

DÁIL ÉIREANN

ROGHCHOISTE SPEISIALTA AN TSEANAID UM AN RÍOCHT AONTAITHE DO THARRAINGT SIAR AS AN AONTACH EORPACH

SEANAD SPECIAL COMMITTEE ON THE WITHDRAWAL OF THE UNITED KINGDOM FROM THE EUROPEAN UNION

Dé Céadaoin, 8 Bealtaine 2019

Wednesday, 8 May 2019

The Select Committee met at 2 p.m.

Comhaltaí a bhí i láthair/Members present:

	Frances Black,
	Gerard P. Craughwell,
	Paul Daly,
	Ian Marshall,
	Michelle Mulherin,
	Joe O'Reilly,
	Niall Ó Donnghaile.

Seanadóir/Senator Neale Richmond sa Chathaoir/in the Chair.

Engagement on Citizenship Rights

Chairman: I remind Senators to ensure their mobile phones are switched off. This important because the use of such devices can cause serious problems for broadcasting, editorial and sound staff. As there is no 4G in this room, mobile phones are no use to us in any event.

I welcome Mr. Les Allamby, who is the chief commissioner of the Northern Ireland Human Rights Commission; Professor Colin Harvey of Queen's University Belfast; Mr. Daniel Holder of the Committee on the Administration of Justice; and Ms Una Boyd. They are here today to discuss citizenship rights following the withdrawal of the United Kingdom of the European Union. The committee touched on this issue in its original round of hearings and it was covered in the report we published in June 2017. Here we are in May 2019 and the wider discussion has not yet reached much of what we would like to see implemented. I do not intend to get into the politics of Westminster or elsewhere. There is an understandable level of frustration. As Members of the Oireachtas, we are aware that the recommendations we made in our report, on the basis of the advice we took in our hearings, are a living picture for many people on the ground on the North and South of this island, in the United Kingdom and across the wider Continent. We appreciate the chance to engage with experts who have vast knowledge of this area and have worked in it. I look forward to a frank discussion and exchange of views with them. I would also like to welcome Ms Emma DeSouza, who is in the Gallery. Members of the committee met Ms DeSouza informally before this meeting commenced. We appreciate her time very much.

I ask everyone to bear with me while I read the rules on privilege, which will take a couple of minutes. Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the Houses or an official, either by name or in such a way as to make him or her identifiable. By virtue of section 17(2)(1) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of their evidence to this committee. If they are directed by the committee to cease giving evidence on a particular matter but they continue to do so, they are entitled thereafter only to qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given. They are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against any person, persons or entity by name or in such a way as to make him, her or it identifiable. I ask Mr. Allamby to make the opening statement.

Mr. Les Allamby: I thank the Chairman and the committee for the opportunity to outline the Northern Ireland Human Rights Commission's position on the issues that are being examined today. The commission has worked productively with its counterpart, the Irish Human Rights and Equality Commission, through a joint committee that was established under the Good Friday or Belfast Agreement to protect and promote the strongest possible human rights and equality protections on foot of the United Kingdom's decision to leave the European Union. We also have worked effectively with the Equality Commission for Northern Ireland in those discussions. We have also had a very significant engagement with civic society more broadly. The joint committee that was established under the Belfast Agreement entered into the discussions with six key aims: to ensure a commitment to non-diminution of rights is evident and enforceable in the final withdrawal agreement; to safeguard North-South equivalence of rights on an ongoing basis; to guarantee equality of citizenship within Northern Ireland, a matter to which I will return; to protect Border communities and migrant workers; to ensure evolving justice arrangements comply with the commitment to non-diminution of rights; and to ensure a

continued right to participate in public life for EU citizens in Northern Ireland.

In our recommendations and our work, we have sought to preserve existing protections, while keeping pace with human rights and equality protections as they develop within the EU in the future. In our view, while substantial progress was made in the withdrawal agreement, significant gaps remain and certain issues need to be resolved. The question of citizenship rights is one of those issues. In particular, consideration must be given to how existing EU law rights can be protected in a way that is consistent with the recognition in the Good Friday or Belfast Agreement that people can identify themselves, and be accepted, as Irish or British, or both, without any adverse consequences for rights. We think there are three strands to resolving this: first, through the draft withdrawal agreement or any subsequent agreements agreed between the UK and the EU 27 or both; second, through bilateral agreements agreed between the UK and the Irish Government; and third, through legislative arrangements that are put in place by the UK Government within its own domestic laws. I will take each of these briefly in turn.

On 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. However, it remains unclear what these rights entail in practice. The nearest thing we have got to a public indication was a fact sheet on the Ireland-Northern Ireland protocol in the draft withdrawal agreement, which was issued by the European Commission. The fact sheet sets out the rights to be guaranteed, including the right to non-discrimination on the basis of nationality, the right to move and reside freely within the EU, the right to consular protection or help from the embassy or consulate of any other EU member state in a country which has no Irish Embassy or consulate, the right to petition the European Parliament and complain to the EU Ombudsman, the right to access European Parliament, European Commission and Council documents under certain conditions, the right to access to the EU civil service and the right to contact and receive a response from any EU institution in one of the official EU languages. It appears that those rights apply to Irish citizens in Northern Ireland when they travel elsewhere to the European Union, rather than the reverse, on their return to Northern Ireland from the EU. Under the Westminster European Union (Withdrawal) Act, the supremacy of EU law over UK law will no longer apply after the EU has left the EU.

The value and impact of any retained EU law rights will depend on the agreements that are finally reached to retain rights for people living in the UK as a whole. The UK Government's position is that it wants to retain access to the European health insurance card for everyone across the EU. It wants to retain access to Erasmus programmes throughout the UK. Such arrangements have not yet been agreed because the draft withdrawal agreement is stuck in Westminster. We in the commission have a particular problem with the current position that extends beyond the need to gain clarity. The current position is that these rights will apply only to those who identify as Irish within Northern Ireland. For us, that creates a potential move towards an unequal citizenship that is contrary to the principles of the Good Friday Agreement, unless those rights are extended to all the people of Northern Ireland. That is the position of the joint committee in respect of this situation.

The second strand I would like to focus on is the bilateral agreements agreed between the UK and the Irish Government. 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 the EU as an intrinsic position. Nonetheless, the EU has recognised the common travel area and that it provides a route for bilateral agreements to be reached which provide for additional rights. This has been recognised as legitimate for social security purposes in the UK Supreme

Court decision in *Patmalniece v. Secretary of State for Work and Pensions*. In terms of access to certain social security benefits and residence clauses, being a part of the common travel area confers advantages over and above other EU nationals, and it is perfectly lawful.

We now know that the Irish and UK Governments have worked on arrangements to ensure provision is in place to, for example, mutually recognise professional qualifications in each state, to pursue further and higher education, to access health care, social and supported housing, homeless assistance and to provide an entitlement to vote in local and national parliamentary elections. I understand that will be reflected in the memorandum of understanding being signed today by the two governments. As ever, for us and others, the detail of the memorandum of understanding and whether any package of legislative measures that may follow will require careful scrutiny in order to assess the value and the legal protections that will be provided. An agreement on reciprocity in social security was also reached at the beginning of February 2019 and has now been published. The commission's position is in line with the research we commissioned last year, which noted that the legal underpinnings of the common travel area are built on sand, and that any future arrangements should be placed on a common travel area formal legal footing through a treaty in order to copper-fasten and future-proof arrangements. I am happy to come back and talk about that further.

The common travel area is not comprehensive and it does not, for example, cover family reunification and family migration arrangements for people in Northern Ireland, including Ms Emma DeSouza. For us, the 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 was an interesting development. That welcome reassurance extends beyond those who identify as Irish citizens and is consistent with the commitment contained in the Good Friday Agreement. We are interested in whether that is based on citizenship or residence in Northern Ireland, but it shows that one can have at least a form of equal citizenship to preserve rights in line with the agreement.

