



Opening statement to the Seanad Special Committee on the Withdrawal of the United Kingdom of the European Union – Northern Ireland Human Rights Commission

Introduction

The Northern Ireland Human Rights Commission (the Commission) has worked productively with the Irish Human Rights and Equality Commission (IHREC) through the joint committee as established under the Belfast (Good Friday) Agreement to protect and promote the strongest possible human rights and equality protections as a result of the United Kingdom's decision to leave the European Union in June 2016.

We have also worked effectively in tandem with the Equality Commission for Northern Ireland (ECNI) in discussions with the UK government on the preservation and development of human rights and equality within the draft withdrawal agreement between the UK government and EU 27 member states.

The engagement with the Irish government, Article 50 Task Force and more recently the UK government has been meaningful, valuable and much appreciated.

We entered into the discussions as a joint committee with six key aims, namely:

- Ensure a commitment to 'no diminution of rights' is evident and enforceable in the final Withdrawal Agreement
- Safeguarding North/South equivalence of rights on an ongoing basis
- Guarantee equality of citizenship within Northern Ireland
- Protect border communities and migrant workers
- Ensure evolving justice arrangements comply with commitment to non-diminution of rights

- Ensure a continued right to participate in public life for EU citizens in Northern Ireland

Our recommendations sought to preserve existing protection alongside at least keeping pace with human rights and equality protections as they develop within the EU in the future.

The Commission's view is that substantial progress has been made within the Withdrawal Agreement but there also remain significant gaps.

The Withdrawal Agreement

The Ireland/Northern Ireland protocol contains a number of important commitments including:

- The UK government's commitment to ensuring no diminution of the rights contained within the Rights, Safeguards and Equality of Opportunity section of the Belfast (Good Friday) Agreement
- That a number of specific EU directives will continue to have effect in Northern Ireland covering equal treatment in the access of supply of goods and services, in employment, self-employment and social security alongside equal treatment between persons of racial or ethnic origin¹. This commitment covers both existing protection and keeping pace with future EU law protection.
- The UK and Irish government will continue to be able to make arrangements for the Common Travel Area (CTA) including offering more favourable treatment than to other EU citizens in some circumstances.
- Maintaining existing North-South co-operation in a number of areas including justice and security and may continue to build on the provision of the Good Friday (Belfast) Agreement in

¹ Directive 2004/114/EC 2004 – the principle of equal treatment between men and women in access to and supply of goods and services.

Directive 2006/54/EC – the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Directive 2000/43/EC – the principle of equal treatment between persons irrespective of racial and ethnic origin.

Directive 2000/78/EC – a general framework for equal treatment in employment and occupation.

Directive 2010/41/EU – the principle of equal treatment between men and women engaged in self-employment.

Directive 79/7/EEC – the principle of equal treatment for men and women in social security.

other areas of North-South co-operation while respecting EU law.

- Putting in place institutional arrangements to oversee the protocol (e.g. a specialised committee and a dedicated mechanism comprised of the Commission, ECNI and the joint committee of the Commission and IHREC). These arrangements, in turn, fit into the architecture of oversight, monitoring, dispute resolution and enforcement mechanisms contained within the Withdrawal Agreement as a whole.

Citizenship Rights

One of a number of outstanding issues is the citizenship rights of all the people of Northern Ireland following the withdrawal of the UK from the EU. In particular, how can existing EU law rights be protected in a way consistent with the Good Friday (Belfast) Agreement recognition that people can identify themselves and be accepted as Irish or British or both without adverse consequences. There are three strands to resolving this. First, through the draft Withdrawal Agreement and/or any subsequent agreements agreed between the UK and EU27. Second, through bi-lateral agreements agreed between the UK and Irish governments or third through legislative arrangements put in place by the UK government within its own domestic legislation.

(i) The draft Withdrawal Agreement

The December 2017 Report acknowledged that people in Northern Ireland who are Irish citizens will continue to enjoy EU law rights as EU citizens where they reside in Northern Ireland. What these rights entail, in practice remains unclear. In a fact sheet on the protocol on Ireland and Northern Ireland in the Draft Withdrawal Agreement the European Commission issues in November 2018 identified the following rights namely to:

- Non-discrimination on the basis of nationality
- Move and reside freely within the EU
- Consular protection (help from the embassy or consulate of any other EU country outside the EU where they have no embassy or consulate of their own country)
- Petition the European Parliament and complain to the EU Ombudsman

- Contact and receive a response from any EU institution in one of the EU official languages
- Access European Parliament, European Commission and Council documents under certain conditions
- Access to EU Civil Service

The rights appear to apply to Irish citizens in Northern Ireland travelling elsewhere in the European Union rather than necessarily the retention of EU law rights on returning to Northern Ireland as the supremacy of EU law over UK law will no longer apply once the UK has left the EU. Moreover, the value and impact of any retained EU law rights will depend on what agreements are finally reached to retain rights for people living in the United Kingdom as a whole, for example, the UK government wishes to retain EHIC card arrangements and access to Erasmus programmes throughout the UK.

One particular problem with the current position beyond gaining clarity about the detail of the retention of EU law rights is that it only applies to those who identify as Irish within Northern Ireland. This would create a potential move towards unequal citizenship counter to the principles of the Good Friday (Belfast) Agreement unless the rights are extended to all the people of Northern Ireland.

