

ILPA has commissioned a series of position papers on legal issues relevant to the EU referendum. Each paper is accurate at the date of the position paper.

The purpose of the papers is to help inform the debate about the EU referendum, and they are available to be used as a resource by both ILPA members and the general public.

The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

Copies of the other position papers can be found on the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk)

**Nicole Francis, ILPA Chief Executive** [Nicole.francis@ilpa.org.uk](mailto:Nicole.francis@ilpa.org.uk)

**Jonathan Kingham, Chair, ILPA EU Referendum Sub Group**

**Immigration Law Practitioners' Association** [www.ilpa.org.uk](http://www.ilpa.org.uk) 020-7251 8383 (t) 020-7251 8384 (f)

---

## The implications of UK withdrawal for immigration policy and nationality law: Irish aspects

*Bernard Ryan, Professor of Law, University of Leicester, 18 May 2016*

### Introduction

This paper addresses the Irish dimensions to a UK decision to withdraw from the EU, in the immigration and nationality policy spheres. It addresses the implications of withdrawal for common travel area arrangements with the Republic of Ireland (section 1) and for the special status of Irish citizens in the UK (section 2).

In the paper, it is assumed that the Republic of Ireland would continue as a Member State of the EU. That has been the position of the Irish Government since the referendum was announced, and there is no evidence of significant support in the Republic of Ireland for a membership referendum, or for withdrawal from the EU.

It is also assumed that Northern Ireland would remain within the UK. Opinion poll evidence in 2014 showed a clear majority (60-40) in favour of Northern Ireland's remaining within the UK, rather than unification with the Republic of Ireland.<sup>i</sup> After a UK decision to withdraw, it must be considered unlikely that there would be an increase in those supporting a change in Northern Ireland's constitutional position.

### The common travel area

#### *Overview*

In this context, the term 'common travel area' refers to administrative arrangements providing a special immigration control regime as between the UK and the Republic of Ireland.<sup>ii</sup> Arrangements of this kind have been in place for the most of the period since the Irish Free State was established in 1922.<sup>iii</sup> In practice, the aims of these arrangements have been to ensure relative freedom of movement between the two states, and to establish forms of co-operation between the two states' immigration authorities.

The primary explanation for the durability of these arrangements has been the assumption of the UK authorities that it is impractical for the Irish border to be an immigration frontier.<sup>iv</sup> One result has been support by Northern Irish unionists for the common travel area, in order to avoid immigration control on journeys between Northern Ireland and Great Britain.<sup>v</sup>

The many social and economic connections between the Republic of Ireland and all parts of

the UK are a second factor pointing towards relative freedom of movement between the two states. This aspect of the common travel area is generally favoured by the Irish Government. It also appeals to nationalist opinion in Northern Ireland, which supports any lessening of the *de facto* consequences of the partition of the island of Ireland.

A third factor underlying common travel area arrangements is that these favour the free movement of labour. For most of the period since 1922, that meant movement of Irish workers to Great Britain. With greater economic development in the Republic of Ireland since the mid-1990s, the pattern has been more varied, with movement in both directions.

### *Current arrangements*

The legal framework relating to the common travel area is quite different in the two states.

In *UK law*, by virtue of section 1(3) of the Immigration Act 1971, immigration control does not apply to persons arriving from the Republic of Ireland. Persons arriving from the Republic of Ireland have leave to enter automatically, subject to the provisions of the Immigration (Control of Entry through Republic of Ireland) Order 1972. Article 3 of the 1972 Order excludes several categories of person from the benefit of section 1(3), including visa nationals not in possession of a visa. Article 4 of the Order deems certain other persons to have leave only for three months, including persons whose nationality means that they do not require visas.

Of particular significance is an exemption within Article 4 to these deemed leave arrangements. In its original version, Article 4 of the 1972 Order exempted *Irish* citizens alone. That provision was however replaced in 2014 by an exemption for EEA/ Swiss nationals and their family members who have a right to enter deriving from EU free movement law.

