

# **Supplementary Written Evidence Submitted by Northern Ireland Human Rights Commission (NIHRC) (CPP0013)**

## **NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the Northern Ireland Office /Home Office submission to the Committee**

**May 2021**

### **Introduction**

1. At the Committee's request, the following commentary supplements the Commission's original submission to the inquiry<sup>1</sup>, responding to arguments put in the written evidence submitted by the UK Government.<sup>2</sup>
2. The argument put forward by the NIO and Home Office, that no action is required to give effect to the birthright commitment in the BGFA, is at odds with previously stated Government positions. This departure is neither acknowledged nor explained in its submission.
3. 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". The Prime Minister went on to state that she had initiated a review of immigration rules "to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement".<sup>3</sup>
4. This recognition was in keeping with the previously stated position of the UK Government. In 2009, in its response to the Commission's advice on a Bill of Rights for Northern Ireland, the government 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

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<sup>1</sup> (CPP0002)

<sup>2</sup> (CPP0009)

<sup>3</sup> Theresa May 'PM Speech in Belfast', 5 February 2019.

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". 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".<sup>4</sup>

### **Question 1 – Interaction between UK nationality law, BGFA and ECHR**

5. On page 2 of its submission, the government asserts that "The Belfast Agreement does not make any statement as to whether the citizenship of a person of Northern Ireland, as defined in Annex 2, either must or should align with their choice of identity." The Commission's response is as follows.
  - The 1998 Agreement was not written as complete or standalone legislative text; it is a political treaty creating a legitimate expectation that its commitments would be fleshed out in legislation. Under a dualist constitution, this expectation carries further weight.
  - Reliance on this argument would render the right "to identify ...and be accepted as Irish or British or both" meaningless since, prior to the BGFA, citizens could already declare themselves Irish and obtain an Irish passport.
  - It further overlooks the commitment that citizens should be "accepted" as Irish or British or both. It is difficult to see how citizens are accepted as being only Irish if the law deems them British irrespective of their choice. Moreover, it requires individuals to renounce British citizenship to assert Irish citizenship and provides no means of recognising individuals who regard themselves as having both a British and Irish identity.
  
6. On page 3, in respect of engagement with the ECHR, the government's submission sets out with approval, four arguments made by the Upper Tribunal:
  - a. "the present system enshrined in the [British Nationality Act 1981] represents a proportionate way of achieving the legitimate public end, not only of avoiding statelessness but also of maintaining a clear and coherent system of nationality law" (paragraph 54);
    - The proposals developed by Alison Harvey and put forward by NIHRC, include amendments to strengthen protection against

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<sup>4</sup> NI Office, 'Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps' (NIO, November 2009), at para 6.6.

statelessness while maintaining clarity and coherence of the statute book and retaining section 1 of the British Nationality Act 1981, operable for the avoidance of doubt, pending an express decision.

- b. "it is not disproportionate in Article 8 terms for [a person of Northern Ireland] nevertheless to be required to give notice of revocation, if she wishes only to be a citizen of Ireland" (paragraph 55);
  - This argument rests on the previous proposition that the current system is a proportionate way of achieving legitimate public aims. If, as we have shown, there is an alternative, less intrusive means of achieving the aim of avoiding statelessness and ensuring clarity and coherence, without requiring revocation, the threshold rises in terms of this requirement being considered proportionate. In our view, the threshold is not met in so far as a person is required to accept that they are British in order to renounce their citizenship and be accepted as Irish only. The proposals put forward would make revocation redundant in this context, therefore the proportionality would be moot.
  
- c. "There is, we are informed, a fee of £200 to be paid. We have not, however, been told that that represents a material barrier to her use of section 12 or that it is otherwise disproportionate in Article 8 terms, for the Secretary of State to levy this sum" (paragraph 56);
  - Again, under the proposals suggested, there would simply be no need for revocation.
  
- d. "Accordingly, since section 1(1) of the [British Nationality Act 1981] does not disproportionately interfere with Mrs De Souza's Article 8 rights, it is not possible to invoke the interpretative principles contained in section 3 of the Human Rights Act 1998, in construing section 1(1) of the [British Nationality Act 1981]" (paragraph 57)
  - This issue would also be irrelevant in the context of our proposals being enacted.

