Assembly, precisely because the Home Secretary had sought to legislate to introduce the NCA into NI in a manner which bypassed accountability of the Policing Board. It was

21 HM Government, *Northern Ireland and Ireland Position Paper* (16 August 2017) para 20 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>.

22 HL Deb 25 April 2018, vol 790, col 1610WA.

23 See, in particular, 2003 Joint Declaration of the British and Irish Governments, Annex 1, paras 6-9.

24 'A new beginning: Policing in Northern Ireland: The Report of the Independent Commission on Policing for Northern Ireland' (September 1999) <<http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf>>.

25 'Implementation Plan issued by the British and Irish Governments (UK-Ireland) Agreement 2001' (1 August 2001) para 8.

only following a U-turn conceding accountability to the Board that the legislation passed at the Assembly, albeit in controversial fashion.²⁶

The UK Border Force is currently not accountable to the Policing Board and has limited accountability to the Police Ombudsman. The Home Office Immigration Enforcement and Compliance Teams, who will be responsible for implementing ‘in country’ ‘hostile/compliant environment’ measures and operate from a base in Castlereagh, Belfast, also sit outside the Pattern accountability architecture.

Birthrights to British and Irish Citizenship in NI

Birthrights to British and Irish citizenship in Irish and UK law presently extend to all persons born in NI, save where both parents are temporary migrants.²⁷ Both states recognised this in the B/GFA, Article 1(vi) of the British-Irish Agreement providing that the two governments:

... (vi) 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 and would not be affected by any future change in the status of Northern Ireland.²⁸

This provision is legally binding in the international sphere.²⁹ This provision has been consistently interpreted, when read with other B/GFA provisions, as providing for the choice to be British or Irish (or both) not to result in unequal treatment.³⁰ Accordingly the NI Human Rights Commission’s B/GFA-mandated advice on provisions for the Bill of Rights for NI recommended the incorporation of these rights as follows:

.... right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, **with no detriment or differential treatment of any kind.**

26 For further details, see ‘Explanatory Memorandum to the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015’ (2015) <http://www.legislation.gov.uk/ukdsi/2015/9780111128299/pdfs/ukdsiem_978011128299_en.pdf> and regarding the controversy over the LCM see Colin Harvey and Daniel Holder, ‘The Great Repeal Bill and the Good Friday Agreement – Cementing a Stalemate or Constitutional Collision Course?’ UK Constitutional Law Blog (6 Jun 2017) <<https://ukconstitutionallaw.org/2017/06/06/colin-harvey-and-daniel-holder-the-great-repeal-bill-and-the-good-friday-agreement-cementing-a-stalemate-or-constitutional-collision-course/>>.

27 British Nationality Act 1981 and Irish Nationality and Citizenship Act 1956 (as amended). Until 2004, Irish law did not qualify the entitlement to citizenship to parentage, and the UK & Ireland agreed to reinterpret the B/GFA reference to the ‘people of Northern Ireland’ in accordance with this change.

28 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Art 1(vi).

29 The B/GFA, in addition to being approved by referendum, was incorporated as a treaty between the UK and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705). Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement corresponding to its competency.

30 This includes the provisions of the preceding subsection (British-Irish Agreement, Article 1(v)) committing the sovereign government with jurisdiction to exercise power with ‘rigorous impartiality’ on behalf of all the people on the basis of full respect for, and equality of, civil, political, social and cultural rights, freedom from discrimination and ‘parity of esteem’ and ‘just and equal treatment’ for the ‘identity, ethos and aspirations of both communities’.

This right would not be affected by any future change in the status of Northern Ireland. (emphasis added)³¹

The Bill of Rights is however an unimplemented commitment from the B/GFA. The context of Brexit therefore is that almost all the population in NI will continue to be, or will be entitled to be Irish and hence EU citizens. Concurrently the UK is duty bound under the B/GFA to provide for equality of rights across the community. This area engages the questions of freedom of movement and residency and entitlements of NI residents, both in NI but also when seeking to exercise freedom of movement rights elsewhere in the EU.

B. Themes

The substantive section of this report on the impact of Brexit is structured around the following themes:

Passport Controls and the CTA

This theme will cover the question and implications of future border controls on entry points to NI from elsewhere in the CTA, namely the land border and across the Irish Sea. It will outline the direction of Brexit policy in this area, and the views and experiences of respondents.

The 'Associated Rights' of the CTA

This theme will cover the question of the scope of rights of British and Irish citizens to reside, work and access services in the alternative jurisdiction. It will explore the extent to which there is provision under the CTA, policy developments, the views and experiences of respondents and the implications for non-British and Irish citizens.

One Big Border? - the Hostile/Compliant Environment Measures

This theme will examine Brexit policy on 'in country' immigration controls in NI and their likely impact on ethnic minorities, including covering existing experiences and policy developments.

Implications for Policing Accountability

This theme will cover the implications of Brexit for policing accountability under the Patten Commission architecture and in particular the implications of enhanced roles in NI for the UK Border Force and Home Office immigration enforcement directorate.

³¹ NIHRC, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 December 2008) p 47.

C. Impact of Brexit

Passport Controls and the CTA

Perspectives from Respondents on Border Controls

Generally political interviewees were averse to CTA border controls. On the question of land border controls Sinn Féin MEP Martina Anderson, citing the B/GFA, stated:

... [it] is not acceptable that we have any kind a physical infrastructure emerging in Ireland because it does challenge the Good Friday Agreement, it challenges our political peace processes.³²

In relation to controls in the Irish Sea, citing internal UK controls, DUP MLA Christopher Stalford stated:

From my perspective the one thing I will not tolerate is people getting on the Larne to Cairnryan ferry having to produce their passport. We're British citizens, we're citizens of the United Kingdom and we should be treated equally and on that basis that was why, the ideas the stuff that was coming from just before Christmas, the idea of a border up the Irish Sea was just completely unacceptable to be honest.³³

There was concern among most political respondents that a border would be an inevitable consequence of Brexit, largely due to the issue of customs controls. Former Ulster Unionist Party (UUP) leader Mike Nesbitt MLA felt that no alternative viable proposal had been brought forward:

... I do not see how you can do your customs checks purely electronically by somebody sticking some sort of electronic label on the windscreen of their lorry. ...I'm waiting for somebody to say to me 'this is how we can do this. This is how we can come out of customs union and the single market and yet still pretend that we're still in' and there's no trade border either on the island or in the Irish Sea...³⁴

