

CTA and Freedom of Movement in the Island of Ireland

Policy Brief

North West Migrants Forum and CAJ



The Common Travel Area and the Island of Ireland:
Removing and Preventing a Hard Border in the Island of Ireland

Introduction

1. A central reason for the Ireland-UK Common Travel Area (CTA) has long been to avoid passport border controls on the island of Ireland.
At present;
 - UK law and policy precludes any passport control on the land border.
 - Irish law disapplies duties to carry and produce passports/ID on the land border only for Irish citizens, persons exercising EU rights, and British citizens.
 - Almost all persons in the State who aren't required to apply for visas in advance of entry into the UK as a visitor (visa-free / non-CTA nationals) can freely cross into the North as a visitor, without any prior UK permission: however, the UK is set to change this.
 - Almost all persons in the north who aren't required to apply for Irish visas in advance can enter the State without prior permission.
 - There is an invisible hard border for persons who do require prior permission to enter the UK or the State (visa nationals), and who therefore need to pass often onerous processes even for a short local journey across the land border.
 - Almost all Non-EU citizens / Non-CTA Nationals in the north are required to apply for a visa in advance of entry into the state.
2. Separate to these CTA arrangements, there is a complex history of both States not generally imposing immigration restrictions on residence, work etc for each others' citizens. For half a century this issue increasingly became irrelevant due to shared EU/EEC membership.
3. The imposition of Brexit has led to the new concept of 'reciprocal rights' of the CTA to ensure continued provision for Irish and British citizens to reside in the alternate state. It also leads to an ahistorical perception the CTA as restricted to Irish and British citizens, and an increased risk of codification of cross-border provision on a restricted basis.¹
4. This briefing note sets out four areas to address the current problems of a 'hard border' for migrant/minoritized communities, particularly in border areas. It also highlights the further hardening of the border through post-Brexit decisions by the UK.

¹ For example, on cross-border health care see paragraph 9 Ireland-UK Memorandum of Understanding concerning the Common Travel Area and associated reciprocal rights and privileges (2019) "The CTA affords British citizens residing in Ireland and Irish citizens residing in the UK the right to access emergency, routine and planned publicly funded health services in each other's state, on the same basis as citizens of that state."



5. Most 'asks' below are within the powers of the State. Others would require pressure imposed on UK authorities.
6. Article 1 of the NI/Ireland Protocol to the EU-UK Withdrawal Agreement, sets out the purpose of the Protocol as *inter alia*, providing for the 'arrangements necessary' to 'avoid a hard border'. Article 3 of the Protocol deals with the movement of people and expressly defers to provision for the CTA by both states to avoid a hard border.

Issue 1: the land border, Freedom of movement and notification

7. In terms of crossing the border into the state from the North of Ireland, there is an invisible hard boarder that predates BREXIT for non-CTA / Visa nationals, with an onerous visa application process. This in practice leaves visa nationals resident in the north feeling 'trapped' inside a border invisible to others. The impact of this is most felt by border communities under the following categories.
 - Non – CTA Nationals settled in the North of Ireland with no time limit/indefinite leave to remain
 - Non-CTA Nationals with Permanent Residence Cards (5 years) living, working, or studying in The North of Ireland
 - Skilled workers from non-CTA citizens with tier 1, 2 and 5 visas working in The North of Ireland
 - Spouses and families of CTA nationals from non-CTA countries living in the North of Ireland
 - Refugees and their families living in the North of Ireland

Family 1: N. is an Irish Citizen by birth with immediate family in both Co. Antrim and Co. Donegal. She is married to a Jordanian Palestinian citizen, A. who first came to NI as a student then on a work visa. His visa status meant he was unable to visit her maternal family in Donegal and only met them when they visited family in the North. Under immigration rules at the time Irish citizens born and living in the North were not allowed to bring spouse under the EU Family permit. Therefore, after marriage he had to apply – from Jordan - to live in the North through the British Spouse Visa scheme which took some time. A valid UK visa does not allow travel to Ireland. This meant years of not accompanying N. or their children to family visits or trips to Co. Donegal. After the Ms DeSouza court decision, he was eligible for an EU settlement status. However due the ongoing fear of unintentionally breaking immigration rules in case it affects future

settlement in Ireland or the UK with his family, he is uncomfortable with travelling across the border until he gets permanent Irish citizenship.

Family 2: H. is an Ethiopian citizen married to an Irish citizen who lives in Muff, Co. Donegal. Her children go to school in Derry. Because she is excluded from freedom of movement under the current CTA rules, she is unable to drop or collect her children from school, unable to attend her children's parent meetings, take her children to social events or take part in any school activities as a parent. This means she cannot fully perform her parental duties or participate in any aspect of her children's school life

Family 3: A refugee child born in Belfast with a congenital heart condition requiring urgent treatment. The child was taken to Paediatric Cardiology in Dublin for treatment as part of the all-island congenital heart disease (CHD) Network scheme. Unfortunately, due to her immigration status, the mother was not able to accompany her child for treatment, causing undue stress on the family. A visa was eventually granted after an emergency application. However, the stress and anxiety are ongoing, especially as if they need further treatment, they may find themselves in the same situation again.

