



What happened to the ‘paragraph 52’ commitments for Irish citizens to continue to exercise **EU rights, opportunities** and **benefits** where residing in Northern Ireland?

The original commitment in the December 2017 joint report:

8 December 2017

TF50 (2017) 19 – Commission to EU 27

Subject: Joint report from the **negotiators of the European Union and the United Kingdom Government** on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union.

Origin: Presented jointly by the **negotiators of the European Union and the United Kingdom Government.**

52. “Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. **The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland.** Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, **in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.”** (*Emphasis added*)

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Executive summary

Background – the commitment on NI Irish citizens' EU rights

- Post-Brexit, Northern Ireland (NI) would be a jurisdiction outside of an EU member state in the extraordinary circumstance where almost everyone who is born here will either be an EU citizen or entitled to be one.
- This is because the UK expressly recognises in the Good Friday Agreement (GFA) that it is the birthright of the people of NI to choose Irish citizenship (or alternatively British citizenship or both). Under EU law, Irish citizens (or citizens of any other EU member state) are automatically also EU citizens. This does not change with Brexit.
- The population of NI is around 1.8 million, while there are around three million other EU citizens in the UK.
- Irish citizens in NI retain some core EU citizens' rights automatically, most notably rights to basic freedom of movement in the EU, in the same way any EU citizen in an existing third country (i.e. non-EU country) does. However, many subsidiary EU rights, opportunities and benefits would not be automatically retained on Brexit and would require a specific arrangement.
- The December 2017 EU-UK Phase 1 Agreement (Joint Report) made broad commitments which would have ensured that Irish citizens residing in NI were able to continue to be able to 'exercise' and have 'access to' their EU rights, opportunities and benefits.
- The Phase II negotiations were to examine the 'arrangements required' to do this – however this commitment has not been taken forward. There is no binding provision in the draft Withdrawal Agreement to implement this commitment, and the subject is not mentioned at all in the 'Political Declaration' on future arrangements.

The EU Settlement Scheme for retained EU rights

- Part II of the Withdrawal Agreement ('Citizens' Rights') contains a scheme aimed at EU citizens in the UK (and British citizens in the EU) who arrived before the end of the Brexit transition period, which permits applicants to retain certain EU rights.
- The UK position is that Irish citizens 'do not need' to apply for settled status under the scheme, as Irish citizens will separately retain rights to reside (and work, etc) in NI (and Britain) under what are now being called the 'associated rights' of the Common Travel Area (CTA).
- However, Irish citizens are not treated differently to EU26 citizens in the citizens' rights provisions of the Withdrawal Agreement and there are a number of reasons why Irish citizens may nevertheless wish to apply for settled status:
 - The CTA 'associated rights' rest on weak foundations, largely do not yet exist. It is not clear what they will cover and they may be changed at any time.
 - The CTA associated rights do not currently include some of the provisions available under the Withdrawal Agreement. For example, rights to family reunification and access to benefits when visiting other EU member states. It is also not clear if the CTA will cover cross-border provision.
 - Rights under the Withdrawal Agreement can be legally underpinned for life.

- Nonetheless, the UK Home Office has taken a stance that it will block NI born Irish citizens' applications under the settled status scheme, through taking the position (incompatible with the GFA) that such persons should be treated as British (not Irish). This means NI Irish citizens may be almost the only EU citizens in the UK not able to retain EU rights.
- People in Northern Ireland may be able to maintain a number of other EU rights (such as workers' rights, etc) under the level playing field provisions of the 'Backstop' for as long as it is in force. In the draft Withdrawal Agreement, the UK has also made a non-diminution commitment in relation to a named section of the GFA (this includes, for example, rights to freely choose residence and women's full political participation).

I. Birthright citizenship in Northern Ireland and EU rights

Irish citizenship and Northern Ireland

Further to provisions flowing from the Irish Constitution, almost all persons born in NI are or are entitled to be Irish citizens.¹ Many other NI residents are also Irish citizens through descent, marriage or birth elsewhere.

This will continue to be the case after any Brexit, where NI would be in the curious position of being a jurisdiction outside of an EU member state where almost everyone who is born here will be (or be entitled to be) an EU citizen. Under EU law Irish citizens (or citizens of any other member state) are automatically also EU citizens.² This does not change with Brexit.