The joint committee position is that the retention of EU law rights must be extended to everyone in Northern Ireland regardless of how individuals identify themselves.

(ii) Bi-lateral agreements

It appears inconceivable that the EU will directly grant people from Northern Ireland more EU law rights than those applying to EU citizens remaining within European Union, nonetheless, the recognition of the Common Travel Area by the European Union provides the route for bi-lateral agreements to be reached which provide for additional rights. This has been recognised as legitimate for social security purposes in the Supreme Court decision of purposes in *Patmalniece v SoS for Work and Pensions* (2011) UKSC11.

Our understanding of the current position is that the Irish and UK governments have worked on arrangements including to ensure provision is in place to mutually recognise professional

qualifications, and in each state to pursue further and higher education, to access health care, social and supported housing and homeless assistance and entitlement to vote in local and national Parliamentary elections.

The Commission understands that a Memorandum of Understanding has been drafted to cover these areas. As ever, the detail of the Memorandum of Understanding and any package of legislative measures will require careful scrutiny in order to assess the coverage and legal protections provided by any arrangements.

An agreement on reciprocity in social security arrangements was reached on 1 February 2019 and has now been published².

The Commission's position in line with the joint committee's commissioned research conclusions that the legal underpinnings of the Common Travel Area are 'built on sand' is that future arrangements should be placed on a Common Travel Area formal legal footing through a treaty in order to copper fasten and future proof arrangements³.

In addition, the Common Travel Area provisions are not comprehensive and do not, for example, cover family reunification and family migration arrangements for people in Northern Ireland.

An interesting development was the recent announcement by the Tánaiste that the Irish government would underwrite the cost of maintaining the European Health Insurance Card (EHIC) arrangements for everyone in Northern Ireland in the event of a 'no-deal' scenario. The welcome reassurance extends beyond those who identify as Irish citizens and is consistent with the commitment contained in the Good Friday (Belfast) Agreement.

² Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland CP49, 1 February 2019

³ Discussion paper on the Common Travel Area – Sylvia Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick – joint committee NIHRC and IHREC 2018

(iii) UK domestic arrangements

The British Nationality Act 1981 confers on those born in the UK after commencement with British citizenship if at that time the person's father or mother is a British citizen or is settled in the United Kingdom. In effect, people in Northern Ireland are treated as British citizens whether or not they identify as British. This runs contrary to the clear intention of the Good Friday (Belfast) Agreement. This was acknowledged as such by the Prime Minister Theresa May in her speech in Belfast on 5 February 2019 when she outlined 'the birth right to identify and be accepted as British, Irish or both and to hold both British and Irish Citizenship is absolutely central to the Belfast Agreement'.

In the same speech the Prime Minister set out in response to people encountering difficulties in securing rights as Irish citizens to bring in family members and that she had asked the Home Secretary, working closely with the Secretary of State for Northern Ireland to review these issues urgently to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement!

It now transpires that the review is informal, confined to family migration rules for the people of Northern Ireland and has no terms of reference or fixed timeline save that a solution will be set out as soon as possible.⁴

In Westminster the Immigration and Social Security Co-ordination (EU Withdrawal) Bill is before Parliament. The Bill includes the repeal of the main EU law relating to free movement rights under EU law. Such rights will be governed through any agreement reached between the UK government and EU27 augmented by the Common Travel Area. The Good Friday (Belfast) Agreement citizenship rights have not been incorporated into UK domestic law and the Commission recommended in its response to the Bill that a new clause be added to amend section 1 of the British Nationality Act 1981 to recognise 'the birth right of all people of Northern Ireland to identify themselves and be accepted as Irish or British, or both,

⁴ See correspondence between Home Secretary and NIHRC dated 1 May 2019 and Parliamentary Answer Caroline Noakes, 3 April 2019, Question 238370

as they may so choose' on a no detriment basis. This recommendation is in line with the advice provided by the Commission in December 2008 on a Bill of Rights for Northern Ireland⁵.

In its response to the Commission's (then) advice the Northern Ireland Office issued a consultation paper in November 2009 and outlined

'The government recognises the considerable symbolic importance of a choice by a person to identify himself or herself as British or Irish or both, in line with the commitments made in the Belfast Agreement and believes that such a choice should be respected. In the view of the Government, such a right is central to any Bill of Rights for Northern Ireland. The Government therefore believes 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.'⁶

The consultation document acknowledged the need to discuss with the Irish government how such a right can be formulated and made effective⁷.

In the absence of Bill of Rights as envisaged within the Good Friday (Belfast) Agreement the Commission recommends that a similar legislative commitment is made effective in UK domestic legislation following discussion with the Irish government.'

Finally, the joint committee of the Northern Ireland Human Rights Commission and Irish Human Rights and Equality Committee are due to meet in Belfast on 22 May 2019. The joint committee will at that meeting consider commissioning research on the outstanding citizenship issues linked to the UK leaving the European Union and how they can be effectively resolved in line with the principles enshrined in the Good Friday (Belfast) Agreement.

⁵ A Bill of Rights for Northern Ireland – Advice to the Secretary of State for Northern Ireland, 10 December 2008

⁶ Consultation paper a Bill of Rights for Northern Ireland: Next Steps issues by Northern Ireland Office, November 2009, para 6.6

⁷ As above, para 6.8

7 May 2019