Written evidence submitted by Dr Austen Morgan (CPP0004)

Summary

Nationality law is complex, requiring analysis across generations in time and space. Here, I deal with United Kingdom law and with Irish law. Historically, those born in Northern Ireland acquired British citizenship, under various statutes. The creation of an Irish state in the 1920s did not lead immediately to a new Irish nationality. It was the 1950s before Irish law – with considerable extra-territorial effect – penetrated Northern Ireland. The basis of Irish citizenship there was unique in the world, being an endless descent rule from an Irish ancestor.

The 1998 Belfast agreement did nothing to change United Kingdom or Irish nationality law. The two governments, however, purported to make a statement, the legality of which – in two systems of law – remains to be determined judicially. Birth right is not a term of legal art: it may apply in United Kingdom law before 1 January 1983; it does not in Irish law as regards Northern Ireland. Subsequent Irish nationality law has not altered this position.

Introduction

1. My name is Austen Morgan. I am a barrister in London and Belfast, in private practice. My practice has included, over many years, nationality law. I have also published a great deal of legal writing on the constitution, including *The Belfast Agreement: a practical legal analysis,* London 2000.[1]

2. I was born a British citizen, under the British Nationality Act 1948, in Northern Ireland. As my father and mother had been born in Ireland before 6 December 1922 (the creation of the Irish Free State), I became entitled to Irish citizenship by descent from them, after the enactment of the Irish Nationality and Citizenship Act 1956. I acquired my first Irish passport in the early 1970s. The 1998 Belfast agreement had no effect on my dual nationality. My birth right, insofar as that has any legal significance, was British and not Irish.

3. I respond to NIAC's call for evidence on 'citizenship and passport processes in Northern Ireland'. I answer the three questions on the call for evidence below.

4. I use the following abbreviations:

BNSAA 1914	British Nationality and Status of Aliens Act 1914
BNSAA 1914-43	British Nationality and Status of Aliens Acts 1914-43
BNA 1948	British Nationality Act 1948

[1] Now available to all: https://www.austenmorgan.com/wp-content/uploads/2018/02/Belfast_Agreement.pdf.

BNA 1948-65	British Nationality Acts 1948-65
BNA 1981	British Nationality Act 1981
BNA 1981-83	British Nationality Acts 1981-83
GB	Great Britain
INCA 1935	Irish Nationality and Citizenship Act 1935
INCA 1956	Irish Nationality and Citizenship Act 1956
INCA 1986	Irish Nationality and Citizenship Act 1986
INCA 2001	Irish Nationality and Citizenship Act 2001
INCA 2004	Irish Nationality and Citizenship Act 2004
NI	Northern Ireland
ROI	Republic of Ireland (also Ireland!)
United Kingdom	United Kingdom of GB & NI

United Kingdom Law

5. Nationality law – a term of art – has always been part of municipal law: **1930 Hague convention concerning certain questions relating to the conflict of nationality laws**. Nationality law regulates citizenship. And citizenship links an individual to a state, with rights and obligations. Citizenship is a legal status, distinct from any question of identity or politics. One is either a national by operation of law, or not. It is not a question of applying for a passport, or not. A passport is simply evidence (genuine or fraudulent) of nationality.

6. In the UK (from 1 January 1801), nationality was a matter mainly for the common law. In the nineteenth century, parliament enacted principally: **Aliens Act 1844**;

and **Naturalization Act 1870** – the first permitting naturalization and the second renunciation.

7. Our nationality law was developed in the twentieth century:

BNSAA 1914;

BNSAA 1914-43;

BNA 1948;

BNA 1948-65;

BNA 1981; and

BNA 1981-83.

8. Under the BNSAA 1914, one became a 'natural-born British subject'. There was a number of ways to this status: birth within his majesty's dominions and allegiance; birth to a father outside his dominions, who was a British subject and born within at least his allegiance; birth to a naturalized father; birth to a father in crown service; or birth registered at a British consulate. Various amendments were made in further statutes, up to 1943. There was a birth right to British subject status. But descent was generally a matter of one generation only.

9. The next significant nationality measure was BNA 1948. Under this, one became 'a citizen of the United Kingdom and colonies'. That was British subject status, which was interchangeable with 'Commonwealth citizen'. Former colonies (called dominions) had created their own nationalities. Éire was treated separately in section 2, a British subject being entitled to hold onto the status on various grounds by notice in writing: crown service; holder of a British passport; 'associations by

way of descent, residence or otherwise' with the UK. This statute was further amended until 1965.

