

EU Withdrawal Bill, Clause 13 – ‘new border arrangements’

Freedom of Movement in the Common Travel Area:

The planned non ‘routine’ passport controls in and out of Northern Ireland and the risks of increased racial profiling, a CAJ briefing

Summary

- Clause 13 of the European Union (Withdrawal) Bill as amended on Report at the House of Lords relates to the *“Continuation of North-South co-operation and the prevention of new border arrangements”* on the island of Ireland. This clause was inserted in the Lords further to a cross-party amendment.
- The UK Northern Ireland and Ireland BREXIT Position paper is limited to ruling out ‘routine’ passport controls within the Common Travel Area (CTA). Government has regularly expressed its desire not to have infrastructure on the land border and also given frequent assurances that there will be ‘no border in the Irish Sea’;
- There has been a lack of clarity however as to what ‘non routine’ controls in the CTA will look like with concerns that there will be a resultant increase in selective checks that target persons on the basis of skin colour or other ethnic indicators – the form of discrimination known as racial profiling;
- In response to an amendment tabled by Baroness Kennedy of the Shaws the Lord Duncan of Springbank at Report Stage clarified government’s policy objective making clear statements that there *“can be no racial profiling at a border”* and that *“There will be no checks whatever for journeys across the land border between Ireland and Northern Ireland, nor between Northern Ireland and Great Britain.”*
- Whilst not doubting the Minister’s sincerity, there is a gulf between these assurances and even present pre-exit day experiences. [One recent case in the public domain](#) and further detailed in this submission relates to a lawyer making a return trip on the ferry from Belfast to Scotland. On all four of the occasions he embarked and disembarked at the respective ports in Belfast and Cairnryan he was singled out by immigration or police officers and asked for a passport or ID, and questioned as to movements despite showing his British passport. In so far as he could see on each occasion he was the only black person in the queue and the only person singled out;
- In addition to ‘non regular’ CTA checks governments intention is also to regulate post-BREXIT migration in Northern Ireland through ‘intensification’ of hostile environment measures, though the Northern Ireland Affairs Committee has urged that NI checks be no more onerous than elsewhere in the UK;
- In her recent official mission to the UK the UN Special Rapporteur on racism, Ms Tendayi Achiume, in relation to the above concerns, has recommended the UK adopt immigration policies that shield migrants from such racial discrimination;

CAJ would urge MPs in ‘ping pong’ debate on clause 13, that may otherwise largely focus on customs matters, to raise the issues relating to free movement of persons and press for safeguards that would prevent non ‘routine’ checks on the basis of racial profiling.

About CAJ

The [Committee on the Administration of Justice \(CAJ\)](#) 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 is the NGO partner in the [BrexitLawNI.org](#) project with the law schools of the Queens University Belfast and Ulster University, and Co-Convenes the NI Equality Coalition with UNISON in Northern Ireland (NI).

BREXIT and passport controls – the official position

The statutory basis for free movement in the Common Travel Area (CTA) is provided for by s1(3) of the Immigration Act 1971 which precludes the use of (passport/border) control for local journeys within the CTA.

Much of the focus of the debate on the Irish land border (and also on movement between NI and the rest of the UK) has focused on the freedom of movement of goods rather than the freedom of movement of people. In relation to people the UK 'Northern Ireland and Ireland Position Paper' is limited to ruling out 'routine' passport controls within the Common Travel Area (CTA). The UK Position Paper states:

*The development of our future immigration system will not impact on the ability to enter the UK from within the CTA free from **routine** border controls.ⁱ*

There is general consensus that fixed border controls on persons crossing the land border would be impractical, undesirable and conflict with the provisions of the Belfast/Good Friday Agreement (GFA). There have also been repeated assurances that there will be 'no border in the Irish sea'. Equally problematic would be 'non routine' controls on both routes that target perceived non-CTA (British/Irish) citizens on the basis of racial profiling;

Further to amendments tabled by Baroness Kennedy of the Shaws in the Lords at Committee and Report stages the Minister, Lord Duncan of Springbank, at Report stage, drawing on statements made during the Committee debate, for the first time ruled out racial profiling and checks on the land border or Irish Sea as follows:

I am very happy to reinforce the clear statement that there can be no racial profiling at a border, whether it be routine, quixotic or even accidental. That cannot be the policy or the direction; there cannot be even a hint of that going on at the border...

