

## Evidence to the Joint Committee on Human Rights on the *Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2020*

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This evidence was prepared as part of the [Performing Identities](#) research project, supported by ESRC grant reference [ES/S006214/1](#). Sylvia de Mars is a Senior Lecturer at Newcastle Law School, Newcastle University; Colin Murray is a Reader at Newcastle Law School, Newcastle University; Aoife O'Donoghue is a Professor at Durham Law School, Durham University; and Ben Warwick is a Lecturer at Birmingham Law School, University of Birmingham. This evidence updates our previous submission regarding the 2019 iteration of the Bill, and draws upon our book, [Bordering Two Unions: Northern Ireland and Brexit](#), published in August 2018.

### GENERAL APPRAISAL

- [1] This evidence relates only to the situation of Irish citizens and to the Common Travel Area (CTA), and should not be taken as commenting upon other aspects of the Bill.
- [2] Clause 2 of the current version of the Bill remains unchanged from the previous iteration of the Bill. The changes it makes regarding the immigration status of Irish citizens are required by the decision, under Clause 1 and Schedule 1, to end freedom of movement for EU citizens. This change must be brought about by legislation a result of the European Union (Withdrawal) Act 2018's presumption that most EU law becomes "retained" UK law after the end of the implementation/transition period. Schedule 1 thus repeals retained EU law relating to freedom of movement (and revokes the Immigration (European Economic Area) Regulations 2016). Under Clause 8 of the Bill, the UK Government will have the power to commence this new immigration regime as it chooses upon the expiration of the UK-EU Withdrawal Agreement's implementation/transition period.
- [3] In this context it is important to differentiate the longstanding special treatment that has been afforded by the UK to Irish citizens (an unbroken practice since an informal UK-Ireland arrangement reached in 1952, and formalised in the 2019 Memorandum of Understanding on the Common Travel Area<sup>1</sup>). Clause 2's clarification of the immigration position of Irish citizens in UK law, as a component of the shared CTA (Memorandum of Understanding, para. 6), is necessary because the point-of-departure related provisions of the Immigration Act 1971 are out of keeping with the nature of 21<sup>st</sup>-century international travel. That the 1971 Act's exemptions from the need to obtain leave to remain only apply to local journeys is recognised in later legislation (see section 50A(5) British Nationality Act 1981). Although these elements of the 1971 Act remain on the statute book, they have been superseded, in practice, by the workings of the Immigration (European Economic Area) Regulations 2016. With the ending of EU freedom of movement in UK law, the clarifications of movement rights for Irish citizens contained in Clause 2 are thus necessary.

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<sup>1</sup> Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated Reciprocal Rights and Privileges (8 May 2019).

- [4] While the exclusion of Irish citizens from immigration restrictions under Clause 2 facilitates their other CTA-related rights and entitlements (Memorandum of Understanding, para. 7-13), these rights and entitlements are scattered across a confusing range of legal sources and policy guidance. These rights and entitlements and their basis in UK law should be stated positively and clearly, if not in this Bill then as a matter of priority ahead of the expiration of the implementation/transition period.
- [5] Irish citizens, according to section 2(1) of the Ireland Act 1949, are ‘not to be treated as foreign for domestic law purposes’. The Immigration Bill Commentary notes this statutory provision, but does not indicate whether the Bill is intended to repeal or alter the interpretation this part of the 1949 Act. The Ireland Act is an important and longstanding statement of principle and of the relationship between the two states and, as such, an express note that the Bill does not affect its operation would be welcome. Alternatively, given the structure of the Bill and the outmoded ‘not foreigners’ language of the Ireland Act, an updated provision noting that Irish citizens are to be treated as equivalent to UK citizens where CTA-related rights and entitlements are at issue, would be appropriate.

## DEPORTATION AND REFUSAL OF ENTRY

- [6] Notwithstanding the terms of the Ireland Act 1949 and the operation of the CTA, UK law has long included formal powers to deport Irish citizens (since the enactment of section 6(3) Commonwealth Immigrants Act 1962). Clause 2’s continuation of section 5(1) of the Immigration Act 1971 without amendment (preserved in the Bill’s new insert; section 3ZA(2) of the Immigration Act 1971), means that Irish citizens are included within the UK Government’s powers to deport foreign nationals. Under Irish law, by contrast, UK citizens are explicitly exempt from deportation in any circumstances, a discrepancy which illustrates the limits to reciprocity across the CTA jurisdictions.<sup>2</sup>
- [7] This provision is inconsistent with one of the main aims of this Bill; to protect the status of Irish citizens in UK immigration law once their EU free movement rights end.<sup>3</sup> There is an incoherence between the Ireland Act 1949, which designates Irish citizens as ‘not foreign’, and the power to deport such individuals. Irish citizens risk falling into a third category; not subject to all of the powers applicable to foreign nationals in UK law, but also not fully equivalent to UK citizens in immigration terms.
- [8] This provision, when read in conjunction the Explanatory Notes, seems to be an attempt to formalise existing policy, contained within a 2007 ministerial statement, whereby ‘Irish citizens will only be considered for deportation where a court has recommended deportation in sentencing or where the Secretary of State concludes ... the public interest requires deportation’.<sup>4</sup> The repetition of this assurance in the Explanatory notes is important in reading this policy position across to the new power.<sup>5</sup> The power is, however, of little practical value in light of the lack of restrictions on travel associated with the CTA. Deported individuals can return to the UK with ease given the absence of checks upon their movement. Given the limited value of this power consideration should be given to whether it should not be retained.