Third are the UK domestic arrangements. The British Nationality Act 1981 confers British citizenship on those born in the UK after commencement, if at that time the person's father or mother is a British citizen or is settled in the UK. In effect, and this is slightly simplistic but not far off it, people in Northern Ireland are treated as British citizens whether or not they identify as British. That clearly runs contrary to the clear intention and spirit of the Good Friday Agreement. That was acknowledged as such by the Prime Minister Theresa May in her speech in Belfast recently 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 that same speech, the Prime Minister set out her response to people encountering difficulties in securing rights as Irish citizens to bring in family members. She had asked the Home Secretary, working closely with the Secretary of State for Northern Ireland, to review these issues urgently and to deliver a long-term solution consistent with the letter and spirit of the Belfast Agreement. Rather disappointingly, it now transpires from answers to parliamentary questions that the review is informal, is 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. We would have preferred a more comprehensive and inclusive review, but I have little doubt that the Irish Government is seeking to bring its influence to bear behind the scenes. We think, frankly, that it should be more upfront and open, and wider than that.

In Westminster, the Immigration and Social Security Co-ordination (EU Withdrawal) Bill is before Parliament. It is a bit of a mouthful. That Bill includes the repeal of the main EU law

relating to free movement rights. In future, such rights will be governed by UK law alongside any agreement reached between the UK Government and the EU 27, augmented by any common travel area arrangements. The Good Friday Agreement citizenship rights have not been incorporated into UK domestic law and the commission recommended in its response to the legislation 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, as they may so choose” on a no detriment basis. That recommendation, interestingly, is in line with the advice we provided on a bill of rights to the Secretary of State in December 2008. At that time, the response of the Northern Ireland Office to that recommendation was instructional. It 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.

The consultation document acknowledged the need to discuss with the Irish Government how such a right can be formulated and made effective. We would prefer to see a bill of rights to do that, but in the absence of one, as envisaged within the Good Friday Agreement, we would recommend that a similar legislative commitment is made effective in UK domestic legislation following discussion with the Irish Government.

The joint committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission is due to meet in a fortnight’s time. We will consider commissioning some research on both the legal and practical ways in which we might address the outstanding citizenship issues linked to the UK leaving the EU, and how they can be effectively resolved in line with the principles enshrined in the Good Friday Agreement. I am more than happy to expand on any of those issues following questions. I thank the Chairman.

Chairman: I thank Mr. Allamby. I would like to note that Ms Emily Logan was invited, but unfortunately was not able to be here in person. She has sent us quite a lengthy piece of correspondence which has been distributed to members and will be included in the record and the work of the committee going forward.

I propose to take the witnesses’ statements together. I will then open the debate up to comments, questions and points from the committee members. I will bring the witnesses back in to reply. I ask Professor Harvey to make his statement.

Professor Colin Harvey: I thank the Chairman and the committee members for the invitation to be here this afternoon. I have provided a written opening statement which has been circulated, so I do not intend to read that out, but will go through some of its key points with a view to moving on to the discussion. Some of it echoes what Mr. Allamby has already outlined this afternoon. There are three themes I would like to underline: the discussion around citizenship in context; Brexit, human rights and equality; and strengthening the protection of human rights and equality on the island of Ireland.

At the end of my written opening statement, I provided an annex which is a proposal for potential amendments of the political declaration in the context of an amendment that was

circulated earlier this year that would explicitly recognise some of the things we were talking about this afternoon. Whereas the withdrawal agreement is to be taken as read, there has been some discussion about the scope for revisiting the political declaration about the future relationship. That amendment was advanced in the context of that conversation and I thought it would be useful for members to see that this afternoon.

First, I refer to citizenship in context. The Good Friday Agreement, and the birthright provisions that are there, the right to be accepted and identify as British or Irish, or both, have already been outlined. It is helpful to put that in context in terms of the current conversation that is happening in relation to the North, and is reflected in the very courageous campaign being undertaken by Emma and Jake DeSouza. That is the sense in which the parity of esteem, mutual respect, and equal treatment provisions of the Good Friday Agreement have been significantly neglected. They have been subjected to systematic disrespect. I put that out there as a context for framing this conversation. I do not think it is possible to understand what is happening in the North at the moment unless we reflect on events in that context.

We have heard reference to the December 2017 joint report from British and EU negotiators. Many people will be aware of paragraph 52 in that report. It refers to the future rights of Irish citizens as European Union citizens and the debate that has emerged regarding Irish citizens born in Northern Ireland, in particular. There is a real and merited sense that the commitment given in paragraph 2 of that same joint report has been neglected and now requires urgent attention. I link that aspect to the earlier point made regarding the recognition of the principles of parity of esteem, mutual respect and equal treatment in the context of the current debate on the Good Friday Agreement.

An event is being organised in Newry tomorrow by Ireland's Future. It follows on from a previous event in January. The context for these events is a growing sense in Northern Ireland of Irish citizens being abandoned and disrespected and of basic elements of the Good Friday Agreement not having been implemented in full. Aspects of the joint report from December 2017, particularly paragraph 52 obligations, have also not been taken forward and implemented effectively and practically and that underlines a feeling of formalisation failure in respect of elements of the Good Friday Agreement. We need to see those rights codified in practice and the existing implementation gap closed.

In placing citizenship in context, I also want to underline another aspect which links with my next point. In the context of a current sense of disrespect and abandonment, arguments are being made in Northern Ireland for the principles of parity of esteem, mutual respect and equal treatment and the rights of Irish citizens to be respected. The people making those arguments are arguing for a levelling up in the sense that the rights of Irish citizens link directly to a wider debate about the human rights culture existing in Northern Ireland.

My second point is that Brexit has exacerbated the current human rights and equality crisis in Northern Ireland. The word "crisis" is merited and I explain that in more detail in my full written submission. There have been attempts to address this in the context of the Brexit conversation and the resultant withdrawal agreement and protocol for enforcement and implementation. It has to be noted that human rights and equality made it into the protocol on Ireland and Northern Ireland and it must be acknowledged that work has been done in this area. There is a sense, however, as committee members will be aware, that this is an exercise in damage limitation. I refer to Northern Ireland getting to remain in the European Union and the sense that everything else is really second best. Regarding Brexit and the concerns remaining about paragraph 52, Irish citizens in the North are genuinely anxious that the obligations and com-

mitments set out in that paragraph will not be realised in practice. I underline again that is why proposals were made earlier this year to amend the political declaration to give a clear commitment to those paragraph 52 responsibilities in respect of the future relationship conversation. The amendments proposed can, of course, be taken forward in a range of other contexts as well.

I also underline the need to strengthen significantly the human rights framework in the North and on the island of Ireland. My written submission contains a number of proposals on how that might be done. The overriding theme of this opening statement is that we have heard many references to the Good Friday Agreement in the context of a European-wide conversation on Brexit. As we are now finding out because of this Brexit process, and as we knew before, there has been a systematic implementation and formalisation failure regarding key concepts in the Good Friday Agreement. The case of Emma de Sousa serves as an example, as do other similar cases. We really need to do something about that implementation gap and formalisation failure. My written submission refers to some of the extensive measures needed. Many of the areas will be familiar. The bill of rights has already been referred to, as has the charter of rights for the island of Ireland. It is important to acknowledge the work being done by the joint committee of the two human rights commissions on the island in areas such as equal marriage, language rights, women's rights and socio-economic rights in the North. Action also needs to be taken, however, to address the significant implementation gap in a range of other areas with respect to the Good Friday Agreement. In that context, the failure to respect, and recognise in law, parity of esteem, mutual respect and equal treatment for the two main communities in the North is a yawning gap. Irish citizens have felt that absence strongly in the years since this implementation gap emerged.

