

ILPA Evidence for the House of Lords' Select Committee on the European Union for its enquiry into the impact on the relationship between the United Kingdom and Ireland following the vote by UK citizens to leave the European Union

Executive Summary

- i. In this response we first describe ILPA and its work on the EU referendum and of questions of immigration, asylum and nationality law on the island of Ireland. We acknowledge that the question of the peace process and of the 1998 Belfast ("Good Friday") Agreement are central to the Committee's deliberations and if we do not focus on these it is because our specialist expertise lies in other areas.
- ii. We touch on the impact of trade relations and in particular the question of whether the UK remains part of the customs union for where dual Irish/British nationals, and indeed third country nationals, on the island of Ireland chose to live and work after a Brexit, and for the immigration law policies of both States and thus for decisions on the common travel area, whether at national or EU level.
- iii. We examine the legal framework of arrangements for the common travel area and the Irish land border. We recall efforts during the passage of the *Borders, Citizenship and Immigration Bill 2008-2009* to reintroduce controls in the common travel area and also mention the implications of the joint customs/immigration functions introduced by that Act for the exercise of control at the borders between the UK and the Republic of Ireland, in particular the land border. We describe Operation Gull, a UK and Ireland initiative operating at Northern Irish ports and on the land border since 2005 and express our concerns about it.
- iv. We look at the particular cases of frontier workers, persons claiming asylum, including 'Dublin III' transfers regulation after a Brexit, and refugees, and urge the mutual recognition of refugee status between the UK and the Republic of Ireland.
- v. We have written extensively on the rights of British citizens in other EU States and on EEA nationals in the UK. We summarise our comments, on principle and on practicality, but concentrate for this response on factors specific to the situation of Irish nationals under UK laws, and also the implications for UK nationals of Ireland's having, like the UK, opted out of the EU common immigration policy.
- vi. Our paper aims to demystify complex areas of law while building a detailed picture of the factual and practical complexities of the current situation.

Introduction

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.
2. Prior to the referendum, ILPA commissioned a series of position papers on the implications of the EU Referendum for free movement rights and rights currently protected in the Common European Asylum System. These do not necessarily represent the views of ILPA, but are designed to provide a view of the questions by experts in their field. These are available on our website¹ and include a paper by Professor Bernard Ryan of the University of Leicester: *The implications of UK withdrawal for immigration policy and nationality law: Irish aspects*², which we understand that Professor Ryan will be submitting to this enquiry. In September 2016, Professor Ryan and ILPA's Legal Director Alison Harvey, participated in the North South Immigration Forum meeting in Belfast, where the implications of Brexit for the island of Ireland in the immigration context were discussed under the Chatham House Rule.
3. ILPA has prepared and is preparing a number of briefings and responses to consultations on the immigration aspects of Brexit. These can be found on the same page of the ILPA website as the position papers.³
4. The third preamble of the Belfast ('Good Friday') agreement⁴ states

The British and Irish governments

...

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union;"

5. We anticipate that the implications of the loss of the framework of EU law, of the protection of the EU Charter of Fundamental Rights and Freedoms, and of the supervisory jurisdiction of the Court of Justice of the European Union for the Irish peace process and the human rights of persons affected by it will be the main focus of the Committee's enquiry. That we do not focus on it is because our specialist expertise is in immigration, asylum and nationality law. Instead we concentrate on the impact on the common travel area, the Irish

¹ Available at <http://www.ilpa.org.uk/pages/eu-referendum-position-papers.html>

² ILPA EU Referendum position paper No. 8 : *The implications of UK withdrawal for immigration policy and nationality law: Irish aspects* Professor Bernard Ryan, 18 May 2016, available at <http://www.ilpa.org.uk/resource/32154/eu-referendum-position-paper-8-the-implications-of-uk-withdrawal-for-immigration-policy-and-national>

³ <http://www.ilpa.org.uk/pages/eu-referendum-position-papers.html>

⁴ 10 April 1998. See

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

land border, and the rights of Irish citizens residing in the UK. We start, however, with a comment on trade relationships, as these provide the backdrop to our remarks.

