

Written Evidence submitted by BrexitLawNI for the Northern Ireland Affairs Committee's inquiry into the land border between Northern Ireland and Ireland (ILB0007)

About the BrexitLawNI project

1. The BrexitLawNI project^[1] is a collaborative Economic and Social Rights Council-funded research project between the Law Schools of Queen's University Belfast and Ulster University and the region's leading human rights organisation, the Committee on the Administration of Justice (CAJ).
2. BrexitLawNI welcomes the opportunity to provide Written Evidence to the Committee on the re-launched inquiry into the *Future of the land border with the Republic of Ireland*.

Summary of Key Issues

3. The focus of the BrexitLawNI project is on the constitutional, conflict transformation, human rights and equality consequences of Brexit in relation to Northern Ireland. Whilst we recognise there is interface with these issues and matters such as cross-border commerce, our main focus in relation to the border - and that of this submission - relates to the freedom of movement of people across the border. As such we concentrate here on the future operation of the Common Travel Area (CTA) and the impacts in particular on minorities ethnic communities in Northern Ireland who cross, or live or work in the vicinity of the border. This includes persons who are British/Irish citizens, other EU citizens, or neither.
4. Government has consistently stated that it does not wish for a 'hard' land border with Ireland. We do not believe such an arrangement would in any case be compatible with the Belfast (Good Friday) Agreement and the Government's recent position paper echoes this position. It is however also Government policy to create a 'hostile environment' for migrants who end up in an irregular status. On current plans this would in future include migrants from elsewhere in the EU, with the probable exception of Irish citizens. The question then turns to how Government intends to enforce its desire for such significantly increased migration control whilst maintaining an open border.
5. Whilst there is currently little detail, from what can be ascertained of the UK position insofar as it has been set out to date, we have serious concerns that the proposals will not be human rights compliant. In particular, the proposals risk widespread 'racial profiling' - the form of unlawful racial discrimination whereby persons are singled out for checks or other processes on the basis of skin colour or other ethnic indicators. It is also likely that there will be significant increases in administrative detention of members of minority ethnic communities until status is verified. Unless there is reform the inevitable increased deployment of the UK Border Force in this context could constitute a significant rollback of the blueprint for human rights compliant policing set out by the Agreement mandated Independent Commission on Policing in Northern Ireland (the Patten Commission).

6. It appears to have been largely overlooked that the recent UK position paper setting out the official position does not in fact rule out controls on the land border. Rather, the position paper is limited to setting out that future UK immigration arrangements will maintain the CTA free from ‘routine’ border controls.[\[2\]](#) This is an indication that Government may be considering reviving plans for mobile selective checks on persons not perceived to be British or Irish citizens.
7. In this context far from being a settled entity, the CTA was almost abolished in 2009 by the-then Government 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. This followed concerns raised by Peers and the Northern Ireland Human Rights Commission about both racial profiling and internal immigration controls within the UK.
8. The proposals had envisaged non-CTA nationals (i.e. persons who are neither Irish nor British citizens) having to carry identity documents to cross the land border, with British and Irish citizens not having to do so. This prompted the clear question as to the basis on which examining officers would distinguish between these two groups. In a post-Brexit context, under current plans, there would also be the question of distinguishing between EU citizens with acquired rights by virtue of residence prior to Brexit, and those EU nationals arriving subsequently who may remain non-visa nationals but will be subject to restrictions.
9. The UK position paper also indicates its intention to increase immigration control duties ‘in country’ to other private and public actors. Employers and social security providers are referenced in the paper.[\[3\]](#) The use of non-state actors and other public service providers in this way is only likely to increase the risk of racial profiling and raises questions that include the provision of adequate training.
10. In relation to potential solutions in a post-Brexit context that would avoid both the need for a hard border and the risks of widespread racial discrimination, members of the team have been exploring models for separate arrangements that recognise the particular circumstances of Northern Ireland. This includes seeking provision of continued EU freedom of movement into Northern Ireland in an agreement with the EU to ensure British citizens in Northern Ireland continue to enjoy equivalent rights to Irish citizens in the jurisdiction - a core principle of the Belfast (Good Friday) Agreement. The Bill of Rights for Northern Ireland, an outstanding commitment within the Belfast Agreement, provides an opportunity to enshrine the rights to freedom of movement provided for by the CTA within Northern Ireland law.

