



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to the Public Bill
Committee of the Immigration and
Social Security Coordination (EU
Withdrawal) Bill**

June 2020

- 1.1 For Irish citizens in the UK and UK citizens in Ireland, the repeal of EU free movement rights in Clause 1 increases the importance of the role of the Common Travel Area. Clause 1 of the Bill removes an extensive package of legally enforceable rights derived from EU free movement legislation, leaving Irish citizens potentially reliant on more limited Common Travel Area provisions largely “written in sand”.¹ The limited rights derived under the Common Travel Area have been supplemented by a range of legal protections under EU free movement law. Many Irish citizens in the UK will be able to register for the EU Settlement Scheme and access the rights under the Withdrawal Agreement and the EU Withdrawal Agreement Act 2020, however, if they are ineligible or do not apply for settled or pre-settled status they will be reliant on the Common Travel Area. The current recognition of these rights in a Memorandum of Understanding between the UK and Irish Governments does not provide a robust legally enforceable form of protection.²
- 1.2 The NIHR is concerned that Schedule 1, Paragraph 6 could have a direct impact on the payment of childcare within Universal Credit (UC) and Working Tax Credit (WTC) for cross border working families on low incomes using child care services in Ireland. The explanatory note on the Bill states that the EU-derived rights, procedures and remedies which cease to be automatically recognised and available in domestic law include article 56 of the Treaty on the Functioning of the EU (TFEU) relating to free movement of services.³ Under the UC and WTC regulations, in order to access these supports, childcare has to be provided in the UK or the provider accredited by the Secretary of State.⁴ For Working Tax Credit, HMRC had refused entitlement to child care support within the benefit for a lone parent who had used child care services in County Cavan. A Tribunal of Social Security Commissioners held that through the application of the EU Services Directive⁵ and article 56 TFEU families in Northern Ireland were entitled to child care support in Working Tax Credit to cover the cost of childcare

¹ Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, ‘Discussion Paper on the Common Travel Area’ (NIHRC and IHREC, 2018), at 9.

² Memorandum of Understanding between the Government of the UK and the Government of Ireland concerning the Common Travel Area and Associated Reciprocal Rights and Privileges, 8 May 2019.

³ UK Parliament, ‘Immigration and Social Security Coordination (EU Withdrawal) Bill, Explanatory Notes on the Bill as introduced on 20 March 2020’ (UK Parliament, 2020), at para 68-69.

⁴ Regulation 37, Universal Credit Regulations (Northern Ireland) 2016; Regulation 14, Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002.

⁵ ‘EU Directive 2006/123/EC on Services in the Internal Market’, 12 December 2006.

provided in Ireland.⁶ Guidance has been issued to decision-makers in UC and WTC to follow this decision. No change has been made to the regulations. Without guaranteeing that this support is carried over, there is a risk that in time low income families in border areas will be unable to continue to receive childcare support and may be unable to find adequate childcare alternatives within Northern Ireland. This is an issue not covered by Common Travel Area social security co-ordination.

1.3 The NIHRC welcomes the provisions in Clause 2 that amend the Immigration Act 1971 to grant leave to enter or remain in the UK, to Irish citizens, based on nationality rather than the origin of their journey having been within the Common Travel Area. Under Clause 2, there remain specific grounds to allow Irish citizens to be deported. There is no equivalent provision to deport UK citizens from Ireland.

1.4 The Belfast (Good Friday) Agreement recognises 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, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments.⁷

1.5 In the 'New Decade, New Approach' agreement to re-establish devolution in NI, the UK government committed to reviewing its rules on migration in recognition that "taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it".⁸ The UK Government committed to changing the rules governing how the people of Northern Ireland bring their family members to the UK to allow for parity between Irish citizens, British citizens and dual nationals.

⁶ *NB v HMRC (TC) (Child Care Element)* [2016] NICom 47.

⁷ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 10 April 1998, at Article 1(vi).