Trade relationships

6. ILPA members include lawyers practising in Irish as well as UK immigration law and members act for clients who are based both in Ireland and the UK. We are aware that, as always, questions of immigration law sit within a wider framework, including that of the relative prosperity of Northern Ireland and the Republic. Whether the UK remains with the customs union and whether the free movement of services is preserved have implications for this. The UK and Ireland are important markets for each other⁵. If the UK leaves the customs union, and if free movement of persons and services is not preserved, particularly if it takes many years to negotiate full independent UK membership of the World Trade Organization, we anticipate that a number of companies will relocate staff and operations out of the UK, reducing the numbers of their staff there. The Republic of Ireland is one place to which to relocate, in particular because of language but also because of culture⁶. Some moves, for example of financial services and tech, would have considerable implications for the prosperity of the Republic. This in its turn could have implications for where dual Irish/British nationals, and indeed third country nationals, chose to live and work and for the immigration law policies of both States. This could in turn affect decisions on the common travel area, whether at national or EU level.
7. In July 2015 the Northern Strategic Migration Partnership responded to the Migration Advisory Committee's call for evidence on the minimum salary thresholds for Tier 2 of the Points-based system. Its detailed consultation response provides valuable information about skills shortages in Northern Ireland.
8. At leader's questions on 27 September 2016, the Taoiseach said⁷

...Our intention is to protect this country's vital national interest in these Brexit talks.

I have asked all Ministers to engage with their counterparts in Northern Ireland in respect of the forthcoming North-South Ministerial Council. This morning, for instance, the Cabinet noted the 2015 report of InterTradeIreland, which deals with cross-Border activities for research and expansion of opportunity for exports and creation of jobs and so on. The reports for 2016, 2017 and 2018 may be very different.

...Ireland will argue vehemently for the continued recognition of the peace process and the support that has brought but also in respect of the critical juncture this country faces in terms of maintaining our links with the United Kingdom, but speaking as a country that will remain a central part of the European Union.

⁵ See the Department of Trade: *Doing Business in Ireland: Ireland Trade and Export Guide* updated 18 January 2016

⁶ See *What will Brexit mean for the City of London*, 24 June 2016, <https://www.ft.com/content/23d576b0-386a-11e6-a780-b48ed7b6126f> ; Irish Times *Dublin's Financial Services expected to benefit from Brexit*, 18 August 2016 <http://www.irishtimes.com/business/financial-services/dublin-s-financial-services-expected-to-benefit-from-brexit-1.2760538>

⁷ Dáil Éireann Debate 27 September 2016, Vol. 922 No. 1.

The common travel area and the Irish land border

Legal framework

9. The Protocol on the Common Travel Area, Protocol 20 to the Treaty of Lisbon⁸, provides that the United Kingdom and Ireland “...may continue to make arrangements between themselves relating to the movement of persons between their territories”.
10. Ireland and the UK joined the EU on the same date⁹ therefore the question of the land border between the two States being an external border of the EU has never arisen. It would be sanguine, therefore, to assume that the Protocol will not become the subject of Brexit negotiations¹⁰. It is not the case, however, that all parts of the Common Travel Area are already fully within the EU: this is not the case for Jersey, Guernsey and the Isle of Man. All three islands have their own immigration laws and their own relationship to the EU.
11. As Professor Ryan described in his paper for ILPA, the legal framework relating to the common travel area is different in the two states. Under the Republic’s Immigration Act 2004, immigration controls apply to “non-nationals”, those who are not Irish or British citizens, who arrive in the Republic from the UK by air or sea, and may be imposed upon non-nationals as so defined who arrive by land, but this must be read with EU rights of free movement.
12. In contrast, in the UK, the Immigration Act 1971, section 1(3) provides:
 - (3) *Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as “the common travel area”.*
13. Article 4 of the Immigration (Control of Entry through the Republic of Ireland) Order 1972 (SI 1972/1610) exempts those exercising rights under EU free movement law from control. As Professor Ryan explains, this replaces the pre-2014¹¹ specific exception in the article for Irish nationals.
14. The Taoiseach, when pressed on the common travel area, said

... The common travel area has been of great benefit to both countries before we joined the Union and since we joined the Union; it has not been tested when one country is in the Union and one is outside it. The British Prime Minister is clear that neither she nor I want to see a return to a hard Border and will do everything possible to see that the free movement of people and goods is as it is now.

⁸ Protocol (No 20) to the Treaty on the Functioning of the European Union on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.

⁹ 1 January 1973.

¹⁰ See HM Government *Alternatives to membership: possible models for the UK outside the EU*, March 2016.

¹¹ When the The Immigration (Control of Entry through Republic of Ireland) (Amendment) Order 2014 (SI 2014/2475).

We are in the negotiations as a member of the European Union, but we want to retain our specific traditional relationship with the United Kingdom. When I met the British Prime Minister, Mrs. May, she made it clear that she does want to return to a hard Border and nor do we. She wants to retain the common travel area, as do we. We will speak as a member of the Union, but we have a particular relationship with Britain that we want to retain.