The final part of my written opening statement refers to a way forward. I am more at liberty to speak about this topic than some of my colleagues here today. To put it simply, and from my own perspective, addressing this implementation gap and formalisation failure is long overdue. The way forward is very clear for Northern Ireland, the North. While negotiations are ongoing, both Governments and all political parties need to openly and honestly confront and address the human rights and equality crisis that objectively exists in Northern Ireland. If we are going to renew the Good Friday Agreement, its values and institutions, we have to face into confronting and addressing the human rights and equality crisis at the heart of the current problems in the North.

Chairman: I thank Professor Harvey and I call Mr. Daniel Holder.

Mr. Daniel Holder: We are grateful to the special select committee for the invitation to give evidence today on the subject of citizenship rights. As committee members may know, the Committee on the Administration of Justice, CAJ, is an independent human rights organisation based in Belfast. I and my colleague, Ms Una Boyd, work for the organisation. We co-convene the Equality Coalition with the UNISON public service union, and we were also the NGO partner in BrexitLawNI, a joint project with the law schools of Queens University Belfast and Ulster University which engaged with much of their subject matter.

The Good Friday Agreement recognises a birthright for those born in Northern Ireland to be Irish or British or both. That is a treaty-based duty on both states. The same provision also obliges both states to recognise dual citizenship. Many other states do not recognise that right. That provision, and related provisions on equality and parity of esteem, mean that the birthright to be British or Irish or both is meant to result in equality of treatment regardless of the choice of citizenship. At the time of the 1998 Good Friday Agreement, the good news was that a fairly comprehensive legal framework, across a range of areas, ensured Irish citizens enjoyed equality

of treatment with British citizens in Northern Ireland. The bad news is that legal framework was EU law, which is going to be turned off by Brexit. What is left is precarious, despite all the attempts to talk up the framework of the common travel area, CTA. It is not possible, as things stand, for someone born in Belfast to land in a Belfast airport on any international journey and enter and reside in Belfast as an Irish citizen. It can be done as an EU citizen but that right currently only exists under EU law. There is a Bill before the British Parliament at Westminster at the moment to remedy that particular gap, but the same clause in the Bill also makes it easier to exclude or deport the same person. There are many assurances about the largely mythical reciprocal rights of the common travel area. I know there is a memorandum of understanding that will be published today and that we have yet to see but certainly there was no public consultation on the scope of that. As it is just a memorandum of understanding it is not going to contain enforceable rights. What we do not see is the UK trying to put in place a comprehensive replacement legal framework to replace EU law that will ensure equality of treatment for Irish citizens in the North. In fact, if one wants a right as simple as not to be deported from one's country of birth, the direction of travel from the UK Government is really that one only has that right by virtue of being considered a British citizen.

Things are not so rosy either in Northern Ireland for those who choose their Good Friday Agreement birthright to be British. Irish citizens will, of course, retain EU citizenship after Brexit and at least the basic freedom of movement in the EU that comes with that but British citizens will not do so. Brexit has managed to turn everyone into a second class citizen albeit in different ways. That is before we get on to the implications for migrant communities who, as shown in our research, are already facing increased racial profiling and discrimination. Brexit leaves different groups of our citizens, and I will quote the title of one of our recent conference, "divided by the rules" as never before as there is going to be a lot of differentiation between entitlements in terms of citizenship status.

Brexit also creates real difficulties in complying with the equality of treatment principles of the Good Friday Agreement. It is difficult to see how any form of Brexit, at least without some form of special status for the North that allowed British citizens to retain EU citizenship, can comply with the provisions of the Good Friday Agreement. Had Westminster discharged its duties under the Good Friday Agreement to legislate for a bill of rights for Northern Ireland, that would have had a legally enforceable birthright to be British or Irish or both without differential or detrimental treatment, it is difficult to see how Brexit could be lawfully taken forward in the North at the moment.

As has been alluded to by others, after 1998 even with the Good Friday Agreement the UK failed to bring its citizenship laws in line with the agreement. It continues to automatically confer British citizenship on almost all persons born in the North. Nevertheless, the UK Home Office until 2012 did generally respect those rights of Northern Ireland born people who were attached to Irish citizenship. That changed, post-2012, precisely to stop the exercise of particular EU rights such as family reunification as in the DeSouza case. The policy changed to treat all Northern Ireland born people as also being British.

While Irish citizens maintain EU citizenship and rights like basic freedom of movement in the EU, most other EU rights, opportunities and benefits are not automatically retained after Brexit but require specific arrangements. That is the case with political rights to return MEPs, the European health insurance card, rights to cross-border healthcare or education, rights to be joined by family members, etc. As has been alluded to by other witnesses, in December 2017 in the phase 1 agreement in the EU-UK joint report, and I refer to the now infamous paragraph

52, it committed to continued access to and exercise of such EU rights, opportunities and benefits for Irish citizens in Northern Ireland. That is well beyond the basic list of citizens' rights that were alluded to by the chief commissioner earlier. The scope of that commitment is beyond that and that is testified by the language in the paragraph around specific arrangements for the continued exercise of these rights being examined. However, there is nothing to implement that commitment in the draft withdrawal agreement. It is only mentioned in the non-binding preamble. It is not even mentioned in the political declaration on future arrangements. That commitment really has been neglected.

More recently, the other route to retain certain EU rights and benefits for Irish citizens in the North is under the EU settlement scheme. It was possible to do so during its pilot phase but then the Home Office changed the criteria with the purpose and effect of excluding Northern Ireland born Irish citizens from retaining EU rights under the withdrawal agreement. Again, that was done on the basis of also treating such persons as British. There is a potential U-turn. We now know of at least one case where a Northern Ireland Irish citizen has applied and successfully achieved the retention of EU rights under the settled status scheme. It is up to the Home Office to clarify its position on this matter. Unless that happens this leaves Northern born Irish citizens as almost the only EU citizens within the UK who will not be able to retain EU citizens' rights under the withdrawal agreement, which is quite a serious situation. Let us consider where we are. This is not where we wanted to be at this particular stage. We wanted to be at a stage where Irish citizens had rightly retained EU rights and benefits, and that would benefit those who would choose to be Irish under the Good Friday Agreement or, indeed, those who choose to be Irish and British. In the context of the Good Friday Agreement and levelling up, we really wanted to be at the stage now of not going for the lowest common denominator but be at the stage of looking at arrangements for those who also exercise their rights under the Good Friday Agreement to be solely British. Instead of this the UK Home Office is quite actively seeking the lowest common denominator and seeking to strip every possible EU right and benefit from Irish citizens in Northern Ireland. It is doing so in a manner that fundamentally conflicts with the Good Friday Agreement. I think we are at a stage where we need significant movement from both Governments and the EU on this issue before it really is too late.

Chairman: I thank Mr. Holder for his presentation and the three witnesses for their stark, sobering and very important presentations. I really appreciate the work that they are all doing and continue to do in this area. As I mentioned, Ms Emily Logan and a number of others have supplied the committee with written submissions, which are welcome.

I will open up the debate to Senators for questions. I propose we take groups of three Senators to start with but that depends on how many Senators are offering. I ask Senators to please raise their hands to indicate a wish to speak. I call Senator Marshall.

Senator Ian Marshall: I thank the witnesses for their interesting presentations. It is a steep learning curve for many members on this committee and many people who have been acutely aware of the DeSouza case, which we have all watched with interest through the media.

Professor Harvey referred to Irish citizens in Northern Ireland being abandoned and a "systematic failure" in terms of the implementation of the Good Friday Agreement. His comments will sound pretty grim to someone on the outside looking in. I have lived in Northern Ireland for 50 years and I do not see a grim or bleak picture. Certainly there are big issues and things we need to deal with but I do not view the situation in the same light as him.

