

Discussion paper on Brexit

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Discussion Paper on Brexit

Colin Murray, Aoife O'Donoghue and Ben Warwick

This paper was written by Colin Murray, Aoife O'Donoghue and Ben Warwick for the Irish Human Rights and Equality Commission. Mr Colin Murray is a Senior Lecturer at Newcastle Law School, Newcastle University, Professor Aoife O'Donoghue is a Professor at Durham Law School, Durham University, and Dr Ben Warwick is a Lecturer at Birmingham Law School, University of Birmingham. The views expressed within this paper do not necessarily represent the views of the Irish Human Rights and Equality Commission, nor the employers of the authors. Report finalised on 23rd January 2018.

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Abbreviations

ACP	African, Caribbean and Pacific Countries
Brexit	UK withdrawal from the European Union
CAP	Common Agricultural Policy
CFR	European Union Charter of Fundamental Rights
Charter	European Union Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CTA	Common Travel Area
DUP	Democratic Unionist Party
EAW	European Arrest Warrant
ECHR	European Convention for the Protection of Human Rights
EU	European Union
EU27	EU Member States Post Brexit
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GB	Great Britain (elements of the UK other than NI)
GFA	Good Friday/Belfast Agreement
HRA	Human Rights Act 1998 (UK)
ICJ	International Court of Justice
IHREC	Irish Human Rights and Equality Commission
ILC	International Law Commission
INA	Independent National Authority
LCM	Legislative Consent Motion
NI	Northern Ireland
NI Act	Northern Ireland Act 1998 (UK)
NIHRC	Northern Ireland Human Rights Commission
NSMC	North/South Ministerial Council
PTA	Preferential Trade Agreement
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties 1969
WTO	World Trade Organisation

Executive Summary

Brexit significantly disrupts the current human rights framework in the UK and Ireland. This disruption will affect both substantive human rights provisions and the structures that support their operation. The impact of this disruption upon Northern Ireland's unique international, constitutional and human rights infrastructure demands particular attention.

Several contextual factors are significant in understanding the current human rights framework, the risk factors of Brexit, and the steps necessary to prevent the diminution of rights. The Good Friday/Belfast Agreement, the Human Rights Act, the Common Travel Area and the Northern Ireland Act provide the main international and domestic imperatives for human rights provision in Northern Ireland that will remain post Brexit. These, coupled with EU goals and values, which are heavily based in human rights language, had created an interdependent system of rights and remedies. One piece of this complex tapestry, EU law, will now be removed or significantly modified.

The Phase 1 Joint Report includes language on citizen's rights – with a single reference to human rights – and specifically refers to preventing diminution of rights. Nonetheless the EU (Withdrawal) Bill, the specifics of devolution following the repatriation of EU competences, the content of the Withdrawal Agreement and the future – if any – trade deal leaves key human rights issues unanswered and in some instances, creates new problems. For instance, the potential for nine categories of residents in Northern Ireland establishes a particularly burdensome administrative system that will be difficult for all individuals to comprehend and access effectively to ensure continued and enhanced human rights protection.

The Good Friday/Belfast Agreement envisaged ongoing membership of the EU. While the GFA does not prevent Brexit, to ensure ongoing compliance with its terms and the sustainability of the ECHR-plus system in Northern Ireland and Ireland, the UK and Irish Government must ensure sustained dialogue with the political parties, human rights bodies and civil society organisations in Northern Ireland. Sustained GFA proofing of all international and domestic legal changes should be conducted. The Irish Government should also seek an Interpretative Declaration from the UK to ensure its ongoing implementation of the GFA. The Phase 1 Report para 53 specifically states that there is to be no diminution of rights in Northern Ireland. A Northern Ireland Bill of Rights would ensure that para 53 is fully implemented.

The Common Travel Area has long provided a safety value to ensure that movement of people between Britain and Ireland for any purpose remains relatively straightforward. All parties agree that this should continue. Nonetheless in a period of considerable legal change the CTA must be put on a more assured footing. At present, it is a mix of legislation, statutory instruments, limited treaties and practice. Currently, the EU provides further certainty as it guarantees many equivalent rights. Now that this will end, it will be essential to place the CTA on a treaty footing to secure family, resident, welfare, social, political and civil rights continue.

The Phase 1 Report will create up to nine categories of residents in Northern Ireland. This ought to be reconsidered in the context of reciprocity and equivalence, and greatly simplified. Without alteration, uncertainty as to an individual's ability to live, work, access essential services, and be joined by family members will exist. Such categorisations may also have a

chilling effect on access to services and could lead to economic hardship for those uncertain of their rights. The practical nature of non-diminution of rights and its implications need to be made explicit, and should include guarantees that the people of Northern Ireland with Irish citizenship will be entitled to full and evolving access to EU citizenship rights and opportunities. Mechanisms to ensure those rights are reflected in UK law as EU standards develop need to be enshrined and practical guidance to all Northern Ireland residents made available.

Cooperative justice arrangements which have become fundamental to cross-border policing in Ireland will be profoundly disrupted by Brexit. The UK stands to be locked out of arrangements covering the cross-border transfer of suspects in criminal cases, prisoner transfers, data and information sharing and the work of the EU's coordinating Agencies. The negotiation of any replacement arrangements to take effect post-Brexit must be focused on the need to ensure equivalent safeguards for fundamental rights and judicial oversight mechanisms.

How Irish EU citizens in Northern Ireland are represented in the EU democratic institutions will be of critical importance after Brexit. Ireland should consider extending the franchise in EU Parliamentary elections to those individuals resident in NI who are not only granted EU citizenship but are also entitled to exercise those rights. This would prevent the creation of a democratic deficit within the European Parliament.

The EU (Withdrawal) Bill will impact on the competences of the Northern Ireland Assembly, specifically under section 6(2)(d) of the Northern Ireland Act 1998. This needs to be examined in detail in the context of the GFA and human rights guarantees, particularly if the Northern Ireland Assembly continues to be suspended.

The Phase 1 Report's favourable language toward PEACE and INTERREG funding to continue to assist Northern Ireland and the border regions in their recovery as part of the ongoing peace process is important in preventing economic hardship. Nonetheless, the impact of the loss of the Common Agricultural Policy on the farming and agri-food sector and the potential for economic hardship needs to be seriously reflected upon and systems put in place by the UK to prevent reduced living standards. While estimates of the impact of Brexit on the UK economy and Northern Ireland vary, the more uncertainty that subsists around residential status and frontier workers, the greater the impact is likely to be.

Summary of Recommendations

1. Ireland should accord particular importance to human rights concerns in its discussions with EU partners regarding post-Brexit Northern Ireland.
2. The Irish Government should seek assurances from the UK Government that any changes to UK domestic law will maintain human rights reciprocity and equivalence under the Good Friday/Belfast Agreement.
3. The UK, EU and Ireland should ameliorate the economic hardships for the farming and agri-food sector that will result from Northern Ireland's loss of the Common Agricultural Policy.
4. The Irish and UK Governments should re-evaluate the role of the North/South Ministerial Council, which is specifically tasked under the Good Friday/Belfast Agreement with examining EU policy and programmes.
5. The UK Parliament should amend the EU (Withdrawal) Bill to retain the Charter within UK law as a clear expression of the rights which apply to retained EU law as a whole and which, as such, safeguard compliance with the Good Friday/Belfast Agreement's requirement of rights equivalence in Ireland and Northern Ireland.
6. The UK Parliament should amend clauses 5 and 7 of the EU (Withdrawal) Bill to retain in Northern Ireland law any provision of EU law of relevance to the Good Friday/Belfast Agreement's requirement of rights equivalence and to exclude such provisions from the ambit of the UK Government's Henry VIII powers under the Bill.
7. The IHREC and NIHRRC should institute a system of joint periodic review of human rights protection in Northern Ireland and Ireland with the aim of drawing attention to potential breaches of the Good Friday/Belfast Agreement's requirement of rights equivalence.
8. The Irish Government should support the inclusion of extensive human rights clauses in a UK-EU Trade Agreement and Withdrawal Agreement to ensure that reciprocal and equivalent rights protections are maintained in Ireland and Northern Ireland post Brexit.
9. A Common Travel Area Treaty should be negotiated between the UK and Ireland to prevent incremental changes to the Common Travel Area's operation and to give UK and Irish citizens assurances as to their status and continued access to social, education, democratic, health and welfare rights.
10. Assurances should be sought from the UK regarding its proposed checking of immigration status when individuals seek to access services. In particular, attention should be paid to the impact on the Irish border and the chilling effect upon migrants accessing essential services or reporting crime to the police.
11. The IHREC should closely assess the impact of Common Travel Area developments upon Irish women travelling to Britain to access abortion services. Particular attention should be paid to any new barriers to accessing services and to resultant economic hardship.

12. The Irish and UK Governments should clarify through the Withdrawal Agreement, whether non-Irish citizens will have full continuing EU rights in Northern Ireland (including the freedom to provide services to all EU member states from Northern Ireland). The Phase 1 Report proposes to afford Irish EU citizens' significantly greater rights than other EU citizens.
13. Ireland should consider extending the franchise in EU Parliamentary elections to Irish EU citizens in Northern Ireland.
14. Parties to the negotiations should clarify the parameters of 'regulatory alignment' to prevent a no-deal scenario producing economic hardship in Ireland and Northern Ireland.
15. The Irish Government should undertake and publish a study of WTO rules on trade in services and the external EU border to assess the economic hardship potentially resultant from a no-deal scenario and to enable mitigating action to be taken.
16. Parties to the negotiations should reflect on the prudence of creating at least nine categories of residents and rights in Northern Ireland. In particular, attention to avoiding the divisiveness of the categories and ensuring simplicity and equivalence of rights is required.
17. The IHREC, NIHRC, and Irish Government should clarify the Withdrawal Agreement's position on individuals in Northern Ireland who are not Irish citizens. This clarification should include the effects of automatic versus claimed Irish citizenship upon EU rights.
18. Public authorities in Ireland and Northern Ireland should undertake an extensive public information campaign on rights entitlements following Brexit.
19. The UK Government should commit in the Withdrawal Agreement to preserving the common set of entitlements for all Irish citizens (whether linked to Northern Ireland or not), in order to avoid significant administrative/definitional issues.
20. The IHREC, NIHRC, and Irish Government should seek explicit guarantees that the people of Northern Ireland with Irish citizenship will be entitled to full and evolving EU citizenship rights and opportunities. This will entail working with the UK to develop mechanisms to ensure those rights are reflected in UK law as EU standards develop.
21. The UK and EU should clarify whether the five-year residency period can be accrued after Brexit day and whether permanent residency can be sought on EU terms on the basis of such accrued residency.
22. The Irish Government, EU institutions and member states, the IHREC and the NIHRC should seek assurances from the UK on the treatment of individuals not covered by citizens' rights or the Common Travel Area following Brexit.
23. The Irish Government should work with the UK on an ongoing basis to ensure clarity regarding post-Brexit immigration rules as far in advance of Brexit as possible.
24. Alongside its EU counterparts, the Irish Government should apply pressure to the UK not to apply different rules to EU citizens from different countries post Brexit.

25. The Irish Government and Northern Ireland authorities should immediately provide information for Cross Border job centre advisors to avoid economic hardship as a result of the Withdrawal Agreement.
26. The Irish Government should agree with the UK to allow gaps in employment of longer than six months for Frontier Workers, especially those living proximate to the border.
27. The Irish Government should work with EU partners to ensure people in durable relationships on Brexit day are treated in a manner equivalent to those who are married or in a registered partnership by the Withdrawal Agreement.
28. The Irish Government and Northern Ireland authorities should ensure full information is provided to those in doubt about their rights as a family member.
29. The UK and Ireland should, as a matter of urgency and before Brexit, clarify and enshrine within treaty and domestic law the Common Travel Area understanding of EHIC-equivalent healthcare.
30. Ireland should negotiate with the UK and the EU for the extension of EHIC-equivalent healthcare for Non-Irish EU citizens arriving in NI after Brexit to facilitate cross-border travel.
31. All parties to the negotiations should ensure that the replacement of the European Arrest Warrant provides for adequate judicial oversight mechanisms which take account of developing EAW jurisprudence, maintains comparable standards of rights protections, and excludes discretion over the transfer of a country's citizens.
32. The UK and Ireland should prepare, as a contingency in the event of no replacement EAW being negotiated, legislation to be passed ahead of Brexit to reform the arrangements currently in force under the Extradition Act 2003 (UK) and European Arrest Warrant Act 2003 (Ireland).
33. The UK and Irish Governments should seek to clarify the status and rights of each other's citizens within their respective criminal justice systems, in particular with regard to post-sentence deportation, and to reflect such an agreement in domestic legislation.
34. The staff base and remit of the Joint Agency Task Force should be expanded to sustain collaborative cross-border investigations post Brexit.
35. The UK and Irish Governments should consider whether the Common Travel Area should make allowance for police involved in 'hot pursuit' situations, as provided for under the Schengen Acquis.
36. The IHREC, NIHRC and Irish Government should seek assurances on the extent of the UK's non-diminution obligation, and whether it includes the continuing incorporation of EU human rights instruments, in order to safeguard the GFA's equivalence requirements.
37. The UK and EU should clarify the territorial extent and range of rights holders covered by the Phase 1 Report's non-diminution of rights agreement.

38. The UK and EU should clarify the Phase 1 Report's non-diminution guarantee's application to remedies and access to EU agencies.
39. The UK and EU should agree that the UK will retain membership or associate membership of EU human rights institutions post Brexit.
40. The UK, EU and Ireland should take steps to support civil society across the island of Ireland, including significant new streams of funding, additional fora for consultation, and additional protections for those individuals engaged in such activism.
41. The IHREC and NIHRC should seek clarity from the UK Government regarding the monitoring arrangements in Northern Ireland which will cover rights beyond citizen/residency rights.
42. The UK and Irish Governments should consult civil society organisations before the creation of new monitoring bodies.
43. The UK, EU and Ireland should clarify how the new 'Independent National Authority' will interact with existing human rights bodies established under the Good Friday/Belfast Agreement.
44. The NIHRC and UK Government should undertake a detailed study of how the EU (Withdrawal) Bill will impact on the competences of the Northern Ireland Assembly, specifically under section 6(2)(d) of the Northern Ireland Act. This is especially important while the Assembly remains inoperative.
45. The UK Government, under the scrutiny of Northern Ireland civil society, should ensure that all Northern Ireland political parties are consulted regarding Brexit on an equal basis, with no one party having a veto.
46. The UK and Irish Governments should revisit the NIHRC's draft proposals on a Northern Ireland Bill of Rights as way of preventing a diminution of rights in the Brexit process.
47. As a guarantor of the Good Friday/Belfast Agreement, the Irish Government should seek an Interpretative Declaration from the UK to ensure the ongoing and good faith implementation of the Agreement.
48. The Irish Government should keep the possibility of international law accountability for any breaches of the Good Friday/Belfast Agreement by the UK under review.
49. The Irish Government should push for the continuation of PEACE and INTERREG funding to continue to assist Northern Ireland border regions in their recovery as part of the peace process.
50. The Irish Government and UK Government should plan to make up any shortfall of PEACE and INTERREG funds resultant from the reduction or non-continuation of those schemes.

1. Introduction

This Report examines the impact of the United Kingdom's exit from the European Union (Brexit) upon human rights and equality issues. Brexit will significantly re-orientate both Northern Ireland's (NI's) established human rights structures and the inter-connected human rights' infrastructure and relationships across Ireland and the UK. Although the completion of Phase 1 of the Brexit negotiations provided some clarity, many human rights issues remain unresolved. Even as the shape of Brexit becomes increasingly apparent in the context of the Phase 2 negotiations, in the specific context of human rights on the island of Ireland seemingly straightforward decisions can have undesirable side effects. At issue are complex and inter-leaving legal provisions emerging from international law, EU law, international and domestic human rights law, UK and Irish Constitutional law and NI's peace process. In this context, human rights protection is uniquely susceptible to retrogression. This Report maps the implications of the emerging Brexit settlement for the protection and enforcement of human rights and equality on the island of Ireland.

Brexit will result in the removal of a significant element of the UK's legal infrastructure. The embedding of over 40 years of EU law into the UK's constitutional and legal structure exacerbates its potential for negative human rights implications. Three elements complicate the process of extricating the UK from the EU without a diminution of rights. The first of these elements is the broad spread of rights – economic, political, social, cultural, environmental, employment, etc., spread through the EU Charter of Fundamental Rights (EU CFR), EU Treaties, EU regulations and directives, as well as judgments of the Court of Justice of the European Union (CJEU). The second is the nature of devolution in NI under UK constitutional law. And the third is the functioning of the Good Friday/Belfast Agreement (GFA) as a bilateral treaty and peace settlement.

Although the UK Government is eager to ensure that the EU's legal safeguards for fundamental rights will be removed from the UK legal order on Brexit, constraints remain upon the UK's freedom of action, including significant international obligations such as the GFA, the continuation of the Common Travel Area (CTA), the UK's membership of the Council of Europe, and the UK's international human rights obligations. Other constraints may emerge during negotiations, including the insertion of human rights provisions into the ultimate Withdrawal Agreement and/or the subsequent trade deal between the UK and the EU. But the disruption to current rights protections will remain profound; existing citizenship and residency rights will be significantly altered for some NI residents, while for others existing rights might be largely unchanged (provided that the UK reaffirms its existing commitments).

Brexit creates significant risks for human rights in Ireland. It potentially threatens the continuation of the CTA, the GFA's requirement for equivalence of rights in both parts of the island of Ireland, the erosion of existing human rights protections based entirely or partially in EU law, the existence of the current official human rights bodies, the establishment of new categories of rights holders, economic recession (with consequent impacts upon standards of living and socio-economic rights), and the removal of employment and social protections. These risks would be heightened in the context of a 'no-deal Brexit' or a 'Hard Brexit', which

also requires an analysis of the impact of World Trade Organisation (WTO) rules on rights protection.

We remain in period of flux. Although the end of Phase 1 and the Joint Report which followed gives a certain level of clarity that has hitherto been absent, much remains to be negotiated and the binding nature of the Phase 1 Report varies across its content. Although the prospect of a no-deal Brexit has receded the potential for regression and divergence remains. Moreover, certain elements of the Report will have consequences which have yet to be fully understood. The Report creates multiple categories rights holder in Great Britain (GB) but, illustrating the complexities which could emerge during Phase 2, an even more bewildering array of categories stand to apply in NI. The EU (Withdrawal) Bill which is currently before the UK Parliament also generates a knot of unresolved issues. It indicates the general approach of the UK Government toward some human rights and NI-specific issues, but provides little detail on the post-Brexit landscape (which remains to be determined at a future date by ministerial action pursuant to sweeping new powers).

This Report maps the human rights issues which must remain at the forefront of negotiations between the EU and the UK and of discussions between Dublin, Belfast and London as the post-Brexit legal landscape is negotiated and established. It provides in turn a discussion of the CTA and the differences between its operation and EU rights, and an evaluation of how the creation of multiple categories of 'citizen' and 'resident' will impact upon identities and rights protections in Ireland and the UK. It thereafter assesses the new institutional human rights landscape, the impact of Brexit on justice and policing and the role of the GFA's human rights obligations (which remain in full force irrespective of Brexit). The Report closes with an assessment of both the risks of diminution of rights in the context of Brexit and the possibilities for strengthening human rights protection. The remainder of this chapter introduces the legal context in which Brexit negotiations operate, highlighting particular issues which will be tackled in detail in the following chapters.

Phase 1 Report from the EU Negotiators and the UK Government

The Phase 1 Report¹ is a joint document between the UK and the EU and the prominence of NI in its terms reflects the EU's focus in the initial phase of negotiations. This provisional agreement is not a Treaty, as is made clear by para 5, which maintains that 'nothing is agreed until everything is agreed', although with regard to NI the parties accept that certain elements of this deal are binding even if Brexit negotiations as a whole collapse.

The language of para 5 reflects several different elements of the Withdrawal negotiations. First, it adopts the contemporary form of trade negotiations at the WTO and trade negotiations more generally. Trade deals are now often premised upon acceptance of full packages by all parties or no deal. A final full deal is also the basis on which new membership of the EU operates. This language maintains the possibility of a Hard or no-deal Brexit.

Beyond specific provisions applicable to NI the Report as a whole is not legally binding under the terms of Article 50 of the Treaty of the European Union (TEU) or under the Vienna

¹ 'Phase 1 Report, *Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union* (TF50 2017, 19) 8 December 2017.

Convention on the Law of Treaties 1969 (VCLT). It could, at most, be described as having 'mixed obligations' given the binding provisions applicable to NI. Nonetheless, the general principle of *pacta sunt servanda* and Article 26 of the VCLT requires the UK to enter Article 50 negotiations in good faith (this is also a general principle recognised in EU law). A further practical consideration is that the process of unilaterally rescinding on pledges would result in a significant loss in international reputation, meaning that neither the UK nor the EU is likely to readily abandon the content of the Report unless by mutual agreement in further negotiations.

Para 46 of the Report is the most significant NI-specific commitment. The principles agreed in this section have primacy over any subsequent agreements between the UK and the EU. Even though all contents of the Report are noted as subject to further negotiation in para 5, para 46 suggests that the Irish border solution is subject to 'unique' treatment within negotiations. Immediately after the publication of the Report, the UK Government appeared equivocal as to whether it regarded the NI-specific commitments as binding. Nonetheless, following statements by the Irish Government, the EU negotiating team and the EU Parliament, it appears that all parties now agree that these particular sections are not open to re-negotiation, but merely to the fleshing out of specific content under their terms. This is significant, as other parts of the Report with human rights implications remain open to negotiation and clarification, and some of the NI-specific commitments in this regard remain open to conflicting interpretations.

Paragraphs 10 to 16 of the Report directly impact upon EU, Irish and UK citizenship rights post Brexit. The proposals set out in these paragraphs will result in the creation of at least nine different combinations of NI residents, with differing rights:

- 1) Irish citizen (no UK citizenship)
- 2) UK citizen (no Irish citizenship)
- 3) Dual Irish-UK citizen (no NI connection)
- 4) Dual Irish-UK citizen (part of the 'people of NI')
- 5) Non-UK citizen who is entitled to Irish citizenship (e.g. USA)
- 6) Non-Irish EU
- 7) Non-EU, Non-UK
- 8) 'Worker' in Ireland with EU/UK citizenship
- 9) 'Worker' in UK with EU/UK citizenship

The implications of these categories for human rights protection and equivalence will be explored further below but the variety of human rights protection requires detailed consideration as the hierarchy of rights protection that may emerge could be substantial. Para 40 outlines the creation of a new 'independent national authority' (INA) to deal with EU citizens' complaints (for those resident pre-Brexit). How this will operate in practice and its relationship with the UK Court system and existing human rights bodies remains to be elaborated upon.

A significant concession in the NI context is para 52 which guarantees that NI residents holding Irish passports or who are entitled to them will continue to enjoy EU citizenship through their Irish citizenship and will continue to be permitted to exercise those rights as far as is practicable. This marks a significant departure for the EU as residence within an EU member

state is normally a requirement to exercise most EU rights (the implications of this provision will be addressed in Chapter 3).

Para 36 requires that the final Withdrawal Agreement covering provisions on citizenship rights will be implemented in the UK in an Act of Parliament which enjoys constitutionally significant status.² Given the concerns regarding the protections included within the EU (Withdrawal) Bill currently before Parliament this provision will be of critical importance in shaping human rights in the UK post Brexit (addressed in Chapter 2). Para 36 requires that a final Withdrawal Agreement will have full force within UK domestic law *and* as an international agreement binding upon the EU institutions and EU27, albeit the dispute settlement process applicable to these arrangements remains to be negotiated.

Paras 42 to 56 of the Report addressed NI specifically. These provisions confirm the importance, practical application and evolution of the GFA since 1998. Para 44 re-affirms the significance of consent under the GFA, which may become important should the Withdrawal Agreement result in a change of 'status' for NI and democratic rights need to be asserted. Given that the EU framework will no longer apply to NI post Brexit, paras 47-48 reaffirms the importance of North-South co-operation. Paras 49-50 set out the methods by which a hard border will be avoided, with much depending on the scope of 'regulatory alignment' under these provisions in terms of rights protection (addressed in Chapter 6).

Para 53 states that there will be '[n]o diminution of rights' post Brexit. This provision appears to envisage human rights institutions on the island stepping into the void left by the EU and thus safeguarding human rights standards. It implies, though it does not explicitly state, that NI at least will maintain not only the protections secured by the incorporation into NI law of the ECHR under the Human Rights Act 1998 (HRA), but also under the EU CFR as it applies to any aspect of retained EU law. The development of a bespoke NI Bill of Rights may therefore become a necessity should the rest of the UK seek to depart from these standards. The broader application of para 53 to the remainder of the UK is unclear. This is the only mention of human rights in the Phase 1 Report, with all other provisions referring to 'citizens' rights'. This linguistic difference is of particular significance due to the potential divergence between EU citizens' rights who take up residency in either part of the island of Ireland post Brexit.

Para 54 enables the CTA exception under EU law to continue and agrees to the UK's use of internal checks to police migration through, for example, banks, landlords, social security offices or NHS access points rather than through infrastructure at the NI/Ireland border. Such arrangements could, however, create significant access problems for EU citizens and produce a chill factor impacting upon their economic and health rights (addressed in Chapter 3).

The Phase 1 Report also states that the parties will give positive consideration of continued PEACE and INTERREG funding for NI, which is of significance to the NI economy. Common Agricultural Policy (CAP) payments, however, are not covered and the UK has only guaranteed continued payments at the current level until 2020. The subsequent economic impact on the farming community and the potential for economic hardship is therefore a significant risk. Para 87-93, although not specific to NI, will impact upon many of its people and businesses.

² See *Thoburn v Sunderland City Council* [2002] EWHC 195.

Of these provisions, para 93 is of particular significance to NI in that it outlines, in the briefest of terms, the parties' aspirations for the continuation of Police and Judicial Cooperation.