**Question 2 – Whether the Government should consider implementing changes to citizenship rules and requirements to better incorporate the birthright commitments of the Agreement into UK law**

7. The Government's response argues against legislative change on the basis that "UK law does not prevent a person of Northern Ireland, who as a matter of law may be a British citizen, an Irish citizen, or a dual British and Irish citizen, from identifying as British, Irish or both, as they may so choose".
8. As set out above, in relation to a similar point made in section 1 of the government's response, reliance on this argument would render the birthright commitment meaningless since prior to the BGFA, citizens could already declare themselves Irish and obtain an Irish passport.
9. It further overlooks the commitment that citizens should be "accepted" as Irish or British or both. It is difficult to see how citizens are accepted as being only Irish, if the law deems them British irrespective of that choice.
10. The Government's second argument against legislative change is that Parliament hasn't already legislated for this commitment. This seems rather circular.
11. The third argument is that the Belfast Agreement "does not mandate, or even posit the possibility of, any changes to UK nationality law so that the acquisition of British citizenship for the people of Northern Ireland is based on choice of identity".
12. The 1998 Agreement was not written as complete or standalone legislative text; it is a political treaty creating a legitimate expectation that its commitments would be fleshed out in legislation. Under a dualist constitution, this expectation carries further weight. Much of the detail set out in the Northern Ireland Act 1998 does not appear in the text of the Agreement.
13. The Government's submission goes on to suggest that any change that would "see the people of Northern Ireland treated differently for nationality purposes from people born in Great Britain" would conflict with "the constitutional status of Northern Ireland as part of the UK".

14. The Commission would point out, however, that the 1998 Agreement has made distinct provision for Northern Ireland in a number of respects that are constitutional in nature and would argue that our recommendations are designed to implement an existing international commitment. The proposals would enable those entitled and wishing to do so, to avail of Irish citizenship alone, if they so choose, with no loss of rights, or detriment to any other party. We submit that the constitutional status of Northern Ireland as part of the UK would remain unaffected by citizens being facilitated in this way.
15. Page 4 of the Government's submission sets out, in support of its position, four further bullet points extracted from the Upper Tribunal's judgement essentially outlining difficulties regarding statelessness and the citizenship of a person of 'undisclosed state of mind'. Both these concerns are fully addressed in our proposals.
16. In summary, section 1(1) of the British Nationality Act 1981, would be retained such that a person is deemed British from birth, subject to the proposed amendments to ensure that a person has the opportunity to express for themselves and for a child, that they are Irish only, and to have that back-dated to birth in the circumstances outlined. The proposals also include an amendment to strengthen the law on statelessness.
17. The Government's paper refers to the protections of the Common Travel Area. Research commissioned by the NIHRC and IHREC found that many of the protections referenced, relied on custom and practice and were "written in sand". The research offered a number of options to address the gaps including those left by EU law which had provided much of what legal underpinning there was until withdrawal.
18. NIHRC acknowledges the temporary solution announced on 24 August for people of Northern Ireland wishing to avail of EEA rights, referenced on page 5 of the UKG paper. These arrangements end from 1 July 2021, after which exclusively Irish citizens with EU Settled Status will retain family reunification rights.

**Question 3: 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**

19. The Commission acknowledges the point made by the government, that the definition in the 1998 Agreement of the 'people of Northern Ireland' in terms of those protected by the birthright commitment, excludes those born outside Northern Ireland.
  
20. As set out in our submission, while there is no legal requirement to do so, the Commission does not foresee any reason why Irish citizens could not be given this opportunity as matter of reciprocity. It may be worth noting that individuals born in Britain, and now living in Northern Ireland who have no family lineage to Northern Ireland save for being married to a NI person would also have to acquire Irish citizenship before being able to acquire an Irish passport. The cost of obtaining Irish citizenship is over 1100 euros so there is not an undue asymmetry between the Irish and UK government's current positions.

*May 2021*