

**Written Evidence to the Northern Ireland Affairs Committee on its inquiry into
'Citizenship and Passport Processes in Northern Ireland'**

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March 2021

Introduction

Identity in Northern Ireland cuts across cultural, religious and national identities. Establishing equality between what had become two largely distinct communities lay at the centre of the 1998 Belfast Agreement, also known as the Good Friday Agreement, which is the term that I will use. The Agreement dealt with a number of human rights issues in the region and formed what many see as a constitutional starting point in healing division and achieving political stability.ⁱ

Whilst the subject of citizenship in Northern Ireland has received renewed attention previous UK interpretations of Article 1(vi) did not lend themselves to the position that a person of Northern Ireland could not choose to be considered an Irish citizen only. The new approach of openly declaring the people of Northern Ireland as British first and foremost, as pursued by the UK Home Office in *Jake Parker De Souza v. Secretary of State for the Home Department*ⁱⁱ, represents a shift in Government policy with little indication as to what prompted this change.

Executive Summary

- Article 1 (vi) of the Good Friday Agreement provides an explicit right for the people of Northern Ireland to be accepted as 'Irish or British, or both'.
- The Agreement defines the 'people of Northern Ireland' as '*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*'. As such residency in Northern Ireland does not bring an individual under the cover of the Good Friday Agreement.
- The commitments under Article 1 (vi) are binding in international law and are to be interpreted in good faithⁱⁱⁱ in accordance with their ordinary meaning in light of the context and object of the treaty.^{iv} In this context it is clear that there remains a duty on both States to accept a person of Northern Ireland as 'Irish or British, or both' and

that this recognition is intended to encompass citizenship 'accordingly', rather than to be limited to some abstract concept of identity.

- The argument that Article 1 (vi) of the Good Friday Agreement relates only to identity, requires that one actively ignore the express wording of '*be accepted as*'.
- The Good Friday Agreement is widely considered a constitutional document and as such these rights should be considered constitutional rights(see *Robinson v Secretary of State*^v).
- There remains a significant implementation gap in giving domestic legal effect to the citizenship entitlements of the Good Friday Agreement. Without adequate legalisation underpinning Article 1(vi) there is likely to be further litigation.
- Concerns over statelessness or access to British citizenship can be met by carefully designed legislation that better incorporates the birthright provisions of the Good Friday Agreement, whilst providing certainty as to citizenship, and avoiding any detrimental treatment or loss of rights.
- The *DeSouza* case stemmed from a blanket immigration policy rolled out by the Home Office without consideration for the Good Friday Agreement.
- Changes to domestic UK immigration law, in relation to the *DeSouza* case are a temporary fix that do not address the underlying issues.

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 Good Friday Agreement

1. The Good Friday Agreement dealt with the question of identity and citizenship under article 1 (vi) of both the Multi-party Agreement (in the section on Constitutional Issues) and the British-Irish Agreement, with the latter being an international treaty between the Irish and British Governments registered at the United Nations.
2. Article 1 of the MPA is replicated in the British-Irish agreement and seeks to recognise the legitimacy of divergent political opinions and national identities. To give legitimacy to these divergent political ideologies and national identities Article 1 offers

guarantees and commitments as to how they will be acknowledged, accommodated, and respected.

3. Article 1 (vi) of the section on Constitutional Issues in the MPA and of the BIA confirms that the participants and 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 Irish and British citizenship is accepted for both governments and would not be affected by any future change in the status of Northern Ireland”.

4. The commitments are binding in international law and are to be interpreted in good faith^{vi} in accordance with their ordinary meaning in light of the context and object of the treaty.^{vii} In this context it is clear that there remains a duty on both States to accept a person of Northern Ireland as ‘Irish or British, or both’ and that this recognition is intended to encompass citizenship ‘accordingly’, rather than to be limited to some abstract concept of identity.
5. Annex 2 of the BIA is titled ‘*declaration on the provisions on paragraph (vi) of Article 1 in relation to citizenship*’. The Annex was added after the signing of the agreement at the behest of the UK Home Office and defines the term ‘*the people of Northern Ireland*’.^{viii}

Interaction between UK nationality law and Articles 1 (v) and (vi)

6. The current position of the Home Office is that a person of Northern Ireland who wishes to be accepted as an Irish-only citizen under the terms of the Good Friday Agreement must first renounce British citizenship. The process of renunciation is laid out below.

