



Promoting Justice / Protecting Rights

Briefing to the Oireachtas Joint Committee on Justice and Equality

Wednesday 23rd January 2019

Strengthening the Protection and Promotion of Human Rights and Equality on the island of Ireland

CAJ

1. The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation working for human rights and affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community and it takes no government funding.

Introduction

2. The United Kingdom's (UK) exit from the European Union (EU) has significant potential impacts on human rights and equality in Northern Ireland (NI). Despite assurances from the UK government, it will undeniably result in the withdrawal of human rights protections. For example, the loss of the EU Charter of Fundamental Rights will result in the removal of a broad range of protections that are currently not contained elsewhere in UK domestic legislation. This is especially concerning in light of the failure to deliver full human rights and equality in NI for much of the period since the Belfast Good Friday Agreement (BGFA). The challenges posed by Brexit concern not just the withdrawal of substantive rights themselves but also the availability of enforcement mechanisms. The EU framework provides for a wider range of enforcement mechanisms that will no longer be available. The reduction of the jurisdiction of the Court of Justice of the European Union (CJEU) provides further complication to this enforcement picture.

3. However, much of the threat to human rights comes from the undermining of the peace agreement that Brexit represents. From a human rights perspective, although different constitutional arrangements can provide equal protection for rights, the particular configuration of the 1998 settlement effectively brought the conflict to an end. No plausible alternative has been proposed that would not run the risk of a return to conflict and a consequent bonfire of human rights. It is therefore the first line of defence for human rights activists.
4. In general terms, the withdrawal of the UK from the EU will have a profound effect on the legal and constitutional underpinning of the present jurisdiction of Northern Ireland, its relations with the Irish state and UK-Ireland bilateral relations. The UK and Ireland's common membership of the EU was an assumption in the BGFA and the UK's adherence to EU law regulates the powers and legislative operations of the devolved institutions. The equal rights of Irish and British citizens, a principle of the BGFA, in great part relies on the equal rights of both having been underpinned by mutual EU citizenship. The lack of significant border regulation is largely due to common membership of the EU, North and South, as well as the implementation of the 'normalisation' provisions flowing from the BGFA, that provided detailed timeframes for the dismantlement of physical security infrastructure, including border infrastructure. Many equality and anti-discrimination provisions in Northern Ireland, which have particular importance in a divided society, rely on EU law. It also appears that the basic right of Irish citizens to reside in Northern Ireland are not currently provided for other than in EU law.
5. The Brexit vote itself put a particularly narrow interpretation on the principle of self-determination of the people of this island and specifically the principle of consent for the people of the North. The danger of a hard border hardly needs stressing while even a "soft" border will create problems. If the border is seen as "porous" we fear an increase in "in country" immigration enforcement which could turn the whole of Northern Ireland into "one big border" based on the notorious "hostile environment" policy.
6. It is only now there is a broader understanding of the full implications of the citizenship issue. It is becoming clear that Brexit, if it goes ahead, will have pulled off the remarkable feat of introducing two new dimensions of inequality between Irish and British citizenship in the North: between EU and non-EU citizens and between those whose chosen nationality gives them unquestioned rights in their homeland and those whose rights are conditional, contested and dependant on the vagaries of future negotiations.

7. At the moment, we still do not know if Brexit will actually happen or, if it does, in what particular way. However, the events of the past two and a half years have already damaged the peace settlement and relations across this island. We presently have no devolved institutions in Northern Ireland and the two major political parties are on opposite sides of the increasingly fractious Brexit debate. In our view, whatever happens, we need to rebuild our intertwined societies on the basis of a new dispensation based on human rights and equality. In the coming years, there will be further dislocation and disagreement, whatever happens with Brexit, as the constitutional status of Northern Ireland again comes to the fore with a probable Border Poll. We need a resilient society and politics with institutions across the island which people can trust to be fair and transparent. In this briefing we wish to make some proposals that come out of our enhanced understanding of the weaknesses and pressure points that the Brexit debate process has laid bare.