Human rights principles infuse many of the EU's activities, and so it is no surprise that they are addressed in the Phase 1 Report, in its unmitigated endorsement of the GFA arrangements. The Report supports the GFA's provisions in four respects. First, it frames the entirety of the Ireland and NI section in terms of protecting all the parts of the GFA and the 'totality of the relationships set out in the Agreement'.³ Second, it repeats the language of the GFA in the guarantees it makes, thereby re-inscribing rather than rewriting its protections.⁴ Third, it goes beyond technical, text-based, or formalistic interpretations of the GFA's meaning, to extend its concern to the safeguarding of the 'practical application' of the Agreement. Fourth, the UK and the EU agree that EU law and practice have contributed to fulfilling the GFA's rights requirements, and that '[t]he United Kingdom commits to ensuring no diminution of rights' following Brexit.⁵

The at-best partially binding nature of the Phase 1 Report and the varied level of detail contained therein mean that a definitive description of post-Brexit human rights is impossible. However, it does set out the context in which human rights will be negotiated over the next year and their enforcement into the transition period. Phase 2 negotiations will have a much broader remit albeit the three-fundamental issues that formed Phase 1 – the financial settlement, citizenship rights and NI – will remain core features. The EU Commission has recommended that NI remains a distinct strand of negotiations. New issues that may touch upon human rights concerns include the international treaties that the EU has negotiated that will roll over as UK obligations, security, environmental protection and policing, and the nature of the transition. The Commission has recommended that during the transition period, at least, that UK will continue to be part of the Customs Union and Single Market and be subject to the CJEU, and as such, during this period, human rights provisions should remain stable. The EU is beginning its process of discussing with member states, including Ireland, their priorities in the negotiations with the UK, Ireland should put the maintenance and increase in human rights protections as a core negotiation goal.

The Good Friday/Belfast Agreement

The GFA⁶ encompasses two elements; first, the settlement between the parties in NI and, second, a bilateral international treaty between Ireland and the UK. This duality is not unusual in contemporary peace settlements; inter-linked settlements between state and non-state actors are becoming the norm.⁷ The GFA's international legal character is demonstrated by both Governments indexing the bilateral agreement with the UN Treaty Series. The VCLT

³ EU-UK Phase 1 Joint Report (n1) para 42.

⁴ E.g. EU-UK Phase 1 Joint Report (n1) paras 47-48

⁵ EU-UK Phase 1 Joint Report (n1) para 53.

⁶ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (2114 UNTS 473).

⁷ C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP, 2008) 146. A database of contemporary peace agreements is available at http://www.transitionaljustice.ulster.ac.uk/peace_agreements_database.html

should therefore be used in GFA's interpretation.⁸ The GFA expressly recognises the interests of the negotiating parties⁹ and NI's inhabitants in the fulfilment of its terms, as affirmed by the 1998 referendum.

In its preamble, the GFA also references the membership of the EU by the UK and Ireland and this being an important aspect of their relationship. While the Preamble itself is not binding it does set the context in which the GFA was intended to be understood. The North/South Ministerial Council (NSMC) is also envisaged as body for considering the role of the EU and relevant programmes and for communicating with the EU.¹⁰ Again, this does not necessarily require that the UK be an EU member state, but it does suggest that any post-Brexit continuation of EU funding programmes will fall within its purview. Although the Phase 1 Report does not reference the NSMC, should such EU programmes continue in NI post Brexit, its role will require further reflection.

The *Agreement Reached in the Multiparty Negotiations* as an annex to the GFA Treaty is as binding as the main text.¹¹ The Annex section on 'Rights, Safeguards and Equality of Opportunity' affirms a partial catalogue of 'the civil rights and the liberties of everyone in the community'. Although this account of fundamental rights 'is purely aspirational as between the political parties',¹² it sets the tone for the subsequent provisions which deal with the two governments' legislative commitments:

The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.¹³

The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction.¹⁴

Under the doctrine of *pacta sunt servanda* contained in Article 26 VCLT, parties are bound to act in good faith throughout negotiation *and implementation* of a treaty. In this context 'good faith' depends upon the ordinary meaning of a treaty's terms, considered in light of its object and purpose.¹⁵ To ascertain the object and purpose, parties can use both the wording of a treaty and the preamble and annexes. Other relevant materials include instruments made by one or more of the parties in the course of concluding a treaty (and which are accepted by other parties as related to it). A bad-faith breach of international obligations includes the non-

⁸ Both parties are signatories to the Vienna Convention on the Law of Treaties 1969, (1980) 1155 UNTS 331. Although Ireland did not accede until 2006, by the mid-1990s the Vienna Convention was regarded as reflective of customary international law

⁹ Eight Northern Ireland political parties signed up to the GFA (in order of their then vote-share, the Ulster Unionist Party, the Social Democratic and Labour Party, Sinn Féin, the Alliance Party, the Progressive Unionist Party, the Northern Ireland Women's Coalition, the Ulster Democratic Party and Labour). The Democratic Unionist Party was the only major Northern Ireland Party to oppose the GFA.

¹⁰ GFA (n6) section 3, paras 5 and 17.

¹¹ GFA (n6) Article 4.

¹² A. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (Belfast Press, 2000) 376.

¹³ GFA (n6) section 6, para 2.

¹⁴ GFA (n6) section 6, para 9.

¹⁵ VCLT (n8) Article 31.

performance of specific treaty terms. This would cover any *subsequent abrogation* of rights. States cannot invoke changes in the political complexion of the executive or legislative branches of Government, or reforms required by domestic law, to negate their obligation to act in good faith.¹⁶ This will include the terms of Brexit and the EU Withdrawal Bill.

The GFA envisages ECHR-plus human rights arrangements for NI. While the repeal of the HRA 1998 has receded from prominence it attained in the UK policy agenda during David Cameron's premiership, Brexit nonetheless threatens NI's post-GFA rights arrangements. First, the lock requiring all EU member states must be Council of Europe members and signed up to the ECHR, could be lost. Second, Brexit threatens the rights under EU law which extend beyond the ECHR, including the EU CFR, decisions of the CJEU, treaty rights, regulations and directives. Even if some of these rights are retained, they will no longer have overriding force in UK law, or be able to be used by claimants to 'disapply' contrary provisions of Acts of Parliament.¹⁷

The Irish Government committed to 'ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland'.¹⁸ This issue is of central import. Under international law the doctrine of reciprocity envisages that a state's obligations under a treaty are balanced against consequent advantages, an outcome that is mirrored by the obligations upon, and advantages secured by, other state parties. Reciprocity does not require that state parties mirror each other's actions but rather depends upon whether divergent approaches are proportionate in light of a treaty's aims.¹⁹ The GFA envisages different arrangements for implementation of the ECHR into law in NI and in Ireland. The GFA does not, for example, explicitly call for the ECHR's incorporation into Irish law, meaning that the existence of some distinctions in the approaches to rights protection within these jurisdictions does not threaten reciprocity, a current example is access to marriage for same-sex couples. The Joint Committee's advice – as mandated by the GFA²⁰ – relating to a *Charter of Rights for the Island of Ireland* is also notable for its efforts to map, and demonstrate the complementarities of, human rights protections available across the two jurisdictions.²¹

The GFA specifically references the ECHR, and considerable attention is therefore paid to this instrument. Nonetheless, as the EU has identified, the GFA requires equivalence of rights in general across the island, and does not focus solely upon civil and political rights.²² Equivalence could potentially require that at least within NI, some human rights protections directly comparable to the EU CFR be maintained.

A potential breach of the GFA may emerge if a discrepancy arises between those rights that emerge from the EU that are applied in the Republic of Ireland, and those which are available in NI subsequent to Brexit. Post-Brexit it is possible that the UK may choose to lessen its rights

¹⁶ VCLT (n8) Article 27.

¹⁷ *R v Secretary of State for Transport, ex parte Factortame* (No. 2) [1991] 1 AC 603.

¹⁸ GFA (n6) section 6, para 9.

¹⁹ D. Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1994) 34 *Virginia JIL* 295, 298.

²⁰ GFA (n6) section 6, para 10.

²¹ Northern Ireland Human Rights Commission and Irish Human Rights Commission, 'The Advice of the Joint Committee on a Charter of Rights for the Island of Ireland' (2011) <<http://www.nihrc.org/uploads/publications/charter-of-rights-advice-june-2011-final.pdf>> (accessed 25 January 2017).

²² EU Commission, 'Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland' (TF50 2017, 15) 3-4.

protections that derive solely from the EU CFR (data protection for instance) thus diminishing equivalence. Post Brexit, the EU could also upscale its rights protections, thereby opening a gap between Ireland and the UK. The most extreme case would involve simultaneous movements towards opposite ends of the spectrum (the EU/Ireland creating more rights, the UK fewer) creating an equivalence gap which could undermine the GFA.

This is a real risk in the context of Brexit; given that the removal of so-called red tape was a prominent justification for Brexit, this poses a long-term risk to workplace rights, gender equality protections, elder law and victims' rights (even if they are initially retained in UK law through the Withdrawal Bill). Given the current state of flux, it is impossible to determine the extent of this risk but areas of particular concern will be outlined in the following chapters. This Paper will also consider the potential for resolution of this issue through devolution and the inclusion of human rights in the EU-UK Withdrawal Agreement and trade deal. A no-deal Brexit would cause these issues to become of immediate concern, and make their resolution more difficult.

A further concern under the GFA is the principle of consent. Para 44 of the Phase 1 Report reaffirms its importance. Under the heading of 'Constitutional Issues' the GFA declares that:

it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people.²³

This is re-iterated in section 1 of the NI Act 1998. This is ordinarily interpreted to apply to a 'border poll' on the status of NI as part of the UK, and in the *Miller* case the UK Supreme Court rejected the argument that it required the assent of the people of NI to Brexit.²⁴ Nonetheless, it is arguable that should the constitutional status of NI within the UK change – for instance utilising para 49-50 of the Phase 1 Report to establish a 'special status' for NI such as a customs territory – the principle of consent may become operational. Should this occur without, at the very least, the involvement of all the representatives of the communities as defined by the GFA – of particular concern should the Stormont Assembly continue to be non-operational and/or direct rule is established – a change to the constitutional status of NI could be in violation of the GFA.

The GFA provides a break on the removal of the ECHR-plus system as is currently established including rights that emerge from membership of the EU. While Brexit does not necessarily violate the GFA, the consequences which may flow from the negotiation of the UK's withdrawal, any subsequent trade deal, or resultant changes to the UK rights protections, could violate its terms.

EU Law and Human Rights

The EU describes itself as a goal driven and value based organisation in the Lisbon Treaty and the EU CFR. The EU's goals display a human rights ethic:

- promote peace, its values and the well-being of its citizens;
- offer freedom, security and justice without internal borders;

²³ GFA (n6) section 6, para. 11.

²⁴ *R (Miller) v Secretary for State for Leaving the European Union* [2017] UKSC 5.

- sustainable development based on balanced economic growth and price stability, a highly competitive market economy with full employment and social progress, and environmental protection;
- combat social exclusion and discrimination;
- promote scientific and technological progress;
- enhance economic, social and territorial cohesion and solidarity among member countries;
- respect its rich cultural and linguistic diversity;
- establish an economic and monetary union whose currency is the euro.

The values of the EU are equally based within a human rights frame and include human rights themselves as core organisational values:

- Human Dignity
- Freedom
- Democracy
- Equality
- Rule of Law
- Human Rights

The EU manifests these goals and values in the CFR and across a network of Treaties, Regulations, Directives and CJEU decisions which make up EU law.²⁵ This means that EU law can currently be seen as a source of rights within UK law. Although some of these rights are mirrored by the ECHR or other international human rights instruments, others are unique to EU law. The structures of enforceability are also not replicated under other legal arrangements under UK law. The CFR is intended to complement the ECHR and to provide a basis for 'Union law providing more extensive protection'.²⁶ The ECHR therefore provides a baseline upon which the Charter provides more extensive protection – a form of ECHR-plus for the EU. It is a more modern rights document and provides a more principled basis for dealing with areas of law which have developed since the ECHR was concluded in the 1950s, such as data protection law. Many of the CFR rights, such as the Right to Asylum, Data Protection, health care, social security, environmental protection, and equality are extended and supplemented by regulations, directives and case law. One UK Parliamentary Select Committee has emphasised that the Charter does at present have direct effect in the UK, albeit only as it applies to areas which fall within the scope of EU law.²⁷ This makes the UK's plans for the removal of the CFR through the EU (Withdrawal) Bill particularly problematic.

The Lisbon Treaty requires the EU to accede to the ECHR.²⁸ While the EU has attempted to accede to the European Convention on Human Rights, in *Opinion 2/13*²⁹ the CJEU held that

²⁵ See S. Douglas-Scott, 'Human Rights as a Basis for Justice in the European Union' (2017) 8 *Transnational Legal Theory* 59.

²⁶ EU CFR, Article 52(3).

²⁷ House of Commons European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights in the UK: A State of Confusion* (2014) HC 979, p. 50-51.

²⁸ TEU, Article 6(2).

²⁹ Case C-2/13 *Opinion 2/13* [2015] 2 CMLR 21, (Full Court, CJEU).

the EU could not accede to the ECHR on the terms of the Draft Agreement on Accession.³⁰ *Opinion 2/13* was driven by a concern that the European Court of Human Rights could establish itself as superior to the CJEU within aspects of its area of competence and which might in some instances be able 'to take the place of the Court of Justice'.³¹ Notwithstanding *Opinion 2/13*, the CJEU and the European Court of Human Rights continue to develop their inter-relationship through case law. The imperative for the EU to accede to the ECHR remains and a renewed effort will be made to address the requirements of *Opinion 2/13*. The future integration of the EU into the ECHR will undoubtedly impact upon the UK through the development of the Convention.

International Trade Law

One of the outcomes of Brexit will be the UK's negotiation of multiple trade deals. Some of which, such as joining the Trans-Pacific Partnership, have already been mooted. The EU Withdrawal Agreement will also constitute an international trade deal. The UK will also maintain its membership of the WTO. While increasingly human rights and equality issues are 'mainstreamed' into trade negotiations, the negative impact of some trade deals on human rights standards – including food safety standards, environmental standards, standards of living and employment and labour rights – are well documented.³² The rise of mega-regionals such as the Trans Pacific Partnership as well as the EU's negotiation of the Trans-Atlantic Trade and Investment Partnership with the United States also raised concerns regarding democratic legitimacy including issues of transparency, accountability and the use of Investment Arbitration Bodies for dispute settlement. While most of these issues will arise post Brexit as the UK begins to negotiate new trade deals, there may be implications for human rights protection in NI. Retrogression/diminution could specifically be at issue. The content and form of the trade deals which follow, for instance, the potential for incorporating human rights protections within them, need consideration as negotiations move forward.

International Human Rights Law

Beyond the ECHR and the EU CFR there are a plethora of international human rights instruments to which the UK and Ireland both subscribe. Within the devolved constitutional structures there is also a possibility for NI to incorporate international human rights protection following the Welsh model on children's rights. While it would not be possible to fill human rights deficits entirely through international treaties as supervisory mechanisms can sometimes be light-touch, they operate as an additional layer of protection. In particular, the UK should be conscious of an increasing range of UN mechanisms which rely on a prohibition of retrogression.³³

The various international reporting mechanisms and quasi-judicial processes also provide a background in which human rights obligations and retrogression/diminution may be monitored. In particular, the Universal Periodic Review will provide a process by which the

³⁰ Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms CDDH-UE (2011) 16.

³¹ Case C-2/13 (n29) [234].

³² See J. Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart, 2007).

³³ A. Nolan, N.J. Lusiani, and C. Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in A. Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP, 2014) 140–141.

overarching human rights structure in Ireland and the UK can be reviewed in the context of Brexit.

Cooperative Justice Arrangements

The Phase 1 Joint Report does not cover post-Brexit co-operative justice arrangements in any depth, but their shape can largely be determined by the relevant legal constraints contained within EU Law. Measures such as the European Arrest Warrant and prisoner transfer agreements will have to be renegotiated. Other cooperative justice arrangements are largely coordinated under the auspices of three EU agencies; Europol and Eurojust, and eu-LISA. The legal instruments creating these Agencies tie full membership to a country being an EU member state.³⁴

Short of a radical overhaul of these arrangements in EU law, the UK will move from playing a member state role in these key EU agencies and the information/data sharing tools they maintain, to a position of partner state with some degree of agreed access. There are, in such a change, multiple risks to cross-border criminal justice cooperation in Ireland, and in particular, to the GFA's requirement that the UK Government ensure fair functioning of the NI criminal justice system.³⁵

Devolution

The impact of Brexit upon the UK's devolution arrangements remains unclear. The NI Act 1998 was not enacted in isolation; it was part of a suite of legislation passed by Westminster establishing devolved institutions in Scotland, Wales and NI with their own law-making competence. Although the UK Parliament retained the legal capacity to make law for any of the constituent parts of the UK, a constitutional convention was agreed preventing it from doing so without the consent of the devolved legislatures.³⁶ Such a constitutional convention is not legally binding under the UK's constitution, but were the UK Parliament to legislate for devolved issues against the wishes of the devolved legislatures, it would amount to a breakdown in the normal functioning of UK governance. When majorities of voters in both Scotland and NI opposed Brexit, the need to deal with the devolved institutions adds an additional complication to Brexit (one which is only partly ameliorated whilst the NI Assembly is inoperative).

Devolution issues were initially relegated to the margins of the EU (Withdrawal) Bill in what amounted to an effort to avoid the need for Legislative Consent Motions (LCM) from the devolved legislatures. The Bill as it currently stands, however, gives new competences to devolved executive actors to make reforms to legislation enacted by the Scottish Parliament, Welsh Assembly and NI Assembly which will be affected by Brexit, and therefore undoubtedly requires a LCM. To avert a potential constitutional crisis, the UK Government must recognise the changed nature of the UK constitution since devolution and reach agreement with the devolved administrations on competence transfers. This necessarily involves restarting NI's devolution arrangements.

³⁴ See, regarding Europol, EU Council Decision 2009/371/JHA (6 April 2009), Articles 1-3.

³⁵ GFA (n6) section 6, para 8.

³⁶ Lord Sewel, HL Deb, vol. 592, col. 791 (21 Jul 1998).

Retrogression and Diminution

The guarantee given by the UK in the Phase 1 Joint Report³⁷ has variously been described as a guarantee of non-retrogression, non-regression, and of non-diminution. While these terms make similar appeals to the idea of avoiding backwards steps in human rights protections, there are several reasons why the term 'diminution' is to be preferred in this context. First, the term used by the Report,³⁸ and present in the EU Task Force's negotiating mandate,³⁹ is 'diminution'. Second, while the principle of non-retrogression is an established idea in international human rights thinking,⁴⁰ it has not previously been used in EU human rights law and there is therefore a danger of drawing upon international principles that are not well suited to the present context. Third, while the non-diminution guarantee is an absolute promise to avoid backwards steps, non-retrogression is a more flexible device which allows backwards steps if they are justified according to a set of criteria.⁴¹ There is therefore a danger that the non-diminution guarantee is diluted by an association with rules of non-retrogression.⁴²

Recommendations

1. Ireland should accord particular importance to human rights concerns in its discussions with EU partners regarding post-Brexit Northern Ireland.
2. The Irish Government should seek assurances from the UK Government that any changes to UK domestic law will maintain human rights reciprocity and equivalence under the Good Friday/Belfast Agreement.
3. The UK, EU and Ireland should ameliorate the economic hardships for the farming and agri-food sector that will result from Northern Ireland's loss of the Common Agricultural Policy.
4. The Irish and UK Governments should re-evaluate the role of the North/South Ministerial Council, which is specifically tasked under the Good Friday/Belfast Agreement with examining EU policy and programmes.

³⁷ EU-UK Phase 1 Joint Report (n1) para 52.

³⁸ EU-UK Phase 1 Joint Report (n1) para 52.

³⁹ Guiding principles for the Dialogue on Ireland/Northern Ireland (n22) 4.

⁴⁰ J.J. Wills and B.T.C. Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse' (2016) 23(2) *Indiana Journal of Global Legal Studies* 640.

⁴¹ E.g. UN Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 42.

⁴² Notwithstanding this issue of which terminology should be used in the EU context, the UK and Ireland both have obligations under international law to ensure that socio-economic rights standards are not rolled back without adequate justification.

2. Human Rights and the UK's Withdrawal Legislation

The EU (Withdrawal) Bill 2017-19 began its passage through the UK Parliament in July 2017. The Draft Bill has, to date, been subject to only one significant amendment. The UK Government has nonetheless averted potential amendments to the Bill's exclusion of the EU CFR from retained EU law and to clarify its relationship with the GFA only by giving assurances regarding the Bill's terms. With the conclusion of the Phase 1 negotiations, and particularly the Phase 1 Report's legislative requirements regarding rights, the UK's withdrawal legislation may need to be reshaped or augmented at a later date.

This chapter evaluates the provisions of the EU (Withdrawal) Bill currently before the UK Parliament as they apply to the EU CFR, and addresses how the Bill's provisions will affect non-Charter rights. This overview underpins this Report's assessment of the risks of rights regression in the UK following the implementation of the EU (Withdrawal) Bill (see Chapter 6). This chapter also assesses the implications of the outcome of Phase 1 negotiations for the overall shape of the UK's withdrawal legislation in the event of both an overall agreement and a 'no-deal' Brexit.

The EU (Withdrawal) Bill and the EU Charter for Fundamental Rights

The EU (Withdrawal) Bill is sometimes referred to as the Great Repeal Bill. Indeed, its opening provision will repeal the European Communities Act 1972, the legislation which provides the link by which EU law is recognised as part of domestic law within the UK's legal systems. But this moniker deliberately underplays the important practical task of the Bill, which is to translate the existing body of EU law into domestic law. If this task is not performed, then yawning gaps will appear in the UK's legal arrangements post-Brexit (and there is insufficient time and capacity to develop new domestic law to replace existing EU law ahead of the UK's withdrawal). Once the act of translation has been achieved, the UK Parliament will be able to alter retained law by ordinary legislative processes, with each such change seeing substantive areas of UK law in repatriated competences diverging from the EU model.

This act of translation maintains that, as a general proposition, EU law rights which are recognised in UK law immediately prior to Brexit will 'continue on and after exit day to be recognised and available in domestic law'.⁴³ But the idea that withdrawal from the EU will, of itself, change little substantive law would be a difficult sell to supporters of Brexit. This general proposition, therefore, does not extend to the EU CFR. Clause 5 of the EU Withdrawal Bill, as introduced, sought to remove the Charter from UK law and to thereby prevent it from conditioning the application of 'retained' areas of EU law following Brexit:

cl.5(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.

⁴³ EU (Withdrawal) Bill 2017-19, cl. 4(1).

As a result, if this clause becomes law, rights found only in the CFR will be lost to UK domestic law as soon as Brexit takes effect. In short, the EU (Withdrawal) Bill proposals intend to strip away the CFR and the principles contained therein but retain (initially at least) many other substantive elements of EU law. The UK Government is attempting in this legislation to both retain a functioning legal order and sell to its pro-Brexit supporters that it is effecting radical change. One practical difficulty with this approach, however, is that the CFR enunciates principles which underpin areas of current EU law as wide spread as data protection, social rights and cooperative justice arrangements. The UK Government has long sought to downplay this concern, maintaining from early 2017 that:

The Charter applies to EU Member States only when they are acting within the scope of EU law, its relevance to the UK will be “removed” by the UK’s withdrawal from the EU. ... As the Charter was not designed to create any new rights or alter the circumstances in which individuals could rely on fundamental rights, removal of the Charter from UK law “will not affect the substantive rights that individuals already benefit from in the UK”.⁴⁴

On this basis the Government insists that ‘it does not intend that the substantive rights protected in the Charter of Fundamental Rights will be weakened’.⁴⁵ Such claims that the Charter adds nothing substantive to rights protections in UK law could be characterised as disingenuous, especially as isolated rights protections in retained law will be easier to amend by statutory instrument (as detailed below) than the CFR retained as a whole.

Moreover, it is all but impossible to excise major principles-bearing elements of EU law without warping the terms of the EU law which the UK intends to retain. The UK Government admit as much when they have committed, in response to an amendment proposed by former Attorney-General for England and Wales Dominic Grieve, to a continuing investigation of the status of general principles of EU law within the withdrawal legislation:

[W]e will look at whether and how some challenges based on the general principles might continue after exit, in a way which best fits with our longstanding constitutional traditions and which minimises uncertainty for businesses and individuals. The rights landscape is complex and our approach is to seek to maximise certainty and minimise complexity and not remove any substantive rights that UK citizens currently enjoy.⁴⁶

Data protection law provides one example of the important role the CFR plays in clarifying rights protections under EU law. The right to protection of personal data is much better developed within the Charter (Article 8 CFR) than under the ECHR (Article 8 ECHR). As the CJEU has recognised ‘Article 8 of the Charter concerns a fundamental right which is distinct from that enshrined in Article 7 of the Charter and which has no equivalent in the ECHR’.⁴⁷

⁴⁴ HM Government, *Legislating for the United Kingdom’s withdrawal from the European Union* (2017) Cm 9446, para 2.23.

⁴⁵ Department for Exiting the European Union, *Charter of Fundamental Rights of the EU: Right by Right Analysis* (5 December 2017) p. 4.

⁴⁶ *ibid.*, p. 10.

⁴⁷ See C-203/15 and C-698/15 *Secretary of State for the Home Department v Watson* [2017] 2 CMLR 30, [129] (Grand Chamber, CJEU).

Although the case law of the Court of Human Rights has developed data protection rights as a facet of the right to privacy,⁴⁸ this is less valuable to individuals than a clearly expressed right. But because the right to protection of personal data is also included in the EU's General Data Protection Regulation,⁴⁹ which itself stands to be retained law, the UK Government maintains that the CFR provisions amount to mere surplusage.

The EU (Withdrawal) Bill and Rights Contained in General EU Law

As clause 5(5) of the Withdrawal Bill attests, it must be remembered that EU law contains principles and rights beyond the Charter:

cl.5(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

Under clauses 4(1) and 5(5) of the EU (Withdrawal) Bill, directly effective rights which exist in EU law beyond the CFR, including in the Treaties, will *prima facie* be transposed into UK law under the EU Withdrawal Bill. These provisions could provide something of a 'sticking plaster', maintaining the equivalence of certain rights protections in the law of NI and Ireland.

But the directly effective caveat is important. For example, the TEU recognises the importance of children's rights within EU law.⁵⁰ This recognition is in addition to applicable CFR provisions.⁵¹ But as the provision does not meet the requirements for a provision of EU law to be directly effective, it is not covered by clause 4(1).⁵² By contrast, the right to equal pay, under Article 157 of the Treaty of the Functioning of the European Union (TFEU) is directly effective and will therefore form part of retained law, even though the corresponding provision of the EU CFR, Article 23, will not be retained.⁵³

Other examples of rights protections covered by clauses 4(1) and 5(5) can be found in the EU legislation enacted under the Treaties (Directives and Regulations). CFR provisions detailing asylum rights⁵⁴ and victims' rights⁵⁵ stand to be excluded from post-Brexit UK domestic law by virtue of clause 5(4), but both are subject to detailed EU Directives⁵⁶ which under the terms

⁴⁸ See, for example, *Z v Finland* (1997) 25 EHRR 371.

