

Northern Ireland Affairs Committee inquiry into *Citizenship and Passport Processes in Northern Ireland*

Written Evidence

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Introduction

This submission is concerned with the first two questions in the Committee’s call for evidence. It considers possible reforms to each of British and Irish nationality law, in the light of paragraph 1(vi) of the 1998 British-Irish Agreement (‘the Agreement’). It draws upon the author’s publications concerning the application of Irish citizenship to persons born in Northern Ireland, and the position of Irish citizens in British immigration law.¹

By paragraph 1(vi) of the Agreement, the two Governments “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, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.”

Paragraph 1(vi) is supplemented by a declaration by the two Governments, made at the time of the 1998 Belfast/ Good Friday Agreement, and contained in Annex 2 of the British-Irish Agreement. The declaration sets out the Governments’ “joint understanding” that “The term ‘the people of Northern Ireland’ in paragraph (vi) of Article 1 of this Agreement means ... all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.”

For convenience, the phrase ‘person(s) of Northern Ireland’ is used here to refer to those within the category of “the people of Northern Ireland” defined in 1998. That is in line with the approach taken in Appendix EU of the Immigration Rules.²

The interpretation of Article 1(vi) of the Agreement

¹ ‘The Ian Paisley Question: Irish Citizenship and Northern Ireland’ (2003) 25 *Dublin University Law Journal* 116-147 and ‘Recognition after All: Irish Citizens in Post-Brexit Immigration Law’ (2020) 34 *Journal of Immigration Asylum and Nationality Law* 284-305 (available on request).

² Definition of ‘relevant person of Northern Ireland’ in Immigration Rules, Appendix EU, Annex I.

In considering the implications of paragraph 1(vi) for nationality law, the central question is whether the statement permitting persons of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose” covers *legal nationality*. Does such a person have the right to choose not only how they self-identify, but also as between (1) British citizenship alone, (2) Irish citizenship alone and (3) dual British and Irish citizenship?

Cogent arguments against such a right to choose citizenship based upon paragraph 1(vi) were given by the Upper Tribunal in *De Souza* in 2019, and may be summarised as follows.³ First, while paragraph 1(vi) recognises the possibility of dual British and Irish nationality, its silence concerning the two other possible choices shows a lack of intention to recognise those.⁴ Second, making citizenship by birth depend on an individual’s ongoing consent leads to uncertainty as to whether a person is or is not a British citizen.⁵ Third, the need for consent would apply to both states’ nationalities, and so would risk statelessness.⁶ The Upper Tribunal also held that certainty as to citizenship, and the prevention of statelessness, justified any interference with the right to private life in Article 8 ECHR.⁷

Nevertheless, there are strong reasons to conclude that paragraph 1(vi) requires recognition of *all three* possible choices concerning British and Irish citizenship. First, the recognition of dual nationality in paragraph 1(vi), and in particular the use of the word “accordingly”, show that the parties to the Agreement recognised that how a person “identifies” in Northern Ireland has implications for citizenship. This provision for *dual* identification in nationality law implies that there should also be recognition for *British-only* identification and *Irish-only* identification.

A second and related factor is the alignment of the 1998 declaration concerning “the people of Northern Ireland” with section 1 (1) of the British Nationality Act 1981, which provides for the automatic acquisition of British citizenship through birth in the United Kingdom.⁸ The fact that this core provision of British nationality law was used in defining the category of person whose self-identification is protected by paragraph 1(vi) is a strong indicator that *all three* options should be protected in the two states’ nationality laws.

Third, the Upper Tribunal’s valid concerns in *De Souza* do not preclude choice over citizenship. They could be met by a carefully-designed scheme which enabled such choice, while providing certainty as to citizenship, and avoiding statelessness. These considerations do not require the automatic application of British or Irish citizenship. Nor would they preclude the application of British citizenship as a default, in the absence of a choice, or until one was made.

³ [2019] UKUT 00355 (IAC). That case concerned the refusal to grant an EEA residence card to the husband of an Irish citizen born in Northern Ireland, on the grounds that she (the sponsor) was also a British citizen.

⁴ *Ibid*, para 39.

⁵ [2019] UKUT 00355, paras 36-37.

⁶ *Ibid*, para 40.

⁷ *Ibid*, para 53.

⁸ As is explained below, there is a difference in the case of Irish citizen parents who are not ordinarily resident in the United Kingdom.

Fourth, a similar response may be made to Upper Tribunal’s rejection of arguments based on Article 8 ECHR. The European Court of Human Rights has repeatedly stated that a person’s nationality is an aspect of their “identity”, and so should be protected against arbitrary denial or deprivation by contracting states.⁹ In the case of Northern Ireland, where the complexity of identity is recognised by paragraph 1(vi) of the Agreement, it is arguable that neither the United Kingdom nor Ireland should arbitrarily *apply* their citizenship to persons of Northern Ireland. In practice, that means avoiding or limiting automatic imposition of nationality in respect of such persons.

