Guarantees of Rights of Entry and Residence after Brexit

Written Evidence to the Immigration and Social Security Co-ordination (EU Withdrawal) Public Bill Committee

Bernard Ryan, Professor of Migration Law, University of Leicester

INTRODUCTION

This submission comments on two sets of provisions concerning immigration status in the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

Clause 1 and Schedule 1 affect the position of other EEA+ nationals[1] and their qualifying family members resident in the United Kingdom on the date that free movement of persons regime comes to an end *at the EU level*. (That date is here called the 'end date'.)

Clause 2 sets out a new legislative guarantee of the position of Irish citizens in immigration law, which will be of particular relevance after the end date.

These provisions are considered in turn here, and proposals made for changes to them.

1. PRIOR RESIDENTS (Clause 1 and Schedule 1)

The proposal advanced in this section is that *this Bill* should provide a legislative guarantee of the rights of residence of prior residents with a connection to EU law.

Summary of the provisions

The purpose of clause 1 and Schedule 1 is to permit the free movement of persons regime to be brought to an end in the United Kingdom, either immediately upon, or soon after, the end date at the EU level. Clause 1 and Schedule 1 would come into effect on a date to be specified by a commencement order (see clause 7(8)). A commencement order may include transitional provisions, and "different provision for different purposes" (clause 7(9)).

The European Union (Withdrawal) Act 2018 provides the default position that both EU law and United Kingdom implementing legislation are to be "retained" in United Kingdom law, unless modified by appropriate United Kingdom legislation. The role of clause 1 and Schedule 1 is to provide the necessary legislation to ensure that the free movement of persons rules cease to apply in the United Kingdom.

The key provisions of Schedule 1 are as follows.

[1] The term 'EEA+' is used for the nationals of all EU28 states (including the United Kingdom), together with the four EFTA states (Iceland, Liechtenstein, Norway and Switzerland) with international agreements with the EU which provide for the free movement of persons.

- Section 7 of the Immigration Act 1988 is to be "omitted" from the legislation to be retained under the 2018 Act (Schedule 1, para 1 of the Bill).

  Section 7(1) states that: "A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972."

  Section 7(1) therefore provides an exemption from any obligation to obtain leave to enter and remain for all persons whose rights of entry and residence flow from EU law. It covers directly effective rights *and* rights under implementation measures adopted in the United Kingdom. This dual approach caters for the possibility of differences between EU law and implementation measures.

- The Immigration (European Economic Area) Regulations 2016 are to be "revoked" (Schedule 1, para 2(2) of the Bill).

  The 2016 Regulations are the implementation measure through which specific EU law rights of entry and residence are recognised in the United Kingdom. They cover all other EEA+ nationals on an equal basis.

- Rights of entry and residence based upon EU treaty provisions or directives which have direct effect will cease to be applicable in the United Kingdom. That follow from Schedule 1, para 9 of the Bill, according to which

  > "Any … EU-derived rights … cease to be recognised and available in domestic law so far as, (a) they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts, or (b) they are otherwise capable of affecting the exercise of functions in connection with immigration."

  At a minimum, this provision appears to catch the following:

  - The provisions of the Citizens Directive of 2004 (Directive 2004/ 38) concerned with entry, residence and exclusion/ expulsion
  - Rights of entry and residence of workers, self-employed persons and posted workers based on Articles 45, 49 and 56 TFEU
  - Rights of entry and residence of students flowing from Articles 165 and 166 TFEU on vocational training
  - Rights of EU citizens concerning movement and residence flowing from Articles 20 and 21 TFEU.

  It is not clear to what extent rights of economic activity as such, or rights of equality of treatment in economic and social matters, are caught by the terms of para 9.

- Regulation 492/2011 on the free movement of workers will cease to apply in part (Schedule 1, para 4 of the Bill).

  It is stated in terms that Article 1 of the Regulation, which recognises the right of EU citizens to take employment on an equal basis in other Member States, will be "omitted" from the list of retained legislation.

  Other provisions of the Regulation are to cease to have effect, if "(a) they are inconsistent with any provision made by or under the Immigration Acts … or (b) they are otherwise capable of affecting the interpretation, application or operation of any such provision." This principle covers the rights of residence of children of workers, and carers, while children complete their education, which have been recognised to flow from Article 10 of the Regulation (and predecessor legislation). It is uncertain how far it affects the economic and social rights provisions contained in the Regulation.

