



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas

Irish Human Rights and Equality Commission

**Proposal for legal analysis on
incorporating into UK law
the birthright commitment under the
Belfast (Good Friday) Agreement 1998**

June 2019

Introduction

1. One of the founding principles of the Belfast (Good Friday) Agreement 1998 ('the 1998 Agreement') was the recognition by the two Governments and all participants, on a 'no detriment' basis, 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.¹
2. The Joint Committee is seeking research to identify and make recommendations on the legislative steps required to incorporate this commitment into UK nationality and immigration law.

Context

3. Recognition in the 1998 Agreement, of the right to identify and be accepted as Irish or British or both, was part of a suite of equality and 'parity of esteem' commitments underpinning the new settlement. The birthright provision is one of several aspects of the 1998 Agreement, however, that have not led to changes in UK legislation, though the focus here is on nationality. Under section 1 of the British Nationality Act 1981:

(1) A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is—

(a) a British citizen; or

(b) settled in the United Kingdom or that territory.

The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998, included, at Annex B, draft legislation to amend the Irish Constitution. Articles 2 and 3 of the Constitution had defined the national territory as the whole island of Ireland with re-integration termed a "constitutional imperative". Articles 2 and 3 were amended in December 1999 to reflect an emphasis on people rather than territory and stating that "it is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation".² The commitment was enacted

¹ Agreement between the Government of the UK and the Government of Ireland, paragraph (vi), endorsed by all participants under Constitutional Issues section of Belfast Good Friday Agreement, paragraph 1(vi)

² Article 2.

by the Irish Nationality and Citizenship Act 2001. (The entitlement was restricted, however, by the twenty-seventh amendment to the constitution³, with further detail set out in the Irish Nationality and Citizenship Act 2004, effectively preventing children born to newly arrived foreign nationals, other than refugees, from acquiring entitlement to Irish citizenship, at birth⁴.)

4. Recognition of the need to provide a legislative resolution goes back at least twenty years in the context of discussion on a Bill of Rights. The NIHRC submitted advice to Government in December 2008, which concluded:

The Belfast (Good Friday) Agreement recognises the right to British and Irish identities and citizenship, and mandated the Commission to consider for inclusion in a Bill of Rights an obligation on public authorities to respect the identity and ethos of both communities. Given the historic and continuing division between the two main communities, and the co-existence of British and Irish identities, the Commission concludes that such an obligation is necessary and desirable in order to promote mutual respect and parity of esteem.

5. The Commission therefore advised that the Bill of Rights should include provisions drafted to ensure that:

1. The right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 3.

1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.”

³ Article 9 was amended to include:

1° Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.

⁴ The Act, accessible here: <http://www.irishstatutebook.ie/eli/2004/act/38/enacted/en/html>

restricted entitlement to Irish citizenship by birth, to those born to a parent who: is Irish, or entitled to be Irish, or British, or living on island with no legal restriction on residency, or can show ‘genuine link’ to Ireland (based on residency) or is recognised as a refugee.

may so choose, with no detriment or difference of treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.

2. The 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. This right would not be affected by any future change in the status of Northern Ireland.
 3. Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.⁵
6. A consultation published by the Northern Ireland Office in 2009, in response to this advice stated:
- The Government therefore believes that any Bill of Rights for Northern Ireland should enshrine in legislation the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both.⁶
7. A Bill of Rights for Northern Ireland remains an outstanding issue some twenty-one years after the 1998 Agreement.
 8. Whereas, the British legal position on acquisition of nationality has been unchanged since 1998, there has recently been a renewed focus on the matter partly due to Brexit and partly because the right of Northern Ireland-born Irish citizens to avail of EEA family reunification rights is currently before the courts.
 9. Emma de Souza and a number of other Northern Ireland-born individuals who identify as Irish, are Irish citizens, and carry Irish passports, have sought to avail of EEA rights to family reunification, to bring a spouse to live in the UK, as opposed to relying on more restrictive UK immigration law⁷. One of the arguments put forward by the Home Office to resist such applications has been that the