32 BrexitLawNI, Interview with Martina Anderson, Sinn Féin MEP (Derry, 16 February 2018).

33 BrexitLawNI, Interview with Christopher Stalford, DUP MLA (Belfast, 7 February 2018).

34 BrexitLawNI, Interview with Mike Nesbitt, UUP MLA (Belfast, 9 January 2018).

The Social Democratic and Labour Party (SDLP) MLA Claire Hanna raised the concern that the realisation of the difficulty of ensuring an open border in the context of Brexit was ‘pushing Brexiteers even to more extremes’,³⁵ including being willing to dispense with the B/GFA, arguing that ‘now that’s its becoming clear that it can’t be fixed they’re prepared to have a hard border really’.³⁶ The Sinn Féin MEP Martina Anderson described the concept of an invisible or frictionless border in the context of Brexit as ‘fantasy island’:

It’s like having some kind of magical wand in an area, it’s really a nonsense of a proposal. ... Michel Barnier has said more than once that if we do not stay in the custom union and the single market then a hard border is inevitable.³⁷

Further, Alliance MLA Stephen Farry also expressed doubt that a ‘frictionless’ border would be possible, but for different reasons stating:

To me [a frictionless border] means the status quo essentially is what we’re seeking to preserve, I think for the point of view of most people in Britain they see this as a practical challenge of avoiding friction or keep it to the barest minimum. I think in Ireland its understood as an economic and psychological emotive issue, in England I think there’s no grasp of a wider dimension of a border so the notion that produces by sort of going ‘we have managed to avoid any stoppage of a border, now here’s a series of camera on poles who’ve been monitoring what goes back and forward, or you see drones flying overhead’. I think people in England would sort of say job done, that’s success, and they’re missing the point that having a row of cameras, delineating a border and monitoring movements, I think it will be seen as being a call to change where things have been and a step backwards ... Producing a frictionless border in a physical sense but in a psychological point of view that doesn’t do the job.³⁸

By contrast, the DUP MLA Christopher Stalford felt that the issues over the movement of goods would be ‘easily overcome’ and that concerns were being overstated, pointing to the political consensus that there should be no hard border:

... in the middle of negotiations people talk problems up to a greater degree than they actually are in reality on the ground, ... in terms of the whole issue of the border, well if a hard border is going to be imposed, who is going to impose it?

35 BrexitLawNI, Interview with Claire Hanna, SDLP MLA (Belfast, 20 February 2018).

36 *ibid.*

37 Anderson Interview (n 32).

38 BrexitLawNI, Interview with Stephen Farry, Alliance MLA (Belfast, 21 March 2018).

Because from what I've heard, the European Union don't want one, the UK government in London doesn't want one, the government in Dublin doesn't want one and before the collapse here it was made clear by Arlene Foster and Martin McGuinness that they didn't want one... To my mind those are the four parties who would be in the position to make any arrangements and if all four of them are in the same place in terms of not wanting a hard border then from whence is it going to come?³⁹

A senior legal practitioner interviewed for this research was among those who queried the ongoing viability of freedom of movement of people into NI in the CTA in light of Brexit; raising concerns the CTA was being talked up as a solution in a manner which had not been thought through:

I don't see [the CTA] as an answer to any of the issues thrown up by the impact of a hard or soft border on the island of Ireland... or in the Irish sea. It is presented as the answer to all of this, that it will keep free movement, certainly North and South, operating, I don't see necessarily that it will... nobody has come up with a solution that means the border is not hardened in some way... even if you maintain this free movement for Irish and British citizens on the island of Ireland, what does that mean for non-Irish British citizens? I don't think anyone's even addressed their mind to that. And that's a real worry.⁴⁰

The Evolution of CTA Policy in the Brexit Era

Well if you go back the thing is the CTA was first articulated in a minute between the... Ministry for Home Affairs I think in Dublin, and the Home Office in London in 1922, so it's one of those things that, way back in the dim and distant, it has a... it has its location in working arrangements rather than in law...⁴¹

As alluded to above and earlier in this report, the CTA has evolved as a loose arrangement referenced in immigration law in both jurisdictions. Brexit has created an unprecedented situation whereby one CTA state is in the EU and the other is not.

39 Stalford Interview (n 33).

40 BrexitLawNI, Interview with Anonymous Senior Legal Practitioner (9 November 2018).

41 Senior Official Interview (n 3).

This challenges the prior direction of travel towards UK-Ireland 'convergence' on CTA immigration rules,⁴² as Ireland will have continued freedom of movement for EU/EEA nationals whereas the UK will not. Whilst the UK does not appear minded to make EU26 nationals 'visa nationals' (i.e. require a visa to enter the UK) admission checks on existing non-visa nationals (e.g. Brazilian, Japanese, US citizens) are usually undertaken at ports of entry, which would not happen at the land border. The UK has given regular assurances that the CTA will continue after Brexit.⁴³ The small print in the UK's 2017 Northern Ireland and Ireland Brexit Position Paper is notable however in that it only commits to not introducing fixed border controls: 'The development of our future immigration system will not impact on the ability to enter the UK from within the CTA free from **routine** border controls' (emphasis added).⁴⁴

The UK-EU Joint Report of December 2017 contains a number of paragraphs on avoiding a 'hard border' but these relate to the freedom of movement of goods.⁴⁵ One paragraph does deal with the CTA, but is limited to reiterating that the UK and Ireland may continue to make arrangements for the CTA between themselves, provided such arrangements respect EU law.⁴⁶ The February 2018 Protocol to the draft Withdrawal Agreement reflects this. A total of 18 provisions deal with freedom of movement of goods,⁴⁷ and a sole article in two parts, deals with the CTA.⁴⁸

This Article 2 of the Protocol is limited to providing that the UK and Ireland may continue to make CTA arrangements for freedom of movement of persons, provided this respects the rights of persons under EU law. The UK is also to commit to the CTA and ensure that its 'associated rights and privileges' can operate without affecting Ireland's obligations under EU law – in particular, freedom of movement rights for EU citizens and their families, to, from and within Ireland.

42 Following the defeat of Westminster legislation in 2008 (which would have permitted internal UK CTA controls), the approach of the UK and Irish governments has been one of 'convergence' of immigration systems, including examination of 'joint standards of entry'. This is set out in more detail in a 2011 Joint Ministerial Statement – see 'Joint Agreement between Ireland and the United Kingdom regarding cooperation on measures to secure the external Common Travel Area border' (20 December 2011) <<http://www.inis.gov.ie/en/INIS/Pages/Joint%20Agreement%20between%20Ireland%20and%20the%20United%20Kingdom%20regarding%20cooperation%20on%20measures%20to%20secure%20the%20external%20Common%20Travel%20Area%20border>>; In 2015, further to these arrangements the UK & Ireland issued their first British-Irish mutual CTA visa recognition scheme whereby a visitor visa for Indian and Chinese nationals for the UK or Ireland would also be valid in the alternate jurisdiction, see UK Visas and Immigration, 'British-Irish visa scheme' (10 December 2015) <<https://www.gov.uk/government/publications/british-irish-visa-scheme/british-irish-visa-scheme>>.

