



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Immigration and Social Security Co-ordination
(EU Withdrawal) Bill:
Submission to Public Bill Committee**

February 2019

Introduction

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory public body established in 1999 to promote and protect human rights. The Commission is one of the three 'A status' National Human Rights Institutions in the United Kingdom. Pursuant to Section 69(1) of the Northern Ireland Act 1998, the Commission reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function the following statutory advice is submitted to the Public Bill Committee on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.
2. The Commission has been considering the potential human rights risks arising from Brexit and ways to mitigate those risks. The UK Government committed to ensuring 'no diminution of rights' as a result of Brexit, in the Joint Report of December 2017.¹ This was later articulated in the Draft Withdrawal Agreement as "The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union...".² The commitment, which will be enshrined in law, is relevant to this Bill, particularly since the 1998 Agreement protects equal treatment and the right to freely choose one's place of residence.
3. In our work with the Irish Human Rights and Equality Commission as the 'Joint Committee'³ we produced a policy statement on Brexit⁴ highlighting the central importance of equality and human rights in Northern Ireland. We raised concerns that continuing EU rights for Northern Ireland's Irish citizens after Brexit could create nine or more categories of rights-holder and place British citizens of Northern Ireland at a disadvantage; we therefore called for continuing rights to be extended to all "the people of Northern Ireland"⁵ at least.
4. This submission addresses, amongst other issues, a parallel question of immigration issues affecting Irish citizens after Brexit.

1 UK-EU Joint Report on Phase 1 of Negotiations, December 2017, paragraph 53

2 The Draft Withdrawal Agreement, 14 November 2018, Protocol on Ireland/Northern Ireland, Article 4

3 Established under the Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity section, paragraph 10

4 Accessible here: <http://www.nihrc.org/publication/detail/joint-committee-statement-on-the-uk-withdrawal-from-the-european-union>

5 Defined in the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 10 April 1998, Annex 2 as "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"

Clause 1 & Schedule 1 – Repeal of the main retained EU law relating to free movement

5. For Irish citizens in the UK and UK citizens in Ireland, the repeal of EEA free movement rights under section 1, increases the importance of rights under the 'Common Travel Area' (CTA). The CTA is not the subject of any international treaty and has limited bespoke domestic legislative underpinning. Beyond the right to travel within the CTA without being subject to immigration law, the legal basis and extent of associated rights under the CTA (e.g. access to healthcare, education, social care) are unclear and can be changed or withdrawn with limited scrutiny.⁶ CTA rights have, in recent decades, been surpassed by a range of protections under EEA free movement legislation, further underpinned by the supremacy of EU law in the UK domestic context. The Commission is not persuaded that protection of rights contained within the CTA will sufficiently meet the 'no diminution' commitment. Family reunification rights are not included and the discussion below details potential inequality arising from deportation provisions. Clause 1 of the Bill removes an extensive package of legally enforceable rights deriving from EEA free movement legislation, leaving Irish citizens potentially reliant on more limited provisions "written in sand"⁷.
6. The Commission would acknowledge in this context that the Department for Work and Pensions announced on 4 February that the UK and Irish governments had signed an agreement in respect of social security co-ordination though, at the time of writing, the detail of the actual agreement has yet to be published⁸.
7. The Committee may wish to satisfy itself as to the clarity and enforceability of EU citizens' rights under the 'settled status' scheme, particularly in respect of the right of appeal proposed in the Draft Withdrawal Agreement. While we understand that the Withdrawal Agreement Implementation Bill was expected to have been enacted by this point, clause 1 may undo the free movement rights on which around three million people rely, before all the commitments to those citizens have been fully protected in law.