10. Dual nationality was recognized first in 1948, by the UK. On the basis of the common travel area (see below), there also emerged the possibility of reciprocal citizenship rights as between the two states. The Irish state quit the commonwealth in 1949, becoming the Republic of Ireland. Westminster enacted the Ireland Act 1949, stating that the ROI was not a foreign country. (That was in UK law. The ROI was of course another state in international law.) Thereafter, Irish citizens had status in the UK. It took the ROI a great deal longer before it reciprocated.

11. The third and current measure is BNA 1981. Under this: 'a person born in the United Kingdom…shall be a British citizen if at the time of the birth his father or mother is – (a) a British citizen; or (b) settled in the United Kingdom.' This statute did away with simple birth right. One needed, in addition to birth, a parent at least settled in the UK. This is a term meaning not subject to immigration control. But note one could achieve nationality for the first time by birth through either parent.

12. Nationality law had become entwinned with immigration control in the Immigration Act 1971, and the BNA 1981 re-defined the right of abode as applying to British citizens and to commonwealth citizens with an existing right.

Irish Law

Irish Free State

13. Ireland was a separate legal jurisdiction before 1922. On 6 December 1922, the Irish Free State came into existence in UK and Irish law. It subsequently acquired statehood in international law.

14. One of the unsung aspects of Irish separatism was the desire not to have Irish immigration controls, against the UK. To that extent, the union continued. The so-called common travel area came into administrative existence, in February 1923. It survived, except during the second world war, and was recognized later in UK and Irish law.

15. The new Irish constitution, drafted in Dublin and London, created a limited form of internal citizenship. This was unique in the sovereign's dominions. Everyone domiciled in the Irish Free State on 6 December 1922, became a citizen of Saorstát Eireann. They travelled abroad, including to NI, as still natural-born British subjects. They continued to use British passports.

1935 Act

16. It was Eamonn de Valera, with the INCA 1935, who developed Irish nationality. This first citizenship act created 'natural-born citizens of Saorstát Eireann'. Irish passports followed, though they were never legislated. This new citizenship had little impact on NI. Separately, in the Aliens Act 1935, de Valera excluded British subjects in the UK (including NI) from the category of alien. To this extent, he impinged on NI legally. Extra-territoriality beckoned. He also anticipated the UK, and the Ireland Act 1949.

17. Eamon de Valera created a successor state, Éire/Ireland, in 1937, with Bunreacht na hÉireann, a new constitution. Article 9 provided for citizenship, but the constitution did not change Irish nationality law. Articles 2 and 3 had no effect either on Irish nationality.

1956 Act

18. The heavily retrospective INCA 1956 did so. The ROI did not want to provoke the UK, but the second coalition government also wanted to affirm Ireland a nation through legislation.

19. Sections 6 and 7 are challenging to interpret. Section 6(1) reads: **'Every person born in Ireland is an Irish citizen from birth.'** That seems to be every living person. Ireland was from article 2 of the constitution. But section 7(1) reads: **'Pending the re-integration of the national territory, subsection (1) of section 6 shall not apply to a person, not otherwise an Irish citizen, born in Northern Ireland on or after the 6th December, 1922, unless, in the prescribed manner, that person, if of full age, declares himself to be an Irish citizen or, if he is not of full age, his parent or guardian declares him to be an Irish citizen. In any such case, the subsection shall be deemed to apply to him from birth.'**

20. The ROI was seemingly not legislating for NI: sections 6(1) and 7(1) read together. Declaring Irish citizenship is a red herring for the following reason. The key lies in the phrase 'not otherwise an Irish citizen' in section 7(1), and the INCA 1956 granting citizenship retrospectively to dead generations. My parents, very much alive in 1956, and well settled in NI, became Irish citizens by birth because both had

been born in (British) Ireland before 6 December 1922. I do not think either much noticed this. I became an Irish citizen by descent from one or the other.

