

## **Equality of Citizenship and the Good Friday Agreement (GFA) – the rights of Irish and British Citizens in Northern Ireland Post Brexit – A Briefing Note**

**April 2018**

### **About CAJ**

The Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland (NI) and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ is the NGO partner in the BrexitLawNI project with the law schools of the Queens University Belfast and Ulster University, and Co-Convenes the NI Equality Coalition with UNISON.

### **Summary**

- This paper examines **what EU rights Irish and British citizens in NI will retain after Brexit** and the implications for **compliance with the GFA**;
- The GFA contains provisions for birthrights of the ‘people of Northern Ireland’ to identify as Irish or British, or both, and accordingly hold **British and Irish Citizenship, without differential or detrimental treatment**. Official Brexit documents reiterate this;
- The **Phase 1 Agreement** explicitly provides for continuation of EU rights for NI *Irish Citizens* when ‘residing in Northern Ireland’ and examination of ‘arrangements required’ to give effect to their ongoing exercise, committing to ‘no diminution of rights’ as a result of BREXIT. This is reflected in the Protocol to the draft Withdrawal Agreement;
- The commitment **goes beyond rights of EU citizens residing in existing third countries** in providing for inclusion of rights for Irish citizens normally associated with residency in a member state. These categories of rights would include matters such as: voting rights, European Health Insurance Card, EU student fee rates. However, **to date there has been no mapping or clarification as to whether and how and the rights** covered in the above examples, or other EU rights deriving from residency, **will be continued** after BREXIT;
- Despite GFA rights of NI born persons to identify as and be **British citizens** and to **equal treatment** with NI Irish citizens there has been an official acceptance to date that those who **identify solely as British will have fewer rights and entitlements** than those who identify as Irish as a result of BREXIT, with no stated proposal to take steps to ensure continued equivalence. This creates **significant practical inequalities in NI (e.g. in relation to political rights, MEPs would only be returned for one side of the community)**. This could be redressed through specific **bespoke arrangements for Northern Ireland**;

## GFA and Citizenship

The Belfast/Good Friday Agreement (GFA) recognised the birthright of the ‘people of Northern Ireland’ to identify themselves and be accepted as Irish or British, or both, as they may choose, and accordingly hold British and Irish Citizenship. This is incorporated in the UK-Ireland GFA treaty<sup>1</sup> and is legally binding. Crucially in accordance with the equality and parity of esteem provisions of the GFA this choice is not to result in differential or detrimental treatment. This paper examines what EU rights Irish and British citizens in NI will retain after Brexit and the implications for compliance with the GFA.

### What rights will Irish citizens in NI actually retain after BREXIT?

Under EU law Irish citizens automatically retain EU citizenship.<sup>2</sup> The Phase 1 Agreement of December 2017, alluding to the GFA provision on the birthright in NI to choose to be Irish or British or both, contains the following commitment:

...The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, **including where they reside in Northern Ireland**. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.<sup>3</sup>

This provision makes explicit reference to residence in NI, elaborates that both the UK and EU agree that the Withdrawal Agreement ‘should respect and be without prejudice to the rights that come with EU citizenship’, and will examine the ‘arrangements required’ to give effect to the ongoing exercise and access to such rights in the next phase of negotiations. The following paragraph of the Phase 1 agreement (alluding to how EU law and practice have been a supporting framework for the rights, safeguards and equality provisions of the GFA) further states that *“The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union.”*<sup>4</sup> The Protocol in the draft Withdrawal Agreement most recently issued on the 19 March 2018 reiterates the above provision in its Preamble. This reflects that Irish citizens in NI will continue to enjoy rights of EU citizenship, and that the Protocol should not prejudice such rights. The Protocol does not yet set out any substantive provisions or arrangements for their realisation.<sup>5</sup>

The continuation of *some* rights of Irish EU citizens are fairly straightforward, for example the treaty rights to ‘move and reside freely within the territory of the Member States’<sup>6</sup> which are available to Irish citizens who live in third countries (i.e. non EU states) already.