⁵ A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, NIHRC, 2008, p. 41 and discussion on p.98-9, accessible here: <http://www.nihrc.org/publication/detail/advice-to-the-secretary-of-state-for-northern-ireland>

⁶ A Bill of Rights for Northern Ireland: Next Steps, NIO Consultation Paper, November 2009, Paragraph 6.6 accessible here: <https://cain.ulster.ac.uk/issues/law/bor/nio301109bor.pdf>

⁷ <https://www.theguardian.com/commentisfree/2019/may/06/home-office-british-citizenship-northern-ireland--good-friday-agreement>

applicants are in fact also British citizens – and therefore ineligible to rely on EU law under UK regulations in force since 2012.⁸ (Another is that such rights are contingent on having first exercised free movement rights.) The Home Office has invited such citizens to ‘renounce’ British citizenship if they wish, however, this has then raised other difficulties in terms of status⁹. The cases have shone a light on the fact that under current UK law, many of those who have only ever identified as Irish, are deemed British citizens, irrespective of the 1998 Agreement.

10. Responding to the issue, the Prime Minister indicated, in a 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 that she had asked the Home Secretary to work with the Secretary of State for Northern Ireland to review immigration rules “to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement”.¹⁰

11. Immigration Minister Caroline Nokes responded to a parliamentary question on the terms of reference and timeline for the review, as follows:

The Prime Minister asked the Home Secretary to work with the Secretary of State for Northern Ireland to review the issues, not to conduct a formal review. This work is ongoing, and as the Prime Minister has said, a solution which complies with the Belfast Agreement will be set out as soon as possible.¹¹

12. Common UK and Irish membership of the EU, in tandem with the equality guarantees of the 1998 Agreement, an invisible border and North-South co-operation, made the distinction between British and Irish identity less contentious in Northern Ireland. This changed with the 2012 Regulations on dual citizens and Brexit makes questions of

⁸ Until 2012, Irish citizens were treated under UK immigration law as EU citizens, even if they are also British citizens. This was changed by the Immigration European Economic Area Regulations 2012 <https://www.legislation.gov.uk/uksi/2012/1547/made>, given after the 2011 judgment of the Court of Justice of the EU in C-434/09 *McCarthy* rejecting reliance on EU law by a dual Irish-UK citizen born in Great Britain.

⁹ See coverage of Gemma Capparelli case: <https://www.theguardian.com/uk-news/2018/oct/31/home-office-tells-northern-irish-woman-to-prove-right-to-live-in-belfast>

¹⁰ Prime Minister’s speech in Belfast, 5 May 2019: <https://www.gov.uk/government/speeches/pm-speech-in-belfast-5-february-2019>

¹¹ 3 April 2019, Question 238370

identity even more significant.¹² The repeal of EEA free movement rights¹³, for example, increases the importance of rights under the 'Common Travel Area' (CTA). Notwithstanding the recently signed Memorandum of Understanding between the UK and Irish Governments¹⁴ and a bilateral agreement on social security¹⁵, the CTA is not otherwise the subject of any international treaty and has limited bespoke domestic legislative underpinning. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill would amend UK law so that Irish citizens do not require leave to enter or remain in the UK, though there would remain the power to deport them.¹⁶ If passed, this would mean that, after Brexit – and regardless of whether there is a deal – Irish citizens would be treated in the same way as British citizens for social security, housing and employment rights. However, the legal basis and extent of these rights, as well as access to healthcare and education, will mostly depend on secondary legislation which can be changed or withdrawn with limited scrutiny. The UK Government website states that Irish citizens' current rights to work, access public services etc., under the CTA will be maintained after Brexit¹⁷. The CTA rights do not include family reunification, and, subject to what might emerge from the review referenced above¹⁸, the Government has announced no plans to maintain the rights to family reunification currently enjoyed under EU law by Irish citizens in Northern Ireland, save for those who have acquired rights protected by the UK's EU Settlement Scheme. Rights under the Settlement Scheme are themselves more restrictive than EEA rights in introducing time limits on family reunification rights¹⁹.