A legislative guarantee in a 'no deal' scenario

The need for a legislative guarantee in the current Bill is especially evident in a 'no deal' scenario. In that case – barring new developments - the end date for free movement of persons rights at the EU level would be 29 March 2019.

If the Withdrawal Agreement were agreed, the Government has committed to primary legislation to "underpin" its citizens' rights provisions in the United Kingdom.[2] Without an agreement, however, there would be no implementing legislation within which guarantees could be provided.

In such a scenario, the Government is committed to protecting the rights of EU residents through the EU settlement scheme, which is already provided for in Appendix EU to the Immigration Rules.[3] The terms of protection would however be slightly different to those which apply under the Withdrawal Agreement. In particular:

- The EU settlement scheme would only apply to persons who were resident on 29 March 2019 (rather than 31 December 2020).

  In a related development, on 28 January 2019, the Government announced a proposal for 'European temporary leave to remain', to be introduced in a no deal scenario. This form of leave would be available to EEA+ nationals and family members who arrived in the United Kingdom after 29 March 2019, but before 31

[2] See Department for Exiting the European Union, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union* (Cm 9674, July 2018), para 29.
[3] Department for Exiting the EU, *Citizens' Rights - EU citizens in the UK and UK nationals in the EU: Policy Paper* (6 December 2018).

December 2020, and who wished to stay for more than three months. This would be a temporary status, valid for 36 months.

- Applications to the EU settlement scheme would have to be made by 31 December 2020 (rather than 30 June 2021).

- The provision for close family members (including children) to join EU citizens under EU rules would only apply until 29 March 2022, rather than indefinitely. After that, the Immigration Rules would apply.

A legislative guarantee as to the position in a 'no deal' Brexit is desirable in the current Bill, in order to give prior residents with a connection to EU law certainty as to their continuing status.

At a minimum, this guarantee should protect those who are covered by section 7 of the 1988 Act at the end date – i.e. who either have directly effective rights or are covered by the 2016 Regulations. It could go further to cater for other EEA+ nationals and family members who are covered by the EU settlement scheme.

Such a guarantee would firstly protect the legal position of EEA+ nationals and qualifying family members who were resident in United Kingdom in the short-term. The 1988 Act and 2016 Regulations will presumably have to be 'switched off', to prevent their application to new arrivals. As indicated, the Government's position is that, in a 'no deal' context, those resident with a connection to EU free movement law would have until the end of 2020 to register. It has not however indicated what the legal position of such persons will be between 29 March 2019 and the end of 2020.

A guarantee in primary legislation would also give certainty to for the longer-term to all those with rights of residence connected to EU free movement law. In effect, it would ensure that these rights could not be reduced or removed at a later date through the Immigration Rules, as a result of a change in United Kingdom policy.

The position with a Withdrawal Agreement

There is also an argument for a legislative guarantee where the United Kingdom exits the EU in accordance with the Withdrawal Agreement.

In that scenario, we may assume that primary legislation to implement the Withdrawal Agreement would guarantee the rights of resident of persons who are protected by the Agreement itself. That covers EU 27 nationals and their family members who are resident in the United Kingdom, and EU 27 frontier workers who work in the United Kingdom.[4]

[4] See Withdrawal Agreement, Articles 10, 13 and 24.

The question which arises is whether there should be a legislative guarantee for prior residents with a connection to EU law, but who are not within the terms of the Withdrawal Agreement. The following cases may be identified.

1. Persons covered by the Withdrawal Agreement who fail to register under the EU settlement scheme.

   Under the Withdrawal Agreement, prior residents would have a minimum of six months to register after the end date.[5] In addition, there would be a minimum of three months to register for those whose rights arise later (those who only later become eligible for permanent/ settled status, and newly-arrived family members).[6]

   Where a person fails to respect these deadlines, it is stated that "the competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline."[7] A person who is in principle covered by the Agreement may therefore lose their rights of residence through a failure to register.

2. Family members of British citizens who are covered by EU free movement law, but not the Withdrawal Agreement.

   One group under this heading are the non-EEA+ family members of a British citizen who has moved to the United Kingdom after exercising EU rights in another member state ('*Singh* cases'). The Government has committed to protecting these family members concerned, and they are eligible to apply under the EU settlement scheme.[8]

   The second group covers the non-EEA+ primary carer of a British citizen child resident in the United Kingdom ('*Zambrano* cases'). This group are not to be covered by the EU settlement scheme, but the Government has instead stated that "further details will be provided in due course on the new status available to them."[9]

3. Persons who are not protected by EU free movement law, or the Withdrawal Agreement, but who are eligible under the EU settlement scheme.

