

NI Affairs Committee Inquiry into Citizenship and Passport Processes in Northern Ireland

The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with this function, the following advice is submitted to the Northern Ireland Affairs Committee in response to their Inquiry into Citizenship and Passport Processes in NI. The Commission bases its advice on the full range of internationally accepted human rights standards.¹

This letter follows the format of the questions posed by the NI Affairs Committee, dealing with each in turn. The Commission would highlight that this submission provides a general overview of the issues. The Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission published a 'Legal analysis of incorporating into UK law the birthright commitment under the Belfast (Good Friday) Agreement 1998' in March 2020. This report provides a detailed analysis of the interaction of UK nationality laws with the relevant principles of the Belfast (Good Friday) Agreement as well as possible recommendations, and is attached with this submission for the Committee's reference.

The interaction between UK nationality law and Articles 1 (v) and (vi) of the Belfast/Good Friday Agreement and any engagement with the ECHR

The Commission highlights that this issue long predates the UK government's decision to leave the EU. In 2008, the Commission submitted its advice on a Bill of Rights for NI, which included a recommendation that the right of people of NI to identify as British or Irish or both and hold the associated citizenship "with no detriment or difference of treatment of any kind" be accepted.² In 2009, the UK Government in its response to the Commission document recognised the "considerable symbolic importance of a choice by person to identify himself or herself as British or Irish or both, in line with the commitments made in the Belfast Agreement" and that "any Bill of Rights for Northern Ireland should enshrine in legislation the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both".³ It proposed that the NI Bill of Rights should "include the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both".⁴ The Bill of

¹ Including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas.

² NI Human Rights Commission, 'A Bill of Rights for NI – Advice to the Secretary of State for NI' (NIHRC, 2008), at 41.

³ NI Office, 'Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps' (NIO, November 2009), at para 6.6.

Rights remains unfinished business of the Agreement, sitting currently with an ad hoc committee of the Northern Ireland Assembly.

The Commission has since continued to raise concerns regarding UK nationality laws failing to meet the identity and birthright principles of Articles 1 (v) and (vi) of the Belfast (Good Friday) Agreement 1998.⁵

There have been serious concerns raised about how UK immigration rules treat citizens covered by the Belfast (Good Friday) Agreement who identify as Irish can exercise their rights. The issue has come to light through the difficulties encountered by individuals seeking to secure their rights as Irish citizens to bring family members to the UK. This recently crystallized in the *Emma de Sousa v Home Office* legal challenge. Emma, born in Northern Ireland and married to a US citizen, applied to return home with her husband but, was refused on the basis that UK immigration law automatically treated her as a British citizen regardless of how she identified.

Within the case, the UK Home Office advanced that the birthright provisions of the Belfast (Good Friday) Agreement provide a right to identify as Irish or British or both but not a right to choose your citizenship. The right to choose your citizenship is not provided for by UK domestic law and therefore cannot supersede the British Nationality Act 1981 that declares anyone born in the UK to a British, Irish or settled parent as British. This is contrary to the birthright to identify and be accepted as British, Irish or both, and to hold both British and Irish citizenship, that is central to the Belfast (Good Friday) Agreement.

The legal challenge did not reach a definitive final outcome, as it was withdrawn following the Home Office amending its immigration rules to allow people in Northern Ireland covered by the Belfast (Good Friday) Agreement to bring in family members through the EU settlement scheme until June 2021.

European Convention of Human Rights (ECHR)

Article 8 ECHR provides everyone the right to respect for his private and family life and non-interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary. A denial of citizenship can be interpreted as a denial on the private life and impact on the social identity of an individual and therefore bring it within the general scope and ambit of Article 8 ECHR.⁶

The European Court of Human Rights (ECtHR) has observed that although the right to citizenship is not expressly guaranteed by the European Convention on

⁴ NI Office, 'Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps' (NIO, November 2009), Annex 1 Summary of Recommendations, at 101.

⁵ NI Human Rights Commission, 'Briefing on the Immigration and Social Security Coordination (EU Withdrawal) Bill' (NIHRC, 2020); NI Human Rights Commission, Submission to the Public Bill Committee of the Immigration and Social Security Coordination (EU Withdrawal) Bill (NIHRC, 2020).

⁶ *Karashev v. Finland*, ECHR 12, 1999; *Genovese v. Malta*, ECHR 11, 2011.

Human Rights or its Protocols, it does not exclude that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 ECHR.