6 See here for research commissioned by the Joint Committee of the Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission: <http://www.nihrc.org/publication/detail/discussion-paper-on-the-common-travel-area>

7 Ibid. at page 9

8 'Government agrees deal to protect social security rights of UK and Irish citizens living and working in each other's state', Department for Work and Pensions, 4 February 2019: <https://www.gov.uk/government/news/government-agrees-deal-to-protect-social-security-rights-of-uk-and-irish-citizens-living-and-working-in-each-other-s-state>

8. The Commission recommends that the UK and Ireland provide clarity and certainty as to the rights of citizens, by agreeing a comprehensive bilateral treaty encompassing reciprocal free movement rights, employment rights, rights to education, health, social security, justice and security⁹ and that such a treaty be incorporated in domestic legislation.

Clause 2 – Irish citizens: entitlement to enter or remain without leave

9. The Commission welcomes the provisions in clause 2 that amend the Immigration Act 1971 to grant leave to enter or remain in the UK, to Irish citizens, based on nationality rather than the origin of their journey having been within the Common Travel Area.
10. The above-mentioned commitment by the UK Government to no diminution of rights¹⁰, protects the 'Rights, Safeguards and Equality' provisions of the Belfast (Good Friday) Agreement ('the 1998 Agreement') to the extent that they are covered by EU legislation. The relevant section includes the right to choose freely one's place of residence. Provisions in clause 2 of the Bill dealing with deportation engage this right and constitute a diminution of rights for Irish citizens because protections will be reduced as compared with those currently provided under EEA free movement directive 2004/38/EC.
11. Whereas provisions under this Bill would allow for Irish citizens to be deported if "conducive to the public good", Article 28 of the free movement directive sets a higher bar. First, it states that EEA nationals may not be expelled except "on grounds of public policy, public security or public health" but protections increase for those with right of permanent residence and for minors and those who have been in the UK for ten years or more; other safeguards include not using deportation for economic reasons, for example. The ECJ has interpreted the grounds for expulsion narrowly.¹¹ Detailed requirements in terms of procedures, considerations and limits to the power to expel, are reflected in provisions of the Immigration EEA

⁹ Many aspects of policing and justice cooperation will require to be addressed within the UK-EU 'Future Relationship'.

¹⁰ In paragraph 53 of the UK EU Report on Phase 1 of Negotiations, 8 December 2017. The Draft Withdrawal Agreement, 14 November 2018, reflects this in the Protocol on Ireland/Northern Ireland Article 4: "The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union..."

¹¹ See EU Law Text, Cases and Materials, P Craig & G de Búrca, Oxford, 2015, 6th Edition, pp 787-789

Regulations 2016 to be revoked by the Bill (see especially Regulations 23-27 and 32)¹².

12. Under clause 2, as it would amend the Immigration Act, there is no exemption in the deportation powers for Northern Ireland born Irish citizens unless they rely on section 1 of the British Nationality Act 1981 (BNA) which deems them British irrespective of their right to identify as British or Irish, or both, under the 1998 Agreement¹³. That right has not been incorporated into domestic legislation. The Commission therefore welcomed the Prime Minister's recognition, in her speech in Belfast on 5 February, that: "The birth right to identify and be accepted as British, Irish or both, and to hold both British and Irish citizenship is absolutely central to the Agreement" and her reference to having commissioned a review of immigration rules "to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement"¹⁴.
13. Neither do the deportation provisions reflect stated UK Government policy. Immigration Minister Caroline Nokes stated at second reading:
"the approach since 2007 has been to consider Irish citizens for deportation only where a court has recommended deportation in sentencing or where the Secretary of State has concluded that owing to the *exceptional circumstances of a case the public interest requires deportation*. This approach is to be maintained."
[Emphasis added.]
14. This confirms the policy as stated in 2007 in a written statement by the then Minister for Immigration, Liam Byrne MP, in identical wording.¹⁵ This policy is not reflected in the threshold specified in clause 2 as "conducive to the public good".
15. Since, for example, a Northern Ireland born Irish person who had renounced British citizenship, could avail of greater protections under EEA law than the Immigration Act, failure to incorporate the 1998 Agreement birthright protection, could result in a diminution of rights as a result of Brexit, contrary to the promise by the UK Government.