43 For example, see the Letter from Prime Minister Theresa May to President Donal Tusk (29 March 2017) p 5, which triggered Article 50, on the where reference is made to wanting to maintain the CTA.

44 HM Government (n 21).

45 TF50, Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union' 19 (8 December 2017) paras 49-51.

46 *ibid*, para 54.

47 TF50, 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland and the European Union and the European Atomic Energy Community' (19 March 2018) ch III and Arts 3-9.

48 'Chapter II, Movement of persons, Article 2, Common Travel Area: 1. The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the "Common Travel Area"), while fully respecting the rights of natural persons conferred by Union law. 2. The United Kingdom shall ensure that the Common Travel Area and associated rights and privileges can continue to operate without affecting the obligations of Ireland under Union law, in particular with respect to free movement for Union citizens and their family members, irrespective of their nationality, to, from and within Ireland.' TF50 (n 47) ch II, art 2.

In reference to the CTA ensuring it respects the rights of persons under EU law, there is no present elaboration as to the extent or any limitation on the EU law provisions this is to cover, and the extent to which they will have effect in NI after Brexit.

In relation to these provisions, the Joint Committee of two Human Rights Commissions have cited the EU Victims Directive not making victim's rights conditional on residence status, or citizenship, and have called for the EU and UK to ensure post-Brexit immigration controls are compliant with human rights standards, and specifically for 'progressive measures to obviate any risk of racial profiling emerging'.⁴⁹

Despite the deferring to bilateral arrangements there is no visible sign of any progress by either government, or both together, in codifying or safeguarding the rights of the CTA.⁵⁰ We have picked up signals from the Irish side that there is a preference to keep the CTA as a 'loose arrangement'. There has been little by way of clarification by the UK as to what is intended by 'non-routine' border controls, and little transparency in what is being planned.

Whilst other public authorities, including the Police Service of Northern Ireland (PSNI) were willing (and often keen) to engage with the research, the senior officials UK Border Force (UKBF) cancelled a meeting arranged with CAJ on the grounds it was not permitted to discuss Brexit policy. The UKBF even declined to tell researchers their current staffing arrangements in NI. Figures were given however to Westminster, by Public and Commercial Services Union (PCS), citing 57 NI-based UKBF officers. Clarification of the NI staffing of the Home Office Immigration Enforcement Compliance Team in Castlereagh (who deal with 'in country' enforcement), also came through a Parliamentary question from a Liberal Democrat peer. The Home Office has 49 NI staff, 30 of whom were Immigration Officers, and had no plans to increase these numbers.⁵¹ Controversial recruitment exercises were run however for increased numbers of UKBF officers. In late 2017, UKBF advertised for 300 new 'mobile patrol' officers for various locations including Belfast, but would not disclose to the media how many would be Belfast-based.⁵² This recruitment exercise, and a second aborted exercise in 2018 seeking 21 new Belfast-based posts (an increase of staffing by around a third) were controversial both in the context of recruiting border officers when assurances were being given regarding no further border controls, but also that the criteria for posts conflicted with the B/GFA and legislation preventing sectarian discrimination, leading to a withdrawal of the criteria following intervention by the Equality Commission.⁵³

49 Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, *Policy statement on the UK withdrawal from the EU* (March 2018) p 11 <https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement_March-2018.pdf>.

50 The Joint Communiqué of the GFA-mandated British Irish Intergovernmental Conference on the 25 July 2018, makes general reference to future bilateral cooperation in the context of BREXIT, with proposals to be considered at a future meeting of the Conference, there is however no specific reference to the CTA. See, Cabinet Office, Northern Ireland Office, The Rt Hon Karen Bradley MP, and The Rt Hon David Lidington CBE MP, 'Joint Communiqué of the British-Irish Intergovernmental Conference 25 July 2018' <<https://www.gov.uk/government/news/joint-communication-of-the-british-irish-intergovernmental-conference-25-july-2018>>.

51 Baroness Suttie, 'UK Visas and Immigration: Northern Ireland: Written question - HL7341' (26 April 2018) <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2018-04-26/HL7341/>>.

52 Connla Young, 'Concern at recruitment of 300 new Border Force Officers' Irish News (19 December 2018) <<http://www.irishnews.com/paywall/tsb/irishnews/irishnews/news/brexit/2017/12/19/news/concern-at-recruitment-of-300-new-border-force-officers-1214183/content.html>>.

53 This issue is covered in further detail in the policy paper on racism and xenophobia.

Ministerial Responses to Questions over Non-Routine Checks

Government policy on non-routine CTA border checks was ultimately drawn out through amendments tabled to the EU (Withdrawal) Bill by Baroness Helena Kennedy, following engagement with CAJ. At Committee stage in tabling an amendment to preclude regulations under the Bill being used to amend the provisions of the 1971 Immigration Act which prevent passport control on CTA journeys, Baroness Kennedy stated:

... I wanted to raise the fact that, at the moment, there really seems very little that is solid around the movement of people. I am talking here not about the movement of trading goods but about the movement of people. As we know, the Government have a policy to create a hostile environment for migrants who end up with irregular status. On current plans, that would in future include migrants from elsewhere in the European Union, with the probable exception of Irish citizens. The question then turns to how the Government will enforce their desire for such significantly increased migration control while maintaining an open border. If the Government are sincere in saying they do not want a hard border, where will the checking of papers take place and how will it be done? ...As for potential solutions in a post-Brexit context which would avoid the need for a hard border and the risks of widespread profiling—pulling out people who they think look like foreigners—you would have to make some special arrangement. Members of the negotiation team would have to explore models that would somehow create special circumstances to deal with the Northern Ireland situation. It may have to be that we talk about continued EU freedom of movement into Northern Ireland in an agreement with the European Union to ensure that British citizens in Northern Ireland continue to enjoy equivalent rights to Irish citizens in the jurisdiction—a core principle... of the Belfast/Good Friday Agreement.⁵⁴

In response, the Parliamentary Under-Secretary of State, NI Office and Scotland Office (Lord Duncan of Springbank) gave assurances that ‘... there will be no impediment at the land border to the movement of people—no checks and no profiling, full stop’. That is the ambition and the policy of the UK Government.⁵⁵ Returning to the subject at Report stage, the Minister further stated:

I am very happy to reinforce the clear statement that there can be no racial profiling at a border, whether it be routine, quixotic or even accidental. That cannot be the policy or the direction; there cannot be even a hint of that going on at the border...