⁴⁹ Regulation 2016/679/EU, Article 1(2).

⁵⁰ TEU (n28) Article 3(3).

⁵¹ EU CFR, Article 24.

⁵² For Treaty obligations to have direct effect upon member states they must be precise, clear, unconditional and not require additional implementing measures; Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁵³ See HM Government, *Legislating for the United Kingdom's withdrawal from the European Union* (2017) Cm 9446, p. 16 and Department for Exiting the European Union, *Charter of Fundamental Rights of the EU: Right by Right Analysis* (5 December 2017) p. 11.

⁵⁴ EU CFR, Article 18.

⁵⁵ Grounded in the EU CFR, Article 1.

⁵⁶ European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60; European Parliament and Council Directive 2012/29/EU of 25 October 2012 on establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57.

of clauses 4(1) and 5(5) form part of retained law, given that they provide for 'fundamental rights or principles which exist irrespective of the Charter'.⁵⁷

It is important, however, not to overstate the importance of these arrangements. The UK Parliament will be able post Brexit to alter any retained EU law by standard processes of law making, and thereby diminish rights protections. The EU, conversely, could develop rights protections which exceed the baseline currently in place in EU law. The operation of either or both of these trends could introduce divergences between the standards of rights protection in the law of NI and Ireland which would breach the GFA's requirement that equivalent rights arrangements be maintained. There is a significant risk that with the removal of so-called EU red tape being such a prominent reason for leaving the EU, there is an existential threat to workplace rights and gender equality protections within UK law (even if the relevant provisions of EU law are initially retained through the operation of the EU (Withdrawal) Bill).

The UK's withdrawal legislation also makes provision for ministers to manage legislative change as an element of the withdrawal process by statutory instrument. The EU (Withdrawal) Bill itself,⁵⁸ and related Brexit legislation, such as the Trade Bill 2017-19,⁵⁹ grant UK Government ministers sweeping powers to amend not simply retained EU law but almost any legislation which might be rendered in some respect deficient as a result of Brexit. The breadth of this so-called Henry VIII power is underlined by clause 7(4) of the EU (Withdrawal) Bill; 'Regulations under this section may make any provision that could be made by an Act of Parliament'.

These measures facilitate the diminution of UK rights protections as part of the Brexit process. Parliament stands to be marginalised in the implementation of Brexit, and in theory this means that *prima facie* retained measures such as the equal pay provisions enshrined in the Equality Act 2010 (or legislation such as the Sex Discrimination Order 1976 in NI) can be subject to rapid alteration with limited debate in Parliament. The Withdrawal Bill sets out no mechanism by which the disparate retained rights are protected against amendment, for example by judicial enforcement arrangements comparable to the HRA 1998's reinterpretation clauses and declaration of incompatibility.⁶⁰ Much as the UK courts could intervene and challenge such a 'back-door' diminution of rights under the principle of legality,⁶¹ the prospect of a protracted legal battle to the UK Supreme Court will deter many potential claimants.

Two protections relevant to the GFA are included in the EU (Withdrawal) Bill; first, these Henry VIII powers cannot be employed to alter the HRA 1998,⁶² and second, there is very limited capacity to use these powers to amend the NI Act 1998.⁶³ These protections are necessary, but do not of themselves suffice to protect the UK's GFA commitments against accidental or deliberate breach through the use of the Henry VIII powers, as they only cover

⁵⁷ See Commons Library, *Legislating for Brexit: The Great Repeal Bill* (Briefing No 7793, 2 May 2017).

⁵⁸ EU (Withdrawal) Bill 2017-19, cl. 7-9.

⁵⁹ Trade Bill 2017-19, cl. 2

⁶⁰ HRA 1998, s 3 and s 4. See D. Grieve, HC Deb, vol. 634, col. 737 (16 January 2018).

⁶¹ See *R v Secretary of State for the Home Dept, ex parte Simms* [1999] 3 All ER 400.

⁶² EU (Withdrawal) Bill 2017-19, cl. 7(6)(e).

⁶³ EU (Withdrawal) Bill 2017-19, cl. 7(6)(f).

legislation enacted to fulfil the UK's GFA commitments, and not its general principles such as equivalence in rights protection between NI and Ireland.

The Impact of the Phase 1 Negotiations Outcome

The outcome of the Phase 1 negotiations between the UK and EU has the potential to change the shape of Brexit with regard to fundamental rights. The key section of the Phase 1 Report in this regard draws directly upon the GFA:

The 1998 Agreement also includes important provisions on Rights, Safeguards and Equality of Opportunity for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland. The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law.⁶⁴

Read out of context, the 'United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law' would indicate a general commitment applicable to the UK as a whole. This would accord with the UK Government's assertions that its primary motivation in removing the CFR is not to reduce rights protections, but because it is surplus to requirements. In terms of a commitment by the UK Government, however, the context of this statement means that it would have to apply at least to NI law to meet the requirements of minimum compliance.

Para 53 should be read alongside the UK Government's commitment in the Phase 1 Report, in the event of a no-deal Brexit, to maintain 'full alignment' with rules of the single market which sustain North-South cooperation, the all-island economy and the GFA.⁶⁵ This provision does not simply apply to aligning regulatory standards for products in NI law; it secures the ECHR-plus protections provided within EU law, extending beyond civil and political rights into workers' rights and environmental rights in so far as they impinge upon North-South cooperation and the all-island economy. Although this commitment does not need to be embodied in the EU (Withdrawal) Bill, it conditions how the powers which it grants to UK Government ministers are to be exercised in the NI context. In short, it ring-fences elements of retained EU law as part of NI law against amendment or repeal.

Should a no-deal Brexit occur in March 2019, any Westminster legislation applicable to NI or NI Assembly legislation will have to comply with this commitment, as will the UK Government and NI Executive in the use of its powers, or the UK will find itself in breach of its international obligations.

Amendments to the EU (Withdrawal) Bill

Shared EU membership has applied a gloss over domestic policy differences between the UK and Ireland as the same supranational standards could be identified as the reciprocal rights framework. On Brexit this backdrop changes, and the UK Government have done little to

⁶⁴ EU-UK Phase 1 Joint Report (n1) para 53.

⁶⁵ *ibid.*, para 49.

dispel accusations that the removal of the EU CFR presages an assault on other human rights protections post Brexit. As they stand, Clauses 4 and 5 of the EU (Withdrawal) Bill create the potential for gaps to emerge between rights enjoyed in NI and in the Republic, and may even lead to their being non-equivalent in GFA terms.

In persuading Lady Sylvia Herman MP to withdraw an amendment to the EU (Withdrawal) Bill reaffirming the UK's commitment to the GFA, the Brexit minister Robin Walker maintained the UK Government's 'commitment to the Belfast agreement is absolutely clear'.⁶⁶ But although he noted that the GFA was binding upon the UK as an international agreement, the commitment built into the Bill is narrower; 'The Government absolutely support those principles, which are enshrined in the Northern Ireland Act, which is protected under the Bill'.⁶⁷ The NI Act 1998, however, is far from the only measure by which the GFA's commitments are enshrined in domestic law. With regard to rights equivalence in particular, more of a safeguard is needed.

The UK Government should therefore support an amendment to the EU (Withdrawal) Bill to protect the principle of rights-equivalence contained within the GFA and thereby address the commitments made in para 49 and 53 of the Phase 1 Report. A further amendment retaining the EU CFR would be desirable in supporting this goal, but at the very least some mechanism should be established by which the disparate fundamental rights contained within retained law can be protected. Although this chapter has addressed the relationship between the EU (Withdrawal) Bill and the Phase 1 Report, Chapters 6 and 7 will evaluate alternate modes of rights protection which could address these Phase 1 Report requirements, in particular, rejuvenating plans for a NI Bill of Rights.

In the absence of such amendments, much depends upon the direction of the post Brexit programme of law reform and the degree of divergence from EU norms that this entails. Nonetheless, as this chapter has illustrated, there are reasons to be wary. The UK Government's persistent characterisation of the CFR as contributing no rights to UK law suggests that rights-enhancing provisions will not be forthcoming. Moreover, for all that the HRA 1998 has become the means by which the UK fulfils its commitment under the GFA to incorporate the ECHR into NI law, ministers have asserted that the UK Government intends to 'further consider our human rights legal framework when the process of leaving the EU concludes, and consult fully on proposals in the full knowledge of the new constitutional landscape'.⁶⁸

Recommendations

5. The UK Parliament should amend the EU (Withdrawal) Bill to retain the Charter within UK law as a clear expression of the rights which apply to retained EU law as a whole and

⁶⁶ R. Walker, HC Deb, vol. 632, col. 1091 (6 December 2017).

⁶⁷ *ibid.*, col. 1093.

⁶⁸ P. Lee, MP, House of Commons Written Question 7772 (12 September 2017). This response reaffirmed the terms of the 2017 Conservative Party Manifesto commitment; 'We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes', Conservative Party, *Forward Together: The Conservative Manifesto* (2017) p. 37.

which, as such, safeguard compliance with the Good Friday/Belfast Agreement's requirement of rights equivalence in Ireland and Northern Ireland.

6. The UK Parliament should amend clauses 5 and 7 of the EU (Withdrawal) Bill to retain in Northern Ireland law any provision of EU law of relevance to the Good Friday/Belfast Agreement's requirement of rights equivalence and to exclude such provisions from the ambit of the UK Government's Henry VIII powers under the Bill.
7. The IHREC and NIHRC should institute a system of joint periodic review of human rights protection in Northern Ireland and Ireland with the aim of drawing attention to potential breaches of the Good Friday/Belfast Agreement's requirement of rights equivalence.

3. Common Travel Area vs EU Protections

This chapter outlines the interaction of the Common Travel Area, EU citizenship rights and the Phase 1 Report and their impact upon access and enforcement of rights.

The Common Travel Area (CTA) and Human Rights

The CTA allows easy travel and other benefits such as social welfare, healthcare and education access between the UK, Ireland, the Channel Islands and the Isle of Man. Historically, this has not been seen in a human rights context. But as gaps between EU free movement and CTA rights open, the CTA will become a more critical source of protection for, in particular, economic, social and cultural rights.

The openness of travel between the UK and Ireland dates to 1922 when the Irish Free State enforced the same travel restrictions as the UK. Neither country required passports for travel from the other. Following the Second World War, the UK's 1949 Ireland Act, s2 formalised the special relationship by declaring that Ireland, while no longer a dominion of the UK, is not a 'foreign country.' In 1952, the CTA came into force. The CTA exists as a collection of legal provisions in each of the relevant jurisdictions rather than as an international treaty. These legal provisions enable UK and Irish citizens to be treated almost identically within both states.

The coverage of the CTA is relatively complex and far reaching. For example, UK citizens in Ireland and Irish citizens in the UK have the right to vote in local, national and European elections. Both sets of citizens enjoy unfettered access to employment, social welfare and healthcare. The few exceptions to this equal treatment are political in nature: though Irish citizens can run for the UK Parliament, UK citizens cannot be elected to the Dáil, nor can they vote in constitutional referenda or Presidential elections.

At present the EU Treaties allows for the operation of the CTA under the Protocol 20 of the TFEU. But the factors that make operating a CTA between Ireland and the UK unproblematic are going to be substantially altered by Brexit. Primarily, the CTA will cover territories of which one is *within* the EU, and the other is *fully external* to the EU. There is no significant precedent governing this type of situation in the EU's history; the closest comparator is Norway's inclusion in the Nordic Common Labour Market, but that is not a true analogy: Norway is in the EEA, and consequently has signed up to the EU's free movement acquis, meaning it cannot be considered a full 'third country' in the way the UK will become once the UK leaves the EU.

The Phase 1 Joint Report in para 54 states that the EU and UK agree that the arrangements between the UK and Ireland relating to the movement of persons (CTA) may continue with the stipulation that its continuation respects the rights of natural persons as conferred by EU law and the UK confirms that the continuation of the CTA will not impact on Ireland's obligations under EU law including the free movement of persons. While this concretises the parameter within which the CTA can operate, specific rights – particularly economic, social and cultural – are not substantively covered or guaranteed under the present CTA. The relative flexibility and informality of the CTA means that it is vulnerable to seemingly technical

modifications that might go unnoticed. Without placing the CTA on a Treaty basis, Irish citizens living in the UK will be without assurance as to their status and those born in Britain living in Ireland will be in a similar position.

Common Travel Area Post Brexit

With an open border, NI is already subject to whatever immigration and visa policies are enacted by the Irish Government. However, the reciprocity of the CTA has allowed the UK Government to exert a degree of influence and control. In terms of non-EU citizens, Ireland and the UK currently maintain common travel visas for Indian and Chinese travellers and proposals were on the table to extend these joint arrangements to travellers from other countries prior to Brexit. Bilateral harmonisation of Irish and UK visa arrangements for other non-EU countries might appear to offer a means of closing this 'backdoor' to the UK without the need for intrusive measures at the land border.

The continuation of the CTA enables EU citizens, all of whom have a right to reside in Ireland, to become Irish citizens and gain legal access to the UK. This would not be a large number, but may be symbolic and become viewed as the last EU-related migration. Further, the UK might also be subject to what would become illegal migration across the border. With the CTA in place it will be relatively easy for EU citizens to travel across the border into NI. The UK Government has stated that it is not concerned that the CTA will allow EU citizens to cross the Ireland-NI border without specific checks being conducted as migration to the UK can be controlled internally though access to bank accounts, the NHS or schools. However, this may have a chilling effect upon access to essential services for migrant workers and their families as the prospect of being reported to the UK Home Office may deter migrant workers from reporting crimes or breaches of employment rights, or accessing essential health services or education.

Rights which are exercised by travelling to the UK also require consideration. This is particularly important to women from Ireland and NI who wish to access abortion services in GB. The CTA currently enables women in Ireland to travel to GB to access abortion services (albeit the economic and social difficulties associated with such travel remain highly problematic). Were the CTA to be downgraded, Irish women could still travel to EU countries to access abortion services, but the additional costs associated with such travel, as well as the potential difficulties with access and language, would exacerbate the difficulties they face.⁶⁹ The CTA, as it currently stands, is an extremely important element of abortion travel for women in Ireland.

The UK withdrawal from the EU means the CTA has come under scrutiny and the differences between being an Irish, UK, EU citizen and the potential consequences for access to rights is coming into sharp relief.

⁶⁹ M. Enright, 'Travel to England as the Safety Valve on Ireland's Abortion Regime – Difficulties After Brexit.' <<https://delilawblog.wordpress.com/2016/07/14/mairead-enright-travel-to-england-as-the-safety-valve-on-irelands-abortion-regime-difficulties-after-brexite/>> (accessed 9 January 2018).

Common Travel Area and European Union Rights

Currently, the CTA and the EU treaties both provide a range of similar rights for UK and Irish citizens. For instance, welfare rights stemming from the CTA are virtually identical to those of any EU citizen possesses. The UK's welfare system is designed to work compatibly with the CTA, indeed several UK welfare rights require prior residency in the CTA. This effectively means that those living in Ireland can move to the UK and access social security benefits as if they had been resident in the UK. While all EU citizens habitually resident within the CTA are able to access these benefits, this rule was established to benefit Irish and UK citizens moving between the two countries.

The rights that the UK grants to Irish citizens, or that Ireland grants to UK citizens, will not themselves be at risk post-Brexit: the fact that Irish citizens are 'not foreign' under UK law and similar Irish provisions, falls outside of the scope of EU law and can, as a matter of law and fact, continue post-Brexit. However, insofar as the CTA covers the portability of benefits granted to Irish citizens once they are in the UK, the Republic of Ireland may also be obliged to extend portability of the same benefits to all other EU citizens.

With regard to social security coordination, the CTA's exemption under Protocol 20 does not negate the obligation under EU law for all EU member states to extend benefits stemming from bilateral agreements that fall within the scope of EU law to all EU citizens.⁷⁰ Currently, if an Irish worker travels to the UK (under the CTA) and collects social security or a pension there and that social security or pension collection is transportable back to Ireland for aggregation purposes, the same would have to happen to a French or a German worker in the UK who collects social security or pension (under UK law) and then moves to Ireland. This will require coordinating mechanisms that are very similar to those currently required under EU law (i.e. Regulation 883/2004) in the UK as well as in Ireland, so information about accrual of benefits can be easily passed on.

Protocol 20 permits better treatment for UK citizens in Ireland and Irish citizens in the UK than for all other EU citizens, but where rights extended are equivalent to those applicable under EU law, they have to then be mirrored for all other EU citizens. This may not be administratively straightforward as much of the CTA's arrangements are uncoded, and the UK will not be automatically participating in the overarching EU social security coordination project post-Brexit. However, in para 30 of the Phase 1 Report the EU and UK provisionally agree to continue to coordinate social security so as to make these rights viable.

A further risk factor is the reach of the proposed Henry VIII powers contained in the Brexit legislation (the EU (Withdrawal) Bill and Trade Bill) currently before Westminster. As discussed in Chapter 2, this legislation would permit the UK Government to take action under statutory instrument which could dismantle the CTA with scant legislative oversight at Westminster (and with the NI Assembly inoperative).

The CTA is not a fixed agreement to be kept or scrapped, but rather a set of shared understandings and legal provisions. Critically, the UK and Irish Governments have now spent a tremendous amount of time unpicking the CTA and although some questions remain over what legal provisions relate to the CTA and what do not, the obligations owed to each other's

⁷⁰ See C-55/00 *Gottardo v Istituto Nazionale della Previdenza Sociale* [2002] ECR I-413, [39] (CJEU).

citizens are perhaps the clearest they have been since 1921. Those shared understandings could well be hollowed out without the language of the CTA being abandoned. To effectively maintain the CTA, there are a number of key features that would have to remain. Primary amongst these is the principle of reciprocity, whereby the UK and Ireland would continue to treat each other's citizens as non-foreign. The benefits flowing from this would also have to be maintained. This means the continued ability of the Irish to travel, live, work, claim healthcare and social security payments, and vote in the UK (and of UK citizens to do the same in Ireland).

To ensure its longevity and to provide security for Irish people resident in the UK (including individuals from NI who only hold Irish citizenship and who do not wish to claim their entitlement to UK citizenship) and UK citizens from Britain in Ireland, the legal obligations contained in the CTA should now be placed into a treaty between the UK and Ireland.

The Phase 1 Report, the CTA and Residual EU Rights

Following Brexit, the Phase 1 Report will result in the creation of at least nine different combinations of NI residents, with different rights. This will create a burdensome and complicated system for the enforcement of rights. The complexity of the different levels of rights and status could be deeply damaging to a shared and principled culture of human rights within Northern Ireland. The current state of the negotiations will mean at least nine main categories of rights holder:

- 1) Irish citizen (no UK citizenship)
- 2) UK citizen (no Irish citizenship)
- 3) Dual Irish-UK citizen (no NI connection)
- 4) Dual Irish-UK citizen (part of 'people of NI')
- 5) Non-UK citizen & Irish entitled (e.g. USA)
- 6) Non-Irish EU
- 7) Non-EU, Non-UK
- 8) 'Worker' in Ireland with EU/UK citizenship
- 9) 'Worker' in UK with EU/UK citizenship

The Report guarantees that those from NI (who hold Irish passports or who are entitled to them) continue to have EU citizenship through their Irish citizenship.⁷¹ The retention of EU citizenship and critically the ability to exercise it when resident in NI is a significant concession for Ireland. Remarkably the Phase 1 Report only appears to grant this exercise of rights to Irish EU citizens, others EU citizens resident in NI are not covered by this concession. This issue will have to be clarified, as it would create a rather odd anomaly for non-Irish EU citizens, and other non-Irish residents in NI. The operation of this concession will have to be covered in the Withdrawal Agreement. The details will be particularly important as up to now, access to EU rights such as free movement of services or capital has depended upon EU citizens being resident in the EU.⁷² For instance, Faroe Islanders have Danish passports but to exercise their rights must be resident in the EU as the Faroe Islands are not part of the EU. The Withdrawal

⁷¹ EU-UK Phase 1 Joint Report (n1) para 52.

⁷² Rights associated with labour are covered by free movement of persons law (TFEU, Articles 63-66) and are therefore less problematic in this context.

Agreement will have to cover access to EU institutions, individuals' ability to enforce their EU citizenship rights and representation if EU citizenship is to be effective when an individual is resident in the non-EU territory of NI.

It will also be important to consider how Irish EU citizens in NI are represented in the EU democratic institutions. At present Ireland does not enable non-residents to vote in elections. There is no bar in EU law to prevent countries extending their votes to emigrants and several countries including France do so successfully. Ireland should extend the franchise for EU Parliamentary elections to Irish-EU residents in NI post Brexit.

The categorisation of individuals into nine groups in NI will create a burdensome and complicated system of citizenship and residency rights. It will mean, for example, that there will be two forms of EU residents in NI – pre- and post-Brexit EU citizens – with distinct rights from the EU citizens resident in Ireland (covered in Chapter 4 of this Report). The extent of this differentiation remains unclear as it is subject to Phase 2 negotiations nonetheless to ensure that no gap in reciprocity emerges under the terms of the GFA or the CTA it will be important to ensure that all residents in NI have access to specific rights – particularly in this context, economic, social and cultural rights.

Trade, Cross Border Activities and Human Rights

For NI paras 49-50 of the Phase 1 Report are key to understanding how future cross border activity will be regulated, although against the backdrop of the CTA these provisions are largely related to goods and, to a lesser extent, services. First, these provisions recognise that ideally the UK and the EU will reach a trade arrangement. If this cannot be achieved, the 'back-up' solution is that the UK will propose an 'island of Ireland' solution. It is very difficult to see what these would look like if not 'special status' for NI; declaring it an autonomous customs territory that is able to strike a trade deal with the EU that prevents a hard border without participation from the rest of the UK. Should that 'back-up' solution fail, the UK has guaranteed that the UK as a whole will maintain 'full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 agreement'.⁷³

Paras 49-50 go beyond the GFA as they specifically enumerate three bases for full alignment, namely: (1) North-South cooperation, (2) the all island economy and (3) the 1998 Agreement. This seems to suggest that the UK is promising to effectively adopt EU legislation in all those areas of law that impact on both the all-island economy and the GFA. While this will not need to involve free movement of persons rules, as the CTA ensures such movement between the UK and Ireland, it seems to suggest full regulatory alignment with the Single Market rules on free movement of both industrial goods and agricultural goods, and a customs union between the UK and the EU that obviates the need for border controls. This will be important in ensuring the maintenance of standards of living across the island and no diminution on key economic rights. The areas covered by full regulatory alignment would appear to be expansive and will touch upon the exercise of economic and social rights in particular, however, at present there remains ambiguity as to the actual content of regulatory alignment. Should a

⁷³ EU-UK Phase 1 Joint Report (n1) para 49.

no-deal Brexit occur it will be essential that the parameters of full regulatory alignment are agreed upon by all parties.

Post Brexit, trade in services between the UK and Ireland in terms of the CTA and EU citizenship may become problematic under WTO law, specifically the General Agreement on Trade in Services (GATS). The provision of services between the UK and Ireland seems implied by the CTA arrangements – i.e., if people can freely reside in both countries, and move between them, and work/establish in them, then they can obviously also work cross-border. WTO law could affect the provision of services to the EU from NI. GATS Article V sets the operation of Preferential Trade Agreements (PTA) in services – the EU itself is an example of a PTA. Under WTO law, a PTA must cover the four modes of services supply:

Mode 1 – Cross border: A user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.

Mode 2 – Consumption abroad: Citizens of country A have moved abroad as tourists, students, or patients to consume the respective services.

Mode 3 – Commercial presence: The service is provided within country A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and — controlled company (bank, hotel group, construction company, etc.).

Mode 4 – Movement of natural persons: A foreign national provides a service within country A as an independent supplier (e.g., consultant, health worker) or employee of a service supplier (e.g. consultancy firm, hospital, construction company).

These modes map onto EU free movements (i.e. of persons, of services, and of establishment). The CTA also implies, if not explicitly guarantees, similar rights. All of those modes of supply are covered by the EU Single Market, which is perceived under WTO terms as a PTA compliant with GATS. Post Brexit, if the UK permits all four modes of supply of services between NI and Ireland without restrictions as the CTA clearly allows, this would be a violation of GATS Most Favoured Nation rules on the part of both the EU and the UK unless it was covered by a comprehensive trade deal between the UK and the EU. This is because the CTA is not a PTA on WTO terms.

This may appear to be only a technical issue. However, ensuring that those currently employed in the cross-border provision of services can continue to do so, will be critical to maintain the standard of living for many individuals and communities. Furthermore, the CTA does not address whether the provision of services from Northern Ireland to the remainder of the EU (and not merely Ireland) will continue to be governed by EU law; if the right to provide services under EU law is lost because Northern Ireland is not a Member State territory, this again will have significant impact on the standard of living and livelihood for many in Northern Ireland. Clarity is therefore urgently needed.

The conclusion of the Phase 1 negotiations indicates that the EU does not intend to passively acquiesce to any post-Brexit diminution of rights by the UK. The UK Government has frequently claimed that it is seeking a comprehensive agreement with the EU after Brexit (bringing in aspects such as security in addition to trade). For the EU, a comprehensive agreement should involve provision for data protection, human rights and possibly workers' rights (at the very least to minimise the potential that companies operating in the UK and trading into the EU under any Brexit agreement could use a lack of such safeguards to undercut their EU-based competitors).

Political, socio-economic, environmental and other rights, are now commonly provided for as part of international trade agreements. Seventy percent of states now participate in PTAs with human rights requirements.⁷⁴ The EU commits itself to respect international legal obligations, including on human rights, in this context;

[T]he Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.⁷⁵

The EU is under treaty obligation to conduct its foreign policy in respect of the principles of 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity ...'.⁷⁶ As part of the EU's Revised Cotonou Agreement 2008-2013 (still operational), the EU incorporates migration and security provisions into trade agreements with African, Caribbean and Pacific Countries (ACP). The EU is subject to human rights in trade agreements across privacy, labour rights, transparency, due process, and sustainable development amongst others.⁷⁷ The EU and Canada also made reciprocal human rights commitments as part of the preamble to their Comprehensive Economic and Trade Agreement (CETA).