There will be no checks whatever for journeys across the land border between Ireland and Northern Ireland, nor between Northern Ireland and Great Britain. As I said earlier, this includes any aspect of what those checks might look like or be interpreted to look like. That is not what will be happening. [[HL Hansard 25 April 18, c/m 1609](#)]

BREXIT and passport controls- the current experience

Whilst not doubting the Minister's sincerity in articulating this policy objective there is a considerable gulf between these assurances and even the present reality. This is highlighted by an incident on the same day this Report Stage debate was taking place when a lawyer, Jules Gnezekora, a dual Ivorian and British citizen who has lived in the UK since 1994 and now resides in Northern Ireland was taking the ferry from Scotland back to Northern Ireland. Mr Gnezekora's experience has been reported in the media [here](#) and [here](#).

In a statement to CAJ Mr Gnezekora reports that in Cairnryan port *“I was queuing with approximately 15-20 people to board the boat. I was the only black person in the queue that I could see... I passed through the check-in area having shown my boarding details to ferry staff and was called to the side by one of the officers who were present, immigration or police. I remember clearly that I was asked to produce my passport, which I did.”* Despite having a British passport Mr Gnezekora was then questioned about why he was traveling to Northern Ireland and his place of birth, he raised his frustration with the officers at being *“the only person singled out for questioning and that I am black. While I said this, I remember pointing to the passing passengers who were looking at me being questioned.”* His testimony continues:

A few hours later, the ferry docked at Belfast. I disembarked and was passing through the exit area in the ferry terminal. Apart from [...] two black people [...] who were waiting to collect their luggage off the boat, I was the only black person leaving the docks at that time that I could see. The only form of control that I could see in this disembarkation area was immigration control. The two officers were letting the people who were ahead of me pass through. I did not see them ask anyone for any identity documents. ... When I approached the officers, I was taken to one side. This was the fourth leg of my return trip within eight days and I had been subjected to this treatment on every single occasion. I was feeling very discriminated against. It was humiliating being singled out and asked questions.

This time the officer asked me to produce my boarding pass for the ferry journey I had just taken. This surprised me as I was leaving the boat, not embarking it. In addition, as far as I was aware they were immigration officers, not Stena Line staff... I was very annoyed and said “Is this what you are looking for”, I produced my British passport and one of the two officers replied, “Yes”. The questions that I recall on this occasion was where was I travelling to in Northern Ireland and why...ⁱⁱ

As alluded to above the same thing had happened to Mr Gnezekora at both ports on his outward journey from Belfast to Cairnryan on the 17 April 2018. In Belfast Port Mr Gnezekora reports waiting with other foot passengers and *“I remember clearly that I was the only black person in the queue”* and at that time was the only person singled out by uniformed officers, asked for either passport or identity document, and on producing a British passport questioned about travel and residency. On arrival at Cairnryan, the same thing happened, with Mr Gnezekora being the only black passenger, and the only one singled out, in so far as he could see.

Mr Gnezekora has lodged a complaint with the Equality Commission for Northern Ireland. In responding to the [media](#) about Mr Gnezekora’s experiences the Home Office stated that *“Immigration Officers speak to members of the travelling public using these routes, regardless of appearance, and a consensual request for photographic ID can form part of that conversation.”* There is no statutory power to conduct such internal immigration checks on CTA routes, and the suggestion such checks are ‘voluntary’ is not clear to passengers.

This is not an isolated incident and the Equality Commission, for example, has supported a previous case, where the Home Office settled a claim (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. This case was reported in the BBC [here](#).