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<sup>1</sup> British Irish Agreement Article 1(vi) (UK Treaty Series no. 50 Cm 4705)

<sup>2</sup> Article 20(2) TFEU “Every person holding the nationality of a Member State shall be a citizen of the Union.”

<sup>3</sup> Joint EU-UK Phase 1 Report, TF50 (2017) 19, 8 December 2017, paragraph 52 (emphasis added).

<sup>4</sup> As above, Paragraph 53.

<sup>5</sup> Protocol on Ireland/Northern Ireland, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (draft of 19 March 2018) Preamble. Article 1(1) of the draft Protocol does deal with non-diminution of rights but at present takes a much more restrictive approach than the Phase 1 Agreement, restricting the rights in question to those listed in one section of the GFA.

<sup>6</sup> Article 21(1) TFEU (Treaty on the Functioning of the European Union).

More complex issues relate to the ability to access EU rights normally derived from *residence in an EU member state*. The EU rights normally derived from residence in a member state include a number of those with which are most commonly exercised, for example:

**1: Political Rights – rights to vote in and be represented by MEPs** – all EU citizens have the right to participate in the democratic life of the EU, with EU citizens directly represented in the European Parliament,<sup>7</sup> the right is usually exercised in the Member State of residence<sup>8</sup>, and – without a bespoke arrangement – Irish citizens in NI will no longer be considered to be in a Member State after BREXIT;

**2: European Health Insurance Card - (EHIC)** grants rights of access to state-provided health care in another EEA state (on same terms as its nationals) for medically necessary assistance during a visit. The EHIC is through *residency* in a member state with the NHS reimbursing other EU state providers for NI residents – this will lapse on BREXIT and there is no guarantee of a replacement reciprocal agreement;<sup>9</sup>

**3: Studying elsewhere in EU and paying EU, and not international students rates;** whilst EU citizens are entitled to study elsewhere in the EU to avail of the EU student tuition fee rate (the same as that for nationals in another state) rather than the usually much higher international student rate, this requires residency in an EU member state for three of the previous five years. This will lapse with BREXIT;<sup>10</sup>

It would clearly neither be compatible with or a good faith interpretation of the Phase 1 Agreement to limit the rights of Irish citizens in NI to the rights of EU citizens that are already available to Irish and other EU citizens that live in third countries. This would conflict with the commitments to non-retrogression and the explicit reference to residence in NI, and would not require the putting in place of further ‘arrangements’ that the Phase 1 Agreement refers to.

The UK Ireland-Northern Ireland Position Paper also sets out a UK government policy of non-retrogression and apparent equivalence of “all the [EU] rights” for Irish citizens resident in NI maintaining the same rights as Irish citizens resident in the Republic of Ireland.<sup>11</sup> The Irish government in response to the Phase 1 Agreement explicitly stated that the birthright to be Irish and hence EU citizens “will be protected,” the Taoiseach, Leo Varadkar specifically elaborating “*So, a child born in Belfast or Derry today will have the right to study in Paris, buy property in Spain, work in Berlin or any other part of the European Union.*”<sup>12</sup>

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<sup>7</sup> Treaty on European Union Article 10(2)-(3);

<sup>8</sup> TFEU Article 20(2)(b).

<sup>9</sup> European Health Insurance Card <http://ec.europa.eu/social/main.jsp?catId=559>

<sup>10</sup> See Siobhán Duffy Legal Expert EU Rights, ECAS, ‘[Implications for Free Movement of Citizens in Northern Ireland](#)’ Seminar on the Impact of Brexit on Citizens Rights (Centre for Cross Border Studies) 28 March 2017, Belfast.

<sup>11</sup> HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017, paragraph 14: “As long as Ireland remains a member of the EU, Irish citizenship also confers EU citizenship, with all the rights that go with this. This is as true for the people of Northern Ireland who are Irish citizens – or who hold both British and Irish citizenship – as it is for Irish citizens in Ireland.”

<sup>12</sup> Irish Government News Service ‘[Statement on Brexit negotiations by Taoiseach Leo Varadkar](#)’, 8th December 2017.