Professor Harvey mentioned in his presentation that issues have not been addressed. He

referred to the failure to deliver on human rights, equality rights, Irish language rights, equal marriage, women's rights and to deal with the legacy of the conflict. Is it fair of me to say that has more to do with the abject failure of the political structure of Northern Ireland as opposed to this issue?

I apologise for my ignorance on this matter but I am completely supportive of Ms DeSouza and the decision on her case is wrong, unjust and unfair. How many similar cases exist? Is there a tsunami of cases or a small number of cases? We were led to believe earlier on that a relatively small number of cases fall into a similar category to the DeSouza case.

Reference was made to the issues that would be presented to Irish citizens residing in Northern Ireland. Are there reciprocal issues for citizens who would qualify themselves as British but reside in the South of Ireland? How does that aspect fit with the wider discussion?

Senator Paul Daly: I thank the witnesses for coming here today and for their eye-opening presentations. I was not aware of many of the consequences of Brexit. I ask that we park Brexit for a few seconds, which I know is impossible to do in any walk of life in the current period, as I want to get my head around how we got here. If there was no Brexit, hypothetically speaking, where would we be today? Has a vacuum been created by the inaction of both Westminster and Dublin in terms of the human rights secured in the Good Friday Agreement? We were led to believe these things were written in stone, including the possibility or opportunity of citizens of Northern Ireland to have Irish or British or both when it came to their citizenship and form of identify. The delegates have highlighted what the ramifications of Brexit will be and the minefields that await. Are we lucky to have dodged those minefields or have many individuals been unfortunate enough to step into them because of what has been written into the withdrawal agreement? Although it is written into the agreement, was it parked and no action taken thereon? If so, what actions could or should be taken? Would the delegates cast the blame on the Government at Westminster, in Dublin or both?

Chairman: I will use my prerogative to ask my question, which is one of the joys of being Chairman. I ask it now because to some extent it follows on from the point made by Senator Paul Daly. I am not seeking to assign blame, but one of the main functions of the committee is to look for solutions to the myriad problems thrown up by the type of Brexit that is or could be on offer. As referenced in the report of the committee, with the hundreds of suggestions we mentioned previously, there are two key areas at which I would look in terms of full implementation of the Good Friday Agreement within and outside the context of Brexit. What are the legislative gaps in the United Kingdom and Ireland that need to be filled and how can they be filled, regardless of what is going on in the wider discussion? Second, is there a role for the British-Irish Intergovernmental Conference? It is meeting today and good progress has been made on the issue of the common travel area by the Tánaiste and the Chancellor of the Duchy of Lancaster, Mr. David Lidington. Can the conference play a more hands-on role in this area? Should it do so? Moving beyond the specific issue of rights, what role could the conference play in the future relationship between the Ireland and the United Kingdom outside the European Union which will ultimately be defined by the nature of Brexit, particularly in key areas of human rights and justice?

Mr. Daniel Holder: Leaving Brexit aside, it is really the absence of implementation of the rights-based provisions of the various agreements that make up the peace settlement that has contributed significantly to the collapse of the institutions. These issues were the unfulfilled business. They were safeguards against the abuses of executive power that took place and which ultimately made the institutions untenable. On whose responsibility it is, I do not see it

as the fault of the political structures, *per se*. These are international treaties and agreements. The main duty bearers are the two Governments, specifically the British Government which has the jurisdiction to legislate for the things for which it was supposed to legislate, including amending the British Nationality Act 1981 to bring it into line with the Good Friday Agreement, as recommended by the human rights commissioner, which would have prevented cases such as the DeSouza case from arising. In addition, the introduction of a Bill of Rights was very much a core component of the Good Friday Agreement. As I alluded to, if the citizenship rights provisions had been implemented at the time, we would not be facing many of the problems we are facing; rather, there would be equality of treatment and a retention of rights.

Ms Boyd might be better placed to identify the number of people affected by the Home Office decision in 2012 to deny Irish citizens in Northern Ireland EU rights to family reunification. Of course, that is reciprocated for British citizens, including those born in the North, who live in this state because it is a right that attaches to a citizen of the European Union residing in a member state other than the one of which he or she is a citizen. The issue caused by Brexit is that whereas this was restricted to a specific group of cases, namely, people looking for family reunification rights, Brexit massively amplifies the problem because essentially it shares the issue of people not being able to exercise EU rights as Irish citizens across a range of other areas of provision that would be covered by the withdrawal agreement or would have been covered by the paragraph 52 commitments. Even if there is a welcome continuation of cross-Border health and education services, for example, under the memorandum of understanding for the common travel area, a distinction needs to be made because they are not enforceable rights. The Governments might agree to an administrative arrangement, but who knows who the next Prime Minister will be or make up the next government of Britain or what attitude it will take to those administrative arrangements? What we really need is an enforceable right. Had some of these instruments been implemented when they were supposed to be, an enforceable EU right would be the type of thing that would be retained.

Ms Una Boyd: A relatively small number of people have been affected by cases such as that of Ms DeSouza. While working as an immigration solicitor in Belfast I encountered a lot of people who were in a very similar situation post 2012. It is very hard to tell how many people have been affected by this because many chose to renounce, as advised by the UK Home Office. They renounce and reapply and the problem quietly goes away, but many others instead choose to take the route of using the UK immigration rules. We have not really seen the cases where the person was affected but managed to resolve the issue by taking a different route. It is the campaigning by Ms DeSouza that has brought many families and cases to the fore and given them a place where they can say this happened to them and how it has affected them. As Mr. Holder said, it previously affected a very small group of people, namely, those who wished to bring non-EU spouses to Northern Ireland, but it has now completely opened up and may affect anyone born in Northern Ireland who considers himself or herself to be an Irish citizen.

Mr. Les Allamby: I will address one aspect of each of the three questions. To respond to Senator Marshall's question, the numbers are relatively small. I cannot remember off the top of my head the exact number who have renounced citizenship in the past ten years, but the figure for the United Kingdom as a whole is relatively small. We do not know how many of them are people who are renouncing Irish citizenship. There are two significant issues. First, no one should have to renounce citizenship in order to preserve, assert or defend his or her rights. Second, this will become a bigger issue, particularly if the legal case taken by Ms DeSouza does not go the way I hope it will, that is, if the United Kingdom leaves the European Union, this will eventually apply to people who desire reunification with family members who are EU

citizens. That is when the issue of preserving EU rights will become far more significant, but it is not clear what will happen. The UK White Paper on immigration essentially applies current arrangements for people outside the European Union and largely replicates them for people within it. In the context of future proofing, this is a very significant issue and the numbers could become considerably greater. That is why the issue is important.

“The Blame Game” is a television programme in Northern Ireland. We have had enough of the blame game locally. If Senator Paul Daly was asking specifically about the two Governments and the Good Friday Agreement, there are three pieces of the agreement jigsaw that have not been fully implemented, namely, a Bill of Rights, an all-Ireland charter of rights and the civic forum. I am a great believer in the value of a Bill of Rights which comes into its own in times of stress and difficulty. When things are stable economically and politically, people are less likely to need to reach for a Bill of Rights. It becomes important when things are not so stable. The United Kingdom leaving the European Union, something nobody envisaged 21 years ago, is just the circumstance in which a Bill of Rights is important. If the identity rights I discussed in my opening statement had been included in a Bill of Rights recognised by the UK Government, we might have avoided some of these issues. The importance and value of a Bill of Rights in the long term remains. The all-Ireland charter of rights was very much aspirational; they were not necessarily enforceable rights, but the concept of parties across the island of Ireland signing up to and committing themselves to the general concept of rights and equality remains important.

On the civic forum and whether we should have some initiatives around a citizens’ assembly in Northern Ireland, there is a need to have an umbilical cord between citizens and politicians and political institutions. That was envisaged in the Good Friday Agreement and we do not have that. Those all-important aspects are writ large as a result of the decision to leave the EU following the referendum.