New legislation and British-Irish Treaties on Citizenship and the Common Travel Area

8. In the Belfast Good Friday Agreement, the British and Irish governments pledged to

recognise 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 and would not be affected by any future change in the status of Northern Ireland.
9. Equality between the two citizenships was core to other provisions in the Agreement, that are to be read alongside the citizenship and birthright sections. The UK government fully recognises this, and has made reference to it during the Brexit process, for example in the UK Position Paper of August 2017, which said that people born in the North had the right:

“to identify themselves and be accepted as British or Irish or both, as they may so choose; [and] **to equal treatment irrespective of their choice.**”¹
10. The basic breach of this principle of equality by Brexit would be that Irish citizens would remain EU citizens whereas British citizens wouldn't. It amounts to a new focus of division between the two main communities here. But it has also become clear that Brexit could make the status of Irish citizens born in Northern Ireland

¹ <https://www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper>. Paragraph 12. Emphasis added.

constitutionally and practically insecure. Irish citizens born in the North have been let down by the European Commission and the Irish Government as well as the UK. There is no sign in the draft Withdrawal Agreement of the “arrangements required” to allow Irish citizens to access those EU citizenship rights which are normally dependent on living in a member state. A commitment to such arrangements was made in the EU-UK Joint Report on Phase 1 of the negotiations in December 2017.² In any event, after Brexit there would be huge complexity in the different categories of citizens in respect of the North as our recent article in The Detail explains: <https://www.thedetail.tv/articles/brexit-the-complex-new-boundaries-between-different-groups-of-citizens-in-northern-ireland>.

11. But what about rights of Northern Ireland born Irish citizens in their region of birth? If Brexit goes ahead, Irish citizens will be EU citizens living in a non-member state. What rights do they have to live, work, access health and social services and fully participate in social and political life where they were born? There are several possible answers to that.

12. The first possibility is that the Home Office will regard Irish citizens as “really” British since UK nationality law decrees that most of those born in the UK have British citizenship. The second possibility is that the Common Travel Area will sort all this out. In fact, as the Human Rights Commission has suggested, Common Travel Area rights are “built on sand.” There is no plan to enshrine rights in entrenched Northern Ireland legislation or to underpin all CTA rights in a British-Irish treaty that covers the full range of CTA rights. To date the Tánaiste has briefed that a treaty will cover some elements of the CTA, including social security, but that most – (including by implication free movement in the CTA), will only be covered by a Memorandum of Understanding. The third possibility is that, under the Withdrawal Agreement, EU citizens living in the UK can retain many of their current rights by applying for “settled status.” You must pay £65 and make an application to the Home Office before mid-2021. If the Withdrawal Agreement as it stands was passed by Parliament, this would be the most certain way of guaranteeing existing rights were retained. The UK has indicated it is minded to press ahead with the Settled Status scheme even in a ‘no deal’ scenario, although may alter its terms.

13. None of these options is appealing as they all involve the implication that those who choose Irish identity are in some way second class citizens. Their rights as full participants in NI life would depend on either a denial of their Irish nationality, as yet unknown bilateral agreements between the UK and Ireland about the CTA or paying to ask the Home Office to graciously allow them leave to live in the land of their

² www.gov.uk/government/publications/joint-report-on-progress-during-phase-1-of-negotiations-under-article-50-teu-on-the-uks-orderly-withdrawal-from-the-eu. Paragraph 52

birth. The reality is that Irish citizens, born and living in Northern Ireland, have no legal connection to the jurisdiction in which they were born.

14. Legislation is needed both in the UK and Ireland to recognise the particular status of Irish citizens born in Northern Ireland and their unequivocal right to participate fully in that region and as fully as feasible in Irish society and full equality in the rights the two categories can access. As a distinct but connected exercise, the ad hoc and uncertain character of the Common Travel Area needs to be replaced by domestic legislation in the two states and a Treaty to guarantee the reciprocal rights which have so far been taken for granted. We also have recommended such provisions be enshrined in the Bill of Rights provided for under the BGFA.