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<sup>2</sup> See the Immigration Act 1999 (Ireland), s. 3.

<sup>3</sup> Immigration and Social Security Co-ordination (EU Withdrawal) Bill: Explanatory Notes, para 1.

<sup>4</sup> Liam Byrne, MP, HC Debs, vol. 457, col. 4WS (19 February 2007).

<sup>5</sup> Immigration and Social Security Co-ordination (EU Withdrawal) Bill: Explanatory Notes (Mar 2020), para 30.

- [9] Further, section 5(2) of the Immigration Act 1971 causes a deportation order to cease to apply upon an individual subject to them becoming a UK citizen. The Bill should amend the Act to make the consequence of obtaining Irish citizenship the same as for UK citizenship, for three reasons. First; consistency with the broader treatment of Irish citizens in the Bill (e.g. at section 3ZA(3)-(4)) and in the Ireland Act 1949. Second; individuals who are part of “the people of Northern Ireland” are entitled to both/either Irish and UK citizenship under the Good Friday/Belfast Agreement.<sup>6</sup> Retaining section 5(2) without adding accommodation for Irish citizenship is at odds with such a choice and could oblige an Irish citizen from Northern Ireland to assert UK citizenship simply to avoid deportation. Third; retaining section 5(2) in its current form is particularly illogical when a large group of people living in the UK (especially in Northern Ireland) are entitled to both UK and Irish citizenship.
- [10] With regard to the Good Friday/Belfast Agreement, the UK Government has expressly acknowledged the ability of the people of renounce the underlying UK citizenship which it maintains is imposed by the operation of the British Nationality Act 1981.<sup>7</sup> There are thus “people of Northern Ireland” who are solely Irish citizens. During the Committee stages of the previous iteration of the Bill the Immigration Minister was obliged to provide assurances that, in light of ‘the citizenship provisions in the Belfast agreement, we would consider any case extremely carefully and not seek to deport a person from Northern Ireland who is solely an Irish citizen’.<sup>8</sup> At the very least, these assurances must be repeated, but it would be better to expressly build them into the legislation or to remove these deportation powers.
- [11] The current Explanatory Notes to the Bill notably omit the prominent discussion of the Good Friday/Belfast Agreement included in the previous iteration.<sup>9</sup> The stripping out of this discussion appears to be a doubling down on the UK Government’s position that because of the automatic imposition of UK Citizenship upon the people of Northern Ireland under the British Nationality Act 1981 the workings of the CTA are not relevant to the people of Northern Ireland, even if they personally identify as Irish (and hold travel documentation accordingly).<sup>10</sup> This approach, however, neglects the Good Friday/Belfast Agreement rights of people of Northern Ireland who have renounced UK citizenship. Furthermore, the absence of reference to the ministerial policy commitment made in February 2019 raises the prospect that the Government are not reaffirming this commitment (especially when, as noted above, the 2007 ministerial statement is explicitly repeated).
- [12] The provisions for refusing Irish citizens entry to the UK under Clause 2’s proposed section 3ZA(3) of the 1971 Act are similarly inconsistent with the purposes of the Bill, with the Ireland Act 1949, and with the spirit of the CTA. This provision should be deleted. The retention of these unamended powers potentially conflicts with the amendment made to the ability to refuse entry to the UK from the CTA by the Bill at Clause 2(3)b. To resolve this 3ZA(3) should be deleted.

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<sup>6</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (2114 UNTS 473), Constitutional Issues, 1(vi).

<sup>7</sup> New Decade, New Approach (January 2020) Annex A, para 13.

<sup>8</sup> Public Bill Committee, *Immigration and Social Security Coordination (EU Withdrawal) Bill*, col. 175 (26 Feb 2019) (Caroline Nokes, MP).

<sup>9</sup> See *Immigration and Social Security Co-ordination (EU Withdrawal) Bill: Explanatory Notes* (Dec 2018), para 27.

<sup>10</sup> *Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355.

- [13] If the deportation/refusal of entry provisions are not removed from Clause 2, further statutory definition should be given to the meaning of the ‘public good’ as it relates to Irish citizens in section 3(5) and 3ZA(3)a of the Immigration Act 1971. Specifically, greater clarity is needed on the relationship between these provisions and the narrower definition of public good (‘conducive to the public good as being in the interests of national security’) contained in section 9(4)a of the Immigration Act 1971.

## **OTHER CONSIDERATIONS**

- [14] In keeping with the Immigration Act 1971, the Bill should include a savings clause to protect against unintended consequences for Irish citizens who have been settled and resident in the UK. Section 7 of the Immigration Act protected those who had been resident in the UK for 5 years prior to the entry into force of that Act. A similar provision in the Bill to prevent unintended negative consequences for Irish citizens resident in the UK would be appropriate given the general UK Government advice that Irish citizens resident in the UK do not need to protect their rights and entitlements under the EU Settlement Scheme.<sup>11</sup>

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<sup>11</sup> See UK Government, Apply to the EU Settlement Scheme (settled and pre-settled status): Eligibility, available at: <https://www.gov.uk/settled-status-eu-citizens-families/eligibility>.