¹² The Immigration (EEA) Regulations 2016 are accessible here:

<https://www.legislation.gov.uk/ukxi/2016/1052/made?view=plain>

¹³ Agreement between the governments of the UK and Ireland, 10 April 1998: Article 1(vi) "[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 Governments."

¹⁴ Note the definition of "people of Northern Ireland" at n4 – includes a person born in NI to person with 'no restriction on their period of residence'

¹⁵ Written Ministerial statements, 19 February 2007 – accessible here:

<https://publications.parliament.uk/pa/cm200607/cmhansrd/cm070219/wmstext/70219m0001.htm>

16. The Commission is mindful also of the broad aims of equal treatment and reciprocity under the CTA, reflected in the Ireland Act 1949 statement that Irish citizens are not 'foreign'. The Committee may wish to reflect on the fact that the Irish government does not deport British citizens.

17. Finally, given free movement within the CTA, the enforcement of exclusion orders presents a challenge, in practice¹⁶.

18. The Commission recommends that a new clause be added to amend section 1 of the British Nationality Act 1981 to reflect the Belfast (Good Friday) Agreement 1998 recognition of "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"¹⁷ on a no detriment basis.

19. The Commission also recommends that Northern Ireland born citizens who identify as Irish, be protected from deportation in any circumstances to meet the requirements of the 1998 Agreement. The above amendment would address this though consequential amendments may be required to section 3 of the Immigration Bill for clarity.

20. The Commission recommends that (non-NI) Irish citizens retain the protections of Article 28 of the free movement directive in terms of deportation. This would recognise, though not fully address, the equal treatment and reciprocity aims of the Common Travel Area. A further argument can be made for full reciprocity with the Irish government's position on grounds of equity, though there is no human rights imperative for this approach.

21. Should this recommendation not be accepted, then, as a minimum, the inserted section 3ZA should be amended to reflect stated government policy on the deportation of Irish citizens.

Relationship between new section 3ZA and existing section 3 of Immigration Act 1971

22. The Committee may wish to satisfy itself as to the relationship between section 3ZA, to be inserted into the Immigration Act by clause 2, and existing section 3 of that Act. Given the general application of section 3(5) and (6) (of the Immigration Act 1971) to non-British nationals, it would

¹⁶ See related comment by the Prime Minister in a speech on 5 February 2019 in Belfast: "Any border that weaves its way through farms and villages, bisects hundreds of road and lanes, and which is crossed and re-crossed by thousands of people every day would pose a logistical challenge in the context of Brexit."

¹⁷ Agreement between the governments of the UK and Ireland, 10 April 1998: Article 1(vi).

appear that the new section 3ZA, in making particular provision for Irish citizens, and replicating some of section 3(5), might be intended to take Irish citizens out of the purview of section 3 (of the Immigration Act 1971). Yet section 3ZA does not replicate the powers in section 3 to deport Irish citizens further to a court recommendation - while this would be a welcome step, it was referred to by the Minister at second reading as having continued effect¹⁸. Secondly, section 3ZA references deportation orders under section 5(1) of the Immigration Act which in turn only applies to deportations under section 3(5) and (6) – the bill does not contain any consequential amendments to section 5, though perhaps it is intended to be addressed using powers under section 4 of the present Bill. If so, the position should be clarified by the Minister.

'Foreign criminals'

23. Related to these issues around the treatment of Irish citizens, section 32 of the UK Borders Act 2007 provides for automatic deportation of 'foreign criminals' sentenced to 12 months or more in prison or sentenced to imprisonment for a specified offence. Confirmation that Irish citizens would not fall within this category after Brexit, would be consistent with the Ireland Act 1949 which provides that Irish citizens are not 'foreign'. This would not impact deportation powers discussed above.