Preventing NI becoming “one big border” and a racist immigration policy

15. The Home Office document on immigration controls after Brexit published in December³ makes it clear that EU citizens entering the UK will be subject to close scrutiny, with limitations on their ability to reside and work in the UK. At the same time assurances have been given that the UK does not wish for a return to the “borders of the past” and the expressed aim is for the border to be as “seamless” and “frictionless” as possible. Indications are that there will be no fixed border posts but there may be “ad hoc” or “intelligence-led” checks.
16. If there are no or few controls on the land border itself, it could be perceived as “porous” compared to British ports and airports. The concern therefore is that relatively free movement across the island could see the territory of Northern Ireland targeted by UK authorities for particularly severe and intrusive “in-country” immigration checks including raids on workplaces and increased detention of migrants. This could lead to the territory of Northern Ireland becoming “one big border” with respect to the rest of the UK as well as increased “non-routine” checks at ports and airports. Amongst other things, such a security clampdown outside the police accountability mechanisms painstakingly built up since 2001 would have a negative effect on public confidence in the rule of law and would be entirely unacceptable from a human rights point of view.
17. There is therefore a real risk that post-Brexit Northern Ireland will become the most “immigration policed” jurisdiction on these islands, with the existing practices and problems of racial profiling being replicated on a major scale. As well as the direct pressure on migrants, such practices would undermine the rights-based aspirations of the Belfast Good Friday Agreement. Furthermore, as we have already seen, the

³ <https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system>

unique intersection of sectarianism and racism in Northern Ireland, combined with largely segregated housing, puts ethnic minorities, whether from within or without the EU, at particular risk. Any increase in enforcement, and particularly detention, would invite media coverage and comment that would fuel racist opinion and moral panic about migrants and refugees.

18. Unfortunately, it appears that the Irish Government is collaborating closely with the UK Government on immigration issues. Newspaper reports from two years ago have the then Secretary of State, James Brokenshire, commenting on the “high level of collaboration on a joint programme of work between London and Dublin to control immigration, with a main focus on strengthening the common travel area (CTA)...We are already working closely with the Irish government and other members of the common travel area to prevent people from seeking to evade UK immigration controls from entering via another part of the CTA. There is a high level of collaboration on a joint programme of work. This includes investment in border procedures; increased data sharing to inform immigration and border security decisions; passenger data systems enabling the collection and processing of advance passenger information; and harmonised visa processes.”⁴

19. Instead of this collaboration, we propose that the Irish Government reject any practices of racial profiling and begin an open and transparent debate about how immigration into the Common Travel Area is managed. This should inform both guarantees about equivalence of protection of rights across the island (see below) and the proposed treaty on the CTA (above).

Charter of Rights

20. It has been argued that one of the reasons for the “Leave” vote in the referendum was disenchantment with the political class and the conduct of public affairs over the past period. On this island, the devolved institutions fell because of perceived abuses of power and a widespread unease about the integrity of politicians. Mistrust of politicians is also hardly absent from the polity in the South of the island.

21. The Good Friday Agreement stated that:

“The joint committee [of the new North and South human rights commissions] will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed

⁴ <https://www.theguardian.com/politics/2016/oct/09/britain-to-push-post-brexit-uk-immigration-controls-back-to-irish-border>

measures for the protection of the fundamental rights of everyone living in the island of Ireland.”