Under *Irish immigration law*, everyone who is not an Irish or a British citizen is classed as a 'non-national'.<sup>vi</sup> Under the Immigration Act 2004, immigration controls apply automatically to all 'non-nationals' who arrive from the UK by air or sea, and *may* be imposed upon 'non-nationals' who arrive by land from Northern Ireland. Individuals who arrive by land must obtain immigration permission to be in the state within one month. This framework is however to be read with the EU free movement of persons rules, which confer rights of entry and residence upon EEA/Swiss nationals and family members.

The two states' authorities have long co-operated in immigration control in practice. One area where extensive co-operation is evident concerns the list of states whose nationals require a visa to enter: currently, 103 states are subject to visa requirements in both states, seven in the UK alone, and seven in the Republic of Ireland alone. A more recent development saw the launching in October 2014 of a joint British-Irish visa, which allows nationals of China and India to visit both states for up to three months, on the basis of a visa issued by either state. There is also co-operation to ensure that individuals cannot use one state as a back door to the other. That is linked in turn to provision in the immigration law of each state for entry to be denied to a person who intends to travel to the other, but who would not be admitted there.

At the EU level, these arrangements between the UK and Republic of Ireland are reflected in three Protocols annexed to the Treaty on the Functioning of the EU. Protocol 19, which is concerned with the Schengen open borders zone, provides that the Republic of Ireland and the UK are not automatically covered by Schengen rules, or by proposals to develop them. Protocol 20 allows the UK and Republic of Ireland to 'continue to make arrangements between themselves relating to the movement of persons between their territories ('the Common Travel Area)'. Protocol 21 provides that each of the UK and the Republic of Ireland may unilaterally choose to opt in to immigration or asylum legislation other than Schengen rules, or to discussion of proposals relating to such legislation.

### *Implications of withdrawal*

In the event of UK decision to withdraw, it is to be presumed that the underlying reasons for the common travel area would continue to apply. The political consensus in support of the common travel area in Northern Ireland would probably be an especially significant factor.<sup>vii</sup>

Continuing with common travel area arrangements also appears to be compatible with EU law.

There is no obvious legal reason why the Republic of Ireland should not retain the benefit of Protocols 19 and 20 after UK exit, allowing it to maintain special co-operation arrangements with the UK outside the Schengen zone.

After a UK decision to withdraw, reform of common travel arrangements might nevertheless be considered. In the words of the Government's March 2016 document *Alternatives to Membership* 'It is not clear that the Common Travel Area could continue to operate with the UK outside the EU, and Ireland inside, in the same way that it did before both countries joined the EU in 1973.'<sup>viii</sup>

One contextual factor would be the possible emergence of customs checks on goods moving between the two states. In the event of a UK withdrawal, much would depend on the terms of its subsequent relationship to the EU. To the extent that customs checks applied to goods moving across the border on the island of Ireland, or to traffic between the Republic of Ireland and Great Britain, there would be pressure for controls on the movement of persons as well.

Three specific factors in the immigration policy field that point towards reform of common travel area arrangements may also be suggested.

*The need to amend UK legislation in any event.* If the UK left the EU, an amendment to Article 4 of the 1972 Order (above) would be required in any event. The 1972 Order currently contains an exemption for all those with rights deriving from EU free movement law in the UK, something which would make no sense in the event of withdrawal. Would an exemption for Irish citizens alone be restored? For reasons explained in section 2 (below), that question would probably be linked to a wider set of issues about the status of Irish citizens in UK immigration law.

*EU free movement rights in Ireland.* If the UK withdrew from the EU, and did not agree to the free movement of persons within a post-exit arrangement, the implications of EU free movement rights in the Republic of Ireland would need to be addressed. The issue would be that EEA and Swiss nationals and their family members could be present or resident lawfully in the Republic of Ireland, but free in practice to enter the UK without permission to do so.

A pragmatic response to this scenario appears the most likely. One solution would be for all or most EEA/Swiss nationalities to be exempted from overall UK visa requirements. Alternatively, persons with those nationalities, and potentially their family members, with residence documents issued in the Republic of Ireland, might be permitted to enter the UK without a visa, even if they would otherwise be visa nationals.

*Dublin transfers.* At present, the UK and Ireland are among the 32 states covered by the [Dublin III Regulation](#). That legislation permits applicants for international protection to be transferred to another participating state *inter alia* where that was the participating state they first entered, or that was where they first applied for protection. [Eurostat data](#) shows that, between 2008 and early 2014, the UK made 1334 Dublin requests to the Republic of Ireland, and received 815 requests from it. In the same period, the UK actually transferred 753 persons to the Republic of Ireland, and received 357 transfers from it.