Renunciation of British Citizenship

7. Form RN1^{ix} that is used for renouncing British citizenship requires the following to be completed;

I am a:-

British citizen

British overseas citizen

British overseas territories citizen

British national (overseas)

British subject

8. Renunciation costs £372 and requires a legal declaration that a person is in fact British, removes freedom of movement for up to 6 months and may carry unknown detriments. Resumption of British citizenship^x is not guaranteed and costs £1027.

Interpretation of Article 1(v)

9. Previous UK interpretations of Article 1(vi) did not lend themselves to the position that a person of Northern Ireland could not choose to be considered an Irish citizen only.

10. The 2008 Citizenship Review conducted by the former UK Attorney General Lord Goldsmith QC contained the interpretation that;

“the Good Friday Agreement confirms the right of the people of Northern Ireland to take either British or Irish citizenship or both”.^{xi}

11. Until recently the Government website ‘NI Direct’,^{xii} contained the view, under the heading of Citizenship in Northern Ireland, that;

“The people of Northern Ireland can choose to be British citizens, or Irish citizens or both. If they choose to be both British and Irish citizens, this means they have a dual citizenship”.

12. This definition was replaced after the Upper Tribunal decision in *DeSouza* to align with the Government’s new interpretation of the birthright provisions.

13. In *DeSouza* the Home Office created an unsupported distinction between the identity and citizenship entitlements in Article 1 (vi)^{xiii} stating that;

“The birthright provisions of the British-Irish agreement allow for choice of identity, which is not the same as a right to choose one’s citizenship in law”^{xiv}

14. It has been argued by some that Article 1 (vi) of the Good Friday Agreement relates to only to identity.^{xv} However, those making such an argument must in my view actively ignore the express wording of *'be accepted as'*.
15. The *'identify is not a right to elect'* argument is a misinterpretation of Article 1 (vi) that is at odds with the view of the Irish government.^{xvi}

Article (v)

16. There is nothing in the Good Friday Agreement to suggest that the position of Article 1 (v) has any effect of Article 1 (vi), in fact the language of Article 1 (vi) directly counters such a presupposition by stating;

"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"^{xvii}

17. Confirming that the entitlements under Article 1 (vi) are not dependent on the constitutional status of Northern Ireland but rather intended to last in perpetuity.
18. Further, if one were to give any credence to such an argument and followed the logic that Article 1 (v) somehow predetermines which citizenship is to take precedent then it follows that in the event of a United Ireland the people of Northern Ireland would then flip to being Irish citizens who can identify as British but are in fact legally Irish first and foremost. Neither of these scenarios are consistent with the text of the Agreement and I would caution any attempt to tie these two provisions together.

The DeSouza case

19. The *DeSouza* case, of which I was a party, began in 2015 when the UK Home Office refused to grant a Northern Irish-born Irish citizen an application for an EEA residence card for their US-born spouse. This was despite the fact that they held an Irish passport only and identified solely as an Irish citizen under the terms of the Good Friday Agreement.

20. In 2017, Judge Gillespie, who presided over the First-tier Tribunal (Immigration and Asylum) (FtT), ruled in favour of *DeSouza*, citing the constitutional nature of the Good Friday Agreement;

“The constitutional changes effected by the good Friday agreement with its annexed British-Irish agreement, that latter amounting to an international treaty between two sovereign governments, supersede the provisions of the British nationality act 1981 in so far as the people of Northern Ireland are concerned. He or she is permitted to choose their nationality as a birthright. Nationality cannot therefore be imposed upon them by birth”^{xviii}

21. The Home Office in turn lodged an appeal against the FtT decision which was initially refused on the grounds that the FtT found there to be ‘*no error in law*’.^{xix}

22. The Home Office lodged a further appeal to the Upper Tribunal, which was subsequently granted in May 2018. However, the case was not heard by the Upper Tribunal until September of 2019 due to two consecutive adjournments requested by the Home Office.

23. The Upper Tribunal ruled in favour of the Home Office and released their decision via a written judgment on October 14th 2019.^{xx}

24. The Home Office argument consisted of two main points: firstly, that Article 1 (vi) relates to identity and not citizenship, despite the corollary section on citizenship; and secondly even if it were to relate to citizenship, that provision does not exist in domestic UK law and therefore under the UK’s dualist system cannot be relied upon.