8. In addition, official guidance also states there is a *notification requirement* to report to a Garda immigration office for non-EEA/EU/Swiss nationals (including those who are not required to apply for visas in advance) when entering the State from the north over the land border. This implies for example that a US citizen resident in Strabane, who is a non-visa national, should nevertheless report to Gardaí (possibly in Letterkenny) each time they cross over the bridge into Lifford.²
9. The legal basis for such notification is currently not clear to us, the requirement appears largely unknown, and we are unaware of the extent to which it is enforced.
10. In order to remedy this situation, the following provisions could be adopted:

² "Entry for non-EU, non-EEA and non-Swiss nationals" ... "If you arrive via the border with Northern Ireland, you must report to an Immigration Officer at Burgh Quay, Registration Office, Dublin or your local Immigration Office at a Garda Síochána (Irish Police) station as soon as possible." <https://www.irishimmigration.ie/at-the-border/entry-for-non-eu-non-eea-and-non-swiss-nationals/>



- **Non-EU/EEA residents who have lawful residency in Northern Ireland should have ‘deemed permission’ to cross the border as visitors. Any notification requirements for persons entering the state across the land border should be removed when the person is similarly visa nationals.**

Issue 2: passport controls on the land border and racial discrimination

11. The statutory basis for passport control is Section 11 of the Immigration Act 2004 (as amended) which requires persons to carry and produce passports when entering the State.³
12. In accordance with s11(4) journeys into the State over land from the north (and other CTA routes) are exempt from these duties to carry and produce passports.
13. This express exemption however does not apply to ‘non-nationals.’ This is defined for this provision as persons who are not either Irish or British citizens or persons exercising EU treaty rights (in practice EU/EEA citizens and their family members).⁴
14. Therefore, Irish citizens, British citizens, EU/EEA citizens and their family members are under no duty to carry and produce passports when crossing the land border, but other non-EEA / Non-EU citizens are.
15. In the context of ethnic diversity, it is not possible to tell who an Irish citizen is just by looking at them, or for the same reason differentiate who is a British, EU/EEA citizen and who is not. The predictable consequence of the differential exemption is that passport checks on the land border tend to take place on the basis of racial profiling (the form of racial discrimination where persons are singled out on the basis of skin colour or other ethnic indicators).
16. The outworking’s of the current law and practice include:
 - Checks on busses that have just crossed the border by immigration Gardaí, particularly in Co. Louth, often on the basis of quite blatant racial discrimination, with passengers singled out on the basis of skin colour.
 - In terms of Irish citizens this has created the circumstance whereby black Irish/ British citizens are ‘expected’ to have and show passports on such

³ <https://revisedacts.lawreform.ie/eli/2004/act/1/section/11/revised/en/html> Passports or equivalent travel documents.

⁴ Under s11(5) as amended. Originally this section only exempted Irish and British citizens. this was amended in 2011 to add persons exercising EU treaty rights, in light of *Ebere Dokie v. DPP*. The reference to British citizens was removed but added in again following Brexit.

journeys and white Irish citizens are not. In practice a 'hard border' based on skin colour.

- The risk of removal from the bus and detention until identity is established creates fear to the extent some minoritized passenger's resident in Donegal will travel to Dublin via Sligo rather than through the north.
- The checks also stigmatise minoritized passengers as a 'suspect community' and damage integration and a sense of belonging to Irish society.

17. Remedy sought:

- **The Immigration Act s11(4) of 2004 be amended to end the requirement for non-EU/EEA citizens to carry and produce passports when crossing the border and to notify the authorities of their visit in advance.**

18. In relation to UK law and policy passport control powers are disapplied for all passengers without distinction on the land border.⁵ The UK has committed as a matter of policy to this continuing to be the case post-Brexit.⁶

19. Separately there are considerable concerns however regarding racial profiling in selective passport checks at NI ports and airports to and from Britain,⁷ as well as a high level of in country passport checks,⁸ and increasing detention of EU citizens.⁹

Issue 3: Irish citizenship and the island of Ireland

20. At present a person can naturalise as an Irish citizen through marriage to an Irish citizen and three years residence anywhere on the Island of Ireland.¹⁰

21. However, naturalisation as an Irish citizen through residence (five years) is presently limited to residence *in the State* and excludes the north.¹¹ Persons who

⁵ Section 1(3) of the (UK) Immigration Act 1971.

⁶ Minister Lord Duncan of Springbank in response to an amendment to EU (Withdrawal) Bill from Baroness Kennedy of the Shaws [HL Hansard 25 April 2018, clm 1609 "I am very happy to reinforce the clear statement that there can be no racial profiling at a border, whether it be routine, quixotic or even accidental... There will be no checks whatever for journeys across the land border between Ireland and Northern Ireland, nor between Northern Ireland and Great Britain.."]