⁸ NI Office, 'New Decade, New Approach' (NIO, 2020), at Annex A on UK Government Commitments to Northern Ireland, para 13.

- 1.6 The right of NI born Irish citizens to avail of EU free movement rights in relation to family members from non-EU states has been challenged before the courts. A decision of the first tier tribunal found that the claimant's wife was not considered a British citizen under the terms of the British Nationality Act 1981, when it was read in light of the birthright commitment in the Belfast (Good Friday) Agreement. This allowed them to rely on EU free movement law in relation to family members from non-EU countries. The Home Office successfully appealed the decision and the Upper Tribunal found that, irrespective of the Belfast (Good Friday) Agreement birthright commitment, the claimant's wife was deemed British under UK legislation and were therefore unable to rely on EU free movement rights in relation to family members.⁹
- 1.7 In May 2020, the Home Office released a Statement of Changes in Immigration Rules which provides for a "relevant person of Northern Ireland" to access EU free movement law protections.¹⁰ These changes will come into force on 24th August 2020 and remain in place until the EU Settlement Scheme closes to new applications in June 2021. A relevant person of NI is defined as someone who is a British citizen, an Irish citizen, or both British and Irish and was born in Northern Ireland to a parent who was British, Irish or both, or otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.
- 1.8 The NIHRC welcomes this change to the immigration rules to allow for people who identify as British, Irish or both to access the rights which flow from the protections of EU free movement rights in the UK-EU Withdrawal Agreement and the EU (Withdrawal Agreement) Act 2020. However this is a temporary fix and does not resolve the wider issue of the 'birthright commitment' in the Belfast (Good Friday) Agreement.
- 1.9 In 2009, in response to the NIHRC advice on a Bill of Rights for NI, the UK Government recognised the "considerable symbolic importance of a choice by person to identify himself or herself as British or Irish or both, in line with the commitments made in the

⁹ *Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355.

¹⁰ Home Office, 'Statement of Changes in Immigration Rules CP232' (HO, 2020), at 10.

Belfast Agreement” and 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”.¹¹ It proposed that the NI Bill of Rights should “include the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both”.¹²

1.10 The NIHRC welcomed the (then) Prime Minister Theresa May’s recognition in February 2019 that “the birthright 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 also welcomed her statement on having commissioned a review of immigration rules “to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement”.¹³

1.11 The Joint Committee of the NIHRC and Irish Human Rights and Equality Commission commissioned research, which set out a number of recommendations on how the birthright commitment in the Belfast (Good Friday) Agreement could be incorporated into UK immigration and nationality law without undermining or inadvertently risking rights of a person who chooses to identify as British or Irish or both.¹⁴

1.12 The NIHRC recommends that the UK and Ireland provide clarity and certainty as to the rights of citizens, by agreeing a comprehensive bilateral treaty encompassing reciprocal free movement rights, employment rights, alongside rights to education, health, justice and security and that such a treaty be incorporated in domestic legislation.

1.13 The NIHRC recommends that the current EU-derived rights of families living in NI to access tax credits and universal credit for childcare provided in the Republic of Ireland is protected through an amendment to Universal Credit and Working Tax Credit regulations.

¹¹ NI Office, ‘Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps’ (NIO, 2009), at para 6.6.

¹² Ibid, at 101.

¹³ Theresa May, ‘PM speech in Belfast’, 5 February 2019.

¹⁴ Alison Harvey, ‘A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998’ (NIHRC and IHREC, 2020).

1.14 The NIHRC recommends that the UK government amend the laws relating to citizenship and immigration to reflect the birthright commitment in the Belfast (Good Friday) Agreement 1998 to identify and be accepted as Irish or British or both without any loss of rights or entitlements.

1.15 The NIHRC recommends that NI born citizens who identify as Irish, be protected from deportation in any circumstances to meet the requirements of the 1998 Agreement.

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