Such agreements open the possibility of the EU and UK incorporating human rights provisions into the Withdrawal Agreement and the trade deal that follows. These could ensure the continued reciprocity of rights protections and give a harder edge to the UK's non-diminution guarantee. The enforceability and effectiveness of such provisions vary in existing trade agreements, and any move to incorporate rights into a Comprehensive EU-UK Agreement must be meaningful, cataloguing the reciprocal rights guarantees and enforcement arrangements. In this regard, reports of a leaked European Parliament motion which would require the UK to remain party to the ECHR under a Comprehensive EU-UK Agreement would provide for such a meaningful protection, although only in the ambit of civil and political rights.⁷⁸ Ireland should therefore prioritise the negotiation of human rights protection clauses in any EU-UK trade agreement to secure existing protections in NI.

⁷⁴ S.A. Aaronson, 'Sleeping in slowly: how human rights concerns are penetrating the WTO' (2007) 6 *World Trade Review* 413, 429.

⁷⁵ TFEU, Article 208(2).

⁷⁶ TEU, Article 21(1).

⁷⁷ Aaronson (n74) 440-441.

⁷⁸ J. Stone, 'Brexit: Britain must stay in European Court of Human Rights if it wants a trade deal, Brussels to insist' *The Independent* (7 December 2017).

Recommendations

8. The Irish Government should support the inclusion of extensive human rights clauses in a UK-EU Trade Agreement and Withdrawal Agreement to ensure that reciprocal and equivalent rights protections are maintained in Ireland and Northern Ireland post Brexit.
9. A Common Travel Area Treaty should be negotiated between the UK and Ireland to prevent incremental changes to the Common Travel Area's operation and to give UK and Irish citizens assurances as to their status and continued access to social, education, democratic, health and welfare rights.
10. Assurances should be sought from the UK regarding its proposed checking of immigration status when individuals seek to access services. In particular, attention should be paid to the impact on the Irish border and the chilling effect upon migrants accessing essential services or reporting crime to the police.
11. The IHREC should closely assess the impact of Common Travel Area developments upon Irish women travelling to Britain to access abortion services. Particular attention should be paid to any new barriers to accessing services and to resultant economic hardship.
12. The Irish and UK Governments should clarify through the Withdrawal Agreement, whether non-Irish citizens will have full continuing EU rights in Northern Ireland (including the freedom to provide services to all EU member states from Northern Ireland). The Phase 1 Report proposes to afford Irish EU citizens' significantly greater rights than other EU citizens.
13. Ireland should consider extending the franchise in EU Parliamentary elections to Irish EU citizens in Northern Ireland.
14. Parties to the negotiations should clarify the parameters of 'regulatory alignment' to prevent a no-deal scenario producing economic hardship in Ireland and Northern Ireland.
15. The Irish Government should undertake and publish a study of WTO rules on trade in services and the external EU border to assess the economic hardship potentially resultant from a no-deal scenario and to enable mitigating action to be taken.

4. National Identity and Rights

The Phase 1 Joint Report proposes an array of different entitlements based on a matrix of citizenships held, residency (pre- and post- Brexit), connection to NI, familial relationships, and employment. These elements combine for many to provide significant rights, including so-called citizens' rights. Some combinations leave gaps in protection, however. In Ireland and the UK, excluding entitlements connected to family members, there are at least 46 types of situation. The rights for those in eight of those circumstances have a significant remaining lack of clarity. For the other 38 situations, excluding CTA entitlements, at least eight different sets of rules will apply.

Brexit and the reshuffling of citizenship entitlements and their associated rights will bring about a profound change to national identities and their perception in the UK, NI, and Ireland. The GFA described NI citizens' right to choose a UK or Irish nationality as a 'birth right'.⁷⁹ However, while these national identities have always been important to individuals and communities to greater or lesser degrees, there have been few practical implications of one's choice (or non-choice) of identity across the islands. This, of course, has been a privileged position. Those without UK or Irish citizenship, and especially those without EU citizenship, have at various times felt the impacts of their national identity in quite severe ways. Post Brexit, however, an individual's choices between the citizenship options available to them will be of practical consequence and not simply exercises in self-understanding. This novel attachment of functional implications to citizenship choices in the UK and Ireland, will create split identities, in which individuals feel obliged to claim Irish citizenship for practical reasons, even if they self-identify as British.

The different rights available to different citizens (especially those living side-by-side in NI) will also be exacerbated, if not being entirely new. Non-EU citizens have been used to living alongside individuals in NI with more rights and entitlements. However, for a reasonable period of time UK and Irish citizens have been able to expect the same in NI (wherever their place of birth or the length of their association with the region). The Phase 1 Report's approach to Brexit appears to change this. Full EU citizenship is guaranteed to the 'people of Northern Ireland who are Irish citizens', but others will not enjoy these rights. This will mean UK citizens and Irish citizens living alongside each other in NI will have different entitlements. The CTA can mitigate some of the disparities, but not all of them and not for all. Non-Irish EU citizens will find themselves in a different position from Irish or UK citizens. EU citizens resident in NI prior to Brexit stand, in certain respects, to enjoy rights which UK citizens from GB will not enjoy. These proposed arrangements create the potential for identity to once again become a highly divisive issue in NI.

Amidst this already convoluted interweaving of identities, the Joint Report explicitly reserves a space for an EU 'identity' for NI's Irish citizens. While much focus is on the legal entitlements, including in what follows below, an important background consideration is the space that will remain post-Brexit for a positive affirmation and expression of that EU identity within NI.

⁷⁹ GFA (n6) section 2, para 1(vi).

Passports, Residency and Rights

There are multiple combinations of residency and citizenship entitlements in NI and Ireland that arise from the conclusions of the Phase 1 Report. Depending on which nationalities an individual has and where they are resident both before and after Brexit, there will be entitlements to different packages of rights. The main packages of rights are Citizens' Rights and Withdrawal Agreement terms; however, UK and Irish domestic laws and citizenship entitlements will remain relevant for many groups.

	Rights after Brexit day in UK (excl CTA)				Rights after Brexit day in Ireland (excl CTA)	
	Become NI Resident pre-Brexit	Become NI Resident post-Brexit	Become GB resident pre-Brexit	Become GB resident post-Brexit	Become Ireland Resident pre-Brexit	Become Ireland Resident post-Brexit
Irish citizen (no UK citizenship)	Citizens' Rights	(Unclear) UK National Law as a minimum	Citizens' Rights	(Unclear) UK National Law as a minimum	Full Irish National Rights & Full EU Law	Full Irish National Rights & Full EU Law
UK citizen (no Irish citizenship)	Full UK National Rights	Full UK National Rights	Full UK National Rights	Full UK National Rights	Citizens' Rights	Withdrawal Agreement terms & Irish Domestic Law
Dual Irish-UK citizen (no NI connection)	Full UK National Rights & (Unclear) Citizens' Rights as a minimum	(Unclear) Full UK National Rights as a minimum	Full UK National Rights & (Unclear) Citizens' Rights as a minimum	(Unclear) Full UK National Rights as a minimum	Full Irish National Rights & Full EU Law	Full Irish National Rights & Full EU Law
Dual Irish-UK citizen (part of 'people of NI')	Full UK National Rights & Full EU Law	Full UK National Rights & Full EU Law	Full UK National Rights & (Unclear) Citizens' Rights as a minimum	(Unclear) Full UK National Rights as a minimum	Full Irish National Rights & Full EU Law	Full Irish National Rights & Full EU Law
Non-UK citizen & Irish entitled (e.g. USA)	UK Domestic Law	UK Domestic Law	UK Domestic Law	UK Domestic Law	Irish Domestic Law	Irish Domestic Law
Non-Irish EU	Citizens' Rights	UK Domestic Law	Citizens' Rights	UK Domestic Law	Full EU Law	Full EU Law
Non-EU, Non-UK	UK Domestic Law	UK Domestic Law	UK National Law	UK Domestic Law	Irish Domestic Law	Irish Domestic Law
'Worker' in Ireland with EU/UK citizenship	Citizens' Rights	UK Domestic Law	Citizens' Rights	UK Domestic Law	No frontier worker status – regular rules apply	No frontier worker status – regular rules apply
'Worker' in UK with EU/UK citizenship	No frontier worker status – regular rules apply	No frontier worker status – regular rules apply	No frontier worker status – regular rules apply	No frontier worker status – regular rules apply	Citizens' Rights	EU citizens = Full EU Law UK Citizens = Withdrawal Agreement terms & Irish Domestic Law

Northern Ireland's Irish Citizens

The Phase 1 Report notes that 'the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens'.⁸⁰ There is no definition of who constitutes the 'people of Northern Ireland', and in particular whether it will be defined by birth place, parentage, residency or some combination thereof. In any case, the Phase 1 Report appears to exclude 'the people of Northern Ireland' who are ineligible for Irish citizenship from accessing EU rights. Further, on its face, this provision would seem to require that individuals from NI take active steps to claim their Irish citizenship entitlement in order to access continuing EU rights. However, for some, citizenship is automatically bestowed by Irish law; 'A person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen'⁸¹ (except where the person is not born on the island of Ireland, when citizenship does not commence until the birth is registered⁸²). Therefore, while it may come as a surprise to some in NI, many born there are pre-existing Irish citizens without themselves doing any act of affirmation or registration, and this will allow them to benefit from EU rights post Brexit.

For others in NI and further afield, the Phase 1 Report implies that Irish citizenship must be claimed in order to enjoy EU rights. Individuals born in NI to a parent who is resident in NI or a UK citizen are entitled to claim Irish citizenship.⁸³ Those born in NI to parents of any nationality since 2004 can claim citizenship if they had a parent who was an EEA or Swiss citizen and who was resident in NI or Ireland 3 of the 4 years prior to their birth.⁸⁴ Those born in Great Britain with an Irish parent or grandparent are also entitled to an Irish passport by applying for Irish Citizenship through Ireland's system of Foreign Birth Registration.

The Phase 1 Report therefore appears to emphasise differences in Irish citizenship law as it applies to NI between a) automatic citizens, b) citizens by registration, and c) non-citizens. It is difficult to see how the categories can be distinguished between for practical purposes. A sudden influx of registrations from class b) is likely as the Joint Report indicates actual citizenship (not merely entitlement) is required. Further, while those in category a) can already apply for a certificate of nationality,⁸⁵ *requiring* all automatic citizens to register would be a significant task, would require legislation to amend Irish citizenship law, and would put something of a dent in GFA principles.⁸⁶ Yet, without registration of individuals in category a), someone seeking to rely on their EU rights in France, for example, would have no official documentary evidence of their Irish citizenship to show. An approach which would avoid registration would grant Irish citizenship to all NI residents regardless of their current entitlements. This expansive – and likely controversial – approach would address the

⁸⁰ EU-UK Phase 1 Joint Report (n1) para 52.

⁸¹ European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/78, Article 7(1).

⁸² Directive 2004/38/EC (n81) Article 7(3).

⁸³ Subsection inserted by Irish Nationality and Citizenship Act 2004 (No. 38 of /2004) s 3(d); Irish Nationality and Citizenship Act 1956 (as amended and unofficially consolidated) s 6(a).

⁸⁴ Section inserted by Irish Nationality and Citizenship Act 2004 (No. 38 of /2004) s 4; Irish Nationality and Citizenship Act 1956 (as amended and unofficially consolidated) s 6A and 6B.

⁸⁵ Irish Nationality and Citizenship Act 1956 (as amended and unofficially consolidated), s 28.

⁸⁶ E.g. GFA (n6) section 2, para 1(v); UK-Ireland Agreement, preamble.

substantive and administrative issues generated by having different classes of Irish citizen within NI.

Irish Citizens in the UK

The UK has its own post-Brexit administrative problem relating to the specificities of Irish citizenship. The Phase 1 Report affirms the right of 'the people of Northern Ireland' to choose between being either UK citizens, Irish citizens or both. The UK commits to respect Ireland's ongoing EU membership⁸⁷ but it does not offer any special guarantees (beyond the citizens' rights offered to other EU citizens resident in the UK pre-Brexit) to Irish citizens except those who are part of the people of NI. The lack of a special guarantee for Irish citizens extends to NI, indeed a literal reading of the Phase 1 Report's text would not entitle Irish citizens who are not part of 'the people of Northern Ireland' to exercise their EU rights in NI. The formal picture would thus mandate a division of NI's Irish citizens (who would have continuing EU rights in NI) from other Irish citizens (who would have no special EU rights in NI).

Yet in practice, to offer rights to the Irish citizens who form part of the people of NI and not to all Irish citizens would entail significant difficulty. Rather, the UK will either have to

- a) allow all Irish citizens the same rights (whether NI linked or not);
- b) provide rights across the UK for the people of NI with Irish citizenship, but only in NI for Irish citizens without an NI link;
- c) provide rights across the UK for the people of NI with Irish citizenship, but no rights for Irish citizens without an NI link or
- d) provide no rights (except those existing from EU law) to Irish citizens in GB, including denying rights for individuals from NI who hold only Irish citizenship.

Approach a) would allow Irish citizens without a link to NI to piggyback on NI's special arrangements to gain greater rights in the UK than their EU counterparts (indeed, full EU citizenship rights within the UK). This might entitle Irish citizens to greater ongoing rights in the UK than many UK citizens, and might be viewed in some anti-immigration quarters as a (symbolic) backdoor to migration to the UK. It would also leave the demands upon the UK Government open to changes in Irish citizenship law. For example, the Irish State may grant citizenship to an increased number of asylum seekers, who would consequently gain access to the provision by the UK of full EU citizenship rights.

Approach b) would maintain largely common rights for Irish citizens on the island of Ireland, being focused upon the exercise by non-NI Irish citizens of their citizenship rights in NI. Approach c) would, however, deny a common set of entitlements to Irish citizens in both parts of the island of Ireland. Both approaches b) and c) would require the UK to define the meaning of the 'people of Northern Ireland' for these purposes, and to have the administrative means to differentiate between people on the basis of this definition.

Approach d) would cause obvious controversy by singling out Irish citizens in NI. The approach would not disadvantage the Irish 'people of Northern Ireland' relative to the British 'people of Northern Ireland' as the latter would not have comparable EU rights to lose. Nonetheless,

⁸⁷ EU-UK Phase 1 Joint Report (n1) para 45.

the approach could justifiably be viewed as an attack on one of the benefits of identifying as Irish within NI.

All of these approaches are concerned with new acquisitions of EU citizenship rights, and would be without prejudice to the bundle of EU citizens' rights that all Irish citizens resident in the UK prior to Brexit would continue to enjoy as long as their residency continued through permanent residency ('five years of continuous and lawful residence as a worker/self-employed person, student, self-sufficient person, or family member thereof'⁸⁸) or temporary residency (for residents in UK less than five years).⁸⁹ Permanent residency is durable through up to five years absence from the UK, meaning that an Irish citizen could return within five years and continue with their EU citizen's rights in the UK.⁹⁰ This standard entitlement for all EU citizens would combine in an awkward fashion with approaches a), b), and c) above where Irish citizens possess rights beyond those acquired through residency.

Citizens' Rights Terms

The terms of the citizens' rights agreement between the EU and the UK at the end of Phase 1 of the negotiations was a significant milestone. The Phase 1 Report sets out who is entitled to continuing access to EU citizens' rights and what those rights are.

The protections provided to those with 'citizens' rights' are wide reaching. Eligible individuals will maintain all of their current EU citizens' rights as they exist on Brexit day. This includes the right of all EU citizens to be treated equally, regardless of their 'home' member state.⁹¹ Importantly however (and addressed further below), their rights will not continue to evolve with new EU protections that come into force after Brexit day. Nonetheless, citizens' rights explicitly include the right to social security for workers, students, the self-employed and economically inactive citizens. Education rights, tax advantages, employment rights,⁹² and health care rights⁹³ are all maintained. The right to equal treatment as set out in the citizenship-relevant provisions of EU law is maintained⁹⁴ and discrimination in respect of UK and EU citizens based on nationality is explicitly prohibited.⁹⁵

EU citizens resident in the UK on Brexit day, and UK citizens resident in the EU on Brexit day will be entitled to continuing citizens' rights. The residency requirement is highly important; these rights will only apply to those resident across the border on Brexit day. People seeking to relocate for the first time or return after their residency permissions have expired will not be entitled to citizens' rights.

⁸⁸ 'Joint technical note expressing the detailed consensus of the UK and EU positions on Citizens' Rights' (TF50 2017, 20) 8 December 2017, row 12; EU-UK Phase 1 Joint Report (n1) para 21; Directive 2004/38/EC (n81) Articles 7 and 16.

⁸⁹ EU-UK Joint Technical Note on Citizens' Rights (n88) row 10; EU-UK Phase 1 Joint Report (n1) para 20; Directive 2004/38/EC (n81) Articles 6 and 7.

⁹⁰ EU-UK Joint Technical Note on Citizens' Rights (n88) row 14; EU-UK Phase 1 Joint Report (n1) para 25.

⁹¹ EU-UK Phase 1 Joint Report (n1) para 11.

⁹² EU-UK Phase 1 Joint Report (n1) para 31; EU-UK Joint Technical Note on Citizens' Rights (n88) row 19.

⁹³ EU-UK Phase 1 Joint Report (n1) para 29; EU-UK Joint Technical Note on Citizens' Rights (n88) row 47.

⁹⁴ EU-UK Phase 1 Joint Report (n1) para 31; EU-UK Joint Technical Note on Citizens' Rights (n88) row 47.

⁹⁵ EU-UK Phase 1 Joint Report (n1) para 11.

The citizens' rights guarantee will be crucial for the large numbers of Irish citizens living in the UK on Brexit day. However, under a literal reading of the Joint Report this could be the full extent of the rights of Irish citizens who are not part of the people of NI. It is also all that is currently guaranteed to the people of NI without Irish or other EU citizenship in the EU, including those resident in Ireland on Brexit day. Citizens' rights terms will also be of crucial importance to the (non-Irish, non-UK) EU citizens resident in the UK (including NI) on Brexit day.

Citizens' rights are not afforded to all on an unlimited basis, but rather only as long as their residency continues to be valid. Valid residency for the purposes of the Joint Report and EU law can be permanent or temporary. Those who already have permanent residency are entitled to have it converted free of charge to a document conferring citizens' rights.⁹⁶ Those who do not already have recognised permanent residency are entitled to claim recognition on the basis of the Withdrawal Agreement having had five years of continuous residence as a worker, student, or self-sufficient person.⁹⁷ The continuity of this residence is not broken by absences of six months a year, or a single 12 month break for an important reason such as illness or pregnancy.⁹⁸ In addition, a worker who reaches the state age of retirement as a resident is entitled to residency without having been resident for five years.⁹⁹ So, too, is a worker who has two years residency who stops work due to permanent incapacity.¹⁰⁰ The UK is calling these permanent residencies 'settled status'. Once acquired, this form of EU permanent residence is lost primarily by absence of at least five years. Unless such an absence occurs, permanent residents under the Withdrawal Agreement terms are entitled to citizens' rights for life.

Neither the Phase 1 Report nor the Joint Technical Note are clear as to whether residency periods will continue to accrue after Brexit day. They note; 'periods of lawful residence prior to the specified [Brexit] date [are] included in the calculation'.¹⁰¹ This does not make fully clear whether residence after Brexit is excluded from the calculation. Both the EU¹⁰² and the UK Government's¹⁰³ interpretation of this section, however, appears to be that residency can continue to accrue after Brexit, and permanent residency can be applied for under the Withdrawal Agreement rules (and presumably with the same citizens' right entitlements). This is of vast importance as it would determine whether permanent residents will be created by means of the Withdrawal Agreement after Brexit day or whether it is a closed category

⁹⁶ EU-UK Phase 1 Joint Report (n1) para 23; EU-UK Joint Technical Note on Citizens' Rights (n88) row 36.

⁹⁷ EU-UK Joint Technical Note on Citizens' Rights (n88) row 12; EU-UK Phase 1 Joint Report (n1) para 21; Directive 2004/38/EC (n81) Articles 7 and 16.

⁹⁸ EU-UK Joint Technical Note on Citizens' Rights (n88) row 11; EU-UK Phase 1 Joint Report (n1) para 25; Directive 2004/38/EC (n81) Article 16(3).

⁹⁹ EU-UK Joint Technical Note on Citizens' Rights (n88) row 13; EU-UK Phase 1 Joint Report (n1) para 21; Directive 2004/38/EC (n81) Article 17(1)a.

¹⁰⁰ EU-UK Phase 1 Joint Report (n1) para 21; EU-UK Joint Technical Note on Citizens' Rights (n88) row 13; Directive 2004/38/EC (n81) Article 17(1)b.

¹⁰¹ EU-UK Phase 1 Joint Report (n1) para 21; EU-UK Joint Technical Note on Citizens' Rights (n88) row 12.

¹⁰² European Commission, 'EU Citizens' Rights and Brexit' (7 July 2017) <https://ec.europa.eu/unitedkingdom/services/your-rights/Brexit_en> (accessed 10 January 2018).

¹⁰³ HM Government, 'Technical Note: Citizens' Rights - Administrative Procedures in the UK' (7 November 2017) para 13 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/657694/TECHNICAL_NOTE_CITIZENS_RIGHTS_-_ADMINISTRATIVE_PROCEDURES_IN_THE_UK.pdf> (accessed 7 January 2018).

from that date. Brexit day is expected to be the 29 March 2019. If only periods of residence prior to Brexit day were to be included in the calculation, this would mean the 29 March 2014 would have been the latest date to start continuous residency in order to acquire permanent residency status under the Agreement. However, even such individuals will be able to stay in the EU/UK for at least two years after Brexit day (29 March 2021 or later) during the administrative/ application window.¹⁰⁴

Those EU or UK citizens resident for less than five years on Brexit day, and who are not otherwise entitled to permanent residency, will be granted temporary residence. To stay longer than three months, residents will need to have worker status, be self-employed, self-sufficient, or in education.¹⁰⁵ If one of these statuses is maintained (and changes in status are permitted¹⁰⁶) then, it appears, temporary residency with citizens' rights can continue for up to five years before permanent residency is acquired.¹⁰⁷ This means that the latest permanent residencies required to be given under the Withdrawal Agreement terms would be 29 March 2024 (become temporarily resident 29 March 2019, and accrue the necessary five years).

For those resident prior to Brexit, the Joint Report also provides for temporary residence of up to three months with no work or self-sufficiency requirements placed upon them. However, in light of the two-year application window following Brexit day, this category is likely to be of limited relevance. Citizens' rights cease to apply for temporary residents when their residency ends, although there may be other rights afforded to some by national law.

Those EU citizens in the UK and those UK citizens in the EU on Brexit day who do not have a legal right to be there, will have no citizens' rights. National laws (of greater or lesser severity) will be applied (with more or less stringency). The UK has not ruled out rejecting applications from those EU citizens in the UK (including NI) prior to Brexit day who do not meet the requirements of even temporary residency (e.g. someone who has been unsuccessfully seeking work for some period of time and who has no means of supporting themselves). Those whose application is rejected will have until the end of the administrative/application period specified by the UK (at least two years¹⁰⁸) to secure residency status through another route or lose their rights to work and to services.

EU law has allowed, and the Withdrawal Agreement will continue to allow, the UK to require EU residents who are not economically active or studying to hold comprehensive sickness insurance, and also allows them to apply 'a genuine and effective work test' to some.¹⁰⁹ The UK has claimed that it will do neither of those things in assessing settled status applications,¹¹⁰

¹⁰⁴ EU-UK Phase 1 Joint Report (n1) para 17e; EU-UK Joint Technical Note on Citizens' Rights (n88) row 23.

¹⁰⁵ Directive 2004/38/EC (n81) Article 7.

¹⁰⁶ EU-UK Phase 1 Joint Report (n1) para 20; EU-UK Joint Technical Note on Citizens' Rights (n88) rows 6 and 10.

¹⁰⁷ EU-UK Joint Technical Note on Citizens' Rights (n88) row 20.

¹⁰⁸ EU-UK Phase 1 Joint Report (n1) para 17e; EU-UK Joint Technical Note on Citizens' Rights (n88) row 23.

¹⁰⁹ C. O'Brien, E. Spaventa and J. De Corninck, 'Comparative Report 2015 - The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (European Commission, 2017) 15-18.

¹¹⁰ HM Government, 'Technical Note: Citizens' Rights' (n103) para 11.

but it has a track record of applying a version of this 'genuine and effective work' test to low-income EU citizens seeking to claim social security benefits.¹¹¹

Full EU Citizenship

Citizens rights' while equivalent to the rights of full EU citizens on Brexit day, will not evolve with new EU law in the same manner as for those relying on full EU citizenship. This will create a disparity between two types of EU law – the rights frozen in time as at 29 March 2019, and the situation as it evolves and exists across the EU. For those relying on citizens' rights provisions, the Phase 1 Report locks in the rights available to EU citizens on Brexit day, in several places. First, the whole agreement is framed by the provision that 'EU law concepts used in Withdrawal Agreement [will be] interpreted in line with case law of the Court of Justice of the European Union by the specified date'.¹¹² There is additional provision for UK courts to pay due regard to 'relevant' decisions of the CJEU that are made after withdrawal.¹¹³ Relevant decisions will be those which are clarifications of pre-Brexit EU citizens' rights. Second, the agreement notes that the rights that eligible citizens are entitled to are those contained in 'Articles 18, 21, 45 and 49 TFEU, Article 24 of Directive 2004/38/EC and Regulation (EU) No 492/2011',¹¹⁴ but does not make provision for similar directives or regulations passed in the future. Third, the Joint Report notes that citizens' rights provisions establish 'rights for citizens following on from those established in Union law during the UK's membership of the European Union'.¹¹⁵ This can be contrasted with the position taken in relation to future social security arrangements, on which the EU and UK will 'decide jointly on the incorporation of future amendments to those regulations in the Withdrawal Agreement'.¹¹⁶

Within the UK, both of these legal positions will be operating simultaneously. Those EU citizens in the UK on Brexit day will enjoy the frozen benefits of their EU citizenship through the citizens' rights provisions (and will clearly retain their full evolved EU citizenship for use if they return to the EU area). However, the provisions regarding Ireland and NI (which are not otherwise contained within the citizens' rights section) guarantee that the people of NI with Irish citizenship 'will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland'.¹¹⁷ It continues that the Agreement is 'without prejudice to the rights, opportunities and identity that come with European Union citizenship'.¹¹⁸ This is the correct position, as Irish citizens in NI should be entitled to full and evolving EU rights and not have them frozen in time as a result of Brexit. However, it means that mechanisms will have to be developed to ensure that UK law (at least as far as the people of NI with Irish citizenship are concerned) keeps pace – in perpetuity – with all EU citizenship provisions.