The UK itself expressly recognised these NI birthrights to Irish citizenship under the 1998 Belfast or Good Friday Agreement (GFA) and acknowledged that such persons were entitled to choose to identify as ‘and be accepted’ as Irish or British (or both). This is incorporated in the British-Irish GFA treaty, is hence legally binding and reads, that the British and Irish governments:

(vi) 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.³

The interpretation of this provision alongside others in the GFA, has been that it should mean equality of treatment regardless of the choice of citizenship. In discharging its mandate under the GFA to advise on the content of a Northern Ireland Bill of Rights the Northern Ireland Human Rights Commission recommended the incorporation of a domestically enforceable provision on:

The right of the people of Northern Ireland to hold British or Irish citizenship or both ... with no detriment or differential treatment of any kind.⁴

To date the UK has not implemented this legislation to take forward the Bill of Rights. In the ‘Citizenship Review’ conducted in 2008 by the former UK Attorney General Lord Goldsmith QC for the then Prime Minister Gordon Brown, stated his interpretation that, ‘the Good Friday Agreement confirms the right of the people of Northern Ireland to take either British or Irish citizenship or both.’⁵ Like the Human Rights Commission advice, the birthright provisions are interpreted as providing for persons to be British or Irish citizens, (or both) with the consequent provisions permitting dual citizenship, required to accommodate the third category.

¹ Constitution of Ireland - Bunreacht na hÉireann, (2018 version) Article 2 and Sections 6 & 6A of the Irish Nationality and Citizenship Act 1956 (as amended).

² Article 20(2) TFEU ‘Every person holding the nationality of a Member State shall be a citizen of the Union.’

³ British Irish Agreement Article 1(vi) (UK Treaty Series no. 50 Cm 4705)

⁴ Northern Ireland Human Rights Commission ‘A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland’, 10 December 2008, p47.

⁵ ‘Citizenship: Our Common Bond’ Lord Goldsmith QC Review 2008, paragraph 20.

This is also the only good faith, and hence internationally lawful, interpretation of the treaty given its context and object and purpose.⁶

This has also been the interpretation of Ireland, which amended its nationality laws after the GFA to make Irish citizenship an entitlement rather than automatic conferral.⁷ However, the UK did not, and continues to automatically confer British citizenship on most persons born in NI under the terms of the British Nationality Act (BNA) 1981.⁸ This conflicts with the provision in the GFA to ‘accept’ persons as solely Irish if they so choose.

The Home Office has curiously sought to interpret the birthright provisions in a manner that limits its duties to allowing persons to ‘identify’ as Irish, but not to be ‘accepted as’ Irish. The Home Office has consequently treated all NI born persons as British, regardless of their choice and has ground this in the continued conferral of British citizenship in domestic law. The position is succinctly set out in recent correspondence from the Immigration Minister Caroline Noakes to Lord Empey, which states:

... The Belfast Agreement gives the people of Northern Ireland the right to identify as Irish or British, or both, as they may so choose, and to hold both British and Irish citizenship ...

... We do not consider that there is any conflict between the Belfast Agreement and domestic immigration and nationality provisions. There is nothing in the Belfast Agreement that prevents British citizenship from being acquired at birth ...⁹

This contradiction to date had gone largely unnoticed by NI-born Irish passport holders (who assume they are not British citizens), as in most circumstances there is little practical impact of the conferral of the additional citizenship.

The issue has come into conflict when the UK Home Office has declined NI born Irish citizens access to EU citizens’ rights to be joined by non-EEA family members, by treating applicants as ‘British’ regardless of the duties under the GFA to ‘accept’ such persons as Irish.¹⁰ Despite also taking a position that the continued conferral of British citizenship is compatible with the GFA the Home Office has also concurrently argued that the BNA 1981, as an Act of the Westminster Parliament, in any case trumps the GFA as an international treaty.¹¹

On some occasions the Home Office has suggested that if Irish citizens in NI wish to exercise EU rights they should renounce their British citizenship. This involves making a declaration of being a British citizen (itself incompatible with the GFA for those who wish to solely be accepted as Irish), and paying the Home Office a fee of £372. Renunciation also may lead to Irish citizens in NI losing certain rights, for example in a recent response in Parliament the

⁶ 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.’)