   One reason this may occur is that some persons benefit from the 2016 Regulations, without being covered by EU free movement law – e.g. persons who entered into a civil partnership outside the EU.

[5] Withdrawal Agreement, Article 18(1)(b).
[6] The Withdrawal Agreement applies to the subsequently-arriving close family members of EU citizens who were resident at the end date, provided the relationship existed at that date. It also applies to the children of those resident EU citizens, born after the end date, wherever they are born.
[7] Withdrawal Agreement, Article 18(1)(d).
[8] Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018), para 6.12.
[9] *Ibid.*

A more general reason is that the EU settlement scheme has dispensed with substantive qualifying conditions in applications under the EU settlement scheme. Instead, the EEA+ national - and any family members qualifying through them – must have been continuously resident for a period of five years. This protects EEA+ nationals who were resident without being self-sufficient (e.g. through non-possession of sickness insurance).

4. Persons who are successful in an application under the EU settlement scheme, without actually meeting its requirements (and without fraud). This may arise because of the broad ways in which continuous residence is evidenced.

A guarantee in primary legislation for these individuals also appears desirable. It would protect them against loss of rights (case 1), changes in United Kingdom policy at a later date (cases 2 and 3), and re-examination of their original application at a later date (case 4).

These guarantees could be provided either in the current Bill, or within subsequent legislation to give effect to the Withdrawal Agreement. The case for taking steps in the current Bill is that it is concerned with defining the fundamental principles of future immigration law, rather than the implementation of an agreement with the EU.

2. IRISH CITIZENS (clause 2)

The historic legal position of Irish citizens

The United Kingdom's historic - and current - policy and practice has been to treat Irish citizens as if they were exempt from requirements to obtain leave to enter or remain.

The reasons for special treatment of Irish citizens relate to the common travel area, understood as a relatively open border arrangement between the two states. The common travel area reflects the long history of personal movement between the two states, including for family reasons, for economic purposes, and for tourism. It also reflects the difficulty of operating immigration control at the Irish land border.

These factors explain why British citizens are fully exempt from control under Irish immigration law.[10]

The special treatment of Irish citizens as a category has never however been fully expressed in immigration legislation in United Kingdom. As the law stood in the 1940s, the basic rule was that aliens were subject to immigration control, whereas no British subject could be denied entry to the United Kingdom. After the Republic of Ireland definitively ended its association with the Commonwealth in 1949 – ending any possible argument that Irish

[10] See the definition of 'non-national' in the Immigration Act 1999, section 1(1), read together with the Aliens (Exemption) Order 1999 (SI 1999 No. 97).

citizens were British subjects - Irish citizens continued to be exempt from control, because of the terms of section 2 of the Ireland Act 1949. According to it

> "notwithstanding that the Republic of Ireland is not part of His Majesty's dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom … and references in any Act of Parliament, other enactment or instrument whatsoever … to foreigners, aliens [etc.] shall be construed accordingly."

The legal position in immigration law changed fundamentally from 1 July 1962, when the Commonwealth Immigrants Act 1962 permitted immigration control to be applied to Commonwealth citizens (that is, citizens of independent Commonwealth states, and colonial Citizens of the United Kingdom and Colonies). The position of Irish citizens was addressed by section 1(4) to the 1962 Act, according to which "This Part of this Act applies to British protected persons and citizens of the Republic of Ireland as it applies to Commonwealth citizens." A new power of deportation of Commonwealth citizens upon a court's recommendation, was also expressly extended to Irish citizens (1962 Act, section 6(3)).

Since 1 January 1973, when the Immigration Act 1971 brought aliens and Commonwealth citizens within one scheme of legislation, Irish citizens have in principle been covered. Legally, only persons with the right of abode are exempt from immigration control, and the only nationality leading to the right of abode is British citizenship.[11]

Irish citizens are covered by the provision for deportation in the 1971 Act. That is confirmed by the provisions of section 7 of the 1971 Act, which exempts Commonwealth and Irish citizens from deportation, if they were resident in the United Kingdom before 1 January 1973, and have been ordinarily resident in the United Kingdom and islands for the previous five years.