The most recent official statistics published for 'Operation Gull', an operation in Northern Ireland ports involving immigration and police officers targeting entry over the land border, record the 'interception' of 775 suspected irregular migrants in the 2015/2016 year, an increase of 66% on the previous year. These figures, the majority of which relate to persons suspected of routine immigration offences rather than crimes, were nevertheless included in an organised crime annual threat assessment report.ⁱⁱⁱ The media reported figures of around 800 detentions in the subsequent year, along with political and academic calls for the discontinuation of Operation Gull due to the concerns over the use of racial profiling.^{iv}

Risks of racial discrimination and erosion of the Belfast Agreement

Given the above experiences there is therefore a considerable risk that *de facto* passport control on CTA routes is set to continue and increase in the context of BREXIT and, despite assurances, involve widespread racial profiling, the form of racial discrimination whereby persons are singled out on the basis of skin colour or other ethnic indicators. The UK Border Force is already notably recruiting to increase its numbers of Belfast-based officers by around one third in the explicitly stated context of BREXIT. In the context of UKBF combining customs and immigration functions, the likelihood of customs controls on the land border leading to immigration checks is also high.

Lord Duncan [speaking for the Government at Report Stage](#) also emphasised that the CTA is "*an integral element—not a symbolic but an integral element—of the Belfast/Good Friday agreement. That should not be underestimated.*" The position on 'non-regular' checks as currently experienced will however undermine the commitments implicit in the GFA to freedom of movement in the CTA, as well as non-discrimination. The increased role of the UK Border Force (UKBF) also means regression in the oversight arrangements for law enforcement in Northern Ireland set out in the Patten Commission report. This is not least as UKBF are not accountable to the Northern Ireland Policing Board and the Home Office have twice launched (and had to withdraw and relaunch) recruitment exercises that were effectively open only to one section of the NI community.^v

There is also a stated strategy to use the in country 'hostile environment' to police immigration in Northern Ireland following BREXIT, and a worrying conflation of routine immigration enforcement with organised crime. The 'Forward Look' section of the Organised Crime Task Force (Northern Ireland) 2017 'Annual Report and Threat Assessment' proclaims that "*Immigration Enforcement will seek to fully exploit all the measures in the Immigration Acts 2014 and 2016 to tackle illegal immigration*" and alludes to Immigration Enforcement continuing its work with UKBF and An Garda Síochána "in conducting intensification campaigns" on cross border and other immigration crime."^{vi}

The Northern Ireland Affairs Committee in its report on the border, welcoming commitments that free movement across the land border would continue, has however called for clarity as to the intentions for in-country controls:

We recommend the Government sets out in detail how it proposes to apply existing, or whether there will be new, internal immigration controls for EU nationals. In the

Committee's view, the residents of Northern Ireland should not be subject to more onerous documentary checks to determine entitlement to stay and to access public services and the labour market than anywhere else in the UK. It must also establish the resource implications of conducting checks on people away from the border.^{vii}

On top of the existing experiences of non-EU migrants we have already heard concerning experiences from EU migrants in NI post-referendum experiencing questioning on arriving into Northern Ireland airports from outside the CTA and problems in accessing services and housing. The querying of entitlements and stigmatisation of migrants takes place in a context where there are already significant concerns about paramilitary involvement in racist attacks.

Detail and references on all of these concerns, along with commentary on the respective parts of the Phase 1 UK-EU agreement and Protocol to the draft Withdrawal Agreement were set out in a CAJ briefing paper to the report stage of the Bill which is available [here](#).

UN Special Rapporteur on racism's recommendation to the UK

In her recent official visit to the UK Tendayi Achiume, the UN Special Rapporteur on Contemporary Forms of Racism, in relation to the racial profiling concerns raised regarding 'non-routine' checks in the CTA recommended that the UK adopt immigration policies both now and after BREXIT that protect migrants from racial discrimination. Ms Achiume stated in her end of mission statement:

Even in parts of the UK such as the devolved nations and in areas where immigrants remain fundamental to the economic prosperity and success of British communities, the groups with which I consulted reported high levels of anxiety among immigrants regarding their status following the UK's departure from the EU. In Northern Ireland, groups expressed concerns that even a policy that committed to no routine passport checks in the Common Travel Area might result in non-routine checks that in the hostile immigration environment would lead to racial profiling of transiting minorities. **I recommend** that the UK adopt immigration policies in advance of and following its exit from the EU that shield EU and non-EU migrants from the threat of racial and ethnic discrimination.^{viii}

Previous stages of the Bill

At Committee and Report stage amendments to clauses 7, 8 and 9 of the bill respectively, tabled by Baroness Kennedy of the Shaws would prevent Regulations under these provisions being used to:

"() amend or vary the provisions of the Immigration Act 1971 relating to passport control procedures on journeys within the Common Travel Area."