Whilst these examples refer more to the ‘four freedoms’ of general EU citizenship, clearly children from Belfast or Derry would be somewhat surprised if the Irish government’s intention were for them to be charged a vastly higher ‘overseas’ student rate rather than EU rates for tuition on courses at French, or indeed Republic of Ireland universities.

To date there has been no explicit clarification as to whether and how the rights covered in the above examples, or other EU rights deriving from residency, are going to be continued to be afforded to NI-born Irish citizens in NI after BREXIT. For example, how would there be a mechanism to enforce such rights if denied to Irish citizens in NI, in the context of the UK reluctance to allow continued supervision by the European Court of Justice. It is also fair to say that this issue has largely been ‘under the radar’ with a general sense of complacency among Irish citizens in NI that the full range of EU rights will be maintained. The complexities, and the issues covered in the second section of this paper relating to the rights of British citizens in NI, risk making it attractive to the concerned governments to backslide on all or some of the above areas of EU rights before there is focus and attention on them.

Clearly also arrangements which are created to cater for persons with the GFA birthright to be Irish in NI mean the creation of a distinction between two different categories of Irish citizens in NI; the first being those who are NI born and the second being Irish citizens who have been resident in NI for some or almost all of their lives but were born in the Republic, elsewhere or have naturalised as an Irish citizen.

*Will Irish citizens in NI still have the same entitlements to NI services as British citizens?*

In addition to the question of ongoing EU rights, there is the question as to the rights and entitlements of Irish citizens in NI to access Northern Ireland public services and benefits. The UK has given assurances that the existing legal framework will ensure equal access for Irish citizens as for British Citizens in Northern Ireland to services.<sup>13</sup> However, as things stand, in numerous areas this is simply not the case, with many entitlements for Irish citizens only provided for by virtue of EEA treaty rights which will cease to have effect after BREXIT.<sup>14</sup> For example, take the following examples of three Northern Ireland resident neighbours all requiring a home help or residential care after BREXIT:

- Person A: An Irish citizen who identifies as Irish born in NI;
- Person B: A British citizen who identifies as British born in NI;
- Person C: An Irish citizen who has lived almost all her life in NI but was born just over the border in a Donegal hospital;

As things stand the NI health Trusts will be debarred from providing Person C with a home help or residential care after BREXIT, which will usually only be available to British Citizens.<sup>15</sup> Person B will continue to be able to receive the service. In order for Person A to receive the service he or she would have to identify as British and prove and rely upon British

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<sup>13</sup> HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017, Paragraph 23.

<sup>14</sup> Traveller Movement ‘[Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future](#)’, December 2017

<sup>15</sup> As above referencing provisions of Nationality and Immigration Act 2002, Schedule 3, paras 1 & 5, which apply to the provisions of Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972, EU citizens are excluded from non-cash based social welfare schemes, unless the exclusion would breach that person’s rights under EU law or the ECHR.

citizenship. This conflicts with the provisions in the GFA, an issue covered in relation to British citizens in the next section.

Whilst the UK government has a clear policy intention to continue to afford Irish citizens equivalent access to services post-Brexit (which entails differential treatment of the EU26), this may not be straightforward in light of the position of the DUP in opposing the GFA and many equality and rights based provisions in general. There is considerable potential for stalemate in the correction or amendment of legislation through regulations envisaged under the current Withdrawal Bill, given the existence of numerous mutual powers of veto within the devolved NI context.<sup>16</sup>

### **What inequalities will be created with British citizens in NI?**

There have been regular reiterations throughout the BREXIT process of the core provision in the British-Irish Agreement regarding the birthright of the ‘people of Northern Ireland’ to hold Irish or/and British citizenship, which explicitly endorse that the choice be without differential or detrimental treatment. For example, the UK Northern Ireland and Ireland Position paper makes reference to the GFA birthright for the people of Northern Ireland:

...to identify themselves and be accepted as British or Irish or both, as they may so choose; **to equal treatment irrespective of their choice.**<sup>17</sup>