⁷ Irish Nationality and Citizenship Act, 2001, section 3 substituting section 6 of the 1956 Act of the same name.

⁸ Section 1(1) ‘A person born in the United Kingdom after commencement...shall be a British citizen if at the time of the birth his father or mother is—(a)a British citizen; or (b)settled in the United Kingdom...’ Notably this would not include a person both of whose parents were Irish if they were not considered ‘settled’.

⁹ Correspondence from Caroline Noakes MP, Minister of State for Immigration, to Lord Empey of Shandon, ref MIN/0016984/18, 13 December 2018, copy on file.

¹⁰ See most notably at present the case of the De Souza ‘Derry woman’s husband denied visa as she refuses to identify as British’ *Irish Times*, 18 July 2017.

¹¹ Correspondence from Caroline Noakes MP, Minister of State for Immigration, to Lord Empey of Shandon, ref MIN/0016984/18, 13 December 2018, copy on file.

Northern Ireland Secretary of State implied that entitlements to vote in referendums in Northern Ireland, including a border poll, may be dependent on British citizenship as the consequence of the application of the principle of reciprocity (and even though Irish citizens are generally recognised to be eligible to vote in referendums now).¹²

It is worth noting that the policy approach of the Home Office prior to 2012, regardless of the BNA 1981, was to generally allow NI-born Irish citizens access to EU rights as Irish citizens, and thus to accept NI-born as Irish or British or both. This approach changed following the CJEU ruling in *McCarthy* concerning limitations on dual nationals accessing EU rights.¹³ Despite the facts of this case (concerning an English woman who had naturalised as an Irish citizen to seek to avail of EU rights), being irrelevant to the circumstances of birthrights under the GFA, the Home Office has nevertheless relied upon it to change policy and treat all NI born Irish citizens as dual nationals.

Controversially, in 2004 Ireland did alter its citizenship laws in a manner which excluded the birthright to Irish citizenship from children neither of whose parents were either an Irish citizen or a British citizen or otherwise permanent residents.¹⁴ The exclusion of children of temporary migrants was already the case as regards birthrights to British citizenship under the BNA 1981 at the time of the GFA.¹⁵ This exclusion is reflected in Annex 2 of the GFA.¹⁶

Retention of EU citizens' rights, opportunities and benefits by NI Irish citizens

Whilst the retention of EU citizenship by Irish citizens is automatic,¹⁷ the retention of rights opportunities and benefits that are largely associated with EU citizenship is more complex.

Irish citizens retain some EU citizens' rights automatically. These are most notably freedom of movement to visit, work, study, retire elsewhere in the EU, along with some more administrative rights, such as rights to petition the European Parliament. Such rights are already available to Irish (or other EU citizens) resident in existing 'third' (i.e. non EU) countries.

¹² [Written Question 230086, Conor McGinn MP, answered 13 March 2019, Karen Bradley MP. See also, https://www.gov.uk/elections-in-the-uk/referendums](https://www.gov.uk/elections-in-the-uk/referendums)

¹³ C-434/09 Judgment of the Court (Third Chamber) of 5 May 2011, *Shirley McCarthy v Secretary of State for the Home Department*. Following the ruling in *McCarthy* the Home Office amended the Immigration (EEA) Regulations 2016 to exclude dual British and EEA nationals; 'EEA national' means—(a) a national of an EEA State who is not also a British citizen' These regulations were further amended in July 2018 following the ECJ ruling in *Lounes* which found that an EEA national who naturalises as a British citizen after exercising their EEA treaty rights in the UK could continue to rely on their EEA free movement rights as a dual national. This does not apply to anyone the Home Office considers to have been born with British citizenship.

¹⁴ Irish Nationality and Citizenship Act 1956 (as amended) sections 6 & 6A - the provision does not apply retrospectively to those born before 2004.

