

The Seanad Special Select Committee on the withdrawal of the UK from the EU: meeting on “Citizens’ rights in Northern Ireland post Brexit” 24 May 2021

Opening Statement – Daniel Holder, Deputy Director, Committee on the Administration of Justice (CAJ)

The Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. CAJ was the NGO partner in the BrexitLawNI project with the law schools of Queens and Ulster Universities considering the constitutional, legal, human rights and equality aspects of Brexit and has continued with a range of interventions since.

We welcome the opportunity to address the Seanad Select Committee on the subject of ‘citizens’ rights in Northern Ireland post Brexit’ and focus this opening statement on the following three themes:

- The retention EU rights by EU citizens, family members and frontier workers under Part II of the Withdrawal Agreement, and post-Brexit migration contexts.
- Commitments on the retention of EU rights by Irish citizens resident in NI.
- The UK commitment in the Protocol to the Trade and Cooperation Agreement to ‘non diminution’ in certain GFA rights as a result of Brexit.

Retention of EU rights under Part II of the Withdrawal Agreement

As the Committee will be aware EU citizens and family members who were resident or frontier workers in the north prior to the end of the Brexit transition period of the 31 December 2020, with some qualification, can retain EU free movement rights to reside, work etc in the UK under the Citizens Rights section of the Withdrawal Agreement.

The main vehicle for EU citizens *resident* in the north to do so was to obtain ‘settled status’ under the UK Home Office EU Settlement Scheme, that opened in March 2019. Concerningly the equivalent scheme for frontier workers was not opened until December 2020 and has barely been publicised.

A pressing concern is that there is currently an arbitrary cut off point for applications under the Settlement scheme of the end of June with limited exceptions. There is a similar requirement to have obtained a permit to continue Frontier Working on the 1 July. This is particularly concerning as after the Brexit transition the UK’s notorious ‘hostile environment’ immigration measures have been extended to EU26 citizens.

The Home Office also actively discouraged Irish citizens from retaining EU rights under the settled status scheme and legislated to block applications from NI-born Irish citizens. This was on the basis of the Home Office position that all such persons are to be treated as British, in conflict with the GFA birthright provisions.

The general Home Office position discouraging Irish citizens from retaining EU rights was grounded in such persons being covered by the post-Brexit concept of reciprocal rights in the Common Travel Area (CTA). However, such provisions remain more limited and less enforceable than retained EU rights. The fulfilment of the GFA provisions for equality of treatment for British and Irish citizens in NI were also largely underpinned in practice by EU free movement law. Due to the litigation by Emma DeSouza, the Home Office did open a specific route for ‘persons of NI’ (whether Irish or

British) to retain EU rights to family reunion via the Settled Status scheme. However this will also largely end in June.

A further issue for consideration is the new context for passport and border controls within the CTA. Until Brexit both States had sought to converge their immigration systems which is no longer possible. Whilst the UK has given a political commitment to no passport checks on the land border, it has continued to both conduct irregular passport checks on Irish Sea routes and 'in country' passport checks, at times on the basis of quite blatant racial discrimination. Our concerns about NI becoming 'one big border' are already transpiring, with 'in country' immigration checks by 2019 already proportionately four times higher in Belfast than London. There also remain similar concerns over checks by Immigration Gardaí on the land border.

These concerns could be exacerbated by the UK's future immigration plans. This includes the 'ETA' proposals for an electronic pre-clearance requirement, similar to the US ESTA system, for travel to the UK. This won't apply to Irish or British citizens but will apply to EU and non-EU 'non visa' nationals who can presently freely cross the land border within the island of Ireland as part of their daily lives. To date the ETA plan has taken no account of local journeys within the CTA and will create a hardened land border.

Commitments on the retention of EU rights by Irish citizens resident in NI

Whilst Irish citizens in NI remain EU citizens and retain basic EU citizens' rights to free movement in the EU, it was clear other rights and benefits linked to matters such as residency in a member state would be discontinued after Brexit unless specific arrangements were made.

Paragraph 52 of the December 2017 in the EU-UK Joint Report contained commitments to 'continued access to and exercise of' EU 'rights, opportunities and benefits' for Irish citizens where they reside in Northern Ireland. The specific arrangements for this were to be examined. However, this commitment was ultimately not taken forward in the Withdrawal Agreement, with reference limited to the pre-amble of the Protocol. Whilst on the EU side such issues were considered to be matters for the future relationship arrangements they are ultimately not reflected in the TCA.

Some welcome progress has been made on specific matters. In particular, the Irish Government made contingency arrangements to seek a *de facto* continuation of the European Health Insurance Card (EHIC) arrangements for NI, that was subsequently progressed through UK bilateral arrangements. Other gaps remain most prominently in relation to family reunification and political rights, and other specific more nuanced gaps are likely to become apparent over time. There is also a risk that the model of bilateral 'reciprocal rights' under the CTA could in some areas lead to regression.

The UK commitment to 'non diminution' in certain GFA rights as a result of Brexit

A commitment was also made under the Ireland/NI section of UK-EU Joint Report, alluding to the GFA, that the UK would ensure that there was "no diminution of rights" caused by Brexit. This was taken forward in the form of the commitment in Article 2 of the Protocol, and an enforcement role for the equality and human Rights commissions.

It should be noted that this commitment itself became 'diminished' before it was enacted. The NIO did not consult on its specific scope (despite GFA equality duty obligations to do so) and ultimately it covers only two sections of the GFA – which do not include the birthright, equality of treatment and 'rigorous impartiality' duties. It

does cover duties to incorporate the ECHR and a range of other GFA affirmed rights, including equality of opportunity in all social and economic activity, democratic rights, and rights to choose ones residence.

At the start of January 2021 when the new powers of the Commissions commenced we issued a complaint to them over a number of areas of provision whereby we considered the UK had already breached the 'non diminution' commitment. These areas related to:

- Civil Service Nationality Rules
- Democratic rights for EU26 and Irish citizens
- Family reunification and the cut-off date for the EU settlement scheme
- Loss of EU rights and benefits for Irish citizens in NI
- Frontier workers

Article 14 of the Protocol also sets out that the Specialised Committee (on the Protocol) is mandated to "consider any matter of relevance to" the non-diminution commitment brought to its attention by the Commissions. To date we are unaware if the Specialised Committee has dealt with issues relating to compliance with this commitment.

We have also raised concerns in general that whilst the commitment to 'non diminution' of certain GFA rights as a result of Brexit is welcome, a mockery is made of it if the UK continues to diminish the same GFA rights for other reasons, including through recent legislation.

I am happy to elaborate on any of these areas in response to your questions.

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