Border controls and the Belfast Agreement

11. The Belfast (Good Friday) Agreement, in addition to being approved by referendum, included the British-Irish Agreement, a bi-lateral treaty between the UK and Ireland lodged with the UN.[\[4\]](#) Article 2 of the treaty binds the UK to implement

provisions of the annexed Multi-Party Agreement. The Agreement is thus legally binding on the UK. As set out in the recent UK position paper:

The British-Irish Agreement is binding on the UK Government and Irish Government, and gives the commitments on equality, parity of esteem and citizenship legal force in international law.[\[5\]](#)

12. The Agreement creates a unique constitutional context for Northern Ireland. In Article 1(vi) of the British-Irish Agreement the UK and Ireland recognised the birthright 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. The Northern Ireland Human Rights Commission’s Agreement-mandated advice on provisions for the 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.[\[6\]](#)

13. It would not be compatible with 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.[\[7\]](#) This issue also engages freedom of movement into Northern Ireland which could not solely be tied to British citizenship.
14. Without a specific arrangement to the contrary however the context of Brexit means Irish citizens will however maintain more rights than British citizens in Northern Ireland by virtue of remaining EU citizens. A potential solution to respecting this provision of the Agreement would be for an agreement with the EU maintaining equivalent rights for British citizens in Northern Ireland given the particular constitutional context. It is reasonable to assume that the EU would only be willing to enter into such an arrangement on the basis of reciprocation of ongoing EU rights for other EU nationals, including freedom of movement, into Northern Ireland.[\[8\]](#) This model would provide a basis to address both sets of our concerns over the land border.
15. 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.
16. As the Committee will know, the Strands of the Agreement also contain specific ‘East-West’ and ‘North-South’ dimensions for Northern Ireland as a polity. 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*. Whilst we appreciate the Committee inquiry focuses only on the land border, it is the case that ‘border’ control checks within the UK would also engage the commitments to

freedom of movement under the UK's international obligations.^[9] 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 arrangements under the Agreement) provide a context whereby 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.

17. The UK position paper concurs that any restriction on freedom of movement within the CTA would engage compliance with the Belfast Agreement. It states:

Although it precedes the Belfast ('Good Friday') Agreement, the principle of free movement between the UK and Ireland carries symbolic significance in implementing the Agreement's commitment to the continued respect of the civil, political, social and cultural rights of the communities in Northern Ireland. It is a tangible example of East-West cooperation between the UK and Ireland ... including its significance in the context of the Agreement.^[10]

The CTA and 2008 proposals

18. As the Committee will be aware, 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). 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, and its existence is already recognised in the EU context. However it is a changing concept and not copper-fastened but rather left to politics, 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/border) control. Whilst the CTA pre-dates and is separate to EU freedom of movement, a post-Brexit scenario presents novel challenges as well as an opportunity to re-think and codify the CTA on a more effective and principled basis.

19. 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.^[11]

20. A provision was introduced into the 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 intent of introducing the above *ad hoc* checks, but also checks at Northern Ireland ports and airports for those travelling to Great Britain. 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 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.[\[12\]](#)

21. The Commission's warnings 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 measure.
22. 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 because she is black.[\[13\]](#) This is not an isolated case. There is a significant risk in a post-Brexit context that such operations, and the serious problems they entail, could be significantly increased.
23. There is also the question as to what extent future arrangements for the land border 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. The UK Border Force is not subject to the full post-Patten architecture for policing accountability in Northern Ireland.

24. In summary, whilst we strongly agree that fixed border controls on the land border are not desirable and would be incompatible with the Agreement, it would be equally unacceptable for controls to be conducted on the basis of widespread racial discrimination. We would therefore urge the Committee to caution against such an approach and to ensure that Northern Ireland does not become a 'cold house' for minority ethnic communities in the context of post-Brexit migration controls.

31 October 2017

[1] <https://brexitlawni.org/>

[2] HM Government: Northern Ireland and Ireland Position Paper, 2017, paragraph 32.

[3] HM Government: Northern Ireland and Ireland Position Paper, 2017, paragraph 33.

[4] UK Treaty Series no. 50 Cm 4705.

[5] HM Government: Northern Ireland and Ireland Position Paper, 2017, paragraph 13.

[6] NIHRC 'A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, 10 December 2008, p 47

[7] For example, 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] For further details on this proposal from a member of the BrexitLawNI team see: <http://rightsni.org/2017/07/equality-of-citizenship-after-brexit/> and also see the Preliminary Findings Reports above n 1.

[9] See Article 12 of the UN International Covenant on Civil and Political Rights (ICCPR), on freedom of movement.

[10] HM Government: Northern Ireland and Ireland Position Paper, 2017, paragraph 20.

[11] 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.

[12] Submission on the Borders, Citizenship, and Immigration Bill for the House of Lords Second Reading, 11 February 2009, paragraphs 24-26.

[13] 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>