Article 14 ECHR, upholds the right to not face discrimination on any ground without an objective justification covering sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This may be relevant if read in conjunction with Article 8 ECHR where differential treatment occurs as a result of citizenship status. For example, in *R(K) v Secretary of State for the Home Department*, the High Court of England and Wales held that provisions of the British Nationality Act discriminated on the grounds of birth status, contrary to Articles 8 and 14 ECHR, on the basis that it did not permit a rebuttal of the presumption that the husband of a mother is the father as of right.⁷

Implementing changes to citizenship rules and requirements to better incorporate the birthright commitments of the Agreement into UK law

The Commission welcomed the (then) Prime Minister Theresa May's recognition in February 2019 that "the birthright to identify and be accepted as British, Irish or both, and to hold both British and Irish citizenship is absolutely central to the Agreement. But I know that in some cases recently people have encountered difficulties in securing their rights as Irish citizens to bring in family members. I understand the serious concerns that have been raised".⁸ The NIHRC further welcomed her statement that she had initiated a joint review by the Home Office and the NIO of the issues "to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement".⁹ The review was never published.

The Commission also welcomed the commitment by the UK Government in New Decade, New Approach to review its immigration rules "taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it".¹⁰

In May 2020, the Home Office released a Statement of Changes in Immigration Rules, which provides for a "relevant person of Northern Ireland" to access EU free movement law protections.¹¹ These changes came into force on 24 August

⁷ *R(K) v Secretary of State for the Home Department* (2018) EWHC 1834. A DOI was granted in this case.

⁸ Theresa May 'PM Speech in Belfast', 5 February 2019.

⁹ Theresa May 'PM Speech in Belfast', 5 February 2019.

¹⁰ NI Office, 'New Decade, New Approach' (NIO, 2020), at Annex A on UK Government Commitments to Northern Ireland, para 13.

¹¹ Home Office, 'Statement of Changes in Immigration Rules CP232' (HO, 2020), at 10.

2020 and will remain in place until the EU Settlement Scheme closes to new applications on 30 June 2021. A 'relevant person of Northern Ireland' is defined as someone who is a British citizen, an Irish citizen, or both British and Irish and was born in Northern Ireland to a parent who was British, Irish or both, or otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.¹²

The Commission welcomes this change though it is clearly not the durable, long term solution canvassed by Theresa May in her speech in February 2019. Moreover, beyond a short term, quick fix it does not address the commitment in the Belfast (Good Friday) Agreement to "recognise 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".¹³

In April 2020, the Joint Committee of the NIHRC and Irish Human Rights and Equality Commission published commissioned research, on the incorporation of the Belfast (Good Friday) Agreement into UK immigration and nationality law.¹⁴ This provides a number of recommendations for legislative change without undermining or inadvertently risking rights of a person who chooses to identify as British or Irish or both.

The Commission recommends incorporating in law the birthright commitment under the Belfast (Good Friday) Agreement 1998 to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements, into UK domestic laws relating to citizenship and immigration.

Northern Ireland residents born in the Republic of Ireland to apply for a British passport

The Belfast (Good Friday) Agreement provides that the birthright to hold both British and Irish citizenship covers the "people of Northern Ireland". This is defined as those people born in Northern Ireland to a mother or father (whether or not the parents are married) who, at the time of their birth, was a British citizen, an Irish citizen, or a dual British and Irish citizen or settled ("without any restriction on their residence") in the UK. People who were not born in Northern Ireland are always outside the definition. People who are not settled are mainly people who do not have "indefinite leave to remain" in the UK: people with leave under the immigration rules for a limited time, or with no leave. Irish people who are not people of Northern Ireland are also treated as settled provided they are

¹² Home Office, 'Statement of Changes in Immigration Rules CP232' (HO, 2020), at 10.

¹³ Agreement between the Government of the UK and the Government of Ireland, 10 April 1998, at Article 1(vi).

¹⁴ Alison Harvey, 'A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998' (NIHRC and IHREC, 2020).

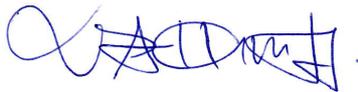
not subject to deportation or exclusion orders. They are thus double-counted in the definition.

In accordance with this definition, NI residents born in Ireland would not be entitled to dual nationality under the Belfast (Good Friday) Agreement. Those individuals who are not settled are mainly people who do not have "indefinite leave to remain" in the UK: people with leave under the immigration rules for a limited time, or with no leave. Irish citizens who are not people of Northern Ireland are also treated as settled provided they are not subject to deportation or exclusion orders. They are thus double-counted in the definition.

There is no legal requirement to do so, nonetheless, the Commission does not foresee any reason why Irish citizens could not be given this opportunity as matter of reciprocity. In effect, this is a matter for the UK government to decide.

The Commission is ready and available to provide any further clarification, in writing or through oral evidence, to what is set out in this letter.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Les Allamby', with a stylized flourish at the end.

Les Allamby
Chief Commissioner

January 2021