Both states might therefore find it attractive to have a post-withdrawal arrangement concerning the transfer of applicants for international protection. This could in theory happen *under* the Dublin Regulation—assuming it survives in something like its present form—if the UK continued to participate. Alternatively, it could be achieved through a modification of historic common travel area arrangements.

Given these reasons to consider adjustments to the common travel area arrangements, wider changes cannot be ruled out. One possibility is that the UK might adopt the Irish approach of applying immigration control to entry by air and sea only. Another possible incremental change would address rights of travel between the two states for residence permit and visa holders.

There would also be scope for a more comprehensive arrangement or international agreement between the two states to emerge. That would potentially address the following points:

- the extent of immigration control on travel by air and sea, and by land
- rights of entry and residence for British and Irish citizens

- rights of travel for those with a residence permit or visas issued by one of the states
- responsibility for international protection applications, and
- the procedures by which visa policy and operational co-ordination would be arranged.

## The status of Irish citizens in the UK

### Overview

Irish citizens are not considered 'foreign' in Britain, something which is linked to various rights and arrangements that directly or indirectly favour them. In the event of a decision to withdraw, with the Republic of Ireland remaining inside the EU, the appropriateness of that special status might well be re-examined, either generally or in relation to specific rights.

### Current arrangements

The fundamental provision concerning the status of Irish citizens in Britain is the Ireland Act 1949, which was passed when the Irish state withdrew definitively from the Commonwealth. Section 2(1) of the 1949 Act declares that 'notwithstanding that the Republic of Ireland is not part of [Her] Majesty's dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK.' It goes on to provide that 'references in any Act of Parliament, other enactment or instrument whatsoever ... to foreigners, aliens [etc..] ... shall be construed accordingly.'

In practice, the main rights which are currently associated with the 'non-foreign' status of Irish citizens are the following.

As explained above, Irish and other EEA/ Swiss citizens travelling directly from the Republic of Ireland are not subject to a requirement to obtain leave to enter the UK.

The position of Irish citizens in UK immigration law is anomalous. Irish citizens became subject to immigration control under the Commonwealth Immigrants Act 1962, but that legislation was not used to prevent entry and residence by them, other than in the event of an exclusion or deportation order. Since 1 January 1973, Irish citizens have also in principle been subject to the control under the Immigration Act 1971. However, from that date, Irish citizens entering *from the Republic of Ireland* benefitted from the exemption in the 1972 Order discussed above. In addition, progressively from that date, entry and residence by *all* Irish citizens - including those who enter the UK from elsewhere, or who were born there - has been protected by EU law.

The position of Irish citizens within nationality law is also anomalous. Irish citizens are treated as 'settled' in the United Kingdom from the date they take up ordinary residence.<sup>ix</sup> This permits Irish citizens to naturalise after five years' continuous residence, and enables their children born in the United Kingdom to acquire British citizenship from the date of residence. This is a more generous regime than that applicable to other EEA and Swiss citizens and their family members, who typically require five years' residence in order to become 'settled', and a further year's residence to naturalise. The precise rationale for this generous regime is uncertain, however, with neither the common travel area nor the Ireland Act 1949 appearing sufficient as an explanation.

Together with Commonwealth citizens, resident Irish citizens have full political rights in the UK, i.e. the rights to vote in all elections, to stand for election to the House of Commons, and to be members of the House of Lords.

Residence elsewhere in the common travel area, including in Ireland, counts towards the 'habitual residence' test of eligibility for non-contributory benefits in the UK.<sup>x</sup> This is of particular relevance to Irish citizens moving from Ireland, and also protects other EEA and Swiss nationals moving from there.

There is an additional Northern Ireland dimension to consider. The 1998 Belfast Agreement recognised 'the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose', and that such persons had the 'right to hold both British and Irish citizenship is accepted by both Governments.' Taken

together, these two statements permit a person from Northern Ireland to *rely upon* their Irish citizenship alone, even if they legally hold British citizenship as well.

### *Implications of withdrawal*

After a decision to withdraw, the following questions concerning the legal position of Irish national appear the most likely to arise.