22. In June 2011, the Joint Committee published proposals for a Charter based on the international human rights which the two governments and many of the political parties had explicitly endorsed in international treaties and in the BGFA.⁵ The proposals were not taken up and acted upon by either the two governments or political parties.
23. In the light of the need to restore faith in political institutions and in the interconnectedness and interdependence of the two jurisdictions on the island, it would be important to revisit these proposals. While the endorsement of fundamental human rights by political parties would be important and useful, it might also be significant to include those standards and principles which might be directly relevant to those organisations who are actually or potentially operating the levers of state power. Commitments to human rights and equality based decision-making, with all the concomitants of transparency and public involvement that would involve, could be the basis of an island-wide code of political behaviour. This could help give a practical basis to confidence in the efficacy and rectitude of public life in the future. In particular, knowledge that all political parties operating in the two jurisdictions were signed up to a common set of standards might help calm inevitable fears if a change in the constitutional position of Northern Ireland becomes a realistic possibility.

Equivalence of rights to be guaranteed

24. The principle of equivalence in protection of human rights between the two jurisdictions on the island is referenced in two ways in the Agreement. First, in relation to Ireland bringing in new human rights guarantees, it states:

“The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.”

25. Though this refers to a kind of “one-way” equivalence, it only makes sense as a reciprocal arrangement. The aim can be expressed as ensuring that the rights of an individual are protected equally wherever they may be on the island, though the mechanisms will be different as they are those of the two sovereign states involved. This is essential to make free movement across the island a reality but also to give the necessary confidence if any change in sovereignty over the North occurs.

⁵ <http://www.nihrc.org/publication/category/Charter-of-Rights>

26. This is the other way equivalence is referenced in the BGFA when it states:

“that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities.”

27. The Joint Committee of the human rights commissions uses this passage as the basis of its proposals on a Charter of Rights. However, it is arguable that that does not go far enough. We have at the moment a situation where the governing party in the UK is in a “supply and confidence” arrangement with the biggest party in the North and it is possible in the future that one or more parties could be in government concurrently in the North and South. That means that, while no party should use state powers for narrow political advantage, complete political neutrality by the government exercising sovereign jurisdiction over the North cannot be guaranteed. It is all the more important that some way of guaranteeing that rights are and will in perpetuity be protected in an equivalent manner in both jurisdictions is developed, whether in compatible legislation or treaty.

For a human rights and equality based return to devolved government

28. Abuses of power, sectarian decision making and a corrosive lack of trust between the two major parties in the North led to the downfall of the devolved institutions. The chaos and division already caused by the Brexit process have worsened the situation. In current circumstances, calls for an immediate and unconditional return to the devolved institutions are not only whistling in the wind but also threaten to entrench the poor governance that led to their dissolution in the first place.

29. We need a human rights and equality based return to devolution based on the full implementation of the rights provisions of the peace settlement, addressing international rights obligations and working fully within the existing rules.

30. The main element of rights protection in the peace settlement remaining to be implemented is the Bill of Rights for Northern Ireland, but also outstanding are an anti-poverty strategy based on objective need, an Irish Language Act and a Single Equality Act. Again, Northern Ireland is in breach of a range of international obligations taken on by the UK state, including in the area of reproductive rights,

marriage equality, dealing with the past and the obligation to effectively tackle hate expression. In terms of the institutions themselves, there has been a widespread failure by public agencies to properly implement the equality duty and poor enforcement by the Equality Commission. The “Petition of Concern” mechanism, designed to prevent breaches of equality and human rights provisions, has been misused to block measures which themselves protected minority rights. Action, or binding commitment to action, on these issues would be an essential precursor to an effective and lasting reestablishment of the devolved institutions.

Conclusion

31. Brexit threatens human rights and equality protections in a number of specific ways. However, its main impact has already been to destabilise both the provisions of the peace settlement and the relations between the two jurisdictions on this island. The current uncertainty and political turmoil may subside to an extent, especially if Brexit does not actually go ahead, but trust and confidence have already been undermined. Questions of identity and citizenship have been opened up in a way not seen since well before the BGFA – those genies cannot be put back in the bottle. We therefore need a set of measures, across the island and, where possible, on the basis of formal treaties between the two sovereign states involved, which can stabilise trust and build resilience as we move into a future of change and challenge.