A domestically enforceable provision on the “*The right of the people of Northern Ireland to hold British or Irish citizenship or both...with no detriment or differential treatment of any kind*” was to be a core component of the GFA-mandated Northern Ireland Bill of Rights, but has not been legislated for.<sup>18</sup>

Despite this regular reiteration, and in contradiction, there has been an acceptance in the official positions that those who identify solely as British in Northern Ireland and hence hold and rely on British citizenship will have fewer rights and entitlements than those who identify (solely or also) as Irish. This is through the official acceptance on both the UK and EU side that Irish citizens will retain EU rights and British citizens will lose them. The UK position paper in making reference to Irish citizenship conferring EU citizenship states “*This is as true for the people of Northern Ireland who are Irish citizens – or who hold both British and Irish citizenship – as it is for Irish citizens in Ireland*” and welcomes a commitment in the European Commission’s directives that Irish citizens in Northern Ireland continue to hold rights as EU citizens.<sup>19</sup>

In a similar vein as cited above the Phase 1 Agreement which reiterates the birthright to choose to be Irish or British or both, goes on to state that the “Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for *such people* [i.e. Irish but not British citizens in NI].” There is also an acceptance from the Irish government that maintenance of EU rights will be

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<sup>16</sup> See: Colin Harvey and Daniel Holder [The Great Repeal Bill and the Good Friday Agreement – Cementing a Stalemate or Constitutional Collision Course?](#) UK Constitutional Law Association blog

<sup>17</sup> HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017, Paragraph 12 (emphasis added).

<sup>18</sup> Northern Ireland Human Rights Commission ‘A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, 10 December 2008, p47.

<sup>19</sup> HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017, Paragraph 14.

dependent on NI residents being willing to take Irish citizenship regardless of their ‘political persuasion.’<sup>20</sup>

However, obliging people in Northern Ireland to identify as Irish and take up Irish citizenship to ensure equal entitlements is not compatible with the GFA, in the same manner that obliging Irish-identifying NI residents to rely on British citizenship for equality of access to services would not be. However, there appears to be a worrying general acceptance in all three parties (UK, Ireland and EU) that detrimental and differential treatment in relation to EU rights for British citizens in NI will flow from BREXIT, and there appears to be no intention of taking steps to ensure equivalent provision for British citizen in NI. In a practical sense we may consider the implications on the three policy areas referenced earlier in this paper:

**1: Political Rights – rights to vote in and be represented MEPs** – Irish citizens in NI retain rights to vote in EU elections, but British citizens do not – in essence there are only MEPs for the nationalist community;

**2: European Health Insurance Card - (EHIC)** Irish citizens in NI retain rights to the EHIC, presumably with their local health Trust footing the bill, but British citizens in NI do not;

**3: Studying elsewhere in EU and paying EU, and not international student rates;** Irish citizens in NI will continue to avail of EU student fees rates, British citizens in NI will not.

One crude option to ensure ongoing ‘equivalence’ between British and Irish citizens in NI would be of course to ‘race to the bottom’ and strip Irish citizens of the above and other EU rights too. Such retrogression would, in addition creating a considerable outcry and conflict, not be compatible with current agreements. Yet political concerns within unionism about Irish citizens alone maintaining many of the above rights may create pressure on the UK government to seek to quietly minimize their continuance. Equally the lack of any steps to seek to provide continuance for British citizens in NI will allow significant differentials to emerge in conflict with the GFA.

There is potential to remedy a number of the above matters through the negotiation of bespoke specific arrangements for Northern Ireland (often referred to as Special Status). In the alternative there could also be UK wide arrangements on some of the areas – for example proposals to maintain the EHIC for the whole of the UK through reciprocal arrangements. At present however there has been little to no official mapping of the rights that will be retained by Irish citizens in NI, the differentials that will be created with British citizens in NI, or any remedial steps planned to ensure compliance with the GFA.

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<sup>20</sup> “These [EU] rights will, of course, be available to everyone in Northern Ireland who chooses to exercise his or her right to be an Irish citizen, regardless of their political persuasion or religious beliefs.” Irish Government News Service ‘Statement on Brexit negotiations by Taoiseach Leo Varadkar’, 8th December 2017.