

**(S478) Written Evidence to the Northern Ireland Affairs  
Committee on its inquiry into the ‘Future of the land  
border with the Republic of Ireland’**

**Committee on the Administration of Justice (‘CAJ’)**

**October 2016**

1. CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.
2. CAJ welcomes the opportunity to provide Written Evidence to the Committee on its October 2016 inquiry into the *'Future of the land border with the Republic of Ireland'*. Before and after the 23 June 2016 EU referendum CAJ has been involved in a body of work in relation to the rights-based implications of the vote, including in relation to the future of the UK-Ireland dimensions of the Common Travel Area (CTA), the situation of cross-border workers, and compliance with the rights-based provisions of the Belfast/Good Friday Agreement 1998. CAJ recently hosted, in partnership with Ulster University a major expert seminar into *'Brexit and Rights'*.<sup>1</sup> CAJ are also applicants in a judicial review into the Brexit process currently before the high court in Northern Ireland.<sup>2</sup>
3. In Summary CAJ would like to raise the following issues:
  - Far from being a settled entity since partition the Common Travel Area (CTA) was almost abolished in 2009 with the intention of introducing 'ad hoc' checks on the land border targeting 'non British and Irish citizens' and passport checks between Northern Ireland and Great Britain. The policy was defeated in the House of Lords following an amendment tabled by Lord Glentoran.
  - As a post-referendum solution falling short of a 'hard border' the above policy may now be revived and if implemented would undoubtedly lead to widespread racial profiling (a form of discrimination), on the land border and internal immigration controls within the UK. CAJ considers in the context of the Agreement Freedom of Movement should be interpreted as extending within the CTA.
  - The citizenship and identity provisions of the 1998 Agreement imply there is to be no detriment to identifying as British or Irish in the Northern Ireland context, yet post-referendum the existing rights of Irish citizens in Northern Ireland, and British citizens in the Republic, and the entitlements of persons linked to either category, may be adversely affected, in the context of the border.
  - Unless legislation is changed there will be specific impacts on groups such as cross border workers, who for example would lose most entitlements to use the NHS in Northern Ireland once EEA treaty rights cease to have effect. The Home Secretary's proposals for employers to prioritise British workers and to disclose their proportion of 'non-British' employees would, in addition to fuelling racial prejudice, be both incompatible with the Agreement and anti-discrimination legislation specific to Northern Ireland .

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<sup>1</sup> 'BREXITING and Rights: Discussion seminar on the human rights and equality implications of the EU referendum' held on 27th September 2016 at the Metropolitan Arts Centre, Belfast (CAJ & Ulster University in association with the Equality Coalition), papers available at: <http://www.caj.org.uk/contents/1451>

<sup>2</sup> *In the matter of an application by Steven Agnew, Colum Eastwood, David Ford, John O'Dowd, Dessie Donnelly, Dawn Purvis, Monica Wilson, the Committee on the Administration of Justice and the Human Rights Consortium for leave to apply for judicial review.*

## The provisions of the Belfast/Good Friday Agreement

4. The Belfast/Good Friday Agreement, 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.
5. The Agreement creates a unique constitutional context for Northern Ireland. In Article 1(vi) of the treaty the UK and Ireland recognised the birthrights of ‘the people of Northern Ireland’ to self-identify and be accepted as Irish or British (or both), and ‘accordingly’ the right to hold both British and Irish citizenship, a right which the Agreement provides will “not be affected by any future change in the status of Northern Ireland”. A UK withdrawal from the EU would be such a change in status. The Northern Ireland Human Rights Commission’s Agreement-mandated advice on provisions for the NI Bill of Rights recommended framing the provision as 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.<sup>3</sup>

6. The preceding Article 1(v) of the British-Irish Agreement also provides that the power of the sovereign government with jurisdiction will be exercised with ‘rigorous impartiality’ on behalf of all the people in the diversity of their identities and be founded on full respect for economic, social and cultural, civil and political rights. This specific provision notably extends beyond British and Irish citizens and birthrights.
7. It should therefore be considered incompatible with the constitutional settlement under the Agreement for the UK to require a dual Irish-British citizen to rely on their British citizenship alone, or on identifying as British, to access entitlements or equal treatment in Northern Ireland. This was recognised by the Home Office in their attempt to introduce identity cards where it was ultimately conceded that it would not be compatible with the Agreement for those who identified as Irish in Northern Ireland to be compelled to receive British Citizen ID cards and instead it was anticipated that Irish citizens, including those who were also British citizens, would be issued with an alternative card, designed for (non-UK) EEA nationals.
8. Whilst international human rights standards generally permit border controls at the boundaries of a state, human rights are engaged where there is racial discrimination or internal border controls impacting on freedom of movement within a state.<sup>4</sup> The complex constitutional context of Northern Ireland in light of the CTA and the mutual recognition rights regarding Irish or British citizenship, as well as the north-south and east-west