Clause 4 – Consequential etc provision

24. The Secretary of State is given a wide power under clause 4, to make any regulations he or she considers appropriate "in consequence of or in connection with", any provision of Part 1, including regulations that would amend primary legislation (a 'Henry VIII power'). Given that Part 1 repeals retained EU law on free movement, the question arises how far this power could be used 'consequentially' to amend primary legislation on immigration. It is further noted that the power is widened by subsection (5) which allows it to be used to impose fees or charges, unlike powers granted under section 8 or 9 of the EU (Withdrawal) Act 2018.
25. The Secretary of State, at second reading, stated: "the Bill gives us the basis to build a legal framework for the future immigration system. It

¹⁸ Hansard, 28 January 2019, Volume 653, Column 586 [https://hansard.parliament.uk/commons/2019-01-28/debates/321FEFF1-26E7-4194-91BD-BC530B5AE57E/ImmigrationAndSocialSecurityCo-Ordination\(EUWithdrawal\)Bill#debate-3677218](https://hansard.parliament.uk/commons/2019-01-28/debates/321FEFF1-26E7-4194-91BD-BC530B5AE57E/ImmigrationAndSocialSecurityCo-Ordination(EUWithdrawal)Bill#debate-3677218)

includes a power to make amendments to primary and secondary legislation that become necessary after the end of free movement.”

26. The important questions of human rights inherent in immigration law are best addressed via the primary legislative process with its attendant consultation, evidence-gathering, scrutiny and potential for amendment. Policy change with a potential impact on the state’s obligation to protect human rights should therefore not be made by statutory instrument.

27. It is recommended that (irrespective of practice in terms of Immigration rules) the clause 4 powers be more narrowly drawn to preclude their use for changes to policy which may impact the human rights of people resident in the UK.

Clause 5 & Sch. 2 and 3 - Power to modify retained direct EU legislation relating to social security co-ordination

28. While it is acknowledged that the Home Secretary confirmed at second reading that “The rights of EU nationals already resident in the UK will be protected”, it is unclear how that is reflected in the Bill. Clause 5(3) does provide that a person’s date of arrival in the UK may be a condition for provision of certain entitlements; likewise their nationality or immigration status. The opportunity should be taken to clarify in law that all those with pre-settled status or settled status and Irish citizens, will retain their existing social security rights.

29. The Commission recommends that Clause 5(3)(a) be amended to confirm that all those with pre-settled status or settled status, and Irish citizens, will retain their existing social security rights.

Immigration detention

30. Related to immigration, but not addressed in the Bill, is immigration detention.

31. Article 5 § 1 (f) European Convention on Human rights permits “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.

32. In *Saadi v UK*¹⁹, the ECtHR held that immigration detention must be carried out in good faith; it must be closely connected to the purpose of preventing

¹⁹ *Saadi v. United Kingdom* [GC], no. 13229/03, ECHR 2008, § 74

unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and *the length of the detention should not exceed that reasonably required for the purpose pursued*. [Emphasis added.]

33. The United Nations Committee on the Convention Against Torture, Inhuman or Degrading Treatment or Punishment, in its concluding observations on the 5th periodic report of the UK (May 2013), called on the Government to:

“Introduce a limit for immigration detention and take all necessary steps to prevent cases of de facto indefinite detention.”²⁰

34. The Commission welcomes the high level of cross-party support expressed at the second reading of the Bill, for the ending of indefinite detention. The Commission supports the recommendation of the Joint Committee that *‘where all other alternatives have been explored and considered unsuitable and detention is considered necessary, the maximum cumulative period for detention should be 28 days. The only exception to the 28 day limit should be that in exceptional circumstances—for example, when there are no barriers to removal and the detainee is seeking unreasonably to frustrate the removal process—the period of 28 days could be extended by a further period of up to 28 days on the decision of a judge. The decision on whether the 28 day period should be extended should be a judicial one, to be considered on application from the Home Office’*.²¹

35. The Commission recommends that a clause be inserted into the Bill to provide a maximum time limit on immigration detention, in line with the recommendation from the Joint Committee on Human Rights.

²⁰ Paragraph 30(c)

²¹ House of Commons House of Lords Joint Committee on Human Rights Immigration detention Sixteenth Report of Session 2017–19 HC 1484 7 February 2019

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