It does not appear however that entry by Irish citizens was ever restricted under either the 1962 or the 1971 Acts. The position was seen for example in the exclusion of Irish citizens from the scope of Immigration Rules for EEC nationals adopted in 1973.[12]

The special position of Irish citizens has not hitherto been reflected in legislation.[13] Two pieces of legislation have conferred *partial* recognition upon them, but only if they entered the United Kingdom from or another part of the common travel area (i.e. the Republic of Ireland or the Crown Dependencies).

---

[11] Immigration Act 1971, section 2. The right of abode is also held by specific categories of Commonwealth citizen who had had that right prior to 1 January 1983.

[12] See *Immigration Rules for Control on Entry: EEC and other Non-Commonwealth Nationals* (HC 81, 25 January 1973), p. 5: "The rules contained in this statement do not, however, extend to citizens of the Irish Republic, who because the Republic forms part of the Common Travel Area … are admitted freely to the United Kingdom, whether coming from within or outside that Area, except in cases where the Secretary of State decides that the exclusion of a particular person is conducive to the public good."

[13] See Traveller Movement, *Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future* (December 2017).

- Under the Immigration (Control of Entry through Republic of Ireland) Order 1972, persons who lawfully enter the United Kingdom from the Republic of Ireland are generally subject to a form of 'deemed leave'.[14] In the original version of the Order, Irish citizens were stated to be exempt from this provision, which implicitly recognised an unlimited right of entry for them. The specific reference to Irish citizens was however removed by an amendment in 2014, which extended the benefit of the exemption to all those with rights of entry flowing from EU law.[15]

- When the Borders, Citizenship and Immigration Act 2009 introduced a definition of the requirement not to have been "in breach of the immigration laws" for applicants for registration and naturalisation through residence in the United Kingdom, it was necessary to cater for lawful entry by Irish citizens. That was done through the concept of a "qualifying CTA entitlement", which is defined as follows:

  > "a person has a qualifying CTA entitlement if the person— (a) is a citizen of the Republic of Ireland, (b) last arrived in the United Kingdom on a local journey … from the Republic of Ireland, and (c) on that arrival, was a citizen of the Republic of Ireland and was entitled to enter without leave by virtue of section 1(3) of the Immigration Act 1971 (entry from the common travel area)."[16]

  It is telling that this 'entitlement' only covers arrival from the Republic of Ireland, in recognition of the fact that an Irish citizen arriving from elsewhere is not legally exempt from the need to obtain leave.

The development of EU law on the free movement of persons anyway reduced the need for legislative recognition of the special position of Irish citizens. In that regard, a key step was the amendment of the Immigration Rules in December 1982 removing the need for qualifying EC nationals and family members to obtain leave to enter.[17] (That principle was later given statutory force by section 7 of the Immigration Act 1971.) The creation by the Citizens Directive of rights of entry and of initial residence for three months for EU citizens, without qualifying conditions, further reduced the need for a specific legal provision for Irish citizens.

Summary of the provisions

The purpose of clause 2 is to provide a specific status (or exemption) for Irish citizens within immigration law. It does so by its statement of a default position in Clause 2(1) that "An Irish citizen does not require leave to enter or remain in the United Kingdom".

---

[14] Immigration (Control of Entry through Republic of Ireland) Order 1972 (SI 1972 No. 1610), Article 4.

[15] This amendment was made by the Immigration (Control of Entry through Republic of Ireland) (Amendment) Order 2014 (SI 2014 No. 2475), Article 3(6).

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

[17] HC 66 (6 December 1982), paras 67 and 68.

There are to be three exceptions to that default positions, covering Irish citizens who are:

- the subject of a current deportation order (clause 2(2))

- covered by direction by the Secretary of State excluding them from the United Kingdom, on the grounds that exclusion is conducive to the public good (clause 2(3))

- Excluded from the United Kingdom by virtue of section 8B of the Immigration Act 1971. That section concerns United Nations and European Union sanctions measures, and regulations adopted under the Sanctions and Anti-Money Laundering Act 2018.

Possible amendments to Clause 2

There are three respects in which Clause 2 could be improved upon, in order to provide equality for Irish citizens within immigration law, while respecting the possibility of deportation.

