

## Evidence to the Northern Ireland Affairs Committee Citizenship and Passport Processes in Northern Ireland

Colin Murray and Clare Rice

### *Author Biographies*

**Mr Colin Murray** is a Reader in Public Law at Newcastle University. He is the principal investigator on the ESRC project Performing Identities: Post-Brexit Northern Ireland and the reshaping of 21st-Century Governance (ES/S006214/1), examining the impact of Brexit on the relationship between Ireland and the United Kingdom (and in particular Northern Ireland).

**Dr Clare Rice** is a Research Assistant at Newcastle University, working on the ESRC project 'Performing Identities: Post-Brexit Northern Ireland and the reshaping of 21st-Century Governance (ES/S006214/1). She works across the disciplines of Political Science and Law, specialising on matters in Northern Ireland.

This evidence is presented in a personal capacity and does not represent the views of the ESRC or of Newcastle University.

**NOTE:** The issues outlined in this submission are expanded upon in a March 2020 report authored by members of the Performing Identities team on behalf of the Northern Ireland Human Rights Commission, accessible here: <https://www.nihrc.org/publication/detail/continuing-eu-citizenship-rights-opportunities-and-benefits-in-northern-ireland-after-brexit>.

## Citizenship in Northern Ireland

- [1] It was known from the outset of the Brexit process that issues relating to citizenship with regard to Northern Ireland would be complex by virtue of the nature of the arrangements established under the Belfast/Good Friday Agreement 1998. This provided that 'the people of Northern Ireland' have the option of identifying and being accepted as Irish, British, or both, affirming the ability of the people of Northern Ireland to use either or both passports.
- [2] The Belfast/Good Friday Agreement included the principles of 'parity of esteem' between these identities and it provided for a baseline of rights protections which would not diminish. Brexit introduced new tensions between these principles; any attempt to retain EU citizenship rights in the Northern Ireland context would have provided for differentiated rights for that portion of the people of Northern Ireland who identify as Irish (and thus retain EU citizenship) compared to those who identify solely as British. In response to the uncertainties of the Brexit process, there has been a notable uptick in the volume of applications for Irish passports from individuals resident in Northern Ireland and elsewhere in the United Kingdom.
- [3] In practical terms, the outworking of the 1998 Agreement's citizenship provisions has been far from straightforward, and these ambiguities became more apparent under the shadow of an impending Brexit. The *DeSouza* case, although relating to the application of rules

regarding “third-country national” spouses applicable before Brexit, has come to provide some clarity on what became a prominent issue within Brexit debates. This case related to rights available to Irish-only identifying citizens born in Northern Ireland and immigration. In this case, an application was made for an EEA-residency card to enable the US citizen spouse of such an individual to live in Northern Ireland, and was rejected after the Home Office determined that this application was excluded on the basis that individuals born in Northern Ireland automatically had underlying British citizenship.

[4] The case lasted for several years, but the litigation ultimately concluded after a concession by the Home Office, which made it possible for the people of Northern Ireland to be treated as EU citizens for the application of the immigration rules. In this way, Jake DeSousa’s residency right was established, but without satisfactorily resolving the fundamental dispute over the automatic ascription of British citizenship to the people of Northern Ireland. The rule change, moreover, is only applicable for the duration of the EU Settlement Scheme, which closes in June 2021. This case demonstrates how citizenship in the context of Northern Ireland is anything but straightforward.

## **The Common Travel Area (CTA)**

[5] The Common Travel Area (CTA) which exists between the UK, Ireland, the Isle of Man and the Channel Islands provides a set of arrangements in which citizens from these places are granted special privileges to citizens. These CTA arrangements predate Ireland and the UK joining the EU, and the EU-UK Withdrawal Agreement’s Protocol on Ireland/Northern Ireland confirmed that these arrangements could continue post-Brexit provided that they did not conflict with Ireland’s ongoing EU law commitments.

[6] The EU-UK Withdrawal Agreement provides for a range of rights and enforcement mechanisms which in some regards extend beyond those of the CTA for British-only identifying citizens within the scope of ‘the people of Northern Ireland’ as previously defined and who are living in Northern Ireland. The clearest example of such a right, provided to British citizens living or working in EU countries under the terms of Part 2 of the Withdrawal Agreement, is with regard to their ability to be joined by non-EU/EEA/Swiss family members.

[7] At various points during the Brexit process, the CTA was hailed as addressing some of the resultant difficulties. The CTA, however, is comparably weak in legal terms with regard to the rights it affords to individuals when compared with the agreement that has been reached in the Withdrawal Agreement. Under the Agreement, Irish citizens are treated as any other EU citizen. This means that Irish citizens who fulfilled the UK residency requirements prior to the end of the transition period are entitled to the protections of Part 2 of the Withdrawal Agreement. In addition to residency, the Withdrawal Agreement allows the UK to require EU citizens in the UK to register in order to take advantage of its terms, which the UK has facilitated through the EU Settlement Scheme.