⁵⁴ HL Deb March 2018, vol 789, cols WA1675-7.

⁵⁵ HL Deb March 2018, vol 789, col WA1703.

There will be no checks whatever for journeys across the land border between Ireland and Northern Ireland, nor between Northern Ireland and Great Britain. As I said earlier, this includes any aspect of what those checks might look like or be interpreted to look like. That is not what will be happening.⁵⁶

Peers also pressed the Minister on the question of what ‘non-routine’ checks meant. Baroness Ludford directly asked ‘what is the meaning of “routine” in the Northern Ireland Position Paper of last August... A lot hangs on that adjective... can the Minister please elaborate on what that means and on what border controls will be allowable?’⁵⁷ The Minister responded by stating that the word ‘routine’ did not have a special meaning in the paper, rather ‘It is simply saying that these are the methods that we have been using thus far and will continue to use.’⁵⁸

The difficulty with this assurance is that it is precisely the current methods that have drawn concerns about racial profiling, and the assurances given by the Minister that there would be no racial profiling are at odds with testimony we have received. This is highlighted by a widely reported⁵⁹ incident on the same day this Report Stage debate was taking place. A lawyer, Jules Gnezekora, a dual Ivorian and British citizen who has lived in the UK since 1994 and now resides in NI was taking the ferry from Scotland back to NI. In a statement to CAJ, Mr Gnezekora reports that in Cairnryan port:

I was queuing with approximately 15-20 people to board the boat. I was the only black person in the queue that I could see... I passed through the check-in area having shown my boarding details to ferry staff and was called to the side by one of the officers who were present, immigration or police. I remember clearly that I was asked to produce my passport, which I did.⁶⁰

Despite having a British passport Mr Gnezekora was then questioned about why he was traveling to NI and his place of birth. His testimony continues:

A few hours later, the ferry docked at Belfast. I disembarked and was passing through the exit area in the ferry terminal. Apart from [...] two black people [...] who were waiting to collect their luggage off the boat, I was the only black person leaving the docks at that time that I could see.

56 HL Deb 25 April 2018, vol 790, col WA1609.

57 HL Deb 25 April 2018, vol 790, cols WA1606-8.

58 HL Deb 25 April 2018, vol 790, col WA1609.

59 See for example: Connla Young, ‘Lawyer alleges he is victim of “racial profiling”’ *Irish News* (7 May 2018) <<https://www.irishnews.com/news/northernirelandnews/2018/05/07/news/lawyer-alleges-he-is-victim-of-racial-profiling-1322941/>>; ITV, ‘Man stopped four times at ferry “because he was black”’ *ITV news* (10 May 2018) <<http://www.itv.com/news/utv/2018-05-10/man-stopped-four-times-at-ferry-because-he-was-black/>>; Lisa O’Carroll, ‘Black lawyer accuses Northern Ireland immigration of racial profiling’ *Guardian* (11 June 2018) <<https://www.theguardian.com/uk-news/2018/jun/11/black-lawyer-accuses-northern-ireland-immigration-of-racial-profiling>>;

60 CAJ, Statement made by Jules Gnezekora (30 April 2018).

The only form of control that I could see in this disembarkation area was immigration control. The two officers were letting the people who were ahead of me pass through. I did not see them ask anyone for any identity documents. ... When I approached the officers, I was taken to one side. This was the fourth leg of my return trip within eight days and I had been subjected to this treatment on every single occasion. I was feeling very discriminated against. It was humiliating being singled out and asked questions.

This time the officer asked me to produce my boarding pass for the ferry journey I had just taken. This surprised me as I was leaving the boat, not embarking it. In addition, as far as I was aware they were immigration officers, not Stena Line staff... I was very annoyed and said "Is this what you are looking for"; I produced my British passport and one of the two officers replied, "Yes". The questions that I recall on this occasion was where was I travelling to in Northern Ireland and why...⁶¹

The same thing had happened to Mr Gnezekora at both ports on his outward journey from Belfast to Cairnryan on the 17 April 2018. At the Belfast port Mr Gnezekora reports waiting with other foot passengers and 'I remember clearly that I was the only black person in the queue' and at that time was the only person singled out by uniformed officers, asked for either passport or identity document, and on producing a British passport, questioned about travel and residency. On arrival at Cairnryan, the same thing happened, with Mr Gnezekora being the only black passenger, and the only one singled out, in so far as he could see. Mr Gnezekora has lodged a complaint with the Equality Commission and Police Ombudsman. In responding to the media about Mr Gnezekora's experiences the Home Office stated:

Immigration Officers speak to members of the travelling public using these routes, regardless of appearance, and a consensual request for photographic ID can form part of that conversation.⁶²

This response highlights the absence of a statutory power for such checks; it is of course not clear to passengers that the checks are in a strict legal sense 'voluntary'.

Operation Gull, Operation Bi-Vector and Port and Border Controls

Our engagement with officials as part of this research appeared to indicate that there was little clarity or planning from government for any specific border arrangements following Brexit. In relation to existing operations the Home Office and UKBF are involved in the aforementioned 'Operation Gull' targeting irregular migrants in the CTA. In response to a question from Nigel Dodds MP on the future operation of Operation Gull, the government stated that no discussions

⁶¹ *ibid.*

⁶² See for example, Connla Young (n 59).

had yet been held by the Home Office with NI authorities as to the future of this operation after Brexit.⁶³ The media have reported around 800 detentions under Operation Gull in the first year following the Brexit referendum, along with political and academic calls for its discontinuation due to the concerns over the use of racial profiling.⁶⁴ Operation Gull has been a cross border operation since 2003, involving the Garda National Immigration Bureau, and is known as 'Operation Sonnet' in the south of Ireland, where there were around 140 resultant detentions between 2015-2017.⁶⁵ Some figures are provided on detention figures in NI in relation to Larne Detention Centre. A 2017 report refers to a staggering 2,233 'movements' in a 12-month period in and out of the Centre (we understand this accounts for a total number of movements in and out and may include matters such as bail hearings and hence is greater than the total number of detainees). The facility is designed to accommodate 19 detainees.⁶⁶

To an extent, some UK immigration controls are already 'subcontracted' to Ireland. Under Irish law there are powers to refuse entry or arrest without warrant a person lawfully in Ireland if officers think they may try and enter NI without lawful authority.⁶⁷ Using such powers on EU26 nationals is likely to come into conflict with EU free movement rules.