25. The Home Office in written submissions to the Upper Tribunal rebuked any obligation to the spirit of the Good Friday Agreement, stating;

“To the extent that the Respondent’s argument relies upon the spirit rather than the text of the British-Irish agreement, arguments based on the spirit of an international treaty cannot, in a dualist constitutional state, trump the clear provisions of domestic law as set out in the British Nationality Act 1981, particularly when there is no conflict between the domestic law position and the express terms of the international treaty.”^{xxi}

26. This aligned with the grounds lodged by the Home Office to the Upper Tribunal which stated;

“A treaty HMG is a party of does not alter the laws of the United Kingdom and the courts of the United Kingdom do not have the power to enforce treaty rights and obligations at the behest of an individual.”^{xxii}

27. In creating a non-supported distinction between identity and citizenship under Article 1(iv) the Home Office stated in its written submissions that;

“Article 1 (vi) also contains, separately, a recognition that it is the birthright of all of the people of Northern Ireland to identify themselves and be accepted as “Irish or British, or both”. Nothing in domestic law prevents such recognition. Persons of Northern Ireland (such as the Respondent’s wife) can identify themselves as British or Irish or both. However, the act of identifying only as Irish does not, of itself, modify the de jure citizenship which arises under the 1981 Act.”^{xxiii}

28. The Appellant did not rely upon the Northern Ireland Act 1998 rather relied upon the Good Friday Agreement as a constitutional document and interpretative tool.

29. The tribunal applied a literal interpretation to the proposition put forward by the Appellant and failed to apply the purposive and generous approach to interpretation required (*Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL to ensure the British Nationality Act 1981 was interpreted consistently with the Belfast Agreement.

30. An appeal against the Upper Tribunal decision was lodged to the Court of Appeal for Northern Ireland which set a preliminary date of June 3rd 2020.^{xxiv}

31. The Home Office brought forward changes to the immigration rules shortly before the Court of Appeal hearing, remedying the original point of law, and bringing an end to the litigation. The changes provided a welcome relief to many families but are temporary and the window to access this measure is incredibly narrow.^{xxv}

Interaction with the European Convention of Human Rights

32. It is notable that the government in its submission to this inquiry opted to hold back on examining whether Article 8 of the ECHR is engaged. The European Court of Human Rights has holds that a person’s nationality is an aspect of their ‘identity’ which should be protected against arbitrary denial or deprivation.^{xxvi}

33. In the case of *DeSouza* the Tribunal failed to determine whether the right to self-determination was engaged under Article 8 of the ECHR, which led to a failure in assessing whether that right was breached.^{xxvii}

Whether the Government should consider implementing changes to citizenship rules and requirements to better incorporate the birthright commitments of the Agreement into UK law;

34. One should consider the historical significance when dealing with issues relating to identity and citizenship in Northern Ireland. The Upper Tribunal in *DeSouza* failed to take this historical significance into account and failed to engage with the concept that to some, British citizenship is not a privilege, but rather, an imposition. When considering whether to put forward recommendations to amend UK nationality law I would encourage the committee to apply a generous approach that takes into account this historical significance.
35. Minimizing the scope of Article 1(vi) to relate to identity and not citizenship would be a significant divergence from the text and could have further unforeseen negative impacts on the people of Northern Ireland. Not just at present, but in the event of a United Ireland. Strengthening this protection through legislation would benefit all communities.
36. The Northern Ireland Office refers to both the Belfast/Good Friday Agreement and the Northern Ireland Act 1998 as forming the basis of the constitutional framework of Northern Ireland.

Legislative solutions

37. A report published in 2020, commissioned by the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission,^{xxviii} and completed by barrister Alison Harvey,^{xxix} shows that legislative solutions that better incorporate the birthright provisions of the Good Friday Agreement are possible. Consideration should be given to these recommendations.

Whether the Government should allow Northern Ireland residents born in the Republic of Ireland to apply for a British passport given that Northern Ireland residents can currently apply for an Irish passport.

38. In considering whether the UK should provide a route for those born in the Republic of Ireland who are resident in Northern Ireland to apply for a British passport it is important to recognise that there already exists several routes for such an individual to naturalise as a British citizen including through marriage, residency^{xxx} or descent.^{xxxi}
39. The question of naturalisation processes in the UK is not a Good Friday Agreement issue but rather a Home Office issue.
40. It is not possible to apply for an Irish passport on the basis on residency in Northern Ireland, the only route to Irish citizenship, for those not otherwise entitled in Northern Ireland, is through marriage to an Irish citizen.^{xxxii} As a result, there are thousands of British and EU citizens resident in Northern Ireland who have no route to Irish citizenship.