*The Ireland Act 1949.* In the event of the Republic of Ireland remaining within the EU, with the UK outside, questions might be posed as to whether it remains appropriate to classify it, and its citizens, as 'non-foreign'. If changes were made, they would potentially affect all of the entitlements referred to above.

*Position in immigration law.* If the UK decided to withdraw from the EU, it would be necessary to resolve the question of the position of Irish citizens in immigration law.

If there was continued support for the common travel area principle, the most likely outcome is a general exemption from immigration control, in line with the position of British citizens in Irish law (above), so as to permit both entry and residence by Irish citizens. An exception could be made for exclusion and deportation cases.

The alternative would be a form of visa waiver for Irish citizens, regardless of where they enter from. This would permit entry and short-term stay, but not residence. The limited nature of this solution would also be difficult to reconcile with continued support for a common travel area between the two states.

*Position in nationality law.* A resolution of the position of Irish citizens within immigration law would permit clarification of their position in nationality law. At what point would they become 'settled' so as to permit them to acquire British citizenship by naturalisation, and their children to acquire it by virtue of birth in the UK?

*Political rights.* The political rights of Irish citizens in the UK have previously been questioned. In his review of citizenship law for the Government in 2008, Lord Goldsmith disagreed with the right of Irish and Commonwealth citizens to vote in parliamentary elections.<sup>xi</sup> Were that suggestion acted upon, it would probably have implications for membership of the House of Commons and Lords as well.

The Belfast Agreement is a significant constraint in this area. In 2008, Lord Goldsmith's solution was to preserve the right to vote for Irish citizens from Northern Ireland alone.

It is possible that these questions would re-emerge in the event of withdrawal from the EU by the UK. It is not however possible to predict the likely outcome at this stage.

## **Conclusions**

Based on the analysis here, the following conclusions may be suggested as to the likely implications of a UK decision to withdraw upon the relationship with the Republic of Ireland, in relation to immigration and nationality law and policy:

- The overall common travel area principle would probably continue to be supported by the two states.
- It would probably be thought necessary to make specific adjustments to common travel area arrangements, e.g. to take account of persons with EU free movement rights in the Republic of Ireland, or to cater for international protection applicants
- There could be pressure for wider changes to common travel area arrangements, such as the application of immigration control to air and sea travel from the Republic of Ireland to the UK, or rights of travel. These might lead on to consideration of a more comprehensive agreement between the two states.
- It would be necessary to resolve the position of Irish citizens within UK immigration law and nationality law.

- A wider questioning of the special status of Irish citizens in the UK, including their political rights, is also a possibility.

## References

- 
- <sup>i</sup> 'Northern Ireland says 'yes' to a border poll... but a firm 'no' to united Ireland', *Belfast Telegraph*, 29 September 2014.
- <sup>ii</sup> Separate arrangements between the UK and the Channel Islands and Isle of Man are not addressed here.
- <sup>iii</sup> See generally Bernard Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *Modern Law Review* 855-874.
- <sup>iv</sup> Recent support for this assessment of the Irish border may be found in HM Government, *Scotland Analysis: Borders and Citizenship* (January 2014), p. 49.
- <sup>v</sup> The exception is a period during and after world war two (1939-1952), when immigration control applied to those arriving in Great Britain from either jurisdiction in the island of Ireland.
- <sup>vi</sup> [Immigration Act 1999](#), section 1(1), read together with [Aliens \(Exemption\) Order 1999](#).
- <sup>vii</sup> This consensus is emphasised by Christine Bell in '[Brexit, Northern Ireland and UK-Irish Relations](#)', *Centre on Constitutional Change*, 26 March 2016.
- <sup>viii</sup> HM Government, *Alternatives to membership: Possible models for the UK outside the EU* (March 2016), p. 12.
- <sup>ix</sup> This position is set out in published guidance: see Home Office, [European Economic Area \(EEA\) and Swiss nationals: Free movement rights](#), (12 November 2015), p. 24.
- <sup>x</sup> See for example, Universal Credit Regulations 2012 (SI 2013 No. 376), Regulation 9.
- <sup>xi</sup> *Citizenship: Our Common Bond* (2008), p 75. He proposed preserving the position of existing residents.