¹¹¹ Department for Work and Pensions, 'Minimum Earnings Threshold for EEA Migrants Introduced' (21 February 2014) <<https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced>> (accessed 11 January 2018).

¹¹² EU-UK Phase 1 Joint Report (n1) para 9; EU-UK Joint Technical Note on Citizens' Rights (n88) row 1.

¹¹³ EU-UK Phase 1 Joint Report (n1) para 38; EU-UK Joint Technical Note on Citizens' Rights (n88) row 56.

¹¹⁴ EU-UK Phase 1 Joint Report (n1) para 31; EU-UK Joint Technical Note on Citizens' Rights (n88) row 19.

¹¹⁵ EU-UK Phase 1 Joint Report (n1) para 38.

¹¹⁶ EU-UK Phase 1 Joint Report (n1) para 30; EU-UK Joint Technical Note on Citizens' Rights (n88) row 50.

¹¹⁷ EU-UK Phase 1 Joint Report (n1) para 52.

¹¹⁸ EU-UK Phase 1 Joint Report (n1) para 52.

Common Travel Area Protections

The CTA across Ireland and the UK will provide additional benefits to Irish citizens who rely on the citizens' rights provisions in the UK.¹¹⁹ The Phase 1 Report allows for the continued operation of the CTA,¹²⁰ while the UK has noted that its Ireland Act 1949 will be relevant to the interpretation of Irish citizens' rights after Brexit.¹²¹ The act legally provides that Ireland is 'not a foreign country' and Irish citizens are not legally included as 'aliens' or 'foreigners'.¹²² In particular, the UK Government has indicated that the Ireland Act will exempt Irish citizens from having to apply for 'settled status' or a 'temporary residence permit' in the UK.¹²³ This is a provision of domestic law and could be changed by the UK Parliament, for example to require registration of Irish citizens in the UK, without breaching the Withdrawal Agreement.¹²⁴ Whether Irish citizens (resident in the UK on Brexit date) in the UK are required to register or not, they will be entitled to the package of EU citizens' rights for the duration of their residency.

The CTA will also provide some additional reassurance to Irish citizens who would have temporary residency under the Joint Report rules, or for those who are not resident in the UK on Brexit day and therefore might have no automatic citizens' rights. For other EU citizens, temporary residency will provide the full suite of citizens' rights but the loss of that temporary residency entitlement under EU law (e.g. by losing one's status as a 'worker'¹²⁵) would lead to the individual being subject to the standard UK legislation on temporary residence permits and settled status. Irish citizens on losing their EU entitlements would have this option, but would have the additional protections of the CTA arrangements if UK immigration policy on temporary residency was to be tightened after Brexit. The CTA is scattered across many domestic laws, treaties, and informal understandings,¹²⁶ and its provisions have become closely intertwined with EU law. It is therefore an uncertain and vulnerable framework on which to rely on in its current state. It would be prudent to condense and reiterate the content of the agreement in the near future.

The rights provided under CTA for Irish citizens in the UK (and vice-versa) are not identical to the rights enjoyed by EU citizens resident in the UK on Brexit day, but substantial overlaps do exist. For instance, rights to work without obtaining permission, to education, to healthcare, and to social security are covered by the CTA.¹²⁷ The EU and UK promise, in the Joint Report,

¹¹⁹ EU-UK Phase 1 Joint Report (n1) para 54.

¹²⁰ EU-UK Phase 1 Joint Report (n1) para 47.

¹²¹ UK Government, 'Status of EU Citizens in the UK: What You Need to Know' (7 April 2017) <<https://www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-what-you-need-to-know>> (accessed 11 January 2018).

¹²² Ireland Act 1949, s2.

¹²³ UK Government, 'Citizens' Rights - UK and Irish Nationals in the Common Travel Area' (22 December 2017) <<https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area>> (accessed 11 January 2018).

¹²⁴ Registration is allowed by; EU-UK Phase 1 Joint Report (n1) paras 16-17.

¹²⁵ Directive 2004/38/EC (n81) Article 7(3).

¹²⁶ See, e.g., existing legal powers in the UK to deport Irish citizens where the Home Secretary determines it to be 'conducive to the public good'; Immigration Act 1971, s 3; The Traveller Movement, *Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future* (December 2017) 12. See further section below on 'Prisoner Repatriation and Deportation'.

¹²⁷ UK Government, 'Citizens' Rights' (n121).

to continue to coordinate social security so as to make these rights obtainable.¹²⁸ This is of particular relevance for Ireland, which must continue to grant any EU citizens living in the UK and then moving to Ireland the same social security coverage that a UK citizen in a comparable position would enjoy.

When the citizens' rights protections are afforded under the Phase 1 Report, they are strong and appropriate. However, particular attention should be given to those who do not qualify or who will be under pressure to bring themselves within a residency category. Especially vulnerable will be non-Irish EU citizens in the UK and NI who struggle to establish legal temporary residency before Brexit day. They will have neither citizens' rights protections nor CTA protections in the UK. This will likely lead to pressure upon them to find employment or study by Brexit day in order to avoid relying on only the rights afforded by UK law. Additionally, as citizens' rights are only afforded to those in the UK on Brexit day, non-Irish EU citizens living in Ireland who move over the border post-Brexit will have no CTA or citizens' rights and will have to rely on whatever UK laws are in place.

EU Access on Brexit Terms

UK citizens who begin residence in the EU without an EU citizenship (including, from a strict reading of the Phase 1 Report, those 'people of Northern Ireland' who have not claimed Irish citizenship) will be in a special position. They will enjoy the rights afforded to them by the as-yet-undecided Withdrawal deal¹²⁹ and, in the context of Ireland, those rights provided under the CTA. Otherwise they will be subject to the national laws in their host country. UK citizens planning to move to an EU member state after 29 March 2019 will face uncertainty until at least the conclusion of the next phase of the negotiations.¹³⁰ At one extreme, with a minimal future relationship between the UK and EU, this could lead to UK citizens who enter the EU after Brexit day relying on whatever conditions are set in the national laws of the EU member states. At the other extreme, a close relationship with the EU after Brexit (a 'soft Brexit') could allow UK citizens entering the EU after Brexit many of the same rights they would enjoy today. In this context, the CTA will provide reassurance and rights to UK citizens seeking to move to Ireland after Brexit day (apparently regardless of the outcome of the withdrawal negotiations¹³¹).

UK Domestic Law

Those EU citizens – potentially including, if the CTA is left unclear, Irish citizens – who arrive in the UK after Brexit day, will be reliant upon the UK's domestic law. This is an unpredictable place for individuals to be in. The UK can unilaterally and without much notice change policy, and in the current anti-immigration climate in the country, xenophobic clamouring can quickly seep into national law. This is not new for non-EU citizens seeking to migrate to the UK, and

¹²⁸ EU-UK Phase 1 Joint Report (n1) paras 28, 30.

¹²⁹ EU-UK Joint Technical Note on Citizens' Rights (n88) row 58.

¹³⁰ European Commission, 'Recommendation for a Council Decision Supplementing the Council Decision of 22 May 2017 Authorising the Opening of Negotiations with the United Kingdom of Great Britain and Northern Ireland for an Agreement Setting out the Arrangements for Its Withdrawal from the European Union (Annex 1)' (2017) COM(2017) 830 final, para 5 <https://ec.europa.eu/commission/sites/beta-political/files/annex_commissions_recommendation_20-12-2017.pdf> (accessed 11 January 2018).

¹³¹ EU-UK Phase 1 Joint Report (n1) para 54.

their treatment can be observed as an indication of how the UK might treat EU citizens arriving in the UK after Brexit. Non-EU migrants are subjected – amongst other things – to regular checks at banks¹³² and in tenancy applications,¹³³ witnesses of crimes having their details passed to immigration enforcement,¹³⁴ high fees,¹³⁵ an 'immigration health surcharge',¹³⁶ and the prospect of indefinite detention pending deportation if found to be in the UK illegally.¹³⁷

The UK has not yet set the specific conditions which will apply in law, but the government has sought to reassure EU citizens in the UK that they are 'valued' and that the UK is one of the 'most tolerant...places in the world'.¹³⁸ However, the Government's June 2017 Policy Paper on the issue also noted that those EU citizens who arrive in the UK after Brexit 'should have no expectation of guaranteed settled status'.¹³⁹ Some of the anti-immigration context of the referendum and the emphasis on border control that has been seen in public discourse since, would also seem to predict harsher conditions for those EU citizens arriving in the UK after Brexit. While, under the Citizens' Rights terms (for those in the UK prior to Brexit day) the UK is not entitled to treat different EU nationalities differently, it would be entitled to impose different immigration terms upon different nationalities arriving after Brexit. This might involve, for example, minimal immigration processes for Spanish citizens but much stricter processes for Polish citizens.

The Withdrawal Agreement might yet establish a relationship between the UK and EU that restrains the UK from acting entirely on the basis of its domestic law, and which prevents it from differentiating between EU nationals. In any case, UK Government action in this respect would be restrained by the need to maintain good relationships with other countries which UK nationals prize access to (e.g. imposing harsh immigration terms on Dutch citizens, might be reciprocated by the Netherlands imposing harsh terms on UK citizens). It is also likely –

¹³² Home Office, 'Current Account Closed or Refused Based on Immigration Status' (30 October 2017) <<https://www.gov.uk/government/publications/current-account-closed-or-refused-based-on-immigration-status>> (accessed 11 January 2018).

¹³³ A. Bate and A. Bellis, 'Right to Rent: Private Landlords' Duty to Carry out Immigration Status Checks' (2017) *House of Commons Library*, SN07025.

¹³⁴ N. Bloomer and S. Jeraj, 'Met Police Hands Victims of Crime over to the Home Office for Immigration Enforcement' (Politics.co.uk, 5 April 2017) <<http://www.politics.co.uk/news/2017/04/05/met-police-hands-victims-of-crime-over-to-the-home-office>> (accessed 10 January 2018).

¹³⁵ For example, an application for Indefinite Leave to Remain costs £2,297 (per person), and an application for a two year visa can cost £337 (per person); Home Office, 'Home Office Immigration & Nationality Charges' (2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607212/Fees_table_April_2017.pdf> (accessed 10 January 2018).

¹³⁶ This surcharge amounts to £200 per year per person (the charge is not applicable to those applying for Indefinite Leave to Remain); UK Government, 'Pay for UK Healthcare as Part of Your Immigration Application: How Much You Have to Pay' <<https://www.gov.uk/healthcare-immigration-application/how-much-pay>> accessed 11 January 2018.

¹³⁷ Amnesty International, 'A Matter of Routine: The Use of Immigration Detention in the UK' (2017) <https://www.amnesty.org.uk/files/2017-12/A_Matter_Of_Routine_ADVANCE_COPY.PDF?ya06n1Z2uH6J0bP8HmO7R2Pn7nabDymO> (accessed 10 January 2018).

¹³⁸ Home Secretary, 'The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU' (Cm 9464, 2017) 3 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf> (accessed 9 January 2018).

¹³⁹ Home Secretary, 'Safeguarding the Position of EU Citizens' (n138) 4.

although not certain – that the UK will eventually be forced to recognise the economic and social necessity of inward EU migration and will develop policy that reflects this.

Frontier Workers

The rights of Frontier Workers are given special mention in the Phase 1 Report. Frontier Workers are individuals who live on one side of a border and work on another.¹⁴⁰ Approximate figures suggest that there are around 9,000 NI residents working in Ireland and 9,000 Irish residents working in NI,¹⁴¹ and there will be further Great Britain residents travelling to Ireland for work and *vice versa*. Frontier Workers are defined under EU law and the Joint Technical Note as 'a UK national or an EU citizen pursuing genuine and effective work as an employed or self-employed person in one or more States and who resides in another State'.¹⁴² Such people have their current rights to work and residence protected.¹⁴³ This will be most relevant to an individual living in the UK who is a 'worker' within the EU at the date of withdrawal. It also includes an EU citizen living in the EU and working in the UK at the date of withdrawal.

In the Irish context, this will require:

- the UK to uphold the existing rights of EU citizen workers resident in the UK who work in Ireland
- the UK to uphold the existing rights of EU citizen workers resident in Ireland who work in the UK
- the Irish Government to uphold the existing rights of UK citizens resident in the UK who work in Ireland
- the Irish Government to uphold the existing rights of UK citizens resident in Ireland who work in the UK

For example, someone who is a 'worker' in Cork at the date of withdrawal and who lives in Belfast is protected (providing they have UK or EU citizenship). Ireland must protect their existing rights as a worker and the UK must protect their existing rights as a resident.

These requirements go beyond the 'Ireland and NI' and the CTA commitments as they extend working rights to a greater range of people. Most NI residents are entitled to dual UK-Irish citizenship and can maintain these rights through that route. Irish citizens are also entitled to 'ongoing' EU rights within NI. However, there are certain categories of individual for whom this is especially important, including those living and working in border communities without an Irish (or EU) citizenship entitlement. For example, as a result of the frontier workers provision, a UK citizen with no entitlement to EU citizenship will be able to continue living in

¹⁴⁰ The definition in EU law is 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week'; Directive 2004/38/EC (n81) Article 1(f).

¹⁴¹ PricewaterhouseCoopers, 'North/South Ministerial Council - An Chomhairle Aireachta Thuaidh/Theas: Study of Obstacles to Mobility' (2001) 36-37 <http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/Documents_Fiches_Projets/obstacles-to-cross-border-mobility_border_people.pdf> accessed 7 January 2018.

¹⁴² EU-UK Joint Technical Note on Citizens' Rights (n88) row 4a.

¹⁴³ EU-UK Joint Technical Note on Citizens' Rights (n88) rows 4 and 4a.

Strabane and working in Lifford with the same rights. These rights are only maintained if the Frontier Worker status is maintained so gaps in cross-border employment could result in some individuals permanently losing their right to work in the UK/ Ireland under EU terms. Individuals who stop working across the border will lose these rights, except in some circumstances.¹⁴⁴ These include for reasons of illness, involuntary unemployment after a year or more employment, or the undertaking of vocational training.¹⁴⁵ However, Frontier Workers will only be entitled to a six-month cross-border employment gap where they are on a fixed term contract which is less than one year long or are involuntarily unemployed after less than a year of employment.¹⁴⁶ This potential for the loss of 'worker' status, and the loss of the ability to work on the other side of the border, as a consequence of unemployment will lead to increased precarity and fewer employment options for some living at the border. As the point at which individuals are determined to be Frontier Workers or not is on the date of withdrawal, those whose short-term contract ends, or who are made involuntarily unemployed from a short-lived job, at any point until six-months before withdrawal are currently at risk of losing the right to work under EU terms.

It is possible that a bifurcation of the labour market on either side of the border will occur. Those with Irish citizenship or NI residents with that entitlement will have an ongoing entitlement to employment rights on either side of the border,¹⁴⁷ while UK citizens' access to employment on the Irish side of the border will be subject to the terms of the Withdrawal Agreement and the continuation of CTA terms.

Family Members

For those that fall within the citizens' rights terms (i.e. UK/EU citizens in the EU/UK on Brexit day), there are attached rights to bring family members to their country of residence. These rights are not unlimited, but are substantial. The Joint Report specifies three categories of family member; those legally resident on Brexit day, those who are related but not resident on Brexit day, and those who become related after Brexit day.

Family members will wish to rely on their status *qua* family member, where they are an EU citizen but have no independent right to be in another EU member state (e.g. because they have been in that other EU country beyond the three-month period and are not in work themselves) or where they are a non-EU citizen in which case family member status might be a more straightforward route to legal status within the EU.

The definition of 'family member' includes those of any nationality who are;¹⁴⁸

- spouses or registered partners
- (grand)children of one's own and of one's spouse or partner who are under the age of 21

¹⁴⁴ EU-UK Joint Technical Note on Citizens' Rights (n88) row 4a.

¹⁴⁵ Directive 2004/38/EC (n81) Article 7(3) a, b, d.

¹⁴⁶ Directive 2004/38/EC (n81) Article 7(3) c.

¹⁴⁷ EU-UK Phase 1 Joint Report (n1) para 52.

¹⁴⁸ Directive 2004/38/EC (n81) Article 2(2).

- (grand)children of one's own and of one's spouse or partner who are over 21 but remain dependant
- dependant (grand)parents and dependant (grand)parents of one's spouse or partner

Other family members not in these categories can also be admitted following checks, if they are partners in a 'durable relationship', dependants, or require care by the EU citizen family member due to poor health.¹⁴⁹

Family members from these categories who are in a host state in the UK/EU on Brexit day will be entitled to citizens' rights.¹⁵⁰ For example, Lucie and her family are UK citizens living in Ireland on Brexit day. She fulfils the conditions to have her own permanent residency in Ireland, but her wife and children do not. They will all have citizens' rights.

Family members who were not abroad in a host state on Brexit day with the 'primary family member', but who were related to that person will have a right to join their family member in the future for as long as they remain related. For example, Suzanne is a Polish citizen who has a job and legal residence in the UK on Brexit day, but her husband Anatol remains in Poland. He can join her at any point in the future as long as they remain married. He would receive full citizens' rights.

The Joint Report also agrees that the UK and EU27 will facilitate the residency of those who are in a 'durable relationship' but who are not married or in a registered partnership on Brexit day. While the Report commits to facilitate residency, it does not afford full citizens' rights for such persons. There is therefore a clear advantage to being married or in a registered partnership on Brexit day if one's relationship spans borders in this manner, as you would retain your EU citizens' rights. For example, if Suzanne and Anatol were not married on Brexit day but were in a durable relationship, he would be facilitated in taking up residency in the UK as long as they maintained that relationship. He would not receive the benefits of citizens' rights but would be accorded rights as set down in UK domestic law.¹⁵¹

Those who become related after Brexit day are in a more challenging position. The Joint Report only covers children (who can become related by birth or adoption). For children born after Brexit day to be covered by the Phase 1 Report's provisions, they must either:

- have two parents with EU citizens' rights;
- have one parent with EU citizens' rights who has sole or joint custody;¹⁵² or
- have one parent with EU citizens' rights and another who is a citizen of the host state.¹⁵³

These provisions will cover most children. However, children who are legally in the sole custody of a parent without citizens' rights will be left without rights to join family members after Brexit under the terms of the Report. For example, if a child born after Brexit day, whose

¹⁴⁹ Directive 2004/38/EC (n81) Article 3(2).

¹⁵⁰ EU-UK Joint Technical Note on Citizens' Rights (n88) rows 5a, 5b, 5c.

¹⁵¹ EU-UK Joint Technical Note on Citizens' Rights (n88) row 5e.

¹⁵² EU-UK Joint Technical Note on Citizens' Rights (n88) row 5f(ii).

¹⁵³ EU-UK Joint Technical Note on Citizens' Rights (n88) row 5f(i).

father is a French citizen living in the UK and whose mother lives anywhere outside the UK on Brexit day, was found according to domestic law to be in the sole custody of her mother, then she might not be entitled to join her father in the UK. Other than children, those who become related after Brexit day will have to rely on domestic law in order to join their family member.¹⁵⁴

If on Brexit day, family members are in a host country with only 'retained rights'¹⁵⁵ following the death, departure, or – in some circumstances – the divorce of the EU citizen whose rights the family were reliant upon, their rights to residence will continue (but to pass into permanent residency will require additional conditions to be met).¹⁵⁶

There appears to be nothing in the Joint Report that would prevent citizens' rights being passed through generations for as long as the Withdrawal Agreement remains in force. For example, two EU citizens in the UK on Brexit day would retain citizens' rights, if they later have a child she would enjoy citizens' rights, and that child could pass citizens' rights onto her children (even if her partner does not have citizens' rights). This passing could continue into the future, and the UK would have continuing EU law obligations as a result. It is not clear that this is intended by the parties.

Healthcare (including EHIC)

For those on citizens' rights terms or retaining full EU rights, the healthcare and EHIC rules as they apply on Brexit day will continue to apply.¹⁵⁷ This will protect those who are temporary or permanent residents in another member state on Brexit day.¹⁵⁸ It will protect – under the Withdrawal Agreement – those UK citizens who are legally in Ireland according to EU law on Brexit day and those Irish citizens who are legally in the UK according to EU law on Brexit day. It will protect 'Frontier Workers' who have lives which are split across the border on Brexit day. The Withdrawal Agreement will not protect those UK citizens (including those in NI) who move to Ireland or who require treatment when visiting the Republic of Ireland after Brexit day. Neither will the Withdrawal Agreement protect Irish citizens' healthcare and EHIC rights if they move to or visit GB (and perhaps NI too) after Brexit.

The UK Government maintains that the CTA covers health rights for UK and Irish citizens, but the legal source of these entitlements in both the UK and Ireland is unclear following the loss of the EU's healthcare rules. At best, these rights derive from a scattered collection of UK-Ireland agreements and reciprocal legal provisions, at worst they are on the basis of informal understandings or governmental statements. Furthermore, there does exist legal authority in GB¹⁵⁹ and NI¹⁶⁰ to charge fees for NHS services for those not ordinarily resident in the respective areas.

¹⁵⁴ EU-UK Joint Technical Note on Citizens' Rights (n88) row 5g.

¹⁵⁵ EU-UK Joint Technical Note on Citizens' Rights (n88) row 7.

¹⁵⁶ Directive 2004/38/EC (n81) Articles 12 and 13.

¹⁵⁷ EU-UK Phase 1 Joint Report (n1) para 29.

¹⁵⁸ See further, ESRC Health Law outside the EU, 'Brexit and Health Law: Implications for Northern Ireland (Background Briefing)' (2017) <<https://www.healthybrexit.org/wp-content/uploads/2017/12/Attachment-4-Brexit-Background-Briefing.pdf>> (accessed 11 January 2018).

¹⁵⁹ National Health Service Act 2006, s175.

¹⁶⁰ Health and Personal Social Services (Northern Ireland) Order 1972, s42.

Non-Irish EU citizens crossing borders after Brexit day do not, according to the agreements in the Phase 1 Report, have EHIC rights. This could prevent frictionless travel across the Irish border, as these EU citizens could lose healthcare coverage on crossing the border. An agreement by the EU and UK could avoid this crucial loss of rights at the border and provide EHIC-equivalent protection for Non-Irish EU citizens in at least NI.

As noted above, citizens' rights can be lost when valid residency ends and EHIC rules will mirror this. Similarly, the retention of permanent residents' status following up to five years of absence from the UK/ EU will also apply in the healthcare context. The consequence of the tying of EHIC to residency is that the loss of residency under the Withdrawal Agreement will also result in the loss of EHIC provisions. Domestic laws (in the 'competent' paying state or host state) might allow a person who has lost their EU residency entitlement to remain in the country, but might downgrade or remove their healthcare entitlements. The loss of residency within the terms of the Withdrawal Agreement might therefore have significant implications for individuals. For example, a Spanish citizen with temporary residency in the UK who voluntarily leaves their job without moving into other employment, training, retirement or self-sufficiency would lose their residency under the citizens' rights terms and would also lose their entitlement to EHIC rights. Although they may retain health rights or residency through UK domestic law, neither of these are currently required by the Withdrawal Agreement.

The people of Northern Ireland with Irish citizenship appear to be afforded full EU citizenship rights and opportunities.¹⁶¹ For most of those individuals, however, the UK will continue to be the competent 'member state' which is liable for the cost of reimbursing treatments abroad.¹⁶² The UK will therefore be continually liable for the costs of Irish NI people receiving certain healthcare and using their EHIC rights. This will apply for those who are not in the EU on Brexit day, and even for those who are not even born yet. These NI individuals will not be entirely unique. The UK will also continue to be liable to reimburse certain healthcare costs of UK citizens abroad in the EU on Brexit day, and their descendants (so long as they maintain their residency in the EU).

Monitoring of Citizens' Rights Protections

UK citizens with citizens' rights in EU member states post Brexit will retain their current access to EU law mechanisms to protect their interests. However, there is more difficulty in overseeing the UK's maintenance of EU citizens' rights once the transitional post-Brexit arrangements end. The Phase 1 Report envisages a number of measures to ensure the protection of citizens' rights, which can be discussed in terms of legislative defences, protection in the event of a breach, and monitoring functions.

The Phase 1 Report seeks to avoid the rights of EU citizens in the UK being violated following Brexit. It requires the UK to enact a number of legislative measures to prevent future diminution of those rights. The first requires the incorporation of the citizens' rights into UK domestic law (including a direct reference to the Withdrawal Agreement). The UK is

¹⁶¹ EU-UK Phase 1 Joint Report (n1) para 52.

¹⁶² European Parliament and Council Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/ 1; European Parliament and Council Regulation (EC) 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284/1.

furthermore required to give legislative primacy to the Withdrawal Agreement. This would mean that the citizens' rights would prevail over UK law whenever it is passed. In UK public law this would amount to the Withdrawal Agreement having special 'constitutional' status.¹⁶³ The only way that Parliament could legislate contrary to citizens' rights would be to expressly set aside its terms. In addition to these safeguards which are proposed in the Phase 1 Report, it would additionally be useful for the UK INA to have a role in scrutinising legislation. Such scrutiny would aid Parliament and help prevent the passing of laws which are accidentally contrary to citizens' rights terms. This would provide clarity at an earlier stage and avoid the prospect of overly burdening the courts.

If the UK Parliament does legislate in a manner which conflicts with the Withdrawal Agreement's citizens' rights terms or if it does not implement these terms effectively, the Phase 1 Report assigns a role to the UK courts. This vital role will replace the ability of EU citizens in the UK to petition the European Commission regarding the UK's non-fulfilment of its obligations and the Commission's ability to take action against the UK before the CJEU.¹⁶⁴ The Phase 1 Report stipulates that individuals should be able to rely upon their citizens' rights directly in UK courts (i.e. they can rely on their rights as the basis of a claim, and not merely as shield against actions brought against them under domestic law). In considering citizens' rights, UK courts must follow EU case law as it exists on Brexit day,¹⁶⁵ and to have 'due regard' to relevant cases which are concluded after Brexit.¹⁶⁶ For eight years after Brexit the UK courts will continue to have permission to 'ask the CJEU questions of interpretation' with regard to EU citizens' rights, a process very similar to the current preliminary reference procedure under EU law.¹⁶⁷

The Phase 1 Report specifies that the European Commission will have a right to intervene in relevant UK court cases. This is quite a remarkable step and indicates that the Commission does not intend to 'leave the UK to it' in interpreting the meaning and application of citizens' rights. The INA, which has yet to have its role fully negotiated, must also have the responsibility to initiate and intervene in relevant cases. Such a role will ensure that the burden of clarifying and enforcing citizens' rights does not fall to individuals with limited resources, and is conducted in a systematic manner. Without this responsibility, the INA is likely to become side-lined in the determination of legal questions relating to citizens' rights and will be all-but toothless.