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<sup>3</sup> NIHRC ‘A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, 10 December 2008, p47

<sup>4</sup> See Article 12 of the UN International Covenant on Civil and Political Rights (ICCPR), on freedom of movement which is binding on the UK.

arrangements under the Agreement, provide an arguable case that the right to freedom of movement should be considered as applying across the CTA. This issue is also contextualised by the preferential arrangements Irish citizens have historically had in relation to the UK (and vice versa), which has led to Irish citizens having rights to work, settle and vote in the UK, and British citizens having a similar status in Ireland. By virtue of EU treaties Irish citizens in Northern Ireland may also have entitlements which extend to family members who are not either British or Irish citizens. Unless significant remedial action is taken all of these issues now stand to be potentially adversely affected by a UK exit from the EU.

## Crossing the land border: The Common Travel Area

9. As the Committee will be aware the arrangement that allows travel between the UK and Ireland without routine immigration control is known as the Common Travel Area (CTA). Essentially the CTA is largely a passport-free-zone between the UK and Ireland (and Isle of Man and Channel Islands – which are not in the EU). It 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. Save for a decade-long period of suspension around WWII a form of CTA has existed since partition and was maintained throughout the ‘Troubles’. The arrangement is however complex, changing and not copper-fastened by any treaty or the (absent) NI Bill of Rights but rather is left to convention and legislative reference. In the UK, Section 1(3) of the Immigration Act 1971 provides that arrival in and departure from the UK from elsewhere in the CTA cannot be subject to (passport) control.
  
10. The CTA pre-dates and is separate to EU freedom of movement, but its future is far from secure. As recently as 2008 the then UK government sought to amend section 1(3) of the 1971 Act and end the CTA in all but name. The amendment would have permitted full border controls, but this was not the then policy intention given their cost and practical complexity. Rather the plan was to introduce ‘ad hoc’ checkpoints targeting *non British and Irish citizens* on the border, whilst assurances were simultaneously given that *British and Irish citizens* would still not have to carry passports. 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.<sup>5</sup>
  
11. The Home Secretary introduced a provision into the then Borders, Citizenship and Immigration Bill which would have essentially abolished the CTA by removing the provision preventing passport control in the CTA under Section 1(3) of the 1971 Act, with the policy

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<sup>5</sup> 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.

intent of introducing the above *Ad Hoc* checks but also checks at Northern Ireland ports and airports for those travelling to Great Britain.

12. This was a cause of serious concern to the Northern Ireland Human Rights Commission who feared the move would lead to widespread racial profiling (the form of racial discrimination where persons are singled out for scrutiny on the basis of skin colour or other ethnic attributes). The Commission told Parliament that:

The Commission's greatest concerns regarding the CTA reforms relate to the land border operations, where there are numerous crossings and a high volume of journeys, many of which are effectively short and local journeys. The Home Office argues that its *ad hoc* checks will target non-CTA citizens. The clear question, in the context of ethnic diversity, is how are those policing the land border going to be able to tell who is a British or Irish citizen and who is not? Who, on indicating that they are not carrying particular travel documents (and may have no obligation to do so), will be allowed to proceed and who will be subject to further examination and even detention until identity is verified?

Any practice of singling out persons visibly from a minority ethnic background is not acceptable. The Commission would be deeply concerned by measures that lead to any form of racial profiling and, therefore, impact on minority ethnic persons, crossing or even just living or working near the land border. The potential outcomes of these circumstances would mean that minority ethnic persons would have to constantly carry identity papers or face frequent questioning regarding their status and, potentially, detention.<sup>6</sup>

13. The Commission's concerns regarding racial profiling were shared in Parliament, along with concerns regarding the introduction of internal UK immigration controls. On the 1 April 2009 the House of Lords voted down the provision further to an amendment to the bill by Lord Glentoran. Government subsequently retreated from attempts in the Commons to reintroduce the provision. Since this time the UK Border Force has nevertheless continued to ask some passengers coming to and from Great Britain for identification at Northern Ireland ports and airports, despite having no statutory power to do so. In one recent 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 as she is black.<sup>7</sup> This is not an isolated case.

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<sup>6</sup> Submission on the Borders, Citizenship, and Immigration Bill for the House of Lords Second Reading, 11 February 2009' paragraphs 24-26.