¹² See discussion in 'Brexit and the Peace Process', BrexitLawNI, September 2018, esp. pp. 21-23:

<https://brexitlawni.org/library/resources/policy-report-peace-process/>

¹³ Via the Immigration and Social Security Coordination (EU Withdrawal) Bill currently in passage:

<https://services.parliament.uk/Bills/2017-19/immigrationandsocialsecuritycoordinationeuwithdrawal.html>

see also the NIHRC submission on the Bill: <http://www.nihrc.org/publication/detail/immigration-and-social-security-co-ordination-eu-withdrawal-bill-submission>

¹⁴ <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta>

<https://www.dfa.ie/media/dfa/eu/brexit/brexitandyou/Memorandum-of-Understanding-Ire-version.pdf>

¹⁵ '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>

¹⁶ https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/cbill_2017-20190309_en_2.htm#pt1-l1g2

¹⁷ <https://www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance>

¹⁸ See paragraphs 10 and 11.

¹⁹ <https://www.gov.uk/settled-status-eu-citizens-families/what-settled-and-presettled-status-means>

13. A Northern Ireland born Irish person who has renounced British citizenship under the British Nationality Act 1981 and chosen to identify solely as Irish, in line with the Belfast (Good Friday) Agreement, can currently rely on protection from deportation provided under EEA Regulations. Once the UK has left the EU, such a person, in common with all other EEA nationals, will no longer be able to avail of protections provided under EEA law and will instead rely on more limited standards provided within the Immigration Act 1971. This will therefore result in a diminution in rights protection from deportation as a result of Brexit. This diminution could be prevented by incorporating the 1998 Agreement birth right protection into UK law and ensuring equal protection from deportation.
14. During the course of discussions on the EU settlement scheme, questions had been asked about the eligibility of Northern Ireland-born Irish citizens to apply. This was definitively addressed when the Home Office Statement of Changes to Immigration rules, published 7 March 2019, replaced the previous 'Appendix EU' to the Immigration Rules which provides for the EU settlement scheme. The new version includes a definition of "EEA citizen" which includes Irish or any other EU27 citizen "who (unless they are a relevant naturalised British citizen) is not also a British citizen". Whether or not it would be advisable to seek settled status, the change confirmed that Northern Ireland born Irish citizens could not apply, unless they have renounced British citizenship.

Issues

15. Incorporation of the birth-right commitment into UK law requires addressing the following issues that arise under current UK primary legislation:
 - a. people of Northern Ireland may risk certain detriments by holding British citizenship (such as lesser rights to family union)
 - b. people of Northern Ireland risk different detriments by holding *only* Irish citizenship (such as the risk of deportation, or denial of social, education or health rights enjoyed by British citizens)
 - c. while people who identify only as Irish and hold Irish citizenship have the right to renounce their British citizenship

acquired by birth (under s7 British Nationality Act 1981), they have no right to do so until they are an adult, the renunciation is not retrospective and it requires the applicant to declare that they are a British citizen (and to pay a significant fee).

Research requirements

16. The Joint Committee is commissioning legislative research on the steps required to incorporate the birthright commitment into UK law on a 'no detriment' basis. Research is required to:

- i) identify the key parts of the statute book potentially requiring amendment;
- ii) develop detailed legislative objectives (short of legislative drafting) that would achieve the policy aim;
- iii) identify risks of inadvertent loss of rights (e.g. statelessness; or uncertainty for those who may have difficulty in proving British citizenship, or their descendants; or which may reduce rights of stateless persons, asylum-seekers or other categories of migrant person) and propose ways to address these through legislative objectives or otherwise;
- iv) identify any practical and administrative consequences that may arise from any legislative amendment, and, if so, how these may be resolved.

Parallel research

17. The Joint Committee is also commissioning, in parallel with this analysis, research into issues arising from the UK and EU commitment to facilitate continuing EU citizenship rights, opportunities and benefits in Northern Ireland after Brexit. A copy of the specification is attached for information.

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