I thought I knew - I think I do know - the Good Friday Agreement pretty well, but I found myself rereading it to refresh my understanding of the agreement in light of these political developments. In the discussion we have had in Brussels, Dublin and London, it shows the value and importance of the Good Friday Agreement but there is work to finish there.

On the common travel area, clearly there is a good working relationship between the two Governments, as is acknowledged by both sides. It again comes back to future-proofing. If those relationships change either economically or politically for whatever reason, at the end of the day a memorandum of understanding simply signifies the two Governments agreeing their understanding of a situation; nothing prevents that from changing at the behest of either of those two parties. We need to see some clear legal underpinnings.

Leaving the EU is interesting. The UK Government used to maintain that the common travel area predates both Ireland and the UK joining the European Union, which, of course, is right. However, many of the issues within the common travel area ended up being underpinned by EU law, including the freedom of movement, for example. As that is going, we need something to ensure the common travel area arrangements are copper-fastened irrespective of what ever happens politically in the next ten, 15, 20 years or beyond. Therefore while I welcome the memorandum of understanding - without knowing its content - as a step forward, it should be a step forward on a journey that is about ensuring those rights are clear not just for my generation, but also for a future generation.

Professor Colin Harvey: Senator Marshall asked some great questions. I sense that - we

may also be able to interpret recent election results in this way - there is an appetite for really progressive change in Northern Ireland. Although that is often presented in a certain way, increasingly across a range of areas the North is not that different from Dublin in terms of where people are at. Recent elections may have confirmed some of that. The sense is that the promises of the agreement across a range of areas, which the members have heard, have just not happened. People's aspirations for something better in respect of a bill of rights that would include rights for everyone have not materialised. A charter of rights for the island has not happened. Mr. Allamby is the Chief Commissioner of the Northern Ireland Human Rights Commission. That body has seen enormous budget cuts in recent years, which have made its task more difficult and needs to be addressed. It is great to see the work of the joint committee.

We are in the current mess because people have been involved in an exercise of sustained avoidance. The agreement contains principles such as parity of esteem, equal treatment and mutual respect. For too many years people have crossed the road or turned away and not addressed dealing with those concepts by legislating for them and making them meaningful in order that people can use them in practice. That must change. In my view, the Good Friday Agreement's values and institutions will only gain renewed life if that changes.

Although we have heard about the numbers being small, there is a sense in which, with courageous individuals like Emma and Jake DeSouza going into the public sphere which is always a risky thing to do, other people have the courage to emerge. They have to be commended on that. We should think about how it feels if a Northern-born Irish citizen is told they are really British even though they might think they have a right in the Good Friday Agreement to be Irish. The birthright provisions in the Good Friday Agreement concern everyone on this island.

Those who stand courageously on one aspect of that birthright provision do so on behalf of everyone potentially protected by it. They do so on behalf of everyone who wants to identify and be accepted as Irish, everyone who wants to identify and be accepted as British and everyone who wants to identify and be accepted as both. The birthright provision in totality matters and we need to see it implemented in practice. There is a conversation happening on the island, which will build in momentum. It is about how we will share this island in the future. The birthright provision clearly continues into the future. It is intended to continue into whatever constitutional arrangements emerge on the island. That makes it even more important to give thought to implementing that more effectively in practice.

The Senator is absolutely right that the Good Friday Agreement and some of the things we are discussing will challenge the British state and British Government. However, they will also rightly challenge the Irish State and Irish Government. The Irish Government and State will be challenged by ensuring the Good Friday Agreement is implemented in full along with the common travel area and all those things, which is absolutely as it should be.

The clue as to why the human rights framework is so important for the future of this island is in the title - it covers the rights of everyone on this island. Today's conversation is one part of that picture and that is why the human rights framework is so important.

Senator Paul Daly spoke about blame. Let us park blame and talk about solutions. One of the remarkable things about the presentations that particularly my colleagues have given this afternoon and the ongoing work in relation to this island and the North in particular is that we have plenty of solutions. I am beginning to think we are the masters at coming up with solutions. The difficulty we have and why I mentioned the implementation gap is because the difficulty rests in implementation. We have many solutions and no doubt the Senator is inundated

with paperwork on them. We need to see them implemented. This is a big moment as regards implementation in the North. We need to grasp that.

The British and Irish Governments are co-guarantors of this agreement and they along with all the political parties need to show leadership in taking this forward, as civil society on this island has already.

The Chairman asked about the British-Irish Intergovernmental Conference. The Good Friday Agreement could potentially come into its own in the years ahead. The British-Irish Intergovernmental Conference is one part of that. It is excellent that it is now meeting more regularly. The institutions and values of the Good Friday Agreement could come into their own in the years ahead in terms of what we are facing. That will only happen in the context of the Brexit conversation and the negotiations that are happening in relation to the North now, if we stop engaging in an exercise of avoidance. We need to confront and face into the rights and equality crisis that has been outlined this afternoon. We need to address the failure to implement some of the instruments we have discussed - the implementation gap. These rights need to be written down. People need to be able to do something about these rights in practice if we want to give life again to the Good Friday Agreement.

Senator Gerard P. Craughwell: I thank the witnesses for their input. I am sorry I missed the first part of the meeting; that is the nature of life around Leinster House I am afraid.

We hear much about the common travel area. It is my understanding that there is no legal basis for the common travel area. The two Governments are signing a memorandum of understanding today. What is the likelihood in a post-Brexit world of that memorandum being challenged in the courts? For the first time since the common travel area came into being it will actually be put through judicial review, which may change the entire concept of what we understand as the common travel area.

Professor Harvey has mentioned the exercise in avoidance that has been ongoing. Citizens in both parts of the island signed up to the Good Friday Agreement. We all then clapped ourselves on the back; money was invested in civic groups in Northern Ireland to ensure cross-community co-operation and the provision of training courses and we then all rested on our laurels. To some degree, the peace process became an industry in itself. Somewhere along the line the political side of the peace process dropped the ball. Vital legislation should have been enacted to address the issue of rights mentioned but nothing has been done. Thus, the Good Friday Agreement, a tripartite agreement underpinned by the European Union and the United Nations, may come under the spotlight as we diverge in different directions, with citizens in Northern Ireland becoming the meat in the sandwich as we try to figure out where we are going.

At this late stage, is there a role for the European Court of Justice to compel both states, while still members of the European project, to enact all outstanding legislation? There is one particular issue that has been a bone of contention for me since the Brexit referendum. I believe that while it was within the gift of the UK Government to call a referendum on the island of England, Scotland and Wales, it was not so simple in Northern Ireland because it was part of a tripartite agreement, one party to which was not consulted. Its citizens will suffer the consequences of an action about which they were not consulted. Ms De Souza's case is a case in point. As this late stage is there a role for the European Court of Justice before we lose the United Kingdom to the European Union?

My final question is a throw-away question, but it is one with a serious aspect to it. Is it

time to sit down and review the Good Friday Agreement to see if there are parts of it that need to be renegotiated?

Senator Frances Black: I thank all of the delegates for their presentations. I am delighted they are here to discuss the issue of citizens' rights post Brexit, which, for me, is probably one of the most important. Much of the Brexit debate thus far has focused on trade. For that reason, this discussion is important.

Mr. Holder mentioned in his presentation that up to 2012 the UK Home Office generally respected the rights of people in Northern Ireland attached to Irish citizenship but that post 2012, to stop the exercise of particular EU rights, the policy changed in the treatment of all people born in Northern Ireland as British. Perhaps Mr. Holder might elaborate on what he believes spurred that decision.

On rights and entitlements, Irish citizens living in the North will remain EU citizens, but they will no longer be able to elect representatives to the European Parliament or the European Council. To me, that is a democratic deficit. It touches on the wider issue of the State not affording voting rights to its citizen residents outside the jurisdiction. We are extremely restrictive on the issue in comparison to other European countries. Will the delegates comment on how we can ensure Irish citizens living in the North will not be disenfranchised entirely?