Operation Bi-Vector is a PSNI C3 (intelligence branch) UK-wide counter terrorism operation within the CTA routes. There is little further information available about it. However, there have been concerns raised about the use of Port & Border Control powers of examination under Schedule 7 of the Terrorism Act 2000 (TACT). This refers to the extensive powers of questioning that can be exercised in NI by PSNI, Immigration and Customs officers at ports and airports or the 'border area' (a mile-wide strip of land around the land border).⁶⁸ The concerns are in the context of a current high use of the powers in NI (12,479 times from 2013-2016) without one single resultant detention under TACT. The usage is many times greater than its proportionate number of passenger journeys compared to GB, where the powers in recent years have resulted in between 1,522 and 1,760 TACT detentions annually.⁶⁹ The current Independent Reviewer of TACT powers, Max Hill QC, refers to his predecessor David Anderson QC's assessment of the NI

63 Nigel Dodds, 'Immigration Controls: Northern Ireland: Written Question - 136699' (19 April 2018) answered by Caroline Nokes MP, 24 April 2018 <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-04-19/136699/>>.

64 Kevin Mullan, 'Calls for suspension of ongoing 'racist' Operation Gull initiative' *Derry Journal* (2 June 2017) <<https://www.derryjournal.com/news/calls-for-suspension-of-ongoing-racist-operation-gull-initiative-1-7988713>>.

65 Claire Daly TD, 'Written Question 225' Dáil Éireann (5 December 2017) <<https://www.oireachtas.ie/en/debates/question/2017-12-05/225/>>.

66 Independent Monitoring Board, *Annual Report of the Independent Monitoring Board at The Glasgow, Edinburgh and Larne Short Term Holding Facilities* (August 2017) <<https://s3-eu-west-2.amazonaws.com/imb-prod-storage-1ocod6bqky0vo/uploads/2017/08/Glasgow-Edinburgh-2016-17.pdf>>.

67 See: Immigration Act 2004, s4(3)(h) where persons can be refused entry at e.g. Dublin airport by an immigration officer if they think they intend to travel (whether immediately or not) to NI (or Great Britain) and would not qualify for admission there. See also s78(c) International Protection Act 2015 (amending the Immigration Act 1999) which allows the arrest without warrant of a person subject to a deportation order if the officer thinks they might leave the State and enter another without lawful authority.

68 Terrorism Act 2000, sch 7.

69 Max Hill QC, 'The Terrorism Acts in 2016: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006' (January 2018) para 5.17 <<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/01/Terrorism-Acts-in-2016.pdf>>.

pattern as 'remarkable' and worthy of further investigation. The PSNI subsequently highlighted to the Policing Board that whilst none of the persons examined under Schedule 7 were detained under TACT for over an hour, not all were released as they were of interest and referred to other agencies such as immigration and HMRC.⁷⁰

The concern is therefore that this emergency type 'counter terrorism' power may be being misused for routine immigration purposes. A number of parliamentary questions have been tabled in relation to the matter. These have ascertained that the powers are being solely used by PSNI and no records are kept of the number of referrals the PSNI have made to UKBF for immigration purposes following exercise of the powers.⁷¹

Furthermore, despite the assurances of 'no checks' in the CTA, legislation has now been introduced into Parliament which would grant an unfettered 'no suspicion' power of examination of persons crossing the land border, purely to ascertain if they are crossing the border. This is being presented as a 'border security' rather than immigration measure, and government denies any relationship with Brexit.⁷² The proposed power occurs however in the context of the unexplained use of the existing Terrorism Act 2000 powers for what may be routine immigration purposes.

The Counter-Terrorism and Border Security Bill currently making passage through Westminster contains this broadly-drafted power that would apply in the 'border area' mile-wide strip along the land border and Newry or Portadown train stations. It provides that anyone can be stopped, questioned, searched and detained, without any reasonable grounds or suspicion of any offence, simply in order to check if they are entering or leaving NI. This power is described as 'essentially a pre-cursor power' to establish whether the 'entering or leaving the UK' condition is met in order to trigger a power on against those suspected of a vaguely drafted concept of 'hostile activity' in the interests of a foreign government.⁷³ However, the full range of stop and search powers are built into this 'pre-cursor' element which includes a duty to 'give the examining officer on request either a valid passport which includes a photograph or another document which establishes... identity'.⁷⁴ Despite all the assurances, such a power could be used to target suspect communities and create a hard border by stealth.

⁷⁰ *ibid*, paras 5.17-5.18.

⁷¹ Baroness Suttie (n 51).

⁷² James Rothwell 'Home Office's Stop and Search Proposal for Irish border risks return to Troubles era say critics' *Daily Telegraph* (11 August 2018) <<https://www.telegraph.co.uk/politics/2018/08/10/home-office-plan-northern-ireland-stop-search-zones-sparks-fears/>>.

⁷³ Counter-Terrorism and Border Security Bill [as amended at Committee stage] (2017-2019) Explanatory Notes, para 133.

⁷⁴ *Ibid*, sch 3. For further information, see Brian Gormally, 'New border policing powers proposed' *Rights NI* (22 June 2018) <<http://rightsni.org/2018/06/new-border-policing-powers-proposed/>>.

Current Experiences of EU26 and other Ethnic Minorities on Journeys in NI

Our research consistently heard, in particular in our consultation events:

- there has been an existing problem of racial profiling in 'ad hoc' checks
- the situation has already deteriorated since the Brexit referendum
- there are concerns of further deterioration when Brexit actually happens

The experiences of racial profiling related both to experiences at NI ports and airports with UKBF, and also on journeys, particularly bus journeys, over the land border, largely with the An Garda Síochána. At our consultation events we heard numerous personal experiences of persons who had been singled out for such checks. This included experiences of persons being signed out on cross border busses in recent months where experiences were described as having picked out people of colour, and being 'intimidating', and little being offered by way of communication as to what was happening. Some checks, described as 'outside Newry' had involved plain clothes officials. One solicitor indicated a large number of cases were being brought to them where racial profiling appears to be a factor and that there had been a significant increase in recent times. One citizen from an ethnic minority background traveling from NI to Dublin recounted being asked for passport and credit cards. There were also experiences with UKBF at Belfast airports on domestic flights including questioning of children. One interviewee stated:

We see that anyway at Belfast City Airport and Aldergrove, certain flights attract attention, other flights there's nobody to meet you anywhere, and people who are singled out on those flights tend to be people of colour. And I have one personal example of travelling with a friend, who's more British than I am, whose family goes back more generations than mine do, who was singled out for a check with UK Border Force and asked all sorts of insulting questions and detained for about 45 minutes, purely based on her colour.⁷⁵

There were also negative experiences of extensive questioning of EU26 nationals by UKBF when arriving on international flights into Belfast airports. EU migrant workers who have been living in NI for some time have told us that they have been subjected to questioning by UKBF staff at Belfast airports when returning from visits to Poland or other countries of origin. This has included questioning about a person's level of fluency in English, current living or working arrangements, family and other matters, and has involved the separation of friends and family members. We heard that these practices on EU nationals were not experienced before the referendum. To date, we have not been able to clarify if they are a result of a policy change

⁷⁵ BrexitLawNI, Interview with Anonymous Interviewee 1 (4 December 2018).

or rather just an attitudinal change that it is now ‘fair game’ to question the entitlement of EU nationals to be in NI following the referendum - despite ongoing freedom of movement in the EU at present. It is also difficult to see how some of the questioning can be considered as verification that EU nationals are exercising treaty rights. We heard testimony that some EU26 nationals are now avoiding Belfast airports and instead flying back in to Dublin - in the words of one respondent to ‘avoid being treated like shit.’