Borders, Citizenship and Immigration Bill 2008-2009

15. The Borders, Citizenship and Immigration Bill as presented to the UK parliament¹² made provision for the introduction of controls within the common travel area, following a Home Office consultation¹³. The Government was defeated in the House of Lords on the amendment¹⁴ and an amendment was substituted strengthening the protection of free movement within the common travel area¹⁵. Ultimately, both the original clause and the amended version were both removed from the Bill¹⁶. Lack of time and the prospect that the Bill might fall led the then government not to insist on the provisions, although it stated that it continued to be committed to the policy.¹⁷

16. The government stated prior to the referendum, discussing its likely effects:

Outside the EU's Customs Union, it would be necessary to impose customs checks on the movement of goods across the border. Questions would also need to be answered about the Common Travel Area.¹⁸

17. It is the case, since the coming into force of part one of the Borders, Citizenship and Immigration Act 2009¹⁹ that one individual can be both a customs official and an immigration officer and that customs functions performed at the border by Her Majesty's Revenue and Customs may be performed currently by the Secretary of State and officials designated by him or her. The Act created a unified border force and subsequent legislation has built on this. While it is not the case that customs checks at the border must imply immigration control, this sharing of functions would make it easier for such control to be exercised, whether in a systematic or selective manner.

18. There are examples elsewhere where customs controls are in force but the free movement of persons is permitted. This is the case, for example, for the Franco-Swiss border because Switzerland is not within the customs union but participates in the free movement of persons.

Operation Gull

¹² HL Bill 15, Clause 46.

¹³ *Strengthening the Common Travel Area* consultation published, together with a partial impact assessment, 24 July 2008. The Government response and a final impact assessment were published on 15 January 2009.

¹⁴ HL Deb 1 Apr 2009: Col 1116.

¹⁵ HL Bill 36 of session 2008-9, clause 51.

¹⁶ HC Deb 14 July 2009, vol 496, cols 238-9.

¹⁷ HC Deb 14 July 2009, vol 496, col 239 and HL Deb 20 July 2009 vol 712 col 1395.

¹⁸ HM Government *The process for withdrawing from the European Union* Cm 9216, February 2016.

¹⁹ On 21 July 2009, the day on which the Act was passed, see s 58(1) therein.

19. The selective controls for which the law of the Republic of Ireland makes provision²⁰ have been operated as part of Operation Gull, a UK and Ireland initiative operating at Northern Irish ports²¹ and on the land border since 2005. An immigration unit was created in Dundalk by the Garda Síochána. A range of joint operations involving relevant immigration personnel from both jurisdictions and the investigative division of the Irish Department of Social Protection have flowed from detections through Operation Gull. Other initiatives have been developed in relation to joint training, sharing immigration liaison officer resources and immigration information and biometric exchanges²².
20. In its response²³ to the consultation on the common travel area which preceded the 2009 Act, ILPA expressed concern that intelligence led operations carried out by immigration officers in Northern Ireland as part of Operation Gull had been carried out on a discriminatory basis, with individuals questioned under Operation Gull on grounds of ethnicity/nationality irrespective of the legality of their intentions. It drew attention to contemporary criticisms of those actions by High Court judges. It highlighted the case of the Zimbabwean engineer Frank Kakopa reported in the *Decisions and Settlements Review 2006-2007* of the Equality Commission for Northern Ireland. Mr Kapoka was legally resident in the UK. He travelled into Northern Ireland from Great Britain by air, was questioned, photographed, detained and strip searched. The Immigration Service agreed later to pay him £7500 for falsely and unlawfully imprisoning him and apologised unreservedly for their actions. ILPA called for independent, transparent, oversight of Operation Gull.

Cross border movements: particular cases.

21. Frontier workers may be Irish or UK or third country nationals and others in the border area may cross the border frequently for leisure or to see family and friends. Customs controls, as described above, could affect such journeys, whether or not immigration controls are imposed, and whether immigration controls are imposed systematically or selectively.
22. In 1999, the Northern Ireland Human Rights Commission *Briefing Paper and Proposed Amendments*²⁴ set out that

Persons who have claimed asylum in the Republic of Ireland may enter Northern Ireland without knowing that they have entered a separate jurisdiction or without realising the consequences of such action. At present such people often wish to return to the Republic quickly but are generally detained whilst procedures for their return are

²⁰ Immigration Act 2004, read with the definition of non-nationals in s 1(1) of the Immigration Act 1999 and S.I. No. 97/1999 Aliens (Exemption) Order.