Senator Rose Conway-Walsh: I, too, thank the delegates for their presentations. Senator Craughwell raised one of the questions I had intended to raise. There is need for a legal mechanism to force the two Governments to play their roles as co-guarantors. The Good Friday Agreement is a legally binding international agreement. What does "legally binding" mean? One imagines implementation of a Bill of Rights would be legally binding. Perhaps the delegates might speak to that point.

It was mentioned that the British Government was still talking about repealing the Human Rights Act 1998 and replacing it with a British Bill of Rights. What would it look like? What input, if any, would others on the island have in that regard? I take it that the Irish Government would not have any input. How would it impact on the implementation of a Bill of Rights?

It was also stated attention would have to turn to the pressing matter of resources and capacity building. We are all encouraged by the civic nationalism and civic unionism and all of the conversations that are ongoing. I agree that they need to be properly resourced to allow them to evolve in a way that will enable those conversations to take place.

I would welcome responses to my questions about the legal mechanisms and resources needed.

Professor Colin Harvey: To respond to Senator Craughwell's question about the common travel area, the widespread view is that it needs to be properly legally underpinned. There has been a call for an international treaty to underpin it. We await the details of the memorandum of understanding, but there is a real sense, linked with the issue of formalisation, that the common travel area needs to be underpinned properly in law.

If the United Kingdom ever does get around to leaving the European Union, one of conversations will be on the political declaration. I realise, given the current shambolic mess that is British politics, some of this is not that straightforward. If there is a conversation on the political declaration, it might include the issues about which we are talking. In my paper I propose an amendment to the birthright provisions. There may be other proposals that would copperfasten

some of the rights issues in the context of a conversation on the future relationship.

On the Good Friday Agreement question, the Committee on the Administration of Justice has used language reflecting a renaissance of the peace process. There is a sense that we need to renew the agreement. There was talk this afternoon of reading it afresh. There is a lot within it that needs to be renewed and implemented. Perhaps that is where the focus needs to be placed, rather than on opening it up for conversation. On the European Court of Justice, in the context of debates on rights and equality and the social protections provided for, EU law does things in the United Kingdom that no other area of law does, particularly when it comes to enforcement and enforceability. We need to bear in mind that its loss will be keenly felt post Brexit.

To respond to Senator Black's question about voting rights which is linked with the conversation on paragraph 52, there is a sense there are things the Irish Government could do in the area of voting rights for Irish citizens in the North. The message coming from the EU seems to be that this is a matter for the Irish Government. It crystalises a real test for the Government to match some of the language around abandonment and not leaving people behind with doing it in practice. The issue of going forward with voting rights is a challenge for the Government, for example. We will see it later in the year on the matter of presidential voting rights. To be clear, Ireland is an outlier in voting rights for those who reside outside the State. It would be very much in tune with European and international developments for Ireland to take a much more generous approach on voting rights in this and other areas. There needs to be follow through on this.

Senator Conway-Walsh referred to the Good Friday Agreement. It is an issue where lessons have been learned in the context of the Brexit discussion. We have all been involved in conversations where we have discussed the agreement as an internationally legally binding document. Some 21 years after the agreement we can see how it is not being implemented in practice, and we have raised that point, but there is nothing one can do about it. One interesting thing around the Brexit conversation has been the emphasis in the withdrawal agreement and its protocol to issues of enforceability and what will people be able to do on this in the future. The agreement remains there, it is an internationally binding obligation and that is why I have put such an emphasis on domestic implementation. It is important that the British and Irish Governments and the State ensure that the Good Friday Agreement is fully and effectively implemented in domestic law and that needs to be pursued urgently. Lessons have clearly been learned in terms of the Brexit conversation. We are now talking about the withdrawal agreement and the implementation of that but this is just the start of the discussion and the future relationship discussion is to come. We must ensure that some of the rights that we have discussed today are enforceable in coming years and that we do not spend the next 20 or 30 years discussing words which exist on a page which no individual on this island can do anything about. That must radically change in the next 20 years.

I refer to the Human Rights Act. When the current government in London gets the small matter of Brexit out of the way, the next thing on its list is the Human Rights Act which it plans to repeal and replace with something called the British bill of rights. This is deeply and profoundly concerning. Brexit represents part of a larger agenda, which is an attack on concept of the practice of human rights. That needs to be faced, confronted and addressed. The Human Rights Act has been fundamentally important to upholding people's rights in the North. It needs to be defended and the Irish Government must confront the British Government on that.

On capacity and resources, many of us have been involved in discussions and negotiations, such as those relating to programmes for Government, where people use the language of co-

design. Everyone loves to talk about participation and everyone is involved in a conclusive conversation and civic society also being engaged in that. Civic society on this island has played a heroic role but that can take money and resources. When we consider issues of co-design and participation and when we are trying to ensure that civic society engages, there must be the capacity to engage and the resources to underpin that. If we are moving into a phase where we are discussing a more all-island civic engagement and conversations, we need to pay attention to capacity-building resources. Many individuals who are working heroically in civil society and in NGOs do so on temporary contracts in highly insecure employment conditions and they go the extra mile to make the argument on some of these issues. If we are going to have conversations about participation, we must also have a conversation about money, funding and resources.

Senator Rose Conway-Walsh: From where does Professor Harvey see the resources coming?

Professor Colin Harvey: Some resourcing for civil society will come from philanthropy, private funding and fundraising by organisations themselves. Too often, government documents, whether in the North or South, loosely use the language of co-design and co-production of major aspects of public policy with very little thinking at all as to how civic society will engage effectively in that process and in participation. If the Government is talking about co-design and participation, it must think about how it will resource that and make it happen in a very practical and meaningful way.

Senator Niall Ó Donnghaile: This committee will feed its contributions and its findings to the Government. Jurisdictional issues pertain to citizens in the North, which we have seen in Ms De Souza's case in terms of the legislative requirements and obligations that must be fulfilled. Have today's contributors reached a view as to what the Irish Government should ask for? We understand the jurisdictional contexts that exist on the island. My latest engagement with the Government on this, through a Seanad Commencement matter, was that it was awaiting the result of the review announced by Theresa May in Belfast in February. Through parliamentary questions and documents released to the media under freedom of information, it has subsequently transpired that to all intents there is no review. It has no timeline or terms of reference, there is no indication as to who will carry out the review or what their remit is. If we park the jurisdictional issue and focus on the Good Friday Agreement and on the root of all of this, namely that of our being Irish citizens, there is a political context which compels the Irish Government to do something. I do not know if there is scope for the Government to act unilaterally on behalf of the State or as a member of the EU to further enable rights and entitlements to Irish citizens who happen to be resident just up the road.

Mr. Les Allamby: I will try to answer the questions in the order they were asked. Senator Craughwell asked if the common travel area could become entangled in the courts. That is always possible. I am not a great fan of trying to fight the legal status of something in the first place. There are principles of administrative law where one could say that if both Governments changed their minds on something, say cross-border healthcare co-operation, there would be a legitimate expectation or administrative law arguments. However, if either the Irish or UK Government unilaterally enacted something to get out of arrangements in the common travel area, there would be political fallout. Would the courts give the common travel area and a memorandum of understanding greater weight than if parliament, either the Dáil or Westminster, passed some legislation to make it clear it was getting out of some or all those arrangements? I am doubtful one would find a court that would take the memorandum of understanding above

legislation. That is why it is important to have a very secure legal underpinning and a very clear understanding of where things are.