The ‘Associated Rights’ of the CTA

Perspectives on the CTA – Does it Cover Reciprocal Rights for British and Irish Citizens?

There have been questions as to the extent the CTA provides for reciprocal entitlements in the alternate jurisdiction to reside, work, and access services, and as to whether such matters are restricted only to British and Irish citizens. In general, there was an understandable lack of certainty as to the extent this was the case, and to the extent provision was more limited than EU treaty rights. Take the following responses by MLAs. Christopher Stalford DUP MLA stated:

My understanding was that [the CTA] was a common travel zone, for example ... if you are an Irish citizen and fall ill in Birmingham, you’ll have access to the National Health Service and you don’t have to pay for it. Now I don’t know whether that’s related to the common travel area or not to be honest with you ... but ... I think it goes beyond simply the right to travel...⁷⁶

Claire Hanna SDLP MLA argued:

My understanding of it is that it broadly allows Irish citizens to access full whatever you get as a British citizen in Britain and vice versa but I understand there are limits to it because I know of people who are applying to, for example for a non-EU spouse. It’s not the same if you’re an Irish citizen exercising your treaty rights or whatever it’s not the same as just being a British citizen so it’s not perfect.⁷⁷

Martin Anderson MEP of Sinn Féin also argued that the question of CTA reciprocal rights was being talked up as a solution but was limited when compared to EU provisions:

... so when people hear about the Common Travel Area they say that’s a solution but they don’t capture or understand the fact it only applies to people who are British and Irish ...

⁷⁶ Stalford Interview (n 33).

⁷⁷ Hanna Interview (n 35).

The Common Travel Area has been what it is but EU regulations and directives is where you are going to get your protection, nobody is really referring to getting protection from the CTA, they get it out of the legislation where it is in Europe.⁷⁸

Brexit Policy - Development on 'Rights and Privileges of the CTA'

Following Brexit, official UK emphasis has been put on the 'associated rights' of the CTA as already providing for reciprocal rights for British and Irish citizens in the alternate jurisdiction. However, to the extent that such rights were ever provided for by the CTA they are largely not currently reflected in the UK legal framework, and there is no sign of any progress as to their codification or safeguarding through the Brexit negotiations.

The Irish government has stated that maintaining the CTA is one of their Brexit priorities, describing it as 'long-standing arrangement between the UK and Ireland which means Irish citizens can move freely to live, work, study, and access social benefits in the UK on the same basis as UK citizens and vice versa', and in June 2018 described work as 'ongoing' to ensure the CTA continues to function post-Brexit.⁷⁹

The UK Ireland and Northern Ireland Position Paper refers to reciprocal 'rights associated with the CTA' as having been codified from the Ireland Act 1949 on, citing bilateral agreements including legislation in 1960 on social security. It also lists a number of bilateral areas that it states are covered by reciprocal rights. The paper does concede that many such rights are also covered by EU provisions and that it can be 'difficult to distinguish' between CTA and EU rights.⁸⁰ The 'associated rights and privileges' are also referenced in the aforementioned CTA Article of the draft Protocol to the Withdrawal Agreement. A response to a Westminster question from John Grogan MP provided on the record clarification as to which CTA associated rights the UK intends to be covered. Echoing the earlier position paper, the response 'firmly' commits the UK to protecting reciprocal CTA rights and lists them as 'including':

- 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;

78 Anderson Interview (n 32).

79 Written Answers, David Cullinane TD to Tánaiste and Minister for Foreign Affairs and Trade, Simon Coveney, (19 June 2018).

80 HM Government (n 21) paras 22-24.

- access to health services; and
- the right to vote in local and parliamentary elections.⁸¹

Whilst the commitment to CTA reciprocal rights from both governments is consistent, we have identified a number of problems. First, it is simply not the case that all the above reciprocal rights are provided for in NI (and more broadly UK) law. Indeed, expert legal analysis has shown that with the exception of political rights to vote, virtually none of the above rights is presently properly provided for, with many of the original bilateral instruments having been repealed and replaced with provision for EU treaty rights that will cease to have effect after Brexit.⁸²

Second, there are questions as to the fate of 'reciprocal rights' covered by the EU but not clearly covered by the above CTA list (which is non exhaustive). For example, does the 'right to study' include rights to pay domestic rates of student fees (a matter currently covered by EU law)? What about EU derived rights that the UK initially did not provide for? One interviewee, Chief Commissioner of the NI Human Rights Commission, Les Allamby raised the question of funded (via tax credits) cross border child care in this context.

Third, as raised above by a political respondent, what about the question of ongoing reciprocal rights of residents who are not British and Irish citizens? Will provision be made, for example, for EU26 or others who live close to the border to benefit from any cross-border health provision, or use of schools?

The latter question engages the interface between CTA rights and any retained EU rights of EU27 nationals (including Irish citizens) who were in NI (or Britain) prior to Brexit and are covered by the Withdrawal Agreement. The draft Withdrawal Agreement itself qualifies its provisions on non-discrimination and equal treatment, to permit more favourable treatment to UK and Irish citizens under the CTA.⁸³ Irish citizens resident in NI may therefore (in theory) end up with more favourable access to reciprocal rights than Irish citizens who retain EU rights under the Withdrawal Agreement. However, as alluded to above by the Human Rights Commissioner, EU rights retained by Irish citizens under the terms of the Withdrawal Agreement may cover a much broader set of entitlements than the CTA. These will not be available to an Irish citizen in NI who arrived, whether through birth or movement, after Brexit, but CTA rights should be. The Irish citizen who may rely on retained EU rights or CTA rights, will of course be the same person, yet there may be a need to differentiate which sets of rights are being relied upon. The UK government has indicated that Irish citizens will be exempt from any verification process granting settled status to EU26 nationals, the question then arises as to how Irish citizens will demonstrate their status post-Brexit for a variety of bureaucratic processes. There is also the

81 HC Deb 13 June 2018, W 153188.

82 For detailed analysis see Traveller Movement, *Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future* (December 2017) <http://travellermovement.org.uk/wp-content/uploads/TTM-Brexit_and_Irish_citizens_in_the_UK_web.pdf>; see also Bernard Ryan, 'The implications of UK withdrawal for immigration policy and nationality law: Irish aspects' ILPA 8 (18 May 2016) <<http://www.ilpa.org.uk/resource/32154/eu-referendum-position-paper-8-the-implications-of-uk-withdrawal-for-immigration-policy-and-national>>.