²¹ See the Northern Ireland Department of Justice Organised Crime Task Force Annual Report for 2015, <http://www.octf.gov.uk/OCTF/media/OCTF/documents/OCTF-REPORT-2015.pdf?ext=.pdf>

²² See the 20 December 2011 *Joint Statement by Mr. Damian Green, Minister of State for Immigration, the United Kingdom's Home Department and Mr. Alan Shatter, Minister for Justice and Equality. Ireland's Department Of Justice and Equality Regarding Co-Operation on Measures to Secure the External Common Travel Area Border.*

²³ ILPA response to the UK Border Agency consultation on Strengthening the Common Travel Area, October 2008. <http://www.ilpa.org.uk/pages/non-parliamentary-briefings-submissions-and-responses.html>

²⁴ <http://www.nihrc.org/documents/advice-to-government/1999/support-provisions-immigration-asylum-bill-hol-committee-june-1999.pdf>

pursued under the Dublin Convention. Facilitation of the removal (with free consent following independent legal advice) would reduce the length of detention. Special administrative arrangements would be required, possibly including the delegation of powers dealing with asylum matters to staff located in Northern Ireland.

23. It is our understanding that those whom it is deemed should make their claims for asylum in the Republic of Ireland continue to be detained at Larne House pending the transfer. We do not have any recent examples of the practice of transferring persons seeking asylum to a detention centre in England or Scotland pending the transfer back to the Republic. It is currently unclear to us whether the Dublin procedure is currently formally invoked for cross-border transfers of persons seeking asylum on the island of Ireland, although we are aware that transfers, at least of adults, from Northern Ireland to the Republic of Ireland do take place. A study in 2012 observed

*Persons who receive a Dublin Regulation Transfer Order may be detained pending removal although [the Irish Naturalisation and Immigration Service (INIS)] stated that this is not common practice. The legal basis for detention pending Dublin II transfer is Section 22 of the Refugee Act, 1996 as amended, and Section 7(5) of S.I. 423 of 2003*²⁵

24. Families seeking asylum tend not to be returned to the Republic following the judgment of the High Court in Belfast in *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88 (14 August 2013), which found that the system of support for persons seeking asylum, ‘direct provision’ is contrary to the best interests of the child and thus that to return children to such support in the Republic of Ireland would breach the Home Office’s duties under section 55 of the Borders, Citizenship and Immigration Act 1999.
25. The UK would no longer be a party to the Common European Asylum System if it left the EU. There is nothing to prevent its continuing to operate a system resembling the Common European Asylum System within the UK, insofar as it is compatible with the UK’s obligations under 1951 UN Convention relating to the Status of Refugees and with the UK’s obligations under international human rights law. The UK will cease to be a party to the Dublin III Regulation²⁶, whereby responsibility for refugees is divided up between member States, on leaving the European Union. The UK could designate European States, including the Republic of Ireland, as “safe third countries” and attempt to negotiate an agreement with the EU. Given the Common European Asylum Policy we do not consider that it could negotiate such an agreement with individual member States. It is unclear what EU states would have to gain from allowing the UK to continue to participate in the Dublin Regulation, as the UK sends more asylum seekers to other member States under the Dublin III Regulation than it

²⁵ King, Emma, and Kingston, Gillian. 2012. “Practical Measures for Reducing Irregular Migration.” European Migration Network. The Economic and Social Research Institute. March 2012

²⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013.

receives from them²⁷. The figures for the Republic of Ireland are set out in Professor Ryan's paper²⁸ and reflect this general trend.