There was a question of whether the European Court of Justice could play a role. It is playing an interesting role. I would nuance this by saying that the ECJ cannot act unilaterally, it cannot decide to make decisions, cases must be referred to it under the process. One example would be the Irish courts on the European arrest warrant and whether it can be applied to the UK and Poland, given different developments there. Those decisions from the ECJ were interesting because they said that while both were full member states that there is no reason to question the bona fides of a European arrest warrant. However, one might look very closely at the arrangements that the UK will have when it leaves the EU. They left the door open to say that while the UK is in the EU, it is expected to abide by all of those rules and, therefore, the European arrest warrant should carry on as now. After that it will depend on what those arrangements are. They have given a hint but they are very restricted in terms of what they can do because it is about questions that are asked. I am with Professor Harvey on reopening the Good Friday Agreement. I would like to see the completion of the existing agreement. When terms like “review” are used, it often is interpreted as unpicking what has been achieved by the agreement. I would like to see it completed.

In response to Senator Black, there is a democratic deficit in the issue of voting rights. Professor Harvey is again quite right that this is not an EU-led issue. It is a matter for the Irish Government as to whether its citizens abroad or elsewhere on this island are entitled to vote in elections. It is not dictated by the European Union. Spain is a good example; its nationals abroad can vote. It is in the hands of the Government.

In response to Senator Conway-Walsh’s question about the Human Rights Act and whether the Irish Government will have any influence, I think it will. My understanding of where things are at the moment with the Human Rights Act is that the UK Government has said it will do nothing until it has completed leaving the EU. My fear, to be candid, is that the matter will then become a political football rather than being a question of the merits of the Human Rights Act. It may be based on politics rather than good policy or legislative or rights-based reasons for reforming the Act. Where I think the Irish Government has a role is that in the Good Friday Agreement it was quite clear that maintaining convention rights was core. The bill of rights was to be a convention rights-plus approach. The Irish Government was tasked with incorporating the convention rights into its own law, which it did. At the time the Good Friday Agreement was enacted the Human Rights Act was not in place but the UK Government had committed to bringing it in. Any attempt to dilute the Human Rights Act seems to me to be germane to the Good Friday Agreement. The Irish Government, therefore, has a perfectly legitimate reason to get involved in those discussions. The Government made some representations in the earlier stages when there were far greater concerns about getting out of the Council of Europe and so on, which seem now to have receded. The future of the Human Rights Act is a perfectly legitimate issue for the Government as the co-guarantor of the Good Friday Agreement.

On the standing of the international treaty, it was considered to an extent in Supreme Court decisions in respect of after we leave and Brexit challenges. At the moment, as I understand the state of law, it is difficult to see how one can judicially apply the Good Friday Agreement effectively. That may change with Ms de Souza’s case. I welcome the fact that we will look at it again in those circumstances. We must never underestimate how important an international treaty is. My experience on the international stage at the moment, when one engages with the UK Government, is that its people are very cognisant of their place on the global stage. They

see the UK still as a global player and they see themselves as a power for good in human rights and equality terms. They do not like having a light shone on their own back yard if they turn out to have their own problems and difficulties. In terms of recognising international treaties and applying them properly, we must never underestimate the importance of being able to persuade the UK Government that if it wants to stay on the international stage as an exemplar of human rights and equality, that always begins at home. There are cards to play that are very important to the UK Government and this should not be underestimated.

As to what this committee could do, I am timorous about responding as it is a matter for the committee. Senator Ó Donnghaile raised a couple of issues. If this committee was saying something positive about a need for a bill of rights in the current circumstances, it would be welcome. In the short term, the suggestion in our paper about copper-fastening citizenship rights in domestic UK law, or at least a recognition of the UK Government's position when it responded to a bill of rights would be important. There is an umbilical cord whereby we can say this starts with the Good Friday Agreement and the response that was made to the advice given to the Commission. Finding a way of dealing with that through a bill of rights or in some other way would be a very welcome recognition. The review is still important, whatever the UK Government is doing. It is disappointing and shows clearly that the underlying issues, including Ms de Souza's case, need addressing. Whatever the UK Government comes up with, committees elsewhere among the co-guarantors of the Good Friday Agreement will look closely at those arrangements and what changes, if any, are made. To measure them against the Good Friday Agreement would be very useful indeed. I would not underestimate some of the valuable things the committee can do within its purview, although the Senators will know better than me, given that we are looking at this through the lens of leaving the EU, which is significant for both parts of Ireland and in terms of the Good Friday Agreement.

Mr. Daniel Holder: I shall start with the issue of what changed in 2012. That was quite a significant time. Although, unlike Ireland, the UK never amended its citizenship laws to bring them in line with the Good Friday Agreement, until 2012, as a matter of policy, the British Home Office usually recognised people's right to be solely Irish in the context of the Northern Ireland birthright. We can see that, for example, in the aborted attempts by the UK to introduce identity cards. They conceded that there would have to be a different card and that they could not have a card in the North that said the holder was British if he or she was an Irish citizen. They conceded that there would be a separate card. We also saw it in the sense that people in the same situation as Ms de Souza who sought EU rights to family reunification generally had those rights respected. People put in those applications and were granted them as Irish citizens.

In 2012, when Theresa May was Home Secretary, a suite of policies was brought in called the "hostile environment". Those policies were subsequently legislated for but 2012 is when it started. There was a series of - in our view and in human rights terms - very draconian immigration policies that aimed just to reduce numbers. The Home Office latched on to a decision of the ECJ called McCarthy, which restricted people's opportunity to exercise EU rights when they were dual citizens. The facts of this case were completely irrelevant to the context of people who have birthrights under the Good Friday Agreement because that is not what it dealt with, yet the decision was used as a pretext to prevent Irish citizens in the North from exercising EU rights to family reunification.

The lines they have taken to defend that policy are extremely worrying and have much broader implications for some of the other issues and questions that were asked. In cases like those of Ms de Souza and others, the Home Office has basically said two things. It has sought

to reinterpret the citizenship provisions of the Good Friday Agreement in a way that completely stretches credibility. There is a broader worry if it does the same with other provisions in the agreement. It is arguing that it is perfectly compatible to automatically confer British citizenship on everyone born in Northern Ireland and that there is nothing in the Good Friday Agreement to stop that, apart from the bit that states the participants “recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both”. It is worrying that things can be reinterpreted in that way.

The second thing the Home Office has done, which is even more worrying, is basically to say it is not bound by the terms of the Good Friday Agreement. It is an international treaty and that does not oblige Her Majesty’s Government directly to change its legislation. I do not think this is correct but that is the line it has taken. That is worrying in the sense of looking at other provisions in the Good Friday Agreement such as the duty to incorporate the ECHR into Northern Ireland law. That is a core provision safeguarded under the agreement. It is what we have currently, through the Human Rights Act, yet the Home Office is now saying it does not consider itself bound by the Good Friday Agreement. That is a much broader worry. It has exposed one of the weaknesses of the agreement, namely that there is no dispute resolution mechanism. No international court was given jurisdiction to remedy faults. When one hears of things such as the Home Office’s position in cases such as that of DeSouza, one realises that it is no wonder that the EU is insisting on a legally binding backstop. There has to be some supernational mechanism to enforce commitments as the UK has a long and consistent track record, throughout the peace settlement, of signing bilateral agreements and treaties which are legally binding under international law and then not abiding by their provisions. There is a much broader set of problems involved which are highlighted by cases such as that of DeSouza.

With regard to the common travel area, there is one thing which needs to be called out. Ever since the Brexit vote there has been a lot of talk about reciprocal rights in the common travel area. I have done a lot of Internet searching but I struggle to find any reference to the concept of reciprocal rights in the common travel area that predates the Brexit referendum. It appears to be a bit of a myth. It conflates two things that are actually different. The common travel area is essentially a free movement zone. It gives people the ability to move between the two islands and between North and South without passport controls. That is reflected in UK law under the UK Immigration Act 1971, which states that local journeys within the common travel area shall not be subject to immigration control. There are to be no passport controls on such journeys. That is how it is reflected in UK law. It is a problem that at times we see checks conducted by UK authorities both on the Irish Sea and on the land Border. These checks are carried out with no legal basis. Quite often these authorities will single out people they believe do not look Irish or British on the basis of racial profiling and seek documents. They will then say that these checks are voluntary. There are also problems with the legislation in this jurisdiction, which are not restricted to British and Irish citizens. Gardaí are allowed to ask for immigration documents, but only from non-EU nationals. How are they to tell the difference? There is a problem there in respect of significant racial profiling.