83 TF50 (n 47), art 34(2) - with reference to art 11 (non-discrimination) and art 21 (equal treatment).

question, particularly highlighted by the Windrush scandal, of how persons in NI will ‘prove’ any residence or nationality requirement. How effectively such a complex system of tiered entitlements will be administered in practice, and how much it will cost in terms of both time and money, remains to be seen.

The difficulty in obtaining answers to these questions has been compounded by a lack of any tangible signs of proposals or progress on legislative changes from either government to ensure the codification of CTA rights. The UK’s EU (Withdrawal) Act 2018 contains no specific provision to ensure that reciprocal arrangements currently provided for by EU rights are safeguarded by the CTA. Given political differences, there are also further difficulties as regards the exercise of regulation making powers under the Act by any re-established NI Assembly.⁸⁴ It is notable however, that there appeared to be a degree of political consensus, including from the DUP (who do not support the B/GFA), that reciprocal CTA rights be maintained. However, as yet there is no mechanism or open process to do so.

There is a real risk that if the CTA is kept as a ‘loose arrangement’ there will be selective application of enforcement against particular groups of Irish citizens, in particular those who have non-EEA family members. In the post-Brexit context, this could be extended to EU26 family members.

One Big Border? - the Hostile/Compliant Environment Measures

A number of interviewees alluded to the primacy of the use of ‘in country’ controls to regulate migration into NI rather than traditional border controls. For example, one Senior Official stated:

One can conclude that... an EU citizen traveling to Dublin post-Brexit, traveling north, will do so just as they do today. ... but there would have to be, you would’ve thought, a different process of in-country checking when they would attempt to register for any service or... employment. And it seems that a lot of, a lot of these things I think will end up with a risk-based approach ...⁸⁵

A DUP MLA noted:

It will not be men in peak caps at borders, that will not be how it works. At the present time you or I can fly to the United States of America for example or we can fly to other countries, we can get into other countries.

⁸⁴ For further detail see, Harvey and Holder (n 26).

⁸⁵ Senior Official Interview (n 3).

In terms of control of the movement of people I think it comes about by enlisting certain organisations to assist the state so for example, someone comes here to work, they get a work permit, if you're a foreign national you get a work permit, if you apply to open a bank account here you have to produce your work permit, if you apply to rent a property, you use your work permit, if you apply to register to vote, your work permit. It's on that basis, so you're enlisting the banks and landlords and employers if you want to get a job...⁸⁶

This approach appears to be confirmed in the UK Northern Ireland and Ireland Position Paper which alludes to future plans for immigration control in NI and the broader CTA being dependent on in country controls:

When considering the nature of the CTA as a border-free zone, it is important to note that immigration controls are not, and never have been, solely about the ability to prevent and control entry at the UK's physical border. Along with many other Member States, controlling access to the labour market and social security have long formed an integral part of the UK's immigration system.⁸⁷

As alluded to in the context section of this report, the use of in-country controls had been significantly, and problematically, accelerated through the 'Hostile/Compliant Environment' measures, introduced under the 2014 and 2016 Immigration Acts. These measures which involve the 'subcontracting' of duties to police immigration to numerous public sector and private actors, have raised serious concerns regarding racial discrimination and other resultant human rights abuses that became common knowledge through the 'Windrush' scandal.⁸⁸ Not all hostile/compliant environment measures have been rolled out yet in Northern Ireland. Whilst the original targeting of the 'hostile/compliant environment' was at non-EEA nationals, the logic of Brexit is that there will be future application to EEA nationals too. In commenting on this, the Westminster Home Affairs Select Committee stated:

We are very concerned at the possibility that the hostile environment could be extended to include EEA nationals and apply to an estimated three million more people living legally in the UK without any evidence that the policy is working fairly and effectively. This has the potential to create further errors and injustices, which we have already seen causing unnecessary distress, and to increase the administrative burden on individuals, employers and landlords, without any evidence that the system works.⁸⁹

86 Stalford Interview (n 33).

87 HM Government (n 21) para 33.

88 For information on the Windrush Scandal see, <<https://www.theguardian.com/uk-news/windrush-scandal>>.

89 Home Affairs Select Committee, 'Home Office delivery of Brexit: Immigration' (7 February 2018) para 122 < <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/421/421.pdf>>.

There is a risk that reliance on ‘in country’ controls will be even more pronounced in NI, given that advocates of further migration controls view the region as a potential ‘back door’ to the UK following Brexit.⁹⁰ One interviewee, a senior legal practitioner, argued that such an approach would be:

... an absolute disaster for anyone who has any belief in human rights, civil liberties, in the peace process, in anti-discrimination. ... [in Great Britain] they introduced this notion of backdoor security checks by landlords and employers etc. which is one of the things being suggested by part of the frictionless border, that you move the checks into the private sector... one of the things that strikes me, you are firstly ... going to have a situation where there are a number of categories of people who are all going to be treated differently, within the law. The law will be mandating discrimination ... You’re then transferring law enforcement to non-law enforcers ...

... it didn’t work in GB. It caused huge distress, it caused upset, ... families upped and left overnight, moved to different parts of the country, presented to different local authorities for homeless accommodation...ended up on the street with children, all to avoid these sorts of provisions ...⁹¹

In the course of our research we heard testimony from EU migrant workers in NI regarding (to adopt the terms used by the Home Affairs Committee) errors and injustices and unnecessary distress that the existing hostile/compliant environment measures have already caused them.⁹² This includes significant problems and costs in relation to interacting with banks and accessing public services where entitlements are increasingly questioned. We have consistently heard that the situation has deteriorated since the 2016 referendum. Again, it is not always clear as to whether such changes are the result of formal policy changes or attitudinal changes among decision makers. The NI Affairs Committee in its report on the border has called for clarity as to the intentions for in-country controls:

We recommend the Government sets out in detail how it proposes to apply existing, or whether there will be new, internal immigration controls for EU nationals. In the Committee’s view, the residents of Northern Ireland should not be subject to more onerous documentary checks to determine entitlement to stay and to access public services and the labour market than anywhere else in the UK. It must also establish the resource implications of conducting checks on people away from the border.⁹³

90 See, for example, Dominic Yeatman, ‘The Brexit backdoor to Britain: Fears over ‘free entry’ at Ireland border’ *Metro* (17 August 2017) <<https://www.metro.news/the-brexit-backdoor-to-britain-fears-over-free-entry-at-ireland-border/712428/>>.