Recommendations

- Amending form RN1 and waiving associated fees.
- Placing into domestic UK citizenship legislation an appropriate amendment to the British Nationality Act 1981.
- Putting in place a long-term immigration policy in relation to family reunion rights for the people of Northern Ireland.
- Consideration could be given to expanding the cohort of a 'person of Northern Ireland'. One category to consider is persons adopted by parents' resident in Northern Ireland who are British, Irish or settled.

16 March 2021

ⁱ <https://www.gov.uk/government/publications/the-belfast-agreement>

ⁱⁱ <https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-355>

ⁱⁱⁱ [The right to be British, Irish or both - Investigations & Analysis - Northern Ireland from The Detail](#)

^{iv} See Article 31(1) Vienna Convention on the Law of Treaties; (General Rule of Interpretation: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.')

v [House of Lords - Robinson v Secretary of State for Northern Ireland and Others \(Northern Ireland\) \(parliament.uk\)](#)

vi [The right to be British, Irish or both - Investigations & Analysis - Northern Ireland from The Detail](#)

vii See Article 31(1) Vienna Convention on the Law of Treaties; (General Rule of Interpretation: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’)

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

ix <https://www.gov.uk/government/publications/apply-to-give-up-renounce-british-citizenship-form-rn>

x [Registration for British citizenship: following renunciation - GOV.UK \(www.gov.uk\)](#)

xi Lord Goldsmith QC, *Citizenship: Our Common Bond* (2008), p.76.

xii <https://www.nidirect.gov.uk/articles/about-northern-ireland>

xiii See BBC News, “Emma de Souza ruling ‘out of spirit’ with Good Friday Agreement – Varadkar” (16 October 2019), and BBC News, “‘People born in NI remain British citizens’, Emma de Souza court hears” (10 September 2019).

xiv Skeleton argument of the Secretary of State for the Home Department in *De Souza v Secretary of State for the Home Department* (unpublished)

xv See, for example, Peter Weir, “Automatic UK Citizenship for Northern Ireland people is at risk from De Souza case” (20 September 2019). <https://www.newsletter.co.uk/news/politics/peter-weirautomatic-uk-citizenship-northern-ireland-people-risk-de-souza-case-938996>.

xvi See Gráinne Ní Aodha and Press Association, “Varadkar says Emma DeSouza ‘is an Irish citizen’ and that he will raise case with Johnson” (15 October 2019).

xvii <https://www.gov.uk/government/publications/the-belfast-agreement>.

xviii First-tier Tribunal decision in *De Souza v Secretary of State for the Home Department* (unpublished); see C.J. McKinney, “Good Friday Agreement doesn’t stop Northern Irish people being born automatically British” (2019).

xix Decision of the FtT on an application to appeal from the Secretary of State for the Home Department (unpublished)

xx <https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-355>

xxi Skeleton argument of the Secretary of State for the Home Department in *De Souza v Secretary of State for the Home Department* (unpublished)

xxii Grounds of Appeal to the Upper Tribunal of the Secretary of State for the Home Department in *De Souza v Secretary of State for the Home Department* (unpublished)

xxiii Skeleton argument of the Secretary of State for the Home Department in *De Souza v Secretary of State for the Home Department* (unpublished)

xxiv See The Irish Times, “Emma DeSouza takes citizenship dispute to appeal court” (25 November

2019).

^{xxv} Home Office, Immigration Rules Appendix EU,
<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu>

^{xxvi} In respect of denial of nationality, see *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 *K2 v. United Kingdom* (judgment of 7 February 2017, para 49)

^{xxvii} Council of Europe, European Convention on Human Rights,
https://www.echr.coe.int/Documents/Convention_ENG.pdf.

^{xxviii} Alison Harvey, “Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998” (March 2020)

^{xxix} See <https://www.no5.com/people/barristers/alison-harvey/court-of-protection/>.

^{xxx}

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946268/form-an-01-21.pdf

^{xxxi} <https://www.legislation.gov.uk/ukpga/1981/61/section/4C>

^{xxxii} <https://1p9fz05mazr28icdhq6jweym-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/Irish-Nationality-and-Citizenship-Act-1956-Reference-Version.pdf>