The common travel area is really a free movement zone and should not be conflated with the reciprocal recognition of citizenship rights between British and Irish citizens, which gives people equivalence of rights. That has a much more complicated history. It does not have anything to do with the common travel area as such because it continued to exist between the years of 1939 and 1952 when the common travel area was suspended in its entirety. British and Irish citizens enjoy the reciprocation of rights across the two jurisdictions but this predates most of the modern and some of the more draconian immigration controls, controls which interfere

in every aspect of life. That was not the case in those years. During the years from 1922 to 1948, British law regarded citizens of the Irish Free State as British subjects which resulted in an equivalence of rights. After Ireland formally legislated to become a republic, Irish citizens had a rather curious status under British law whereby they were not British but not foreign. I do not make this up; that is what it said. That was not completely unique because that was also the status given to Commonwealth citizens, who did not face particular restrictions. That status continued after 1962 when restrictions were placed on Commonwealth citizens but most of this was dispensed with under the contemporary UK immigration regime which came into force in 1973. That was also a key date because what replaced the ongoing arrangements was both states joining what would become the EU. This granted British and Irish citizens, and citizens of other EU citizens, reciprocal rights. We have therefore had reciprocal rights for the best part of 50 years, not based on the mythical reciprocal rights of the common travel area, but on joint EU membership.

The two Governments are now putting together something really new, the reciprocal rights of the common travel area. The problem is that they have largely been conducting this exercise on what the scope of these rights should be and to whom and what they should apply behind closed doors. There is no consultation document setting out what the scope of these rights should be. We have battered down doors with both Governments and have managed to get meetings and to have discussions, but that is no substitute for public or parliamentary consultation on what this should look like and what form it should take. We only have a treaty on things such as social security and pensions. There may well be big gaps in that; I cannot see housing and a number of other things mentioned. The only thing that seems to be supplementing that is this memorandum of understanding, which will not be legally binding. It may have some legal routes into it on the ground of reasonable expectation and such things but where I can see this clashing is where there are significant gaps. We have anti-discrimination law and if one side of the community, Irish citizens, is not afforded rights equal to those of the other side of the community, that will collide with immigration law.

It must be remembered that the common travel area, CTA, is never going to replace rights outside the borders of the CTA. That is one of the reasons it is far more limited than the rights that would be available if paragraph 52 of the joint report, regarding continued access and exercise of EU rights, were implemented on the basis that we are in the extraordinary circumstance whereby Northern Ireland will be a jurisdiction outside the EU in which every single person born, now and after Brexit, will either be or be entitled to be an EU citizen. To allow EU citizens to be stripped of all rights is not a good place to be.

With regard to our asks, a number of things could be put to the Irish Government. The first one is fairly straightforward. The Irish Government needs to hold its line about the implementation of the citizenship provisions under the Good Friday Agreement. There have been mixed messages in some correspondence. We do not want to see an artificial separation of issues of citizenship and identity. That cannot be done. The Government should hold the line that the UK should amend the British Nationality Act 1981 to bring it into line with the Good Friday Agreement. We would like to see the Irish Government moving to implement those aspects of EU rights that are within its gift, one of which is voting. There is no more politically sensitive issue in the North than voting. The Government should ensure that is taken forward. The common travel area should be underpinned by an enforceable treaty. We really need to open up the discussion as to its scope rather than it being held behind closed doors. It also needs to be underpinned by the bill of rights because that is the only way in which it will be properly legally enforceable in domestic law.

The final ask is big but fairly straightforward. Clearly there are going to be further negotiations. The withdrawal agreement is not going to be reopened but it is possible that an addendum could be added to it. It is also possible that changes could be made to the political declaration on future arrangements. In his amendment Professor Harvey sets out something we would really like to see, which is the reinsertion of the existing commitments to implement paragraph 52 of the joint report. With regard to the correlation between that and the other provisions of the Good Friday Agreement referenced in the withdrawal agreement, it is important to ensure there is a mechanism for levering up in order for everyone within Northern Ireland to retain that type of provision.

Professor Colin Harvey: I would like to raise a point about the Irish Government. We have talked about the wider human rights framework in which this all needs to be placed. I acknowledge and commend the work that has been done in securely locating some of these arguments in the position of the EU 27. That has been fundamentally important and it is also important that remains the case and that the arguments about this island remain at the heart of the conversation about the future relationship. The Irish Government has an important role in that, which is why we have heard reference to the political declaration.

I will speak to the issue of Irish citizenship with regard to Irish citizens in the North. It is something to which the Irish State, people in the South of Ireland, and the Irish Government really need to pay attention. I have a sense that something is happening with regard to Irish citizens of which people need to be aware. With regard to the Good Friday Agreement, we have heard about parity of esteem, mutual respect and equality of treatment. There is a sense that is being disrespected on a sustained basis. I am conscious that other people may have other views about that but I want to put it out there that Irish citizens in the North sense that tangibly. We have seen the confidence and supply arrangement between the current government in London and the Democratic Unionist Party. Not a day goes by without reference to the precious union. Speaking as an academic, I have been to many conferences in the UK where people agonised for days over the fate of the UK's constitution. I have spoken at those conferences and engaged in that conversation, but, speaking somewhat personally here today, when one raises a question about the constitutional future of this island, it seems to invite a rather different response. We need to recognise that we have to conduct a conversation about the constitutional future of this island in a mature way, and with a measure of civility. That is about constitutionalism on this island. I have been at many events as an academic where we have talked about constitutionalism on the other island in the UK and we need to have one about this island as well.

I am speaking here today as an Irish citizen who is not about to wave my passport in front of the committee, and what I pick up is a sense that, to be candid, the passport I have does not seem to hold any sort of inferior status because I was born in Derry and now live and work in Belfast. There is a sense in which that really matters for Irish citizens, however, I pick up an odd mood in the Irish State and Government about recognising the fact that there is a broader context in the North. There is a broader human rights framework, but there are also Irish citizens in the North who are not in a very good place and who feel fundamentally disrespected in terms of some of the things we have been talking about this afternoon. The Irish Government seems to be remarkably anxious about upholding the rights of some of its own citizens who live in the North of this island. If there is one thing the Irish Government should do, it is to lose that anxiety and caution about defending, acknowledging, and recognising the rights of Irish citizens in the North of this island in the context of the broader human rights and equality framework we talked about this afternoon.

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My final point in relation to that is very clear. I accept, acknowledge and commend the work the Irish Government has done thus far in these negotiations, but if there are things it can do in relation to, for example, voting rights and the democratic deficit that we have just heard about, then why not go ahead and do it, and make some of these verbalised commitments meaningful in practice so that democratic deficit is addressed, and those voting rights are respected. I have talked about the broader human rights framework, and speaking personally as an Irish citizen and a European citizen, I think that Irish citizens in the North have had enough. They want to see an Irish Government that confidently speaks up for the rights of everyone in the North, that recognises that the Irish citizens who live in the North do not have a second-class version of Irish citizenship, and to see that reflected in Irish Government, law, policy, and practice. I thank the Chairman.

Chairman: I would like to thank all the witnesses for their lengthy contributions and their in-depth responses to a range of questions from committee members. We appreciate them taking the time and travelling down to testify. We also appreciate their ongoing work and wish them well in that endeavour. We will suspend briefly and will return in private session.

Sitting suspended at 3.45 p.m. and resumed in private session at 3.51 p.m.

The select committee adjourned at 3.58 p.m. *sine die*.