21. Section 6 also includes: **'(2) Every person is an Irish citizen if his father or mother was an Irish citizen at the time of that person's birth or becomes an Irish citizen under subsection (1) or would be an Irish citizen under that subsection if alive at the passing of this Act…(4) A person born before the passing of this Act whose father or mother is an Irish citizen under subsection (2), or would be if alive at its passing, shall be an Irish citizen from the date of its passing.'** I was told, during the negotiation of the Belfast agreement, by an Irish government lawyer, to think Brian Boru (941-1014). Thus, Irish law invented an endless descent rule. Irish citizens in NI acquired their nationality by descent. Thus, the Irish practice of asking applicants to trace themselves from a person born in Ireland before 6 December 1922 (in my case, both of my parents, but for younger people, a grandfather or grandmother. In time, it will become great grandparents). Query whether this practice continues?

22. Thus, Clive Parry, in *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland,* London 1957, referred to 'the eccentric operation of the Act in relation to Northern Ireland.' (p 952) He concluded that citizenship by descent, under section 6(2) and (4), is also, under section 6(1), citizenship by birth: 'For any person who is born in Northern Ireland on or after December 6, 1922, of a parent there born before that date is also a citizen by descent under section 6(2) of the Act by reason of having been born of a parent who is, under section 6(1), deemed to have been a citizen by birth at the time of that person's birth, or who would be a citizen thereunder if he had survived the commencement of that subsection. And it

would appear that, where the qualification is inoperative [namely the declaration], a person concerned is to be treated as possessing citizenship by birth rather than the alternative category of citizenship which renders the qualification inapplicable to him.' (pp 948-9)

The 1998 Belfast Agreement

23. Some people refer to the good Friday agreement, and give it a strong nationalist coloration. They find what they want in it. The Belfast Agreement – the official name in domestic law and the appropriate name in international law – comprises two agreements: a short, British-Irish, agreement, governed by treaty law; and a longer, multi-party agreement, which is political. The latter achieves some legal effect, through article 2 of the former: **'The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement. In particular there shall be established in accordance with the provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institution: …'.**

24. The British-Irish agreement began with a number of recitals, which are not provisions. Article 1 was a joint statement by London and Dublin. It has status by being part of a treaty. But it is not law, not even international law. It also had no effect on the law of the UK or the ROI. Article 1 deals with the status of NI, deploying principally the concept of self-determination, but in a very unusual way – splitting it between two states. Article 1 is largely aspirational. Paragraphs (i) to (iv) are interrelated. Paragraph (v) is about a change in sovereign rule.

25. While NIAC isolates paragraphs (v) and (vi), I submit that paragraph (vi) is freestanding. I also submit that NIAC appears to have overlooked annex 2 of the Belfast agreement. This is a declaration on article 1(vi), making clear that 'the people of Northern Ireland' is a political term, with a reduced legal content. The same point could be taken regarding 'the birthright of all the people of Northern Ireland'. I submit that this too is political rhetoric, and not legal certainty being articulated by two governments.

26. I have already taken the point about nationality in UK law being based upon a birth rule, between BNSAA 1914 and BNA 1981. From 1 January 1983, one needed more than birth in NI to acquire the new British citizenship. Introducing the INCA 1956 in Dáil Eireann, the minister for justice had said of NI nationalists: 'Citizenship is, in our opinion, their birthright.'[2] That was precisely what his bill did not offer, as is clear from what became sections 6(1) and 7(1).

27. Dual nationality, as I have suggested, emerged with the BNA 1948. In 1956, with the INCA, the UK government did not lodge an international protest about interference (as it should have done). Partly, the Irish hoodwicked London. Partly, the UK was losing the will to rule. But ultimately, it was not important, in an age before mass aviation.

Irish Law Again

[2] *Official Reports,* 1000, 29 February 1956.

28. The Belfast agreement did not require the UK, or the ROI, to amend its nationality law. The UK did not. However, the ROI had relied upon article 2 of the constitution for its definition of Ireland: INCA 1956 section 2. That had gone.

29. Thus, in the INCA 2001, Irish law turned to 'the island of Ireland', saved from the deleted article 2 of the constitution. This required the redrafting of sections 6 and 7 of the INCA 1956.

30. Section 6(1) now became: **'Every person born in the island of Ireland is entitled to be an Irish citizen.**' And section 7(1) (citizenship by descent) now became: **'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.'** Section 7(2) read: **'The fact that the parent from whom a person derives citizenship had not at that time of the person's birth done an act referred to in section 6(2)(a) shall not of itself exclude a person from the operation of subsection (1).'**

31. Section 6(1) was not a clear birth rule. And section 7(1) was still – note 'from birth' not 'by birth' – was legislatively retrospective. This is reinforced by section 7(2).