Equality in family migration

Irish citizens would benefit from a guarantee of equal treatment with British citizens in the family migration provisions of the Immigration Rules.

The main issue is to ensure that Irish citizens will have the same opportunities as British citizens to sponsor family members (partners, children, parents, etc). In practice, under the current Rules, sponsors will either be (a) British citizens coming to take up residence in the United Kingdom, or (b) British citizens or persons with indefinite leave who are currently resident in the United Kingdom.

In relation to (a), without an amendment to confer equality of treatment, Irish citizens will not be able to move to the United Kingdom with family members who are neither British nor Irish citizens.

In relation to (b), resident Irish citizens will be considered 'settled' for the purposes of the Immigration Rules if clause 2 becomes law. An amendment to confer equality of treatment would ensure that in future Irish citizens would have the same entitlement to sponsor as British citizens.

A second issue is to ensure that Irish citizens would count equally with British citizens in the detail of the family migration rules. An example is the provision that children who are British citizens or settled in the United Kingdom do not count in minimum income calculations. Equality for Irish citizens implies that the same provision be made for Irish citizen children.

The threshold for deportation and exclusion

As drafted, clause 2 provides that Irish citizens may be deported under section 5 of the 1971 Act. That section permits deportation where a person is "liable" to deportation under section 3 of the Act. That applies to

- A person whose deportation the Secretary of State "deems … conducive to the public good". This test is met automatically when a person is covered by the mandatory deportation provisions of the UK Borders Act 2007 (i.e. a sentence of imprisonment of at least 12 months, or any sentence of imprisonment after conviction for a serious office).

- A person whom a court recommends for deportation at the time of conviction for a criminal offence punishable by imprisonment

- The family member of a person who is or has been ordered to be deported.

Clause 2 would also introduce a new specific power to exclude Irish citizens from the United Kingdom where the Secretary of State considers that to be "conducive to the public good". This new power is consistent with existing powers to exclude persons arriving from other parts of the common travel area, and to refuse leave to enter to a person seeking to come to the United Kingdom.[18]

As drafted, the Bill does not however imply any particular protection as to the threshold for deportation or exclusion of Irish citizens. The stated policy of the Government in 2007 was that "Irish citizens will only be considered for deportation where a court has recommended deportation in sentencing or where the Secretary of State concludes, due to the exceptional circumstances of the case, the public interest requires deportation."[19] There is no evidence that the position in this regard has changed, or that it is likely to do so. It appears desirable to reflect that policy in legislation.

In this regard, it may be added that, by virtue of their exemption from Irish immigration law, British citizens are immune from deportation and exclusion under Irish law.

Deportation and exclusion of Irish citizens who are from Northern Ireland

A further question is whether, in order to comply with the Belfast Agreement, there should be an exemption from deportation and exclusion for Irish citizens who are from Northern Ireland.

Article 1(vi) of the British-Irish Agreement of 1998 states that:

[18] See section 9(4) Immigration Act 1971 and the Immigration Rules, paras 320(6) and V.3.2, respectively.
[19] Minister for Immigration, Liam Byrne, *House of Commons Written Ministerial Statement*, 19 February 2007.

> "the two Governments …recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Government and would not be affected by any future change in the status of Northern Ireland."

That statement was reproduced in the multi-party agreement, and endorsed by its signatories.

The term "the people of Northern Ireland" was defined in a "declaration" made by the two governments at the time, as follows:

> "The term "the people of Northern Ireland" in paragraph (vi) of Article 1 of this Agreement means … all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence."

There is a risk that, as formulated, the deportation and exclusion clauses will fail respect the right of a person from Northern Ireland who wishes to identify as an Irish citizen.

In most cases, such a person will also legally be a British citizen, and therefore immune from deportation and exclusion. The question is whether it is compatible with the Belfast Agreement to require them to assert their British citizenship in order to gain that immunity.

A further complication is that a person from Northern Ireland may have specifically renounced British citizenship. Were they to have done so, they would not have British citizenship to rely upon (unless they re-acquired it). Here too, it is not clear that deportation or exclusion from the United Kingdom of a person would be compatible with the Belfast Agreement.

To avoid these difficulties, an amendment to clause 2 could provide that an Irish citizen may not be deported or excluded from the United Kingdom if they are among the 'people of Northern Ireland' entitled to identify as Irish citizens under Article 1(vi) of the British-Irish Agreement of 1998.

11 February 2019