<sup>7</sup> Belfast City Airport: Black woman 'stopped for looking foreign' BBC NEWS online 20 July 2016.  
<http://www.bbc.co.uk/news/uk-northern-ireland-36846314>

14. There is also the question as to what extent future arrangements between the UK and an Irish state within the EU will require customs controls. Whilst this is a separate matter to immigration controls the Committee will be aware both disciplines are now part of the same agency, having been put together within a unified UK Border Force. Deploying such an agency on the border with an immigration role, even whilst officially there for customs purposes, will undoubtedly risk 'ad hoc' immigration checks being conducted regardless of a change in the law. There is also the question, given the controversy over the National Crime Agency (NCA), of ensuring the ethos and accountability arrangements for the UK Border Force comply with the post-Patten policing accountability architecture in Northern Ireland.
15. In recent years there have been moves towards a convergence of immigration arrangements and even to a single British-Irish Visitor Visa scheme in the context of the CTA. Should the UK now end EEA freedom of movement within its jurisdiction the UK and Irish immigration systems will clearly be quite different. To date at a rhetorical level at least there has been general consensus that there should not be a 'hard border' on the island of Ireland. CAJ is concerned however that an alternative accommodation to permanent border controls will be reached that put in its crudest terms will leave an open border for white people with approved accents, but a border which will be 'hard' for everybody else. CAJ would urge freedom of movement is maintained across the CTA and that no system of internal or selective passport checks is introduced.

## **Entitlements in Northern Ireland following an EU exit**

16. The vast majority of persons born in Northern Ireland are, or are entitled to be Irish citizens, and hence EU citizens. The British Nationality Act 1981 still automatically grants British citizenship to persons born in Northern Ireland (save children whose parents are temporary migrants). This means that persons born in Northern Ireland choosing to carry an Irish passport who have never had a British passport are usually also British citizens under UK law. It is fair to say this is not common knowledge. Irish citizens have had rights to settle, work and related matters in the UK for some time but much of this is now provided for on the basis of exercising EU treaty rights.
17. In the event of Northern Ireland being outside of the EU, legislation which grants entitlements on the basis of EU treaty rights will presumably cease to have effect. The direction of travel from government may be to further link entitlements to British citizenship. On the face of it this will not *per se* remove entitlements of Irish citizens who are also British Citizens. However, as alluded to earlier it would not be compatible with the Agreement to oblige those who chose to identify as Irish, to identify as British to obtain entitlements, and there would be practical difficulties in differentiating this group of Irish citizens from other Irish citizens. Irish citizens, or other EU citizens, coming to Northern Ireland would no longer have entitlements that are linked to EU treaty rights. This by its nature will adversely impact on persons who regularly cross the border or even Irish citizens resident in Northern Ireland.

18. Outside of issues of settling and working in Northern Ireland, the above issues are best illustrated by a practical example –access to the NHS. At present in general terms full free access to the health services is available to those who are ‘ordinarily resident’ in Northern Ireland. Whilst this test is on residency rather than nationality, in practice it is much more straightforward to meet the test if you can demonstrate you are an EU/EEA national, with more onerous proofs being usually requested for non-EEA/EU nationals. Should this change and the test remain straightforward for those who are and identify as British citizens but not as Irish citizens, there are compliance questions with the Agreement.
19. In relation to persons who are not ‘ordinarily resident’ entitlements to use the NHS (beyond largely exempted services such as A&E) are to be found within the visitor entitlements regulations.<sup>8</sup> There is no explicit provision for persons crossing the land border but entitlements to NHS access are provided for Irish or other EU/EEA nationals on the basis of the exercise of EU treaty rights or EU reciprocal agreements with other states, which are likely to cease to have effect. There is some provision for students, the self employed and persons working with UK employers but this may not cover all cross border workers and students. There is provision for treatment the need for which arises during a visit for a person who resides in another EEA state, a provision, which may or may not be maintained following a UK exit. Presumably those living in the north and working in the south would be similarly affected, unless otherwise provided for.
20. The Home Secretary’s speech and briefing note to the 2016 Conservative Party Conference have been widely interpreted as urging employers to ensure they are prioritising British workers, and providing for a duty to be introduced to oblige firms to disclose the proportion of ‘non-British’ workers they employ. Such policies, reminiscent of ethnic registration, have already caused deep alarm and if proceeded with would fuel racial prejudice in a Northern Ireland context where, as the Committee has previously acknowledged, there is already paramilitary involvement in racist violence. It would be remiss also not to point out that such policies in Northern Ireland would be incompatible with the Agreement, and would directly clash with Fair Employment legislation and monitoring. Given the strong correlation between national identity and community background in Northern Ireland, any preferential treatment of British workers by public authorities or subordinate legislation would appear unlawful under anti-discrimination legislation or in the alternative, Section 76 of the Northern Ireland Act 1998.

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<sup>8</sup> See Regulation 7 of the Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015.