26. Refugees are entitled to a refugee travel document if recognised as such; if given humanitarian protection they will be eligible for a Home Office certificate of travel. Resettled Syrian refugees in the UK are being given humanitarian protection and thus are entitled to certificates of travel rather than refugee travel documents. To travel to the Republic of Ireland, within the Common Travel Area, they thus need to obtain a visa. Obtaining visas in certificates of travel can be problematic in other European States, as, unlike refugee travel documents, they are not internationally recognized documents. It is currently unclear to us whether the Republic of Ireland is recognizing UK certificates of travel; attempts to clarify this are ongoing. The mutual recognition of refugee status and humanitarian protection between the two States would be a much tidier way of allowing beneficiaries of international protection to travel on the island of Ireland.
27. It is the intention of the current government to increase the range of areas to which persons seeking asylum and resettled refugees are dispersed²⁹. The more asylum seekers and refugees are dispersed to border areas the more likely it is that they will cross the border.
28. Third country nationals other than asylum seekers who cross the border may be detained pending their transfer back to the Republic. The "Joint Statement Regarding Co-Operation on Measures to Secure the External Common Travel Area Border"³⁰ of 20 December 2011 commits both governments to strengthening joint initiatives. As Professor Ryan points out in his paper the lists of third States whose nationals require a visa to visit is largely, although not completely, aligned in the UK and Ireland. The two governments, both sitting outside the Schengen zone, have cooperated on the issuing of joint visas. A visa launched in October 2014 allows nationals of China and India to apply for one visa to visit both the UK and Ireland³¹. Both States can turn back persons who would not be admissible in the other, at the external border of the common travel area. It appears likely that such arrangements could survive Brexit, because of Ireland's opt-out from the common immigration policy, but the EU may wish to be satisfied that entry into the Republic from the UK does not become a back door to entry into the EU. One way to ensure this is to require that control between the UK and the Republic meets particular standards, another is to require more stringent control on persons travelling from the Republic to the rest of the EU. If Ireland decided to opt into the common immigration policy its freedom to align with the UK would be constrained.

The rights of Irish citizens residing in the UK.

29. See comments above re frontier workers.

²⁷ See the discussion in ILPA's EU Referendum Position Paper 10 - The UK Referendum on the EU and the Common European Asylum System, 29 April 2016 by Professor Elspeth Guild.

²⁸ Op.cit.

²⁹ See e.g. HC Deb 3 May 2006, Vol 609 cols 44-45WH.

³⁰ Op.cit. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/99045/21197-mea-sec-trav.pdf

³¹ See the UK Visas and Immigration *Guidance: British Irish Visa Scheme* 10 December 2015 <https://www.gov.uk/government/publications/british-irish-visa-scheme/british-irish-visa-scheme>

30. ILPA has prepared a detailed paper for the consultation by the non-governmental organization British Future into the rights of nationals of EU member States in the UK post Brexit³² and is preparing a paper for the House of Lords' Select Committee on the European Union for its enquiry into the possible consequences of Brexit on EU rights. We summarise here general comments on the rights of EU nationals in the UK which are explored in more detail in those papers and go on to focus here on matters specific to Irish nationals.

A note on British citizens residing in Ireland

31. Ireland, like the UK and Denmark, has opted out of measures in the common immigration policy which standardize rights of third country nationals living in the State. Thus, leaving aside the specific question of the common travel area, discussed above, there is much less certainty for British citizens living in the Republic of Ireland than for those British citizens in most other EU member States and there is scope for bilateral negotiations on the rights of British citizens in the Republic of Ireland which would not exist in most other EU member States.
32. There is current concern in the Republic of Ireland about British citizens making applications for documentation evidencing exercise of treaty rights in the Republic of Ireland, when they are not in reality living there³³. This has been uncovered by Operation Vantage, the original focus of which was marriages of convenience, but which has uncovered broader concerns.
33. We are very much aware of the renewed interest in Irish nationality since the referendum from British citizens, regardless of where they are currently resident, who have Irish nationality by birth or are eligible for it³⁴. Those British citizens resident in the Republic need however to consider the rights of any third country national members before applying to naturalize.
34. It is unclear whether Ireland, like the UK³⁵, applies its domestic immigration law to EEA nationals who have naturalized rather than continuing to treat them as persons who exercising rights of free movement. In the UK, from the point of naturalization of the EEA national onwards their third country family members do not benefit from rights under EEA law flowing from their relationship with the principal and instead fall under domestic immigration law. Practitioners in the Republic are unaware of any cases in which the point has been arisen. The wording of Regulation 3(5) The European Communities (Free

³² 7 September 2016, available at <http://www.ilpa.org.uk/resources.php/32463/ilpa-evidence-for-british-futures-inquiry-into-the-status-of-eu-nationals-in-the-uk-7-september-2016>

³³ Discussed at the North South Immigration Forum, September 2016, Belfast. See Garda Síochána press release *Operation Vantage: Investigation into sham marriages and immigration issues*, 27 November 2015, <http://www.garda.ie/Controller.aspx?Page=16224>

³⁴ For a general overview of acquisition of Irish citizenship by birth, descent or naturalization see the website of the Irish Naturalization and Immigration Service <http://www.inis.gov.ie/en/inis/pages/wp11000022>. The website at <http://www.inis.gov.ie/en/INIS/Pages/EU%20Treaty%20Rights> carries a notice dated July 2016 about a high volume of applications from EEA nationals.