Finally, the purpose of the Agreement, to provide a comprehensive political settlement in respect of Northern Ireland, ought to be reflected in the interpretation of paragraph 1(vi). In Northern Ireland, British and Irish ‘identities’ often have a political character, in the sense that they are related to opinions concerning whether Northern Ireland should remain part of the United Kingdom, or should be part of an all-Ireland state. In that specific context, it appears artificial to separate an individual’s options concerning self-identification from those concerning citizenship.

Implications for British nationality law

British citizenship is acquired automatically by anyone born in Northern Ireland to a parent who is a British citizen or “settled”.¹⁰ The concept of being ‘settled’ requires that the parent was “ordinarily resident” in the United Kingdom, and had no time restrictions on the period of stay. Two adjustments appear necessary to bring British nationality law into line with paragraph 1(vi): provision for children born in Northern Ireland to non-resident Irish citizens, and for choice over British citizenship for persons of Northern Ireland.

Children born to non-resident Irish parents

Under current law, a child born in the United Kingdom to an Irish citizen parent becomes a British citizen automatically only if the Irish parent is ‘settled’ in the United Kingdom.¹¹ There is however no basis in law for the acquisition of British citizenship through an Irish citizen mother or father who was *not* ordinarily resident in the United Kingdom at the time of a child’s birth. That is at odds with the terms of paragraph 1(vi), both for those who might wish to be British alone, or for those who might wish to be dual British and Irish citizens.

⁹ In respect of denial of nationality, see *Karashev v. Finland* (decision of 12 January 1999), *Genovese v. Malta* (judgment of 11 October 2011, para 33) and *Mennesson v. France* (judgment of 26 June 2014, para 97). In respect of deprivation of nationality, see *Ramadan v. Malta* (judgment of 21 June 2016, para 85) and *K2 v. United Kingdom* (judgment of 7 February 2017, para 49).

¹⁰ British Nationality Act 1981, sections 1(1) and 50(2).

¹¹ The Home Office has long treated Irish citizens as being free of time limits as a matter of policy. Since 31 December 2020, that has been the statutory position, as the Immigration Act 1971, section 3ZA - inserted by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 - contains a general rule that Irish citizens do not require leave to enter or remain in the United Kingdom. There are powers to exclude Irish citizens from the United Kingdom for individual reasons. For a discussion of the legislation, see Ryan (2020).

The position in nationality law may be contrasted with the approach taken in Appendix EU of the Immigration Rules. There, the category of “relevant person of Northern Ireland” who may sponsor family members requires that a person was born to at least one parent who was a British citizen *or* an Irish citizen *or* “otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.”

Choice over British citizenship

If there is to be a choice over British citizenship, it appears necessary to expand the options for it not to be taken up, or to be given up, by persons of Northern Ireland. At present, the only option for a British citizen - whether from Northern Ireland or otherwise - is to renounce their citizenship by means of a declaration to the Secretary of State.¹² Renunciation is possible only when the person in question is of “full age and capacity”, which will typically arise only be at the age of 18.¹³ It is a requirement that the Secretary of State be satisfied that the person in question “will ... have or acquire” another citizenship or nationality. British citizenship may later be resumed upon application, at the discretion of the Secretary of State, by a person of “full age and capacity”.¹⁴

It is the combination of British citizenship arising automatically *and* the fact that it can be given up only after the age of 18 which appears problematic. One solution would be to enable the parents of a child who is a person of Northern Ireland to make a declaration concerning the child’s citizenship.¹⁵ That could be enabled as part of the birth registration process, or otherwise when the child is an infant. The making of such a declaration should be optional, so that the principle of automatic acquisition of British citizenship would be unaffected for those who did not do so. If the decision were taken to forego British citizenship, and was taken within a defined period, that could be deemed to apply from birth.

A person of Northern Ireland should also have at least one opportunity to make their own declaration, to alter the initial decision by their parents – expressing their own preference, and renouncing or resuming British citizenship, as the case might be.¹⁶ Consideration could be given to reducing the minimum age limit below 18 for such a declaration. It would also be possible to set a maximum age after which this option to revisit the declaration would cease.

¹² British Nationality Act 1981, section 12.

¹³ Section 12(5) provides that a person who marries or enters a civil partnership before 18 is considered to be of ‘full age’.

¹⁴ British Nationality Act 1981, section 13(3). Section 13(2) confers a right to resume British citizenship once, where it was renounced in order to enable the retention or acquisition of another citizenship or nationality, but seems irrelevant in this context.

¹⁵ For a similar proposal, see Alison Harvey, *Legal analysis of incorporating into UK law the birthright commitment under the Belfast (Good Friday) Agreement 1998* (Irish Human Rights and Equality Commission and Northern Ireland Human Rights Commission, 2020), paras 192-197.

¹⁶ See the similar proposal in Harvey (2020), para 198.

Consideration should be given to the removal of any fees associated with such a declaration. At present, the fee for renunciation is £372, while that for resumption is £1,206, and these presumably do or would hinder choice in practice.