Finally, while the provisions relating to legislation and the courts are important, a range of monitoring functions which are carried out by EU institutions will be lost upon Brexit. The INA must be empowered and resourced to monitor how citizens' rights are implemented on the ground, and to take up with the UK Government any practical issues which are preventing the enjoyment of citizens' rights. For example, one issue which will be essential to allowing the proper enjoyment of citizens' rights, is the creation of a more tolerant and open society. This is an issue which will require cooperation amongst the UK's human rights institutions and other statutory bodies, as discussed in Chapter 6 of this Report.

¹⁶³ In its impact upon subsequent legislation the Withdrawal Agreement legislation would be comparable to the HRA 1998. See also *Thoburn v Sunderland City Council* (n2) [60].

¹⁶⁴ TFEU, Article 258.

¹⁶⁵ EU-UK Phase 1 Joint Report (n1) para 9.

¹⁶⁶ EU-UK Phase 1 Joint Report (n1) para 38.

¹⁶⁷ EU-UK Phase 1 Joint Report (n1) para 38.

Recommendations

16. Parties to the negotiations should reflect on the prudence of creating at least nine categories of residents and rights in Northern Ireland. In particular, attention to avoiding the divisiveness of the categories and ensuring simplicity and equivalence of rights is required.
17. The IHREC, NIHRC, and Irish Government should clarify the Withdrawal Agreement's position on individuals in Northern Ireland who are not Irish citizens. This clarification should include the effects of automatic versus claimed Irish citizenship upon EU rights.
18. Public authorities in Ireland and Northern Ireland should undertake an extensive public information campaign on rights entitlements following Brexit.
19. The UK Government should commit in the Withdrawal Agreement to preserving the common set of entitlements for all Irish citizens (whether linked to Northern Ireland or not), in order to avoid significant administrative/definitional issues.
20. The IHREC, NIHRC, and Irish Government should seek explicit guarantees that the people of Northern Ireland with Irish citizenship will be entitled to full and evolving EU citizenship rights and opportunities. This will entail working with the UK to develop mechanisms to ensure those rights are reflected in UK law as EU standards develop.
21. The UK and EU should clarify whether the five-year residency period can be accrued after Brexit day and whether permanent residency can be sought on EU terms on the basis of such accrued residency.
22. The Irish Government, EU institutions and member states, the IHREC and the NIHRC should seek assurances from the UK on the treatment of individuals not covered by citizens' rights or the Common Travel Area following Brexit.
23. The Irish Government should work with the UK on an ongoing basis to ensure clarity regarding post-Brexit immigration rules as far in advance of Brexit as possible.
24. Alongside its EU counterparts, the Irish Government should apply pressure to the UK not to apply different rules to EU citizens from different countries post Brexit.
25. The Irish Government and Northern Ireland authorities should immediately provide information for Cross Border job centre advisors to avoid economic hardship as a result of the Withdrawal Agreement.
26. The Irish Government should agree with the UK to allow gaps in employment of longer than six months for Frontier Workers, especially those living proximate to the border.
27. The Irish Government should work with EU partners to ensure people in durable relationships on Brexit day are treated in a manner equivalent to those who are married or in a registered partnership by the Withdrawal Agreement.
28. The Irish Government and Northern Ireland authorities should ensure full information is provided to those in doubt about their rights as a family member.

29. The UK and Ireland should, as a matter of urgency and before Brexit, clarify and enshrine within treaty and domestic law the Common Travel Area understanding of EHIC-equivalent healthcare.
30. Ireland should negotiate with the UK and the EU for the extension of EHIC-equivalent healthcare for Non-Irish EU citizens arriving in NI after Brexit to facilitate cross-border travel

5. Cooperative Justice Arrangements

The EU's cooperative justice arrangements, once designated as the Justice and Home Affairs Pillar, showcase the UK's difficulties with EU membership. On one level, these activities highlighted how far the remit of the EU had expanded beyond the core single-market concerns of the EEC, however, the UK Government was often a leading actor in developing this EU role. Under the Coalition Government of 2010-2015 the Conservative Party expressed its concern over the CJEU's increased role in overseeing cooperative justice arrangements. As a result, in 2014, the UK instituted opt-outs from some of these arrangements,¹⁶⁸ indicating how contentious this element of relations between the UK and EU had become ahead of the 2016 referendum.¹⁶⁹

The UK, therefore, had already 'partially Brexited' from criminal justice cooperation.¹⁷⁰ But Parliament permitted the UK Government to retain other cooperative measures. Theresa May, then Home Secretary, argued that abandoning these measures 'would seriously harm the capability of our law enforcement agencies to keep the public safe'.¹⁷¹ It is notable that during the referendum campaign the future Prime Minister explicitly highlighted cooperative justice arrangements as a major benefit of EU membership.¹⁷²

The UK Government has insisted that it is pursuing a comprehensive deal with the EU which extends beyond trade. Although the elements of the current EU arrangements which the UK Government considers to be part of such a comprehensive deal remain mutable, security and policing co-operation have been prominent priorities for the UK Government.¹⁷³ The Phase 1 Report, however, provides little detail on the future shape of cooperation over crime or policing.¹⁷⁴

Although cooperative justice arrangements were not part of the opening phase of Brexit negotiations, the UK Government's insistence that Brexit will 'bring to an end' the CJEU's jurisdiction with regard to any aspects of UK law makes these issues particularly intractable.¹⁷⁵ Below, the relationship between the UK's negotiating position and the existing EU justice and security measures will be mapped. This includes moves towards replacing or retaining the European Arrest Warrant, prisoner repatriation and deportation arrangements, information

¹⁶⁸ See V. Mitsilegas, 'The Uneasy Relationship between the UK and European Criminal Law: From OptOuts to Brexit?' [2016] *Crim LR* 517.

¹⁶⁹ See House of Commons European Scrutiny Committee, 'The UK's block opt-out of pre-Lisbon criminal law and policing measures' (2013) HC 683.

¹⁷⁰ A. Weyembergh, 'Consequences of Brexit for European Union criminal law' (2017) 8 *New Journal of European Criminal Law* 284, 284.

¹⁷¹ T. May, HC Deb, vol. 587, col. 1229, (10 November 2014).

¹⁷² Theresa May, 'Home Secretary's Speech on the UK, EU and Our Place in the World' (25 April 2016) <<https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>> (accessed 9 January 2018).

¹⁷³ Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union* Cm 9417, para 2.9.

¹⁷⁴ EU-UK Phase 1 Joint Report (n1) para 92.

¹⁷⁵ Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union* Cm 9417, para 2.3.

sharing and data collection, and involvement in Europol. The final sections below address the potential arrangements for judicial oversight of post-Brexit cooperative justice measures.

European Arrest Warrant

The European Arrest Warrant (EAW) entered force in 2004 as a measure to replace traditional extradition procedures between EU member states in order to facilitate the transfer between justice systems of individuals facing criminal prosecution or prison sentence.¹⁷⁶ The UK makes considerable use of this system, both in terms of suspects transferred into and out of its jurisdiction.¹⁷⁷ With regard to NI, over two thirds of the EAWs sought by the PSNI between 2007 and 2017 involved a request to the Republic of Ireland (113 out of 154 in total).¹⁷⁸ It can therefore be of little surprise that the PSNI Chief Constable, George Hamilton, informed a House of Commons Committee that EAWs 'are essential in tackling terrorism, organised and volume crime across the island of Ireland'.¹⁷⁹ The UK Government has indicated that maintaining the EAW after Brexit, or making equivalent arrangements is a priority.

The operation of the EAW system is overseen by domestic courts and, since 2009, the CJEU has enjoyed the jurisdiction to hear references from domestic courts regarding the operation of the EAW.¹⁸⁰ The CJEU's interpretation of EU law within a preliminary ruling issued in response to such a reference, is binding upon the domestic courts of member states. In the course of such rulings the CJEU applies the provisions of the EU CFR,¹⁸¹ with its construction of fair hearing rights,¹⁸² the right to liberty,¹⁸³ and the rights to private and family life,¹⁸⁴ being particularly important in the EAW context. With regard to all of these rights, the CFR recognises the comparable ECHR rights as the base-line standard.¹⁸⁵

Whereas the European Court of Human Rights sets minimum rights standards, permitting divergences in protections across ECHR states, de Boer notes that an attempt by the CJEU to follow this model 'would conflict with the demands of primacy, uniformity and effectiveness of EU law'.¹⁸⁶ The EAW system allows for rapid transfers in large part because it operates 'on

¹⁷⁶ EU Council Framework Decision 2002/584/JHA (13 June 2002), Article 1(1).

¹⁷⁷ Statistics indicate that in recent years the UK has transferred roughly 1000 individuals under the EAW and issued over 200 of its own EAWs annually; see National Crime Agency, *Wanted by the UK: European Arrest Warrant Statistics 2009—May 2016 (Calendar Year)* (July 2016): <<http://www.nationalcrimeagency.gov.uk/publications/european-arrestwarrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics/690-wanted-by-the-uk-europeanarrest-warrant-statistics-2009-may-2016-calendar-year>> (accessed 19 January 2018); and National Crime Agency, *Wanted from the UK: European Arrest Warrant Statistics 2009–2016 (Calendar Year)* (July 2016): <<http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrantstatistics/wanted-from-the-uk-european-arrest-warrant-statistics/691-wanted-from-the-uk-europeanarrest-warrant-statistics-2009-may-2016-calendar-year>> (accessed 19 January 2018).

¹⁷⁸ C. Campbell, 'Government fears "essential" extradition powers to combat crime will be lost after Brexit' *The Detail* (23 November 2017).

¹⁷⁹ (13 December 2016) Q162.

¹⁸⁰ TFEU, Article 267.

¹⁸¹ See C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43, [54] (Grand Chamber, CJEU).

¹⁸² EU CFR, Articles 47 and 48.

¹⁸³ EU CFR, Article 6.

¹⁸⁴ EU CFR, Articles 7, 9, 33.

¹⁸⁵ EU CFR, preamble, Articles 52(3) and 53.

¹⁸⁶ N. de Boer, 'Addressing rights divergences under the Charter: *Melloni*' (2013) 50 *Common Market Law Review* 1083, 1083.

the basis of the principle of mutual recognition'.¹⁸⁷ In short, the EAW operates on a presumption that EU member states maintain equivalent protections for defendants in their criminal justice systems. This presumption colours the interpretation of human rights protections which exist in the UK's implementing legislation.¹⁸⁸

The system and the CJEU's protection of rights within it, is not without its criticisms. The extent to which fair hearing rights are protected in the context of the EAW has been questioned, and in particular, the lack of a proportionality test in the issuing of an EAW.¹⁸⁹ In responding to these criticisms the UK Government has consistently emphasised the value of the EAW in protecting the interests of victims of crime.¹⁹⁰

Notwithstanding these criticisms, the CJEU nonetheless acts as the ultimate arbiter upon the operation of the EAW system. This is potentially problematic when the EU (Withdrawal) Bill denies any further role for the CJEU in the interpretation of UK law. The Phase 1 negotiation agreement sustains this major element of the UK Government's Brexit policy, and – at least in the citizens' rights context – acknowledges that any residual jurisdiction of the CJEU will lapse after an eight-year transition period post-Brexit.¹⁹¹

The status of the CJEU post-Brexit is already shaping the engagement of UK courts with EU law. Before the Joint Report agreed that there would be a transition period and that active cases before the CJEU would be taken to their conclusion notwithstanding Brexit,¹⁹² the NI Court of Appeal refused to countenance a reference to the CJEU on the effectiveness of the UK's transposition of the Council Framework Decision implementing the EAW on the basis that 'such a reference ... would ... be largely academic'.¹⁹³

However much the UK Government claim to prioritise the maintenance of the EAW, this goal is all-but incompatible with its refusal to countenance any CJEU oversight in any area of law and its side-lining of the CFR in the UK's post-Brexit arrangements.¹⁹⁴ Common rights standards and the oversight of the CJEU are both fundamental facets of the system.

Several individuals across the EU have used Brexit to challenge their transfer to the UK under an EAW, a development which is already impacting upon the effectiveness of the system. In Ireland, several individuals subject to EAWs issued by the UK Government have instituted legal challenges, one of which is to be considered by the Supreme Court.¹⁹⁵ Notwithstanding the transitional arrangements indicated in the Phase 1 agreement, given that some of the UK's domestic courts are refusing to countenance preliminary reference requests to the CJEU

¹⁸⁷ EU Council Framework Decision 2002/584/JHA (13 June 2002), Article 1(2).

¹⁸⁸ Extradition Act 2003, s 21.

¹⁸⁹ House of Commons European Scrutiny Committee, 'The UK's block opt-out of pre-Lisbon criminal law and policing measures' (2013) HC 683, para 124.

¹⁹⁰ T. May, HC Deb, vol., col. 491 (10 July 2014).

¹⁹¹ EU-UK Phase 1 Joint Report (n1) para 38.

¹⁹² EU-UK Phase 1 Joint Report (n1) para 93.

¹⁹³ *Kocielek v The Polish Judicial Authorities* [2017] NIQB 87, [23] (Deeny LJ).

¹⁹⁴ See House of Lords European Union Committee, 'Brexit: judicial oversight of the European Arrest Warrant' (2017) HL 17, para 57.

¹⁹⁵ Thomas O'Connor's appeal against the 2017 High Court decision that there is 'no evidence he is at any real risk of his rights being breached' (see *Minister for Justice and Equality v O'Connor* [2017] IEHC 518) is due to commence in January 2018. See J. Power and C. Gallagher, 'Brexit delays up to 20 extradition warrants to UK' *Irish Times* (24 November 2017).

on the basis of Brexit, it is entirely possible that a domestic court elsewhere within the EU will question whether the UK remains entitled to the mutual recognition of its processes.

The strain already being placed upon the EAW arrangements ahead of Brexit, and the barrier to negotiating a retention of these arrangements if the UK seeks to abandon the CFR and sever all CJEU jurisdiction post-Brexit, necessitates the evaluation of alternative arrangements. Although Norway and Iceland are not EU member states, a 'suspect surrender agreement' has been reached (but has not yet entered force). This will allow them to participate in a system which is in many respects akin to the EAW (although a political offence exception is retained, and parties can refuse to transfer their own citizens).¹⁹⁶

This Agreement provides a potential model for the UK to pursue after Brexit, in particular because it does not impose the jurisdiction of the CJEU, with disputes over the operation of the arrangements being referred to a meeting of governmental representatives.¹⁹⁷ Nonetheless, these arrangements do presuppose that few disputes will arise as the CJEU and the domestic courts in Norway and Iceland will be content to have regard to developments in each other's' jurisprudence.¹⁹⁸ Under any equivalent arrangements post-Brexit, the CJEU would likely remain the key interpretive institution influencing the shape of these arrangements and UK courts would have to have some regard to its findings. Furthermore, Norway and Iceland's membership of the Schengen free movement area facilitates this arrangement (but is not determinative, given that the UK has operated the EAW effectively outside the Schengen zone). Negotiation of such an alternative arrangement to the EAW does open up the possibility of enhancing the protections for individuals within the system, which should include consideration of a proportionality requirement upon the operation of such a measure.¹⁹⁹

Although the negotiation of the Norway-Iceland arrangements began soon after the commencement of the EAW, and were agreed in 2006, they have yet to enter force (despite common criminal justice standards and a shared commitment to the ECHR rights). A similar gestation period for any agreement between the UK and the EU post-Brexit would therefore necessitate the UK falling back upon the Council of Europe extradition arrangements.²⁰⁰ The UK and other EU member states retain these treaty arrangements and continue to employ them in cases involving countries including Russia.

This Council of Europe's extradition arrangements could avoid a situation whereby cooperative pursuit of suspects between the UK and EU member states halts if it is not included in the Withdrawal Agreement or subsequent deal. Some commentators suggest that the EAW provisions explicitly supersede the Council of Europe Convention as it applies

¹⁹⁶ EU Council Decision 2014/835/EU (27 November 2014) on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2014] OJ L343/1; EU Council Decision 2006/697/EC (27 June 2006) on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L292/1, Article 6.

¹⁹⁷ EU Council Decision 2006/697/EC (n196) Article 36.

¹⁹⁸ EU Council Decision 2006/697/EC (n196) Article 37.

¹⁹⁹ See House of Lords European Union Committee, *Brexit: Future UK-EU Security and Police Cooperation* (2016) HL 77, para 145.

²⁰⁰ European Convention on Extradition (13 December 1957).

between EU member states, and that the UK will therefore have to ensure that EU states with monist legal orders take steps to revive these arrangements post-Brexit.²⁰¹ This potential problem is possibly overstated; the Council of Europe arrangements which were put into abeyance whilst the UK is an EU member state will be reinvigorated post-Brexit unless other agreed arrangements take their place. But in Ireland the domestic legislation activating these arrangements has changed since the advent of the EAW,²⁰² and new legislation would need to be enacted to restart this system.²⁰³

Reviving these extradition arrangements is nonetheless a very different proposition from the EAW. First, individuals challenging extradition proceedings post-Brexit would enjoy more protections than they do under the EAW system. This arguably comes at the expense of the speedy administration of criminal justice. As the Director of Public Prosecutions for England and Wales informed one parliamentary committee, 'when we looked at casework, either outside the EU or prior to the EAW, we were talking months and years rather than the days and weeks we currently have'.²⁰⁴ Second, the European Convention on Extradition contains exceptions not found in the EAW, which can become the subject of prolonged litigation (as seen in a number of high-profile cases during the NI conflict).²⁰⁵ A memo from the NI Department of Justice on post-Brexit arrangements, released under a Freedom of Information request, effectively summarised this problem; whereas the 'EAW has removed the political dimension from extradition', upon Brexit '[t]he extradition process could become toxic once again'.²⁰⁶

Prisoner Repatriation and Deportation

Under EU law, cooperative justice arrangements have extended to provide for an expedited system of prisoner transfer between EU member states.²⁰⁷ In 2014, the then Home Secretary Theresa May defended these measures as being necessary to 'get foreign criminals out of our prisons'.²⁰⁸ The 'compulsory' arrangements concluded as part of transfer agreements under the EU Prisoner Transfer Framework Decision potentially allow for transfer of prisoners without their consent.²⁰⁹ Again, these EU justice measures rely on mutual recognition of standards across justice and prison systems, and raise issues of fundamental rights

²⁰¹ H. Malcolm QC, Evidence to the Select Committee on the European Union Inquiry *Brexit: Future EU-UK Security and Police Co-operation* (14 September 2016) Q9.

²⁰² European Arrest Warrant Act 2003, s 50 (repealing Extradition Act 1965, Part III).

²⁰³ See House of Lords European Union Committee, *Brexit: UK-Irish Relations* (2016) HL 76, para 147.

²⁰⁴ A. Saunders, Evidence to the Select Committee on the European Union Inquiry *Brexit: Future EU-UK Security and Police Co-operation* (2 November 2016) Q65.

²⁰⁵ For examples, see C. Campbell, 'Extradition to Northern Ireland: prospects and problems' (1989) 52 *Modern Law Review* 585.

²⁰⁶ C. Campbell, 'Extradition "could become toxic" post-Brexit – Stormont officials' *Irish Times* (23 November 2017).

²⁰⁷ EU Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters [2008] OJ L327/27, Article 1(2).

²⁰⁸ Rt Hon Theresa May MP, 'Fight Europe by all means, but not over this Arrest Warrant' *The Daily Telegraph* (9 November 2014).

²⁰⁹ EU Council Framework Decision 2008/909/JHA (n207) Article 6.

protections.²¹⁰ These arrangements supplant earlier Council of Europe treaties on prisoner exchange as they apply between EU member states.²¹¹

The operation of these arrangements has not been smooth; fewer than 300 EU foreign national prisoners have been transferred from UK prisons since the arrangements came into effect in 2011. In 2016 the House of Commons Home Affairs Select Committee highlighted the slow progress towards transferring EU foreign nationals during their sentences. At 764 prisoners, Irish citizens (excluding prisoners from NI) were the UK's second largest group of foreign national prisoners.²¹² Ireland has not concluded a compulsory prisoner transfer agreement with the UK under these EU arrangements.²¹³ Indeed, with Ireland's prison population numbering less than 4000, the effect of compulsory transfer of Irish citizens incarcerated in UK prisons upon Ireland's prison infrastructure would be dramatic.

In Parliament, the EU arrangements have been referred to as 'the all-singing, all-dancing EU prisoner transfer directive',²¹⁴ and Ireland's position is described as a failure to implement its provisions.²¹⁵ But transfer agreements are concluded under the auspices of an EU Council Framework Decision, which gives much more latitude to EU member states than a directive. Had Ireland engaged with the UK's overtures and concluded an agreement, this would not necessarily change the picture. As one Home Office minister, responding to recent questions about the negligible use of these provisions pointed out, 'even with prisoner transfer agreements, it is down to the receiving country to take those prisoners'.²¹⁶

Post Brexit the UK can potentially fall back upon earlier Council of Europe treaties covering prisoner transfer. Both the UK and Ireland have ratified the Council of Europe Convention on the Transfer of Sentenced Persons.²¹⁷ Brexit will not, of itself, alter these arrangements. This treaty permits, but does not oblige, state parties to agree to transfer foreign national prisoners to their country of citizenship.²¹⁸ Under the original treaty such transfers required the consent of the prisoner, but the UK has ratified the 1997 Additional Protocol which permits the transfer of prisoners without their consent.²¹⁹ Ireland has also ratified the Additional Protocol, but has declared that it will not take prisoners in such circumstances on the basis of these arrangements.²²⁰ Prisoner transfers between the UK and Ireland will therefore not accelerate post-Brexit under such arrangements.

UK legislation permits the Home Secretary to order the deportation of any 'foreign criminal' who has been convicted of one of a range of specified criminal offences and sentenced to a term of imprisonment of more than 12 months.²²¹ Under this legislation the deportation of foreign national offenders from the UK following the completion of prison sentences is likely to continue apace after Brexit, with 40000 having been returned to their country of citizenship

²¹⁰ See C-399/11 *Melloni v Ministerio Fiscal* (n181).

²¹¹ EU Council Framework Decision 2008/909/JHA (n207) Article 26(1).

²¹² Home Affairs Select Committee, *The work of the Immigration Directorates (Q4 2015)* (2016) HC 22 para 93

²¹³ A. Selous, HC Deb, vol. 618, col. 1618 (14 June 2016).

²¹⁴ P. Hollobone, HC Deb, vol. 632, col. 891 (5 December 2017).

²¹⁵ J. Schickler, 'EU doesn't prevent us deporting foreign prisoners' *InFacts* (3 June 2016).

²¹⁶ S. Gyimah, HC Deb, vol. 632, col. 891 (5 December 2017).

²¹⁷ Council of Europe Convention on the Transfer of Sentenced Persons (21 March 1983).

²¹⁸ Council of Europe Convention on the Transfer of Sentenced Persons (21 March 1983) Article 2(2).

²¹⁹ See FCO, *Additional Protocol to the Convention on the Transfer of Sentenced Persons* (2010) Cm 7906.

²²⁰ *Additional Protocol to the Convention on the Transfer of Sentenced Persons* (18 December 1997) Article 3(6).

²²¹ UK Borders Act 2007, s 32.

since 2010.²²² This power directly impacts upon the private and family life of those affected, and where they are EU citizens they can currently rely upon EU free movement law and the EU CFR to resist deportation.²²³ On the UK Government's current approach to Brexit these protections will be lost following the UK's withdrawal from the EU, and alternate rights protections under the HRA 1998 have been weakened by UK legislation.²²⁴

The UK Government considers that these measures are applicable to Irish citizens resident in the UK.²²⁵ Nonetheless, in light of the unique position enjoyed by Irish citizens in UK law, ministers gave assurances during the passage of the UK Borders Act 2007 that these powers would only be applied to Irish citizens when a judge had specifically recommended post-sentence deportation or the Home Secretary identified an overriding public interest in deportation.²²⁶ This also applies to Irish citizens in NI. No case has yet fully tested how the courts will apply these provisions to Irish citizens in light of the terms of the Ireland Act 1949, whereby the 'Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom'.²²⁷ However, examples provided of the sort of exceptional circumstances are a terrorism offence, murder or a serious sexual or violent offence.²²⁸

Policing and Prosecutorial Cooperation

Europol has been fully integrated into the EU as its Agency for Law Enforcement Cooperation since 2010.²²⁹ Its primary function is to support the law enforcement authorities of EU member states in their efforts to tackle serious cross-border crime. As such, only EU member states are entitled to full membership of Europol, although many other states enjoy strategic and operational partnerships with the Agency, and some third-country partners operate bureaux of law enforcement officers alongside those of EU member states. Indeed, one such partner state, the United States of America, currently maintains the largest of the liaison bureaux hosted by Europol.

Although the UK's involvement in European-wide policing cooperation will be diminished by Brexit, these negative effects are likely to be mitigated by the conclusion of a new strategic and operational partnership with Europol. Nonetheless, it must be emphasised that a third-country arrangement does not substitute for full involvement in Europol, and in particular the UK will lose its say in setting the Agency's priorities.²³⁰ Moreover, any such agreement as a third country partner could take considerable time to conclude and would be subject to the approval of the European Parliament.²³¹

The 2014 opt-outs highlighted the UK Government's desire for Europol to remain an intergovernmental tool for policing cooperation, and its resistance to moves towards the EU

²²² S. Gyimah, HC Deb, vol. 633, col. 6MC (21 December 2017).

²²³ TEU, Articles 63-66 and EU CFR, Article 8 and 45. See E. Berry, 'The deportation of "virtual national" offenders: the impact of the ECHR and EU law' (2009) 23 *Journal of Immigration, Asylum and Nationality Law* 11.

²²⁴ See Immigration Act 2014, s 19.

²²⁵ See *The Traveller Movement* (n126) 13-14.

²²⁶ See L. Byrne, HC Debs, vol. 457, col. 4WS (19 February 2007).

²²⁷ Ireland Act 1949, s 2(1).