³⁵ See the definition of an EEA national in the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) Regulation 2, and see the discussion of 16 July 2012 amendments in the Home Office guidance at EUN2.16, at <https://www.gov.uk/government/publications/eea-family-permits-eun02/eea-family-permit-eun02>

Movement of Persons) Regulations 2016 (S.I. 2015/584 into force 1 February 2016) read with Regulation 3(1)(a) is unclear³⁶

Irish nationals in the UK post Brexit

35. The 2011 census collected data³⁷ on country of birth which was subdivided into, *inter alia*, Northern Ireland and the Republic of Ireland. Irish was an identified ethnic group³⁸. This does not give a complete picture of the numbers of the Irish nationals, or those with a claim to Irish nationality in the UK, but provides some indications of numbers.
36. As described in more detail in the responses detailed in the introduction to this part, the rights of EU nationals in the UK post Brexit is the source of considerable uncertainty, affecting them, their family members, their employers and the institutions in which they are studying. There is a need to address qualifying non-EEA family members, including persons exercising derived rights. Account must be taken of Articles 21, 45 (workers) and 49 (establishment) and 56 (services) (and predecessor provisions) to cover all free movement of persons.
37. If customs and/or immigration controls are re-introduced on the land border dividing the island of Ireland some frontier workers may wish to relocate to the side of the frontier on which they work to avoid having to negotiate controls, with any attendant risk of delays.
38. The then Minister said in the 6 July 2016 debate:

*This issue is not simply about the immigration status of an individual. Under free movement law, EU citizens' rights are far broader than just the right to reside in the UK. There are employment rights, entitlements to benefits and pensions, rights of access to public services, and rights to run a business, which is so closely aligned with the right to provide cross-border services, as well as the ability to be joined by family members and extended family members, in some cases from countries outside the EU. ...we must remember that people do not have to register with the UK authorities to enjoy basic EU rights to reside. We will need to work out how we identify fairly and properly the people who are affected.*³⁹

³⁶ See also the guidance of the Irish Naturalisation and Immigration service at <http://www.inis.gov.ie/en/INIS/Pages/EU+Treaty+Rights>: **Applications based on Irish nationals are not accepted by EU Treaty Rights Unit** Please note that we cannot accept applications under EU Treaty Rights provisions from non-EEA family members of Irish nationals. Directive 2004/38/EC on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States applies only to Union citizens who move to or reside in a Member State other than that of which they are a national.

Exceptions to this apply only in cases where the non-EEA national family member has previously held a residence card of a family member of a Union citizen which has been issued by another Member State under Article 10 of the Directive.

³⁷ Question 9.

³⁸ Question 16.

³⁹ Col 951.

39. Where a person is a dual British and Irish national, Brexit will not affect them as individuals they will continue to enjoy all their rights as a British citizen. It may, however, affect their family members.
40. In *McCarthy v United Kingdom* (Case C-434/09) the European Court of Justice held that dual nationals holding two EU nationalities and living in one of the countries of nationality who have never exercised free movement rights cannot rely on the Citizens' Directive (2004/38). Ms McCarthy's claim based on or on Article 21 of the Treaty of the Functioning of the European Union did not succeed. The court proposed a general test for the application of the article, that the national measure had the effect of depriving the Union citizen of the substance of her/his rights associated with that status or of impeding the exercise of his/her rights of free movement. The court concluded that Ms McCarthy did not meet the test as her situation was confined in all relevant respects within a single member State⁴⁰ and had no factor linking it with any of the situations governed by European Union law. The extent to which it may be possible argue that dual nationals who have worked in a Member State (albeit without moving) are or have exercised their rights to free movement and are beneficiaries under Directive 2004/38/EC or to argue that they have rights derived directly from the Articles 20 or 21 of the Treaty on the Functioning of the European Union and its articles on workers and self-employed persons which are the equivalent of Citizens Directive's rights, are not yet matters of settled law and thus it is not possible to state categorically whether a dual Irish/British citizen living in the Republic of Ireland living there as a national and not exercising rights under EU law and their family members could currently rely on EU free movement rights on return to the UK following a period of residence in Ireland.
41. The 1998 Belfast ("Good Friday") 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 so chose" and to hold both citizenships. It was not considered in the McCarthy case. The status of the Good Friday Agreement in domestic law is relevant to whether it could trump domestic primary or secondary (including the Immigration (European Economic Area) Regulations 2006 and thus to whether, as a matter of UK law, a person could rely on their Irish citizenship alone, even if they legally hold British citizenship as well.
42. There may be British citizens who are unaware that they are also Irish citizens. The rights of their third country national family members may be affected by Brexit. Where third country family members are required to meet domestic immigration rules, these entail minimum income thresholds. It may be particularly challenging for those in Northern Ireland to meet these. Households in Northern Ireland have the lowest disposable gross disposable household income in the UK⁴¹. While the UK immigration rules⁴² are concerned with income rather than disposable income, the figures serve as a proxy. A worsening of economic conditions following Brexit could further affect income levels in Northern Ireland. The Northern Strategic Migration Partnership in its July 2015 response the Migration Advisory Committee's call for evidence on the minimum salary thresholds for Tier 2 of the Points-based system, mentioned above, said