⁷ See for example <https://www.itv.com/news/utv/2018-05-10/man-stopped-four-times-at-ferry-because-he-was-black>

⁸ <https://www.thedetail.tv/articles/concerns-over-disproportionately-high-levels-of-immigration-checks-in-belfast>

⁹ <https://thedetail.tv/articles/record-number-of-eu-citizens-deported-from-northern-ireland-in-2016>

¹⁰ S15A Irish Nationality and Citizenship Act 1956, consolidated version, as amended to 2011.

¹¹ As above, s15.



have made the north their home for decades are unable to naturalise as Irish citizens.

22. In addition, it remains a significant concern that the children of the nation are no longer cherished equally further to the 27th Amendment to the constitution in 2004 and subsequent legislation restricting birth entitlement to Irish citizenship.

23. Remedy:

- **Amend the citizenship law to open a pathway to Irish citizenship through residency on the island of Ireland and to restore birth entitlements to citizenship.**

Issue 4: Access to cross border services

24. Many public and other services are provided or availed of on a cross border basis.

25. This includes children attending school in the alternate jurisdiction; families availing of childcare; cross-border health care arrangements including the provisions paediatric congenital cardiac services in Children's Health Ireland at Crumlin or in the North-West Cancer Centre, Derry.

26. EU free movement law would have provided entitlements to some cross border services but has been affected by the UK's Brexit.

27. The development of CTA 'reciprocal rights' since Brexit, as set out in the 2019 MoU with the UK, cover access to some cross border provision, such as health and education but have been expressly developed as largely applying only to British and Irish citizens.¹²

28. Unless otherwise provided for this could lead to a situation whereby a cross border public service previously open to a broader cohort of persons is now restricted.

¹² For health see footnote 1 above.



29. Pre Brexit, persons who are non-British/ Irish but permanent residents in the alternate jurisdiction were largely excluded from accessing cross border services.
30. The ‘hard border’ for visa nationals and others could also prevent access to services only provided on a cross border basis such as paediatric congenital cardiac services.
31. Remedy sought.
- **Undertake a social mobility assessment and ensure that essential cross-border services are available to all legally resident non-EU/EEA citizens who have lawful residence on the island of Ireland.**
32. In relation to crossing from the State into the north: at present almost, all persons present in the State who are EU/EEA citizens, and non-EEA citizens who are not visa nationals, are granted a form of ‘deemed leave’ to enter meaning they can freely cross into the north on local journeys as visitors without any need for prior immigration permission. This excludes primarily visa nationals.¹³
33. At present therefore, persons who require UK visas face a hard border and cannot for example travel from Donegal into Derry. Others – including almost all EU/EEA citizens and non-EU/EEA citizens who are non-visa nationals are used to free movement across the land border into NI, with particular benefits to such persons in border communities.
34. In conflict with the NI Protocol the UK however is currently legislating to diminish this and to harden the land border for such person through the introduction of requirements for electronic pre-travel authorisation (‘ETA’) prior to travel with no exemption for local journeys over the land border.¹⁴
35. This ETA requirement will not apply to Irish or British citizens. It will apply to EU citizens and non-visa nationals (with possible exemptions for person with existing immigration status in the UK, including retained EU rights under the

¹³ See s1(3) of the (UK) Immigration Act 1971, and The Immigration (Control of Entry through Republic of Ireland) Order 1972 (as amended).

¹⁴ Clause 71 Nationality and Borders Bill (as amended in House of Commons Committee, Nov 21).





Withdrawal Agreement). The ETA requirement will capture numerous other persons in the State, including EU citizens and non-visa nationals living in border communities.

36. Failure to hold an ETA when required to will be an immigration offence. This means that many EU citizens (and non-visa nationals) including those living in border Counties could now find themselves in an irregular situation and facing up to six months in prison for crossing into the north without an 'ETA'.

- **In light with of the protocol, Irish government must Press the UK Government to prevent a hard border on the island of ireland, to exempt journeys across the land border from ETA requirements.**

North West Migrants Forum
Committee on the Administration of Justice (CAJ)
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North West Migrants Forum

The North West Migrants Forum (NWMF) is a network of individuals working together to tackle racial inequality and prejudice. Based in Derry/Londonderry, NWMF was first founded in 2012 with the fundamental goal of supporting and advising members of black and minority ethnic (BAME) communities who reside in Northern Ireland.

Our vision is for a tolerant, pluralistic, and diverse Northern Ireland where migrants, refugees, and people from traditional cultures in Northern Ireland can live, work, and celebrate together -both their differences and similarities- in a welcoming and safe environment.

We offer support and advice through a variety of means including running funded events and projects that will educate participants, from BAME and traditional communities, and encourage them to challenge negative perceptions and policies that affect them while also gaining skills and confidence to make change happen.

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Committee on the Administration of Justice (CAJ)

The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues and is affiliated to the International Federation of Human Rights (FIDH). CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