Where either the initial parental decision, or any subsequent declaration by the person concerned, involved a choice not to have British citizenship, it would be a requirement that Irish citizenship *was* held at that time.¹⁷ The general options of renunciation and to seek resumption of British citizenship would also remain after a subsequent declaration, or the maximum age (if one was specified).

Consideration could be given to extending it to two groups, beyond persons of Northern Ireland, as defined in the Agreement. One category is persons adopted by parents resident in Northern Ireland who are British, Irish or settled: parallel arrangements could be put in place for an optional declaration by parents, and for a later declaration by the person who was adopted. The other is persons who are born in Northern Ireland and registered as British citizens by their parents while they are minors: arguably, they too should have the opportunity to express a preference after the minimum age.¹⁸

Implications for Irish nationality law

Prior to the 1998 Agreement, the position in Irish law was that anyone born on the island of Ireland was an Irish citizen *by place of birth*, save that persons born in Northern Ireland had to make a declaration to that effect.¹⁹ Anyone born on the island of Ireland after 6 December 1922, to a person born on the island of Ireland before that date, was also an Irish citizen *by descent*, as the requirement to register second and subsequent generations born abroad applied only to births elsewhere.²⁰

The right to choose in paragraph 1(vi) of the 1998 Agreement led to the reform of Irish nationality law by the Irish Nationality and Citizenship Act 2001.²¹ That altered the legal position as regards the acquisition of Irish citizenship *by place of birth*, with retrospective effect from 2 December 1999, so that any person born on the island of Ireland was “entitled” to Irish citizenship. Irish citizenship was acquired automatically at birth if the person was not entitled to any other nationality.²² For those – such as persons of Northern Ireland – who acquired or were eligible for another nationality, the acquisition of Irish citizenship required the performance of “any act which only an Irish citizen [was] entitled to do”. In parliamentary debate, the following were given as examples of such “acts”: applying for an Irish passport, a declaration of citizenship, registration of a child as an Irish citizen, and registration to vote in Irish presidential elections.²³ A relevant act may be performed on behalf of a person who is not a full age or

¹⁷ Indeed, Irish law could provide that such a declaration was an “act” which asserted the person’s entitlement to Irish citizenship – see further below.

¹⁸ See British Nationality Act 1981, section 1(3), section 1(3A), section 1(4) and Schedule 2, para 3.

¹⁹ Original version of the 1956 Act, sections 6(1) and 7(1).

²⁰ Original version of the 1956 Act, sections 6(2) and 7(2).

²¹ See the discussion in Ryan (2003).

²² Section 6 of the 1956 Act, as amended by the Irish Nationality and Citizenship Acts 2001 and 2004.

capacity. Where a relevant act is performed, Irish citizenship is deemed to have existed from birth.

For persons of Northern Ireland, the arrangements put in place in 2001 were not affected by the amendment of the rules concerning acquisition of Irish citizenship by birth by the Immigration and Nationality Act 2004. A person born on the island of Ireland on or after 1 January 2005 is entitled to Irish citizenship by place of birth only if one of their parents is (1) an Irish citizen (or entitled to be so), (2) a British citizen, (3) a person entitled to reside in the Irish state or in Northern Ireland without any restriction on their period of residence, or (4) has lived on the island of Ireland for three of the previous four years.²⁴

Neither the 2001 Act nor that of 2004 altered the substance of Irish law as regards the acquisition of Irish citizenship *by descent*, however.²⁵ Accordingly, where a person is descended from a person born on the island of Ireland before 6 December 1922, and two successive generations have not been born outside the island of Ireland, that person will be an Irish citizen by descent. This may be presumed to apply to the majority of persons of Northern Ireland.

Irish nationality law provides for renunciation of Irish citizenship by declaration by a person of “full age” who “is or is about to become” a citizen of another country, provided they are ordinarily resident outside the State”.²⁶ Irish citizenship may also be reacquired upon the making of a declaration by a person born on the island of Ireland.²⁷

In order to bring Irish nationality law into line with the provision of the Agreement for choice over Irish citizenship, it appears necessary to revisit the descent provisions of the Irish Nationality and Citizenship Acts. In that regard, one solution would be to provide that citizenship by descent only apply to persons born outside the island of Ireland. If acquisition by descent for those born on the island of Ireland were to cease, it would then be for consideration whether to retain the current automatic entitlement to Irish citizenship of children born elsewhere to parents who did *not* take up their own entitlement to be Irish citizens.

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²³ Minister for Justice, John O’Donoghue, *Seanad Debates*, 26 January 2000 and *Dáil Debates*, 13 April 2000.

²⁴ Sections 6, 6A and 6B of the 1956 Act, after amendment by the 2004 Act. There is an exception for children born to diplomats, and residence by a parent without immigration status, or as a student or an applicant for international protection, does not count.

²⁵ Section 7 of the 1956 Act, after amendment by the 2001 Act.

²⁶ Section 21 of the 1956 Act.

²⁷ Section 6(5) of the 1956 Act, after amendment by the 2001 Act.