⁴⁰ Paragraph 55.

⁴¹ *Statistical bulletin: Regional gross disposable household income (GDHI): 1997 to 2014 Annual estimates of regional gross disposable household income (GDHI)*. Office of National Statistics, May 2016

⁴² HC 395, Appendix FM.

The proposal to increase the minimum salary thresholds for Tier 2 will, we believe, have a disproportionate impact on employers in Northern Ireland vis-à-vis employers in other parts of the UK, due to the lower salary levels offered here and the acute shortage of appropriately skilled labour in the region

43. Where a person is an Irish citizen and is not a British citizen they may be exercising rights of free movement in the UK. A post-Brexit settlement needs to make provision not only for them, but also for their third country national family members.
44. As set out in Professor Ryan's paper, section 2(1) of the Ireland Act 1949 provides that "the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK". Immigration law appears to make its own provision for Ireland, separately from the 1949 Act, see for example the Commonwealth Immigrants Act of 1962 and the Immigration Act 1971.
45. Irish citizens without a right of abode in the United Kingdom are persons subject to immigration control under s 1(2) of the Immigration Act 1971. They are relieved from that when they arrive in or depart from the UK from elsewhere in the common travel area by section 1(3) of that Act. See further the common travel area exemption for them in the 1972 Immigration (Control of Entry through the Republic of Ireland) Order 1972 (SI 1972/1610).
46. The effect of these provisions is that Irish citizens, save insofar as they are exercising rights of free movement, are treated as persons subject to immigration control for deportation purposes but not otherwise.
47. Under the 1949 Act, where provision is made in law for foreign countries, for example in aspects of criminal law, Ireland is not to be treated as such. In ILPA's view there is scope to build on this to argue that treatment of Irish citizens cannot be aligned with that of third country nationals and that Brexit would not affect this. One possibility is to give nationals of EEA states, including Irish nationals, special status in UK law.
48. As Professor Ryan explains, as a matter of administrative practice, Irish citizens are treated as settled in the UK from the date they take up ordinary residence. This allows them to naturalize after five years continuous residence⁴³ and means that their children born in the UK are born British citizens⁴⁴.
49. In *Patmalneice v Secretary of State for Work and Pensions*⁴⁵ it was held by the UK Supreme Court that the different treatment afforded to Irish nationals in relation to benefits dependent upon the claimant having a right to reside in the UK or elsewhere in the common travel area did not constitute unlawful discriminatory treatment in favour of Irish nationals and was not unlawful under EU law since there is sufficient connection between social security arrangements and the aim of promoting free movement between the two countries for the arrangements challenged to attract the protection of the Protocol.

⁴³ British Nationality Act 1981, s 6(1).

⁴⁴ British Nationality Act 1971 s 1(1)(b).

⁴⁵ [2011] UKSC 11.

Devolved powers

50. We are aware that there will continue to be debates about independence and the independence of parts of the UK so that they could remain within the EU. There will continue to be debates on whether Northern Ireland should join the Republic. Short of such settlements certain matters pertaining to EU citizens resident in Northern Ireland are within the competence of the Northern Ireland assembly. While immigration is a reserved matter, for example welfare entitlements are devolved in Northern Ireland and thus EEA nationals' access to services in Northern Ireland could be protected by clarifying which matters are within the competence of the Northern Ireland Assembly. Further devolution could bring aspects of the rights of EU/EEA nationals within the legislative competence of Northern Ireland Assembly to allow it to reach its own settlement. Devolved matters on which there is immigration legislation include⁴⁶:

- health and social services
- education
- employment and skills
- social security
- housing

51. As Professor Ryan sets out in his paper, habitual residence elsewhere in the common travel area, including in Ireland, makes a person eligible for non-contributory benefits to which an habitual residence test is applied, anywhere in the UK. An Irish citizen habitually resident in the Republic of Ireland and present in the UK is thus eligible for these benefits and for homelessness assistance.