32. Irish law became tautologous: **'…a person born in the island of Ireland is an Irish citizen from birth if he or she does…any act which only an Irish citizen is entitled to do.'** (section 6(2)(a)) Law gave way to administration, this being about applying for an Irish passport. Subsection (3) then weakened the status: **'A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.'** This may refer to statelessness. What about British citizenship in NI? These provisions of the INCA 2001 were

made retrospective to 2 December 1999, the day when the Belfast agreement entered into force.

33. Irony of ironies, what the UK did with the BNA 1981, the ROI did with the INCA 2004. The stimulus was illegal immigrants giving birth to children, who acquired citizenship automatically. The INCA 2004 had extra-territorial effect in NI. The new section 6(6) of the INCA 1956 redefined 'person' to exclude children: neither of whose parents was an Irish citizen nor entitled to be an Irish citizen; nor a British citizen; nor a person not subject to immigration control in the ROI; nor 'a person entitled to reside in Northern Ireland without any restriction on his or her period of residence'. Irish nationality law, in preserving the INCA 1956, but smothering the endless descent rule with 'from birth', became less legal certainty and more administrative convenience.

Renunciation

34. Renunciation is a provision found usually in nationality law. However, it is not normally a matter of individual choice. States are obliged not to let people become stateless.

35. Thus, section 12 of the BNA 1981 provides for the registration of a declaration of renunciation, made in the prescribed manner. It is a matter for the secretary of state, but not absolutely. Section 13 permits a resumption of British citizenship, after such a declaration, but only on one occasion.

36. Section 21 of the INCA 1956 was, in contrast, more restrictive. First, one had to be about to become a citizen of another country. Second, one had to be ordinarily resident outside the state. Third, one had to lodge a 'declaration of alienage' in the prescribed manner. And fourth, one needed the consent of the minister to do so in wartime.

37. There is not a great deal of renunciation activity in the UK, the flow being all the other way with immigrants seeking residence and then citizenship. The position in the ROI is different (though it too attracts immigrants). Successive Irish governments have interfered in NI. Perhaps, if Dublin begins to major again on the rights of Irish nationals, it could stimulate unionists – who never asked to be Irish – formally renouncing that unwanted gift. There might be a legal problem about becoming a citizen of another state (there are already British). There would be no problem about living outside the state.

The De Sousa Case

38. Emma De Souza was born in NI in 1987. She was a British national under the BNA 1981. Later, she met and married a US national, Jake De Souza. She could have secured his entry as her spouse to the UK under its immigration rules. Emma De Souza sought to claim she was an Irish national only, and, living in the UK, she could rely upon the Immigration (European Economic Area) Regulations 2006. She refused to renounce her British citizenship, and apply as an Irish national, because, she said, that would be to recognize … the law!

39. Jake De Souza made an EEA application in December 2015. He was refused. He won an appeal before the first-tier tribunal (immigration and asylum chamber) in Belfast in August 2017. In September 2019, the secretary of state for the home department won an appeal to the upper tribunal (immigration and asylum chamber) in London (the president, Lane J, presiding). The upper tribunal decided, coherently, that the Belfast agreement had not changed UK nationality law. Emma De Souza was a British citizen in UK law. She was also an Irish citizen in Irish law. But, in effect, the UK state had not amended its domestic law, through a joint statement with the Irish government, contained in an international agreement. That judgment of a high court judge is unlikely to be overturned, if another case should go to the court of appeal or the supreme court.

40. The NIO rarely wins against nationalist legal challenges. This time, it behaved like a loser. In *New Decade, New Approach*, in January 2020, and struggling to get the executive back together in Belfast, it promised to make the immigration rules equal, as between a British citizen and an Irish national in NI relying upon European Union law. On 14 May 2020, in a regular *Statement of Changes in Immigration Rules,* CP 232, the home office amended the government's EU settlement scheme, through appendix EU (family permit) in the ever-expanding immigration rules. The drafter abandoned nationality law. He/she invented a 'relevant person of Northern Ireland', who was defined as essentially Irish or British or both. But the Belfast agreement did not apply to GB, and this was potentially discriminatory. The irony (aside from that) was: the immigration rules are statements of policy, not rules of domestic immigration law. Emma De Souza succeeded in her case. She did not achieve a point of principle. The EU settlement scheme – related to Brexit – is due

to expire on 30 June 2021. That will be the end of 'a relevant person of Northern Ireland'.