91 Senior Legal Professional Interview (n 40).

92 In February 2018, BrexitLawNI with NGO and trade union partners and the Stronger Together network held a major conference on the implications of Brexit for migrant workers in NI - a report from which is pending.

93 NI Affairs Committee (n 6) para 31.

The Government's response to the Committee's recommendation stated, in June 2018, that it was 'carefully considering a range of options' for a future UK immigration system and 'initial plans' would be set out in coming months.⁹⁴ Whilst such proposals are awaited, references however to increased 'intensification' of the Hostile/Compliant Environment measures under the 2014 and 2016 Acts are already explicit in other official documents. For example, the 'Forward Look' section of the Organised Crime Task Force (Northern Ireland) 2017 'Annual Report and Threat Assessment' states:

Immigration Enforcement will seek to fully exploit all the measures in the Immigration Acts 2014 and 2016 to tackle illegal immigration; **the team in Northern Ireland was the first in the UK to convict an individual (rather than an employer) for the offence of illegal working.**⁹⁵ (emphasis in original)

A case study in the report elaborates that the latter example referred to three persons working without immigration permission in a restaurant in October 2016 (there is no information provided that would indicate this incident related to 'Organised Crime'). The immigration section of the Organised Crime report also alludes to Immigration Enforcement continuing its work with UKBF and An Garda Síochána 'in conducting intensification campaigns to tackle cross border and wider immigration crime.'⁹⁶ There are therefore clear indications that within the Home Office there is a desire to 'fully exploit' the hostile/compliant environment measures.

Implications for Policing Accountability

As alluded to earlier, the arrangements for the accountability of law enforcement agencies in NI flow from the Independent Commission on Policing (the Patten Commission) established further to the B/GFA.⁹⁷ The reforms entailed a new framework for human rights compliance, with new binding codes of ethics and powerful accountability bodies including the NI Policing Board and Police Ombudsman. The model did not envisage 'tiered' law enforcement in NI and there has been considerable controversy in recent years regarding attempts to introduce new tiers of law enforcement into NI that circumvent and were not accountable to the Patten accountability architecture.

The UKBF is currently not accountable to the Policing Board and has limited accountability to the Police Ombudsman. An enhanced role for the UKBF in NI and also Home Office Immigration Enforcement and Compliance Teams, who will be responsible for implementing 'hostile/compliant environment' measures and are also not accountable to the Board, has the potential

94 House of Commons and Northern Ireland Affairs Committee, *The land border between Northern Ireland and Ireland: Government Response to the Committee's Second Report* (15 June 2018) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmniaf/1198/1198.pdf>>.

95 Organised Crime Task Force, *2017 Annual Report and Threat Assessment* (6 February 2017) p 18 <<https://www.octf.gov.uk/OCTF/media/OCTF/documents/articles/publications/OCTF-Annual-Report-2017.pdf?ext=.pdf>>.

96 *ibid.*

97 'A new beginning' (n 24).

to further rollback policing accountability in this jurisdiction. The likely need for UKBF officers to seek security support from the PSNI in controversial and discriminatory operations may also impact on the ability of the PSNI to comply with their 'core policing principles' duty to carry out their functions with the aim of securing support and cooperation of the whole community in NI.

From the engagement carried out in our research, we did speak to persons who expressed unease within policing about both the resource and reputational implications of being drawn in to border control and broader UKBF operations. At present however there has been no commitment or initiative from government to ensure UKBF and the Home Office compliance teams are brought under the umbrella of NI policing accountability. We have come across a general assumption that there is some sort of 'immigration exemption' and that 'immigration' is 'different' to policing. We can however see no merit in that argument as many of the same human rights compliance issues that required the accountability architecture also manifest themselves in the exercise of immigration enforcement. Whilst the 'suspect community' may be different, the issues are the same. There is a real risk that unless this happens, Brexit could prompt a return to the use of broadly drafted arrest, questioning and detention powers in an arbitrary and discriminatory manner.

D. Ways Forward

Codifying and Enshrining Rights in the CTA

A process should be set underway to codify and legally underpin the CTA both in relation to free movement and reciprocal 'associated rights'. This should include the CTA being underpinned by a bilateral (UK-Ireland) treaty. However, the experience of the peace process whereby many rights-based provisions in bilateral agreements (without dispute-resolution mechanisms) have not been implemented, would point to this being insufficient. The treaty-based provisions should therefore also be enshrined into domestic legislation; the NI Bill of Rights being an evident vehicle for this jurisdiction. An international mechanism which can deal with disputes over implementation of the treaty should also be established.

The codification of rights to free movement within the CTA should explicitly incorporate the existing policy position put forward by UK Ministers to Parliament that there will be no passport checks on either the land border or Irish Sea and no racial profiling. The existing operations leading to passport checks (and racial profiling) in such locations by both states should be discontinued, and Ireland should amend legislation that provides for land border ID checks on 'non-Irish/UK nationals' only.

The UK should also amend and provide additional safeguards in its legislative framework. The UK should review and revise its 'Schedule 7' port and border control powers and ensure any such powers are only used in a human rights compliant manner and are not misused beyond the purpose for which Parliament legislated. The new 'border security' powers allowing unfettered examination of anyone crossing the land border are not compatible with the CTA and should be removed from the current bill.

The codification of reciprocal 'associated rights' in the CTA should ensure that, as a minimum, it provides rights currently enjoyed under EU provisions that are subsidiary to the agreed areas of reciprocity. Whilst reciprocal rights have largely been considered as attached to British and Irish citizens, such provision should not prejudice or preclude in the NI context entitlements being attached to other persons with residence (EU26 citizens or otherwise), in particular in the border areas where public services may be on the alternate side of the border.

Accountability, Safeguarding Against Discrimination

It is not possible to envisage a solution, other than continued EU freedom of movement into NI, that is not going to create multiple new differentials in entitlements making further racial profiling and broader discrimination even more widespread. This option should be returned to and consideration should also be given, in the context of the re-established institutions, to the devolution of immigration powers and a bespoke system, that assist in addressing existing problems in this area.

The UK should desist from its planned roll out of 'hostile/compliant environment' measures in NI, and retract those which have already been put in place.

The UK should legislate to ensure that the UKBF and Home Office immigration enforcement compliance teams insofar as they exercise functions in NI, are fully accountable to the full range of accountability bodies and standards established under the Patten Commission.

Specific safeguards should be introduced, in accordance with international best practice, to prevent racial profiling across the public sector.



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