52. In ILPA's view there is potential for different successor arrangements to be made by the English, Welsh, Northern Irish and Scottish administrations.

ILPA recommendations

53. ILPA has recommended standstill clause and that the relevant date for the application of any protection should be the date of leaving the EU: this would be similar to the approach taken when changes are made to the Immigration Rules affecting, *inter alia*, persons on the route to settlement (see e.g. the pre and post November 2014 Tier 1 (Investor) changes; Part 8 of the Immigration Rules and its replacement by Appendix FM to those rules etc.). ILPA has recommended that all those who have permanent residence at the cut-off date should retain the equivalent of their rights as a permanent resident. Those who do not yet have permanent residence should, at the very minimum, be allowed to qualify for permanent residence once they meet the current conditions for permanent residence set out in EU law (i.e. preserve this basis of qualification in separate provisions).

54. ILPA has recommended that beneficiaries of a standstill provision should include all EEA (not only EU) citizens and Swiss and their qualifying non-EEA family members, including persons exercising derived rights. Account must be taken of Articles 21, 45 (workers) and 49 (establishment) and 56 (services) (and predecessor provisions) to cover all free movement of persons.

⁴⁶ Cabinet Office and Northern Ireland Office, *Devolution settlement: Northern Ireland*, 20 February 2013.

55. It will be necessary to make provision for persons who may subsequently become part of the family unit: e.g. babies born to a couple benefiting from protection.
56. Consideration should be given, for simplicity's sake to giving rights of permanent residence to persons with a certain number of year's residence, e.g. five, without looking at detail within that period. This would be administratively more convenient. There will be many persons, including Irish citizens, long resident in the UK who are struggling to evidence rights of permanent residence, including many self-employed persons. Persons may struggle to evidence periods of job-seeking, in particular to meet current UK requirements on evidence, without which continuity of residence would be broken.
57. Provision should be made for *de facto* EU residents, e.g. the economically inactive partners of British citizens who do not have comprehensive sickness insurance and are thus not treated as exercising treaty rights as self-sufficient persons, but who have built lives and families here. For this group and to avoid other complications we strongly suggest that rights of access to the NHS be treated as comprehensive sickness insurance cover.
58. Provision should be made for persons exercising derived ("derivative") rights of residence to continue to exercise such rights for as long as the conditions currently pertaining to such exercise are met.
59. Those who do not yet have permanent residence should be allowed to qualify for permanent residence once they meet the current conditions for permanent residence set out in EU law (i.e. preserve this basis of qualification in separate provisions as described above).
60. The Citizens Directive 2004/38/EC offers greater protection from deportation for EU nationals than that afforded to other third country nationals, increasing with length of residence. We have proposed replicating this but it may be felt that the question of losing rights is separate to that of accruing them.
61. Were these guarantees, elaborated upon in the papers in the introduction to this part, accepted, then they would provide a sound basis for the rights of Irish nationals. The need for certainty means that it is desirable to set out minimum, but not minimal, guarantees as soon as possible. These minimum guarantees could be built on to give more rights to more people, or enhanced rights to beneficiaries of an initial settlement, in future and at this point special provision could be made for Irish nationals if required.
62. Matters of movement, visa waiver etc. (e.g. for tourism) rather than residence will depend on whether the common travel area survives Brexit.

Legal and practical problems

63. We consider that there should be a special post-EU status, set out in a separate set of rules, separate from current leave under the immigration rules (e.g. the rules on indefinite leave to remain).
64. Increasingly, immigration officers, employers, landlords etc., have to know who has a right to reside and who does not, and evidence is needed to prove this. We suggest that it will

therefore be necessary to have residence documents confirming the rights to the new status. We are acutely aware, however, of the logistical problems this would entail. For the scale of the task see the Migration Observatory's 3 August 2016 post *Here today, gone tomorrow? The status of EU citizens already living in the UK.*⁴⁷ We are currently experiencing long delays in the issue of certificates of application in EEA cases, which attest to an application's having been made. Home Office capacity is not up to the scale of the task of dealing with current demand from EEA nationals and their family members, just as we understand the Republic of Ireland to be struggling to cope with the post-Brexit volume of applications for passports.

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30 September 2016.

⁴⁷ <http://www.migrationobservatory.ox.ac.uk/commentary/here-today-gone-tomorrow-status-eu-citizens-already-living-uk>