²²⁸ *In re Doherty's (Edmund) Application* [2016] NIQB 62, [39].

²²⁹ EU Council Decision 2009/371/JHA (6 April 2009).

²³⁰ L. Campbell, *Beyond Brexit – Beyond Borders Mutual Assistance in Policing and Investigating Organised Crime* (Durham University Centre for Criminal Law and Criminal Justice, 2017) p. 4.

²³¹ TFEU, Article 218.

having an integrated and autonomous capacity to tackle cross-border crime.²³² Upon Brexit, the UK's constraining influence over these developments will be removed. Further integration of European policing could therefore proceed at a pace, and Ireland could consequently find itself dividing its attention on cross border crime between the work of an increasingly integrated and autonomous EU agency and an essentially bilateral relationship with the UK.

The bilateral relationship between law enforcement authorities on the island of Ireland was bolstered prior to Brexit by the announcement that a Joint Agency Task Force was to be established under the 2015 Fresh Start Agreement. The Task Force, operative since early 2016, consists of officers from the PSNI, An Garda Síochána, the Revenue Commissioners and HM Revenue and Customs and enhances cooperation on specific areas of cross-border crime.²³³ In terms of North-South policing cooperation in Ireland/NI, this Task Force provides the foundations of an effective bilateral relationship.

An enhanced bilateral policing relationship Brexit will oblige the PSNI and An Garda Síochána to devote more resources to cross-border crime, including smuggling and people trafficking. Should the legal movement of goods or people across the land border become more difficult then criminal efforts to circumvent these restrictions will become more attractive.²³⁴ Beyond these solutions to the coordination of policing responses, sharing of information regarding crime could become a more pressing problem post-Brexit.²³⁵

'Hot pursuits' present a specific ongoing problem for cross border policing in Ireland. Neither the PSNI nor An Garda Síochána are permitted to continue pursuit of suspects who cross the border out of their jurisdiction. In the remainder of the EU, covered by the Schengen Agreement, cross-border police pursuits of suspects are permissible.²³⁶ As an Oireachtas Joint Committee Report has noted, these provisions provide 'an EU precedent which facilitates the pursuit of criminals over international borders'.²³⁷ In the interests of enhancing policing cooperation post-Brexit, legislation within the UK and Ireland should be considered to allow the CTA to mirror these aspects of the Schengen Acquis.

Eurojust is an EU Agency tasked with improving cooperation between prosecutorial/investigatory authorities across EU states.²³⁸ Although the real-time cooperation achieved under the auspices of Eurojust has been characterised as 'essential' for the UK's prosecutorial authorities,²³⁹ it is also likely to be difficult to sustain after Brexit. The required oversight of EU institutions, and particularly the CJEU, of investigations involving Eurojust, effectively prevents these measures from being retained in the absence of the UK

²³² See A. Weyembergh, 'Consequences of Brexit for European Union criminal law' (2017) 8 *New Journal of European Criminal Law* 284.

²³³ Northern Ireland Executive, *A Fresh Start: The Stormont Agreement and Implementation Plan* (November 2015) para 3.2.

²³⁴ See House of Lords European Union Committee, *Brexit: UK-Irish Relations* (2016) HL 76, para 150.

²³⁵ See section below on 'Information and Data Sharing for Criminal Justice Purposes'.

²³⁶ The Schengen Acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders OJ L 239 (22 September 2000) Article 41.

²³⁷ Joint Committee on Jobs, Enterprise and Innovation, *Report on the All-Island Economy* (2016) 31 JEI 023 p. 89.

²³⁸ EU Council Decision 2002/187/JHA (28 February 2002).

²³⁹ House of Lords European Union Committee, *Brexit: Future UK-EU Security and Police Cooperation* (2016) HL 77, para 87.

Government changing its position on terminating the CJEU's jurisdiction over all aspects of UK law. Eurojust nonetheless maintains co-operation agreements with third countries including Norway, Switzerland and the United States of America, providing for the exchange of liaison prosecutors. The UK Government have highlighted the potential of such arrangements, and also for bilateral agreements on cooperation in this field with EU states (with Ireland likely to be a priority).²⁴⁰

Information and Data Sharing for Criminal Justice Purposes

In addition to the operational policing cooperation fostered by Europol, the law enforcement authorities of EU member states are able to draw directly upon a range of systems to access information of relevance to cross-border investigations. The UK has played a leading role in developing these tools for tackling serious and organised crime through EU mechanisms, particularly in the aftermath of the 9/11 attacks.²⁴¹

The information technology systems required to share this information are managed by eu-LISA. As recently as November 2017 the UK Government notified Parliament that 'it is in the national interest to continue participating in eu-LISA' and that it was planning to opt into new measures for information sharing ahead of Brexit.²⁴² The EU's most important information sharing/data collection mechanisms which the UK could lose access to post-Brexit are summarised as follows:

- The Europol Information System (EIS) pools information from EU member states about criminal actors. Through the UK's membership of Europol its law enforcement agencies can access this information directly to assist in their criminal investigations.
- The European Criminal Records Information System (ECRIS) provides a secure electronic platform for sharing criminal record information between EU member states.²⁴³
- The Prüm Decisions allow the law enforcement agencies of EU member states to search for biometric and vehicle registration data against other member states' databases.²⁴⁴
- The Schengen Information System (SIS II) provides alerts about ongoing law enforcement investigations across much of the EU.²⁴⁵ This database was constructed for countries within the Schengen Acquis (Ireland is not currently party to SIS II arrangements), illustrating the extent of current UK integration.
- Passenger Name Records (PNR) are collated by carriers as part of the travel booking process (covering, for example, details of how a booking was made, the name of the traveller, contact details, and travel

²⁴⁰ House of Lords European Union Committee (n239) para 78.

²⁴¹ See C. Murray, 'Out of the Shadows: The Courts and the United Kingdom's Malfunctioning International Counter-Terrorism Partnerships' (2013) 18 *Journal of Conflict and Security Law* 193.

²⁴² A. Rudd, HC Deb, vol. 630, col. 32WS (2 November 2017).

²⁴³ EU Council Framework Decision 2009/315/JHA (26 February 2009).

²⁴⁴ EU Council Decisions 2008/615/JHA and 2008/616/JHA, Framework Decision 2009/905/JHA.

²⁴⁵ EU Council Decision 2007/533/JHA (12 June 2007).

itinerary. PNR analysis therefore helps to track the movements of serious criminals.²⁴⁶

Some have warned that, if no deal is reached regarding information sharing, that 'there is a risk that [the UK] will be the kind of Brazil of Europe ... it would be more attractive for criminals to come here and less easy to find them without these databases'.²⁴⁷ The UK has already tried to live without some of these measures; opting out of Prüm in 2014 and relying on data sharing through Interpol instead. Less than a year after opting out, the UK Government sought to rejoin Prüm, recognising that doing so 'would be in the national interest as it would help us to identify foreign criminals and solve serious crimes'.²⁴⁸ The importance of reaching an agreement for access to these EU law enforcement tools does not detract from the difficulty of putting such a deal in place. Any access deal will, as with cooperation agreements with Europol and Eurojust, be subject to approval by the European Parliament.

With regard to data protection, the UK Government has emphasised that withdrawing from the EU CFR and the jurisdiction of the CJEU will prevent interference with the UK's security policy. Of particular controversy is the CJEU's assessment in *Watson and Davis* of the UK's intrusive legal arrangements concerning data intercept and retention under the Data Retention and Investigatory Powers Act 2014.²⁴⁹ The implication of the UK's position on EU 'interference' with its security policy is that the UK Government will not seek to maintain data protection arrangements comparable to those of the Charter post Brexit. However, if the UK does seek to hollow out these protections, the EU institutions will likely be resistant to any arrangement which permits data sharing. It is notable in this regard that in *Schrems*, the CJEU focused upon the lack of scrutiny of the United States' data protection standards in striking down data sharing arrangements between the EU and the United States.²⁵⁰

Policy Implications of Brexit for Cross-Border Justice Arrangements

In summary, the threats to cross-border justice arrangements discussed above are severe. As Campbell summarises, 'Brexit will lead inevitably to a diminution in the level and nature of cooperation between the UK and remaining EU member states, for structural, legal, political, and practical reasons'.²⁵¹ The UK Government has insisted that the EU will be willing to offer it a comparable package of criminal justice measures post-Brexit out of a desire to retain the benefits of including the UK in the cross-border fight against crime. This analysis is, however, simplistic. EU leaders could instead prioritise the benefits of deepening integration in this field, taking steps so far prevented by the UK. Moreover, as was demonstrated above, legal barriers ultimately prevent the UK from retaining the current package of measures as a non-member state.

The different strands of cooperative or integrated activity which takes place under the auspices of the EU in the field of criminal justice form an interlinking package. The Irish and UK Governments must ensure that Brexit negotiations in this field do not only fixate upon the

²⁴⁶ Directive 2016/681 of the European Parliament and EU Council (27 April 2016).

²⁴⁷ S. Peers, Evidence to the Select Committee on the European Union Inquiry *Brexit: Future EU-UK Security and Police Co-operation* (14 September 2016) Q5.

²⁴⁸ J. Brokenshire, HC Deb, vol. 602, col.39-40WS (26 November 2015).

²⁴⁹ C-203/15 and C-698/15 (n47).

²⁵⁰ C-362/14 *Schrems v Data Protection Commissioner* [2016] 2 CMLR 2 (Grand Chamber, CJEU).

²⁵¹ Campbell (n230) p.1.

replacement of high-profile measures, such as the EAW, as this undermines much of the cumulative value of the EU's current arrangements for cross-border policing in NI/Ireland. Any negotiation of a replacement of the EAW should focus on three factors; the provision of an adequate judicial oversight mechanism which takes account of developing EAW jurisprudence, the need to maintain comparable standards of rights protections (and at the least a proportionality requirement upon the exercise of any replacement measure) and the need for a replacement measure to exclude discretion over the transfer of a country's citizens (as discretion on this basis can slow the surrender of suspects).

In the alternative to some replacement for the EAW being negotiated, a return to extradition arrangements and will have serious consequences for cross-border policing in Ireland. Such a step will also require legislation in both Ireland and the UK ahead of Brexit to reform the arrangement put in place under the Extradition Act 2003 (UK) and European Arrest Warrant Act 2003 (Ireland).

The UK's arrangements for post-incarceration deportation that apply to Irish citizens could become a pressing issue post-Brexit. At present, the UK Government applies discretion not to enforce the provisions of the UK Borders Act 2007 to Irish citizens in most circumstances. But the legal protection for these interests is at best unclear, given that it largely rests upon the Ireland Act 1949. As discussed above, the dated and opaque arrangements which govern the CTA are a recurring problem. Whilst the CTA arrangements were to a certain extent buttressed by EU citizenship rights in UK law, this lack of clarity could be down-played. With Brexit looming, the UK and Irish Governments should now take the opportunity to reach an agreement clarifying the status and rights of each other's citizens within their respective jurisdictions and to reflect this agreement in domestic legislation.

In order to ensure that NI's law enforcement agencies retain at least effective indirect access to EU information and data sharing measures in their collaborative cross-border investigations, steps should be taken to expand the staff base and remit of the Joint Agency Task Force established in 2016. Consideration should also be given to whether the CTA should make allowance for police involved in 'hot pursuit' situations, as provided for under the Schengen Acquis.

Recommendations

31. All parties to the negotiations should ensure that the replacement of the European Arrest Warrant provides for adequate judicial oversight mechanisms which take account of developing EAW jurisprudence, maintains comparable standards of rights protections, and excludes discretion over the transfer of a country's citizens.
32. The UK and Ireland should prepare, as a contingency in the event of no replacement EAW being negotiated, legislation to be passed ahead of Brexit to reform the arrangements currently in force under the Extradition Act 2003 (UK) and European Arrest Warrant Act 2003 (Ireland).
33. The UK and Irish Governments should seek to clarify the status and rights of each other's citizens within their respective criminal justice systems, in particular with regard to post-sentence deportation, and to reflect such an agreement in domestic legislation.

34. The staff base and remit of the Joint Agency Task Force should be expanded to sustain collaborative cross-border investigations post Brexit.
35. The UK and Irish Governments should consider whether the Common Travel Area should make allowance for police involved in 'hot pursuit' situations, as provided for under the Schengen Acquis.

6. Non-Diminution and Equivalence

The GFA's human rights protections have been framed by some as either an irrelevance or an inconvenience,²⁵² they are instead a common thread running through the entire text; a pledge not to return to the abuses which characterised the NI conflict. The GFA records that;

The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves...to the protection and vindication of the human rights of all.²⁵³

In addition to the commemorative function of human rights, the GFA also explicitly designates them as a safeguard to ensure the proper operation of NI's democratic institutions,²⁵⁴ as a building block of a harmonious society,²⁵⁵ and an important aspect of North-South cooperation and equivalence.²⁵⁶

The GFA does not require the UK's or Ireland's membership of the EU, but it does assume continued membership²⁵⁷ and its terms are likely to be easier to pursue within the common frameworks of the EU. Neither does the GFA require the UK's adherence to particular EU human rights instruments.²⁵⁸ The GFA does, however, envisage the adoption of 'rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience'.²⁵⁹ It also requires that Ireland, which at the point of the GFA's conclusion was behind the UK in the processes of enshrining the ECHR into domestic legislation, would 'ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland'.²⁶⁰

While much has changed since the GFA's conclusion and some assumptions made in its text have not transpired as expected (such as the non-completion of an NI Bill of Rights), the Agreement remains binding under international law (as discussed in Chapter 1).

Substance of Non-Diminution and Equivalence Guarantees

By establishing that there can be no diminution of rights following Brexit, the Joint Report implicitly guarantees some form of continuing application of the EU CFR and all legislation giving effect to the non-discrimination provisions in that Charter. This guarantee of the continued application of CFR standards and other EU human rights provisions is essential, as in many areas EU protections go beyond what would otherwise exist. The UK's HRA 1998 affects the incorporation of much of the ECHR into domestic law and therefore responds to

²⁵² Peter Weir MLA, NIA Deb, vol 105, no. 2, page 48 (1 Jun 2015).

²⁵³ GFA (n6) section 1, para 2.

²⁵⁴ GFA (n6) section 3, para 5b.

²⁵⁵ GFA (n6) section 6.

²⁵⁶ GFA (n6) section 6, paras 10, 9.

²⁵⁷ See further 'NI and the Good Friday Agreement: Post Brexit' for a discussion of the Council.

²⁵⁸ Note that the GFA very clearly requires the UK's adherence to the ECHR.

²⁵⁹ GFA (n6) section 6, para 4.

²⁶⁰ GFA (n6) section 6, para 9

a central element of the GFA. However, EU human rights protections take the ECHR only as a baseline of protection. EU protections go beyond the ECHR in the areas of marriage and family rights, education, asylum, data protection, health, social security, environmental rights, and protections from discrimination (as discussed in Chapter 2). Retreat to a human rights framework grounded only in the ECHR would therefore have significant substantive impacts.

The guarantee extends to require adherence not only to the standards of the EU CFR, but to all rights which might be lost due to the UK's departure from the EU. This would include any EU laws which provide rights to non-discrimination. However, it could also include non-EU human rights which Brexit 'causes' individuals to lose. For example, if the UK is a party to human rights treaties via an EU ratification but does not have its own ratification of the treaty. The 'Convention on the International Recovery of Child Support and Other Forms of Family Maintenance' is potentially such a treaty.²⁶¹ Another example of the diminution of international rights relates to environmental rights which could be damaged by the withdrawal from the EU's broad protections. It has already been claimed that the Aarhus environmental treaty has been breached by the UK's failure to consult about changes to environmental protections flowing from Brexit.²⁶²

The Phase 1 Report is not precise about what the agreed meaning of non-diminution is. There are two major forms it could take;

- a) A snap shot on the date of Brexit
- b) The ongoing incorporation of additional rights

The snap-shot interpretation (a) would freeze the rights available on Brexit day and ensure there is no retreat from the standards as they exist on 29 March 2019. Interpretation (b) would ensure that there will be no diminution of the human rights associated with residing in an EU member state into the future (which would require domestic incorporation of new developments in those rights and to any new human rights instruments developed at the EU). Interpretation a) would allow the UK to protect only those EU human rights laws in force on Brexit day. Interpretation b) would sign the UK up to protecting the totality of human rights protections that the EU develops *in perpetuity*.

A snapshot approach does not fully protect those in the UK from non-diminution. Under this view, there could be no retreat from human rights standards accrued up until Brexit day and therefore no diminution from the absolute standard in place on that day. However, in a relative sense, there would be clear diminution of the rights as any increase in EU rights protections would be enjoyed by those in Ireland and the rest of the EU, while those in the UK would be deprived of those advances. As the European Social Pillar, for example, is a relatively recent and fast-moving development, any advances in its content after Brexit day would be lost to those in the UK.

²⁶¹ Whether it is a human right treaty is a more open question, but the rights of the child are recalled within it; Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (adopted 23 November 2007; entered into force 1 January 2013).

²⁶² F. Marshall, 'Communication to the Aarhus Convention Compliance Committee Concerning Compliance by the United Kingdom Regarding Public Participation in the Context of the "Great Repeal Bill"' <[http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2017-150/Correspondence with the Party concerned/ToPartyC150_05.01.2018.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2017-150/Correspondence%20with%20the%20Party%20concerned/ToPartyC150_05.01.2018.pdf)> (accessed 7 January 2018).

Contextually, the ongoing incorporation approach (b) is more appropriate. This part of the Joint Report aims to maintain the close ties between the UK and Ireland and to reduce the significance of the Irish border. An interpretation of the non-diminution phase which freezes rights in NI in time while rights in Ireland continue to develop would clearly not meet that aim. In any case, the continuous integration approach of interpretation b) also makes practical sense for the UK. The Report guarantees to the 'people of Northern Ireland who are Irish citizens' that Brexit should 'be without prejudice to the rights, opportunities and identity that come with European Union citizenship'.²⁶³ This guarantees full, ongoing, and continually accruing EU rights and opportunities to a class of persons within the UK. The UK Government will therefore be under the obligation to provide human rights in line with interpretation b) to some within NI. Affording the same type of rights guarantee (i.e. protection of those human rights linked EU laws as they develop or are created) to all would significantly simplify the future constitutional and administrative framework of the country. Otherwise, human rights protections would vary between Irish citizens in NI (who would have full and continuing accrual of EU rights) and non-Irish people of NI (who would have only those EU rights in force on Brexit day).

The GFA,²⁶⁴ is also relevant to the interpretation of the non-diminution guarantee. The GFA required the levelling-up of Irish and UK human rights provisions so that they respected NI's specific circumstances, and were equivalent on either side of the border. It would therefore be contrary to the GFA for either the UK or Ireland to remove a human rights protection (what the GFA refers to as 'rights supplementary' to the ECHR²⁶⁵), or for either country to cease to provide an 'equivalent level of protection'.²⁶⁶ The non-diminution guarantee protects rights important in NI's specific circumstances, and which are acknowledged to have 'provided a supporting framework [to the GFA] in Northern Ireland and across the island of Ireland'.²⁶⁷ However, any interpretation of the non-diminution guarantees that provided only such a snapshot would mean that the Joint Report is less exacting than the GFA. The snapshot approach would enable the UK to break with the equivalence requirement without breaching the Withdrawal Agreement terms enunciated to date, but would violate the GFA.

The GFA still imposes international law obligations upon the UK to maintain substantive equivalence with Ireland. To acknowledge this, the UK could choose to go beyond the content of the Withdrawal Agreement (should it require a lower standard) and maintain rights equivalence with Ireland in its domestic law in order to respect the GFA. However, there currently seems little appetite within the UK to ensure rights protection beyond what is forced upon it by the withdrawal terms. Non-diminution implemented in a minimalist, snapshot fashion by the UK would breach the GFA's equivalence requirements while leaving the Joint Report intact.

Territorial Extent of Non-Diminution Guarantees

The non-diminution agreement is placed within the Ireland and NI section of the Phase 1 Report, and is divorced from the earlier discussion of citizens' rights. It is crucial that this separation of the two in form, should reflect a commitment to honour the non-diminution

²⁶³ EU-UK Phase 1 Joint Report (n1) para 52.

²⁶⁴ EU-UK Phase 1 Joint Report (n1) para 42.

²⁶⁵ GFA (n6) section 6, para 4.

²⁶⁶ GFA (n6) section 6, para 9. See further 'Introduction'.

²⁶⁷ EU-UK Phase 1 Joint Report (n1) para 53.

agreement for all within the territory, and not only to those with a certain citizenship status. It would be entirely contrary to the nature of the CFR and the nature of human rights to afford them to only those – for example – with EU citizenship, or only to those who were resident in the territory prior to Brexit day. If it is the intention of the EU and UK that all within the territory will be protected by the guarantee of non-diminution, this is not currently clear from the Phase 1 Report's wording.

The text of the Phase 1 Report also seems to require no diminution of rights in the UK as a whole, and not merely in NI. The text reads; '[t]he United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union'.²⁶⁸ This suggests that it is the UK's intention to have Charter and non-discrimination rights maintained for the whole country. However, domestic debates have indicated the opposite. It is notable that the only mention that the CFR receives is in the Ireland and NI section of the Report, and that – absent a commitment to the non-diminution of rights across the whole UK – rights protections in GB will be damaged as a result of Brexit.

Remedies

The UK is likely to cut ties to a range of EU rights enforcement mechanisms following Brexit. This will entail a reduction in individuals' rights to seek effective remedies by removing their ability to petition or rely on EU institutions. At present, individuals' rights are monitored by, protected by, or can be enforced via, the Fundamental Rights Agency,²⁶⁹ the European Parliament petition procedure,²⁷⁰ the European Ombudsman,²⁷¹ the European Data Protection Supervisor,²⁷² and the European Commission (and CJEU).²⁷³

There is a strong case that cutting all ties with these bodies would be a diminution of rights, and would breach the GFA's equivalency requirement if equivalent domestic mechanisms were not immediately instituted. Access to these bodies gives individuals recourse to a wide range of remedies that will be lost upon the UK's withdrawal from the EU. This is quite clearly a diminution of rights that would immediately bring the conditions of the Joint Report into question. In this sense, the Report is contradictory; facilitating the UK's withdrawal from EU rights-protecting institutions while calling for the absolute protection of rights.

Compliance with the GFA is somewhat easier for the UK in this area. The GFA does not require Ireland and the UK to have identical mechanisms of rights protection, only equivalent substance. This means that as long as those in the UK enjoy equivalent rights to a remedy as

²⁶⁸ EU-UK Phase 1 Joint Report (n1) para 53.

²⁶⁹ Established under Regulation (EC) No 168/2007 (15 February 2007). See European Union Agency for Fundamental Rights, 'About FRA' <<http://fra.europa.eu/en/about-fra>> (accessed 3 January 2018).

²⁷⁰ TFEU, Article 227. See European Parliament, 'Petitions' <<http://www.europarl.europa.eu/atyourservice/en/20150201PVL00037/Petitions>> (accessed 3 January 2018).

²⁷¹ Established under TFEU, Articles 20, 24 and 228. See European Ombudsman, 'Complaint Form' <<https://www.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>> (accessed 3 January 2018).

²⁷² Established under Regulation (EC) No 45/2001 (12 January 2001). See European Data Protection Supervisor, 'Our Role as a Supervisor' <data-protection/our-role-supervisor_en> (accessed 3 January 2018).

²⁷³ European Commission, 'Complaint Form for Breach of EU Law' <https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/index.html> (accessed 3 January 2018); Access to the CJEU is provided via TFEU, Article 258.

Irish residents enjoy from various EU bodies, then equivalence will be maintained. However, this must go beyond the simple presence of institutions which are equivalent in name (e.g. a UK Information Commissioner's Office in place of the European Data Protection Supervisor), but must also allow for the same types of complaint and remedy. The UK must also ensure that its domestic measures evolve on a continuous basis with EU mechanisms, in order to maintain equivalency with Ireland.²⁷⁴

Structures to Secure Equivalence and Non-Diminution

Monitoring of the UK's adherence to the non-diminution guarantee and to the GFA's requirement of equivalence will become complex following Brexit. Since the GFA, in addition to being signed up to broadly similar human rights substance, the UK and Ireland have shared a common set of institutions which monitored their performance in similar fashion. Following Brexit, the UK is likely to depart from a number of those institutions. This endangers both the equivalence requirement of the GFA, but also will make individual rights-claiming more difficult and will therefore imperil the non-diminution guarantee.

The GFA requires enforcement of human rights standards in NI through a number of mechanisms. It stipulates the existence of an NI Equality Commission,²⁷⁵ a NI Human Rights Commission²⁷⁶ (and also one for Ireland²⁷⁷) and the existence of a Joint Committee of the two.²⁷⁸ It also requires that courts in the UK are able to nullify legislation of the NI Assembly where it breaches the ECHR or the NI Bill of Rights.²⁷⁹ The UK is required by the GFA to allow individuals to bring claimed breaches of the ECHR before domestic courts, a promise it made good on in the HRA 1998.²⁸⁰ Besides these, the GFA does not require any particular forms of rights enforcement or particular institutions to monitor them. There is also no explicit requirement for equivalent institutions North and South of the border. As such, it would be speculative to ground a claim in the GFA that simply by virtue of Ireland's membership of EU human rights institutions, the UK must remain in them to maintain human rights equivalence. Put differently, there is no duty of institutional equivalence arising from the GFA. However, as discussed above, in order to maintain the substantive equivalence between the jurisdictions and comply with the GFA the UK must ensure that if it withdraws from EU human rights enforcement mechanisms, these and their remedies are replaced at domestic level.

The situation with the non-diminution guarantee is different, however. In the Phase 1 Report, the UK 'commits to ensuring that no diminution of rights is caused by its departure from the European Union'.²⁸¹ In context, 'no diminution of rights' can readily be interpreted as referring not only to substantive rights, but also to the procedural guarantees of having access to various EU institutions. Interpreted in this manner, the UK would breach its guarantee as soon as it withdrew from the EU.

Separate to the UK's non-diminution guarantee, the UK also undertakes to respect all of the rights, opportunities and identity of the people of NI who are Irish citizens (see Chapter 4). It

²⁷⁴ Such ongoing changes will require additional monitoring by NHRIs in the UK and Ireland. See below.

²⁷⁵ GFA (n6) section 6, para 5.

²⁷⁶ GFA (n6) section 6, para 5.

²⁷⁷ GFA (n6) section 6, para 9.

²⁷⁸ GFA (n6) section 6, para 10.