Three Questions

41. NIAC, in its call for evidence, posed three questions. As often, they suggest answers. The above discussion shapes my answers.

Question One: article 1(v) and (vi)

42. I have distinguished paragraphs (v) and (vi) above, and separated the latter as being concerned with nationality law.

43. I have separately considered UK domestic law, Irish domestic law and international agreements. States change their laws through their constitutions. In the UK, parliament is held to be sovereign. Only it can change the law. The executive, through international relations, cannot usurp the domestic legislature. That is what some enthusiasts for the good Friday agreement wish to maintain. The law said Emma De Souza was born a British citizen in 1987. She maintains that the Belfast agreement somehow overrode that in 1998. Thus, she declined to avail of the UK law permitting renunciation of her nationality, as the home office had cravenly suggested (in order to free up her Irish nationality in NI for reasons of immigration control). The UK thereby acquiesced in extra-territoriality, not a healthy principle in international law generally. What if the UK chose to legislate for the ROI? That would be extra-territoriality.

44. I can see little or no role for the European convention on human rights, in nationality questions. One of course should be referring to the Human Rights Acts 1998, which is how convention rights take effect in UK law.

Question Two: birth right

45. I have discussed this at length above. Birth right is rhetorical, and connected with religion and politics. Insofar as it is legal, it is the concept of nationality by birth in a particular state. This was statute law in the UK from 1914 until 1981. Subsequently, one needed a parent in the UK, with at least settled status. It had also been the law in the ROI, until 2004. Then, the state aligned with the UK, against the children of immigrants who had no status. In terms of NI, there was a birth right in UK law, from 1921 until 1981. There never was a birth right in Irish nationality law, for NI residents. That is because the Irish state invented retrospective nationality by endless descent from anybody born in the state before 6 December 1922.

Question Three: UK passports for Irish citizens in the ROI

46. This is the most interesting question, and one that poses the idea of reciprocity in state to state relations. Since 1998, the ROI has been largely all take, including on nationality.

47. The BNA 1948 – which anticipated dual nationality – recognized citizenship of Éire. Éire was treated separately in section 2, as noted: **'(1) Any citizen of Eire**

who immediately before the commencement of this Act was also a British subject shall not by reason of anything contained in section one of this Act be deemed to have ceased to be a British subject if at any time he gives notice in writing on all or any of the following grounds…'. The section was entitled 'continuance of certain citizens of Eire as British subjects'. The BNA 1948 came into force on 1 January 1949. At that point, under Irish law, there were citizens of Éire, in mainly the ROI. This was also the position in UK law, but existing British subjects were not forgotten. It is not known how many British subjects in the ROI gave notice in writing to the secretary of state in subsequent years.

48. The point about the UK permitting its nationality law to have extra-territorial effect in the ROI related substantially to Éire/Ireland still belonging to the commonwealth. All that changed in 1949.

49. Thereafter, the UK never updated from 1 January 1949. Section 31 of the BNA 1981 is: continuance as British subjects of certain former (?) citizens of Eire: **'(1) A person is within this subsection if immediately before 1st January 1949 he was both a citizen of Eire and a British subject. (2) A person within subsection (1) who immediately before commencement was a British subject by virtue of section 2 of the 1948 Act…shall as from commencement be a British subject by virtue of this subsection. (3) If at any time after commencement a citizen of the Republic of Ireland who is within subsection (1) but is not a British subject by virtue of subsection (2) gives notice in writing to the Secretary of State claiming to remain a British subject on either or both of the following grounds [crown service or associations] …he shall as from that time be a British subject by**

virtue of this subsection.' Query whether the UK was recognizing dual nationality or not?

50. Birth before 1 January 1949 means one would be at least 72 years of age. This is a declining right dwindling to extinction. It is very far from reciprocity, namely the UK offering British citizenship extra-territorially in the ROI – as a complete mirror of what that state has been doing in NI since 1956, albeit in a very contrived legal manner.

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