Passport controls on local journeys in the CTA are currently precluded in UK law by virtue of s1(3) of the Immigration Act 1971 which provides that such journeys are not subject to (passport/border) 'control' under this Act.^{ix} This provision is the statutory basis for freedom of movement within CTA. In introducing these amendments, which were withdrawn in the context of assurances from the Government and a commitment to further correspondence, Baroness Kennedy [stated](#):

I remind this House that, in Committee, Ministers committed the Government to the whole business of continuing the common travel area, saying that it was the ambition and policy of the Government that there should be no land border checks and no racial profiling. Racial profiling is one of the matters that concerns many of us. How do you distinguish between people living in the United Kingdom and travelling into Ireland and Irish people coming here and those persons who may come from the wider European Union? How do you distinguish them from people coming from elsewhere, and how do we manage those distinctions without risking the introduction of racial profiling? Concerns about racial profiling have been highlighted recently by a number of high-profile cases; they are an existing problem that may be exacerbated by increased controls in the Brexit context, even if there is not going to be routine checking—even if it is non-routine checking, which means that you would have mobile units or pick people out from queues of travellers.

Further to a division at Report Stage in the House of Lords clause 13 was added to the Bill. The amendment was tabled by Lord Patten of Barnes, Lord Murphy of Torfaen, Baroness O'Neill of Bengarve and Baroness Suttie regarding the continuation of North-South Cooperation and the prevention of new border arrangements. In relation to the latter provision, subsection 2(b) would preclude regulations which create or facilitate new post-exit day border arrangements between Northern Ireland and the Republic of Ireland, that are not provided for in a bilateral agreement between the two states and which feature a number of enumerated matters namely:

- (i) physical infrastructure, including border posts,
- (ii) a requirement for customs or regulatory compliance checks,
- (iii) a requirement for security checks,
- (iv) random checks on goods vehicles, or
- (i) any other checks and controls.^x

This latter provision engages passport or border controls on freedom of movement of people. At present there is a considerable risk practices of involving racial profiling will further become routine in the CTA.

CAJ, May 2018

ⁱ “The development of our future immigration system will not impact on the ability to enter the UK from within the CTA free from **routine** border controls.” HM Government: Northern Ireland and Ireland Position Paper, 16 August 2017, paragraph 32 (emphasis added).

ⁱⁱ Statement of Jules Gnezekora, taken by CAJ on 30 April 2018.

ⁱⁱⁱ Organised Crime Task Force, Annual Report and Threat Assessment 2016, Department of Justice NI, June 2016, Page 13.

^{iv} [Calls for suspension of ongoing ‘racist’ Operation Gull initiative, Derry Journal, 2 June 2017](#)

^v See [Press Statement: \[Equality\] Commission comment on Border Force recruitment advertisement 19/04/2018](#); [‘More than 1,000 Border Force jobs withdrawn over ‘British passports only’ policy](#) Irish News 21 April 2018; [Home Office sorry for Border Force British passport ‘error](#) BBC News 21 April 2018

^{vi} Organised Crime Task Force 2017 ANNUAL REPORT & THREAT ASSESSMENT Department of Justice 6 February 2017, page 18

^{vii} Northern Ireland Affairs Committee ‘The land border between Northern Ireland and Ireland’ HC 329 Published 16 March 2018, Paragraph 31.

^{viii} End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the United Kingdom of Great Britain and Northern Ireland, paragraph 63, emphasis in original.

^{ix} Immigration Act 1971 1(3) “Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as “the common travel area”.

^x Before Clause 10 “Continuation of North-South cooperation and the prevention of new border arrangements (1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must—(a) act in a way that is compatible with the terms of the Northern Ireland Act 1998, and (b) have due regard to the joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 of the Treaty on European Union. (2) Nothing in section 7, 8, 9 or 17 of this Act authorises regulations which—(a) diminish any form of North-South cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South implementation bodies, or (b) create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature— (i) physical infrastructure, including border posts, (ii) a requirement for customs or regulatory compliance checks, (iii) a requirement for security checks, (iv) random checks on goods vehicles, or (v) any other checks and controls, that did not exist before exit day and are not subject to an agreement between Her Majesty’s Government and the Government of Ireland.”