²⁷⁹ GFA (n6) section 3, para 26a.

²⁸⁰ GFA (n6) section 6, para 2.

²⁸¹ EU-UK Phase 1 Joint Report (n1) para 52.

would significantly hollow out the agreement if this promise was to exclude procedural rights or rights to petition EU agencies and institutions. To respect the full range of EU rights that Irish citizens' in NI have, they must genuinely have the same rights and opportunities in NI as they would in an EU member state. This would mean EU institutions continuing to monitor their enjoyment of rights in NI, and the ability to complain to EU agencies and institutions regarding the UK's treatment of them in NI. Such arrangements are not addressed at all in the Joint Report. The approach taken to citizens' rights protections involves transferring EU rights into UK domestic law, but such an approach would be clearly inadequate for Irish citizens in NI.

For none of these categories of protection – GFA equivalence, non-diminution, and full EU rights – does the Joint Report afford rights holders the ability to rely upon them directly in court, or make provision for the involvement of EU institutions in their enforcement. This is in direct contrast to the range of protections for citizens' rights where the rights are locked into UK law, individuals can invoke their rights before UK courts, the European Commission can intervene in cases, UK courts can make references to the CJEU, and there is a UK independent national authority. The rights under the non-diminution guarantee and the promise to Irish citizens in NI currently have no safeguards. Robust monitoring mechanisms and safeguards should be addressed urgently in the separate work stream that is running in Phase 2 to address Ireland-NI issues.²⁸²

There are many options to ensure adequate protection, however a number of key principles should be prioritised. First, there is a need for EU involvement in the monitoring and enforcement of these EU rights. This should involve measures at least equivalent to the European Commission's rights to intervene in UK courts regarding citizens' rights. Second, the new difficulties that Brexit will cause for the monitoring of GFA equivalency needs to be addressed. While the UK and Ireland have been in similar structures (such as the EU), monitoring has been low-key. With the UK charting its own course, the task of monitoring equivalence will be a very large and continuing challenge. Third, this challenge will require monitoring bodies to be adequately resourced so that in a fast moving and complex legal environment, they can adequately ensure no diminution and the exercise of full EU rights. Finally, established human rights institutions in Ireland and NI have reserves of experience and expertise. The new UK independent national authority and any other new monitoring bodies should be given a mandate which complements that expertise. Civil society organisations on the island, including statutory human rights institutions, should be consulted on how new monitoring bodies should function and how mandates might be separated.

Recommendations

36. The IHREC, NIHRC and Irish Government should seek assurances on the extent of the UK's non-diminution obligation, and whether it includes the continuing incorporation of EU human rights instruments, in order to safeguard the GFA's equivalence requirements.
37. The UK and EU should clarify the territorial extent and range of rights holders covered by the Phase 1 Report's non-diminution of rights agreement.

²⁸² EU-UK Phase 1 Joint Report (n1) para 56.

38. The UK and EU should clarify the Phase 1 Report's non-diminution guarantee's application to remedies and access to EU agencies.
39. The UK and EU should agree that the UK will retain membership or associate membership of EU human rights institutions post Brexit.
40. The UK, EU and Ireland should take steps to support civil society across the island of Ireland, including significant new streams of funding, additional fora for consultation, and additional protections for those individuals engaged in such activism.
41. The IHREC and NIHRC should seek clarity from the UK Government regarding the monitoring arrangements in Northern Ireland which will cover rights beyond citizen/residency rights.
42. The UK and Irish Governments should consult civil society organisations before the creation of new monitoring bodies.
43. The UK, EU and Ireland should clarify how the new 'Independent National Authority' will interact with existing human rights bodies established under the Good Friday/Belfast Agreement.

7. The Northern Ireland Assembly and the Good Friday/Belfast Agreement

The continued suspension of the NI Assembly creates its own specific issues with regard to Brexit. Changes to the Assembly's competences as part of the Brexit process also create a complex constitutional knot which needs to be untangled ahead of Brexit to ensure democratic rights.

The Northern Ireland Assembly

The institutional arrangements established on the basis of the GFA, including the NI Assembly form a core element of NI's human rights infrastructure. In this context, the NI Act 1998 provides a frame of competences in human rights and EU law. According to the terms of the GFA, the NI Assembly's competence is bound by human rights considerations.²⁸³ Section 6(2)(c) of the NI Act 1998 denies the Assembly the ability to make laws incompatible with incorporated ECHR rights, a concept which 'has the same meaning as in the Human Rights Act 1998'.²⁸⁴ This direct link to the HRA 1998 is accepted by all parties to the GFA. For instance, Annex B of the St Andrews Agreement, on human rights, specifically references the HRA 1998,²⁸⁵ and thereby exemplifies the degree to which the HRA 1998 has become the baseline underpinning the human rights aspects of the GFA. But whereas the HRA 1998 does not permit the UK's courts to strike down Acts of the Westminster Parliament which conflict with its incorporated rights, through these provisions the NI Act 1998 provides for hard-edged oversight of the Assembly's legislation.

Lord Sewel, the minister responsible for piloting the 1998 devolution legislation through the House of Lords, explained that once devolution was operational a constitutional convention would operate to ensure that 'Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'.²⁸⁶ The same convention also covers Wales and NI.²⁸⁷ If Westminster, legislating without consent in an emergency is the only instance where the convention would not 'normally' apply, then when the UK Government proposes legislation which touches on devolved matters, the Sewel Convention requires that such a change be assented to by the Assembly by means of a LCM.²⁸⁸

Under the NI Assembly's standing orders, Westminster legislation which covers a 'devolution matter' requires an LCM.²⁸⁹ This includes any measure which touches upon an area of

²⁸³ GFA (n6) section 3, paras 5 and 26.

²⁸⁴ NIA 1998, s 98(1).

²⁸⁵ St Andrews Agreement Annex B.

²⁸⁶ Lord Sewel, HL Deb, vol. 592, col. 791 (21 Jul 1998).

²⁸⁷ The Convention was adopted within the Memorandum of Understanding on relations between the UK's devolved and central institutions; Office of the Deputy Prime Minister, *Memorandum of Understanding and Supplementary Agreements between the UK Government and the Devolved Administrations* (December 2001) Cm 5240, para 13.

²⁸⁸ The Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Dec 2012) vol. 1, p. 251 (A. Speaight QC).

²⁸⁹ Northern Ireland Assembly, Standing Order 42A, para.10. On this issue, see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [140].

competence transferred to NI's institutions or which attempts to change the Assembly's legislative competence. The EU (Withdrawal) Bill alters the Assembly's competence as it changes the restriction contained within section 6(2)(d) of the NI Act, a provision which denies the Assembly any competence to make law that is incompatible with EU law. Under the EU (Withdrawal) Bill, 'EU law' will now only include retained laws (i.e. those translated into domestic law by Westminster). As discussed in Chapter 2, this Bill does not retain the EU CFR, thereby changing the restrictions upon the Assembly's law-making competences. Assuming that the Assembly is functioning, the Sewel Convention could mean such a change would trigger the need for a LCM.

Passing a LCM could be practically difficult if the Assembly once again becomes operative. The NI Act contains consociationalism provisions to prevent measures passed with the backing of parties representing one community from having a disproportionate impact upon the other community's interests. Those in the Assembly in favour of a deep continued relationship with the EU (predominantly Nationalist parties) could use NI Act provisions to trigger a Petition of Concern.²⁹⁰ This would require that any LCM authorising reform received cross-community support. By this route the Assembly's consent could be refused for any reform which was considered by one or other community to be a threat to the GFA's human rights obligations. However, as respect for the LCM procedure is based on a constitutional convention, while ignoring the blocking of an LCM could be fairly described as unconstitutional, it could not ultimately be legally enforced.²⁹¹

Of course, this also requires the NI Assembly to be operational. The NI Executive collapsed in January 2017 amid the fallout from the Renewable Heating Initiative scandal and there was a further suspension after the March 2017 Assembly elections. The possibilities for the passage or refusal of an LCM, is reliant on the resumption of the Executive. Absent an Executive, there could be no request to the Assembly to issue a LCM regarding Brexit and changes to the Assembly's competences.

For as long as the Assembly is inoperative, the UK Government has pledged to keep the main NI parties informed with regard to withdrawal negotiations. However, this consultation has been uneven in practice. Immediately prior to the conclusion of the Phase 1 Report between the UK and the EU, the DUP were virtually put in a position of veto over the UK negotiating position on Ireland/NI issues. This was a direct result of the confidence and supply agreement between the Conservative Party and the DUP at Westminster. This resulted in just one of the political parties in NI being properly consulted and having an opportunity to affirm or veto fundamental changes to NI's future trading status and the status of its residents. This was potentially in violation of the GFA and steps should be taken to ensure that all parties are given an equal say in the future of NI through the remaining stages of the negotiations. This will be particularly important whilst the Assembly continues to be inoperative.

Northern Ireland and a Bill of Rights

The introduction of a comprehensive Bill of Rights in NI could resolve some – but not all – of the issues raised by Brexit. The UK Government has accepted that unilateral action to

²⁹⁰ Northern Ireland Act, s 42(1).

²⁹¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [148].

establish a NI Bill of Rights would challenge the nature of the GFA.²⁹² Moreover, successive Secretaries of State for Northern Ireland have insisted that any progress on a NI Bill of Rights requires the Assembly's consent:

[A] legislative consent motion must be passed by the assembly in circumstances where the government brings forward any legislation at Westminster such as a Bill of Rights which will have a significant impact on devolved policy. ... The British government is happy to move, but there is no point in moving until we have achieved some sort of consensus which is very much lacking at the moment.²⁹³

Annex B of the St Andrew's Agreement follows the GFA in regarding the ECHR as a human rights baseline and that in NI 'ECHR-plus' arrangements would be placed in an NI Bill of Rights. The St Andrews Agreement can be properly understood as 'subsequent practice' by the UK and Irish Governments that legally augments the GFA.

The NIHRC's draft proposals on a NI Bill of Rights should be reassessed in the context of Brexit to counter the risk of a diminution of human rights provision in NI.²⁹⁴ Moreover, the Phase 1 Report specifically states, the UK and EU agree in principle that there is to be no diminution of rights in NI.²⁹⁵ As discussed in Chapter 6, if the non-diminution guarantee is taken to require the continuous integration of EU rights and full access to the remedies of EU institutions, then a NI Bill of Rights would not fully ensure the non-diminution requirement is met. Likewise, a NI Bill of Rights would not necessarily ensure equivalence with Irish human rights protections for the purposes of the GFA. Ireland's protections would still evolve with the EU, while the Bill of Rights would struggle to integrate such changing standards.

International Law and Modifying the Good Friday/Belfast Agreement

It would be possible to amend the GFA to reflect the circumstances of the UK's withdrawal from the EU. Successor treaties, treaty amendments, the use of severability provisions, and certain fundamental changes in circumstance can all provide recognised means of altering the binding character of some or all of a treaty.

Article 59 of the VCLT allows treaties to be suspended or terminated by another treaty, which as a matter of law remains an option available to both Governments.²⁹⁶ The VCLT also allows for successive treaties to modify the provisions of an earlier treaty. This is an option which is particularly straightforward with bilateral treaties and a route which the Irish and UK Governments have employed since the establishment of the Free State in 1921.²⁹⁷ If there was suspension or termination, the GFA Bilateral Treaty including the Annex would be

²⁹² Lord Bridges, HL Deb, vol. 773, col. 376 (24 May 2016).

²⁹³ Owen Paterson, reported in: M. Hennessy "'Stormont agreement" needed for rights Bill' *Irish Times* (23 Nov 2010). See also T. Villiers, MP, Westminster Hall, col. 197WH (16 Jul 2013).

²⁹⁴ NIHRC, *A Bill of Rights for Northern Ireland. Advice to the Secretary of State for Northern Ireland* (10 December 2008).

²⁹⁵ EU-UK Phase 1 Joint Report (n1) para 53.

²⁹⁶ VCLT (n8) Article 59.

²⁹⁷ VCLT (n8) Article 30. See the Government of Ireland Act 1920 and Treaty between Great Britain and Ireland, 1921, available from <<http://treaty.nationalarchives.ie/document-gallery/anglo-irish-treaty-6-december-1921/>> (accessed 19 January 2018).

suspended or terminated, but the GFA as a political agreement within NI would stand. Its political position would instead become a UK constitutional issue between the devolved Government and Westminster rather than a question of international law. In the circumstance of a successive treaty (as with the Anglo-Irish Agreement before it), the GFA Bilateral Treaty and Annex could be terminated between the two Governments and replacement terms agreed between the two parties. Nonetheless, it is extremely unlikely that such a change would be attempted without the consent of NI's political parties.

Besides suspension and termination, the VCLT also allows for the amendment of treaties. In the context of the GFA, it is the Annex that would require amendment rather than the UK-Ireland treaty. While international law allows for amendment, the political viability of such a course of action is doubtful.

The citizenship referendum in Ireland, provides a useful case study. The referendum partly reversed changes to Ireland's Constitution that had been instituted in response to the GFA.²⁹⁸ To maintain its international obligations, the Irish Government first sought the UK Government's agreement through an Interpretative Declaration to the effect:

[T]hat this proposed change to the Constitution is not a breach of the ... Agreement or the continuing obligation of good faith in the implementation of the said Agreement.²⁹⁹

As a guarantor of the GFA, the Irish Government has affirmed its responsibility to safeguard the GFA institutions and principles and to hold the UK Government to account should any violation of the GFA occur.³⁰⁰ The Irish Government should seek a similar Agreement with the UK to encourage the country to continue its good faith obligations in interpreting the GFA and ensure that, as the UK goes through significant constitutional changes of its own, it continues to comply with the Agreement.

Challenging Unilateral Action by the UK

While it is possible to pass a subsequent treaty, or to amend or sever the GFA provisions, it is not possible for the UK to do so unilaterally. Any modifications sought by the UK must be done through re-negotiation with the Irish Government and, given the circumstances of the GFA, in tandem with the parties in NI. It would be nearly impossible to reopen the human rights element of the 1998 settlement in isolation from other aspects of the Agreement. If the UK did proceed to act unilaterally, several options would become available to Ireland under international law and the VCLT.³⁰¹ If the Irish Government considered the UK's unilateral act to be a 'material breach', which would be a valid interpretation of such action by the UK, Ireland would be entitled to terminate or suspend the whole or part of the treaty. This is an unattractive option for Irish ministers seeking to apply pressure upon the UK to maintain its GFA obligations. Alternatively – although the GFA's Bilateral Treaty includes no dispute

²⁹⁸ Constitution of Ireland, *Bunreacht na hEireann*, Nineteenth Amendment.

²⁹⁹ Citizenship Referendum: Interpretative Declaration by the Irish and British Governments regarding the British Irish Agreement Dáil Debate, 21 April 2004 Vol. 583 No. 6.

³⁰⁰ C. Flanagan, TD, 'Commencement Matters: International Agreements' (Seanad, 14 May 2015).

³⁰¹ VCLT (n8) Article 60.

settlement clause – there are some other options that remain open to Ireland if it believes the UK to be in violation of the Agreement.

First, while it might seem the most intuitive option, taking action before the International Court of Justice, does not appear to be a possibility. Both states, in making their declarations of compulsory jurisdiction (the formal recognition of the Court's authority), have included qualifications that could be interpreted as excluding the other. The Irish Government has the most evident exclusion, which allows for all disputes to be heard at the International Court of Justice except those that arise between it and the UK with regard to NI. The UK's declaration is slightly more open in that it states, 'any dispute with the government of any other country which is or has been a Member of the Commonwealth'.³⁰² Whether the UK's exclusion would include Ireland is questionable and is reliant on interpretations of whether Ireland was ever a member of the modern Commonwealth. As such, a case before the ICJ would appear unlikely.

Second, remedies for breach may be available through the law of state responsibility. Though the International Law Commission's *Articles on State Responsibility for Internationally Wrongful Acts* are not treaty based, they are regarded as binding customary international law.³⁰³ An internationally wrongful act can be an act or omission which is attributable to a state and which constitutes a breach of its international obligation. The internal conditions or domestic law of a country are irrelevant to a determination of a breach, as such, the Brexit referendum would not be a sufficient defence.³⁰⁴ The Bilateral Treaty imposes international obligations upon the UK, and any internal constitutional changes which breach GFA obligations, would trigger the Law of State Responsibility. Under international law, the injury to Ireland would include both material and moral damage. Such an injury under international law, entitles Ireland to reparations including restitution, compensation and or satisfaction.³⁰⁵ If a state (the UK) refuses to acknowledge its breach or provide reparations, the injured state can ultimately invoke proportionate 'countermeasures'.³⁰⁶ These could include Ireland suspending the application of other agreements including, for instance, the CTA or policing measures.

Although, it is difficult to imagine such a collapse in relations between the UK and Ireland, if the UK did unilaterally abrogate its GFA commitments, international law provides Ireland with some options for recourse.³⁰⁷

Continuation of PEACE and INTERREG Funding

Both Ireland and NI benefit from several funding streams available through the EU. Currently, the border separates different funding regimes. Under the EU Cohesion Policy (2014-2020) NI is designated as a region in transition, whereas Ireland is in the more developed category. As

³⁰² Both states' declarations are available at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (accessed 25 Jan 2017).

³⁰³ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries (2001), GA Resolution A/56/10.

³⁰⁴ ILC Draft Articles (n303) Articles 1, 2 and 3.

³⁰⁵ ILC Draft Articles (n303) Articles 31 and 34.

³⁰⁶ ILC Draft Articles (n303) Articles 49 and 51.

³⁰⁷ If Ireland consented to the UK breaching the Bilateral Treaty this would vitiate any claim to a wrongful act; ILC Draft Articles (n303) Article 20.

such, NI is currently able to access more funding than Ireland. There are also specific programmes which follow from the peace process which are aimed at increasing cross-border co-operation. The Special EU Programmes Body (PEACE IV Programme (2014-2020)) provides funding to manage cross-border EU Structural Funds programmes in NI, the Border Region of Ireland, and parts of Western Scotland. The programme was agreed between the Irish Government and the NI Executive and covers the entire border region. Over the course of the programme €229m will be made available, 85 per cent of which comes from the EU with the remainder from Ireland and NI budgets.

INTERREG IVA provides structural funding for border regions. Ireland and NI fall within several of the designated regions, North West Europe, Northern Periphery and Arctic and the Atlantic Area. Under the Programme, Ireland/NI/Scotland is recognised as a region requiring specific funding. This programme is worth €240 million, with €42 million of matching funding from Ireland and the UK.

The Phase 1 Report of the EU and UK agrees to look favourably on the continuation of PEACE and INTERREG funding into the future while agreeing to ensure the continuation of the current funding stream. This puts this issue onto a more positive – if not altogether fully resolved – footing. The financial settlement the UK has reached with the EU also ensures the immediate continuation of this funding. For all the prevailing talk of the financial settlement as the UK's 'divorce bill', this element of the Report illustrates the EU's willingness to make an ongoing financial commitment to NI.

Both of these funding streams have made significant contributions to the success of the GFA, providing funding for areas that were put at significant disadvantage economically, socially, culturally and politically during the Troubles. The creation of sustainable infrastructure and social, economic and cultural programmes significantly contribute to NI and it should be a priority to ensure the continued funding for these programmes until the disadvantage ends. This may require a larger commitment of funds from both the UK and Ireland to offset any reduction of funds from the EU or alternatively a commitment to contribute to the EU budget on these matters if the EU is to continue to administer these funds.

Recommendations

44. The NIHR and UK Government should undertake a detailed study of how the EU (Withdrawal) Bill will impact on the competences of the Northern Ireland Assembly, specifically under section 6(2)(d) of the Northern Ireland Act. This is especially important while the Assembly remains inoperative.
45. The UK Government, under the scrutiny of Northern Ireland civil society, should ensure that all Northern Ireland political parties are consulted regarding Brexit on an equal basis, with no one party having a veto.
46. The UK and Irish Governments should revisit the NIHR's draft proposals on a Northern Ireland Bill of Rights as way of preventing a diminution of rights in the Brexit process.
47. As a guarantor of the Good Friday/Belfast Agreement, the Irish Government should seek an Interpretative Declaration from the UK to ensure the ongoing and good faith implementation of the Agreement.

48. The Irish Government should keep the possibility of international law accountability for any breaches of the Good Friday/Belfast Agreement by the UK under review.
49. The Irish Government should push for the continuation of PEACE and INTERREG funding to continue to assist Northern Ireland border regions in their recovery as part of the peace process.
50. The Irish Government and UK Government should plan to make up any shortfall of PEACE and INTERREG funds resultant from the reduction or non-continuation of those schemes.

8. Conclusion

The Joint Report on Phase 1 of the EU-UK negotiations has resolved a number of serious concerns for UK, Irish, and EU citizens. Its package of citizens' rights and Ireland-Northern Ireland measures, bring some reassurance and appear to be an earnest attempt to grapple with the difficult issues arising from the UK's decision to withdraw from the EU. However, the current set of guarantees that have been made by the EU and the UK provide inadequate protection for human rights on the island, and especially in Northern Ireland. This is especially so where the details of the Joint Report are evaluated in the context provided by the GFA, the CTA and cross-border criminal justice.

This Report has made 50 recommendations relevant to human rights protection in Northern Ireland and Ireland. Brexit, it must be emphasised, will have many effects for Ireland (for example, with regard to trade and the border) and for the UK's future relationship with the EU, which fall outside the scope of this Report. There is nonetheless a significant danger that the difficult issues relating to human rights will not be satisfactorily resolved if the attentions of the UK, Ireland and the EU are dominated by other economic, business and trade issues.

The likely consequences of leaving these issues unresolved will be manifold. Reduced human rights standards and degraded enforcement mechanisms in Northern Ireland risk fostering an increasingly fractured society featuring a staggering array of classes of rights-holder, a less stable political environment, a more prominent border, a more economically fragile situation and greater difficulties in dealing with cross-border crime. In combination, these outcomes would profoundly destabilise UK-Ireland relations.

Resolving the outstanding issues will require a mixture of high level political action, cooperation between governmental bodies, and wide-reaching, streamlined administrative solutions. As Brexit day, 29 March 2019, draws near, all of these actions are relatively urgent, but not all of them are equally so. While the two-year implementation phase set out in the Phase 1 Report will allow some limited breathing room for the UK's political processes and administrative bodies, many of the recommendations made in this Report require action well before then, and indeed a proportion of them require resolution in advance of Brexit day.

For example, agreeing how the non-diminution guarantee will be monitored, consulting with Civil Society, legislating for any new (cross-border) agencies, the staffing of those bodies with qualified individuals, and their physical accommodation, will have to happen in advance of Brexit day (leaving less than 14 months). Some recommendations are even more urgent. Any Frontier Worker whose short-term contract ends, or who is made involuntarily unemployed from a short-lived job any time until the end of September 2018 is at risk of losing their EU workers' status. These individuals therefore need urgent advice and support. Still other recommendations relate to processes that ordinarily take many years, but which require severely expedited action to avert substantial problems following Brexit. The negotiation of a suite of cross-border criminal justice measures is one example. Without the European Arrest Warrant, North-South police cooperation will be significantly hampered. Yet, the implementation of replacement arrangements could be a long process; it took around two years to negotiate for Norway and Iceland, and the agreement is still not operational twelve years later.

However, while it is essential that the damage to human rights protections in Northern Ireland are mitigated, it is also clear from the analysis above that even with some of the very rough edges of the current positions addressed, the human rights landscape across the island will still be more fragmented, more contingent on the UK Government's policies, and ultimately easier for breaches of human rights standards to go unnoticed. As a result, while action will certainly be needed over the coming years to avert reductions in rights protections, significant preparations should also be made to deal with this new fragmented environment. The role of civil society across Ireland and Northern Ireland, centred upon statutory human rights institutions, will change dramatically. In a short space of time, there will be new laws developed, new rights issues to be monitored, new groups to attend to, and new enforcement processes that might provide fresh advocacy opportunities. These new aspects of the civil society role will coincide with the loss of old aids to human rights protection; the UK and Ireland's membership of similar institutions aiding the monitoring of GFA equivalency, the potential loss in Northern Ireland of the support of EU human rights institutions, and the potential loss in Northern Ireland of EU human rights laws. The scale of these changes will require unprecedented levels of additional support (including new funding streams) for, and receptiveness to, civil society voices across the island if human rights are to be effectively monitored.

It is difficult to outline priorities for action when so many of the issues have the potential for extensive impacts on individuals and communities. However, some themes emerge.

First, the UK must renew its commitment to the Good Friday/Belfast Agreement as binding international law. Such a restatement of the UK's commitment to the GFA's terms would provide an important opportunity to address the possible inconsistencies between Brexit positions and the GFA. The 1998 settlement has not been fixed in stone; some of its provisions can be adapted to accommodate a Brexit settlement. But the whole settlement is in jeopardy for as long as the UK Government continues to pay lip service to its GFA commitments whilst setting out to undermine many of those commitments in its vision of Brexit.

Second, the provisions of the Common Travel Area should be solidified. These will be relied upon and will come under new strain on Brexit day. A lack of clarity regarding the CTA or excessive room for the UK and Ireland to make their own informal interpretations of what is required, will be damaging for rights. Consequences for healthcare, social security provision and even freedom of movement are all possible. A new agreement between the UK and Ireland in force by Brexit day will be required, and domestic laws will need to be updated to reflect the loss of the shared EU framework.

Third, the support of Ireland's EU partners should be sought to advance several human rights issues. The Irish Government is clearly under significant domestic pressure to secure an open border, to protect Ireland's economic interests and to deepen its relationship with the EU. Integrating human rights considerations alongside these other priorities is nonetheless an essential starting point. In particular, the Irish Government should seek to build support for requiring the UK to retain the EU CFR as a pre-condition for any new EU-UK trade deal.

These three themes are centred on firming up human rights protections around those aspects which are most unshakable and where most consensus exists. In essence, a focus on these themes aims to build post-Brexit human rights protections out of the political good will around the Good Friday Agreement, the Common Travel Area, and human rights as a core component of EU values. However, while reaffirming the structures and principles that will

apply following Brexit is important, it is on the detail of the post-Brexit environment that many rights protections depend. Picking up on these details and resolving them will require governmental, cross-departmental and civil society attention to be applied in a contextualised manner. Moreover, the continued willingness of negotiating parties to appreciate the particular challenges of Brexit for Ireland and Northern Ireland will be essential to a smooth, neighbourly and human rights respecting post-Brexit island of Ireland.