¹⁵ Section 1(1) 'A person born in the United Kingdom after commencement...shall be a British citizen if at the time of the birth his father or mother is—(a)a British citizen; or (b)settled in the United Kingdom...'

¹⁶ GFA Annex 2: 'Declaration on the Provisions of Paragraph (vi) of Article 1 In Relationship to Citizenship': *The British and Irish Governments declare that it is their joint understanding that the term 'the people of Northern Ireland' in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, 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.*

¹⁷ Article 20(2) TFEU 'Every person holding the nationality of a Member State shall be a citizen of the Union.'

However, the continued access to many EU rights, opportunities and benefits requires specific arrangements as practical access to and exercise of them is normally either dependent on residency in an EU member state, participation in EU programmes or coordination of social security systems. This includes core citizens' rights such as democratic rights to return MEPs and being joined by family members. It also includes rights, opportunities and benefits that are subsidiary to rights of freedom of movement, for example, access to the European Health Insurance Card (EHIC) or qualification recognition.

Such provisions can therefore only be retained if bespoke arrangements that would be required to ensure Irish citizens in NI can continue to have practical access to them, are put into place. Otherwise EU rights of Irish citizens in NI would be 'dormant', in that they would be only practically accessible by leaving NI and taking up residence in an EU member state.

It is important to note that the rights of Irish citizens in Northern Ireland to work, study, rent housing, social security and even to an extent rights to reside are currently to an extent dependent on Irish citizens in NI exercising rights under EU law (or in the alternative through being treated as British, in conflict with the GFA).

Whilst the UK has regularly stated that such provision for Irish citizens in NI (or the UK generally) is provided for under what are now termed the 'associated rights' of the CTA, these arrangements are not in fact legally secured (save democratic rights to vote in local and Parliamentary elections).

The position of British citizens in Northern Ireland

British citizens will cease to be EU citizens on Brexit. British citizens (including NI-born) if living outside the UK – including in the Irish state, will be able to retain some EU rights under the Withdrawal Agreement.

Those in NI who wish to solely identify as British (rather than just as Irish or alternatively as British and Irish) and hence not take up an entitlement to Irish citizenship will therefore not have access to rights that flow directly from EU citizenship without bespoke arrangements.

As alluded to earlier, in accordance with the equality and parity of esteem provisions of the GFA this choice of British or Irish citizenship is not meant to lead to one group or the other being placed at a disadvantage. This position has, at a rhetorical level, been reiterated by the UK in its Brexit position papers, which allude to the GFA birthright for the people of Northern Ireland:

'...to identify themselves and be accepted as British or Irish or both, as they may so choose; [and] **to equal treatment irrespective of their choice.**'¹⁸

However, despite this clear interpretation of the provisions of the GFA, the UK has shown no inclination to put in place arrangements to ensure that there is an equivalence of entitlements between those who solely identify as British to match the entitlements of and those who identify as Irish.

This has largely manifested itself in the rejection of a form of special status for Northern Ireland that would involve the retention of EU rights. Such arrangements would be practically possible across many of the areas concerned. For example, should an MEP

¹⁸ HM Government, 'Northern Ireland and Ireland Position Paper' 16 August 2017, Paragraph 12 (emphasis added).

constituency continue to exist in Northern Ireland, the franchise could be extended beyond EU (including Irish) citizens to British citizens. In the same manner the UK to date has permitted (non-EU) commonwealth citizens to vote for MEPs.

This whole issue highlights the problem of Brexit hardening the boundaries between different groups of citizens. Despite much talk about the need for flexibility and imagination these qualities have been absent from engagement thus far with the complexities of the implementation of the GFA.

The worst-case scenario is, of course, whereby the 'equivalence' conundrum is resolved by stripping Irish citizens of as many EU rights as possible to ensure a form of minimalist equivalence with British citizens, closing off any option to retain EU rights. This is the 'lowest common denominator' approach that should be avoided.

The proposition that entitlements would be dependent on holding both citizenships clashes with the GFA, both in the birthright provisions for persons to be 'accepted as' solely British or Irish if that is what they choose. However, not providing the same entitlements that persons who chose to be accepted as British or Irish, to those who choose to be both, also offends the principles of equal treatment under the GFA. It remains