[8] The UK Government long advised Irish citizens residing in the UK that it was not necessary to register through the EU Settled Status Scheme in order to protect their rights after Brexit. This advice was qualified late in 2020, with an acknowledgement that these 300,000 people ‘may wish to apply to the scheme to make it easier to prove their status in the UK in the event that they wish to bring eligible family members to the UK in the future’ (HL Deb, Vol. 805, Col. 629 (7 September 2020)). This shift illustrates the legal distinctions between the rights and entitlements of individuals who identify as Irish and are resident in the UK by virtue of the CTA and those who are part of the people of Northern Ireland.

## European Union Rights/Entitlements

- [9] As a consequence of EU citizenship, both static and 'moving' Member State nationals now enjoy certain rights stemming from primary EU law, some of which operate outside of Member State territory. These rights are detailed in the Charter of Fundamental Rights and the Citizens' Rights Directive (Directive 2004/38/EC). Holders of Irish citizenship resident in the UK also enjoy these rights (even if many of them are passive until they enter the territory of an EU Member State). These rights are therefore available to all of the people of Northern Ireland who choose to activate their Irish citizenship (through holding an Irish passport, for example), but are not available unless an individual has taken active steps to assert their Irish (and with that EU) citizenship.
- [10] Although the preamble to the Withdrawal Agreement recognises that Irish citizens in Northern Ireland 'will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union', this commitment is not realised in the operative part of the Agreement. The extension of EU citizenship rights to the territory of Northern Ireland, post-Brexit was all but impossible to reconcile with the territorial nature of most EU citizenship rights. Moreover, any effort to extend these rights to all of the people of Northern Ireland (regardless of whether they had asserted their Irish citizenship entitlement) would fundamentally alter the basis of EU citizenship as dependent upon citizenship of an EU Member State.
- [11] Under the Withdrawal Agreement, British citizens in Northern Ireland, even if part of the 'people of Northern Ireland', will not retain their EU citizenship (and associated rights) unless they also activate their entitlement to Irish citizenship. The Agreement, moreover, leaves EU citizens in Northern Ireland (including Irish citizens) with an EU right to access consular and diplomatic protection, and the ability to choose to exercise broad free movement rights into EU Member States (thereby activating EU law's protections against discrimination by comparison to the citizens of those states). Any EU citizen living in any part of the UK can take such steps and it is worth noting that these rights are in no way dependent upon the Withdrawal Agreement; they are no different from the rights which apply to any EU citizen living outside Member State territory.
- [12] These do not, in short, amount to meaningful special EU citizenship arrangements for Northern Ireland. Some special provisions relating to Northern Ireland, however, have been debated or given effect following the expiration of Brexit's implementation/transition window regarding European Health Insurance Cards (EHIC) and the Erasmus scheme.
- [13] Following the UK's withdrawal from the EU, the Irish Government did pledge that it would provide for a replacement for EHIC for Northern Ireland residents. These cards are used for receiving emergency healthcare in EU Member States. Following the Brexit Agreements, however, EHIC cards will now be replaced with UK Global Health Insurance Cards (negating the need for Ireland to put in place a special scheme). Existing EHICs will remain valid until their expiry date and the UK replacement scheme will offer comparable cover. It was recently announced that applicants for the new UK Global Health Insurance Cards will be given the option of whether or not to have a UK flag printed on it.
- [14] With Brexit, the UK left the Erasmus scheme. The UK's replacement Turing scheme has been in existence for some time already. It does not, however, provide the same support as Erasmus, with the practical consequence being that many students and even academics might feel constrained from taking up exchange opportunities. The Irish Government,

however, has committed to extending the Erasmus scheme to support students resident in Northern Ireland (independent of how they identify). This approach has been taken as a means to ensuring the 'parity of esteem' principle is upheld with regard to Northern Ireland, but once again creates a distinction in the entitlements available to individuals resident in Northern Ireland and those resident in other parts of the UK.

## Conclusion

- [15] Post-Brexit, citizenship and identity are increasingly complex issues notwithstanding the Belfast/Good Friday Agreement's provision that the people of Northern Ireland can choose and be accepted as Irish, British or both. To assume the matter is simply one that hinges on how individuals identify in terms of being British or Irish overlooks the complexity of identity as a concept – put simply, just because a person might identify as British in Northern Ireland, does not preclude this individual from seeking to secure an Irish passport for practical reasons. At the core of legal understanding citizenship in Northern Ireland, therefore, has to be the Belfast/Good Friday Agreement.
- [16] The combined effect of the Belfast/Good Friday Agreement citizenship provisions, the Withdrawal Agreement commitments to protect rights for Irish citizens and the people of Northern Ireland more generally, and the UK Government's pursuit of a Brexit which provides for a clean break from EU law, at least in terms of its effects upon Great Britain, have produced a multi-tier system of rights operating within the post-Brexit UK, and one which is sure to produce confusion.
- [17] The UK Government's delays in taking steps to ensure the rights stemming from the Belfast/Good Friday Agreement were reflected in immigration and citizenship, as highlighted by the *DeSouza* case, has caused concerns in recent years. Following Brexit, however, the issues surrounding citizenship and attendant rights and entitlements are increasingly complex. Some rights of the people of Northern Ireland now rely on domestic law, some from the ability to claim Irish (and as a consequence EU) citizenship, and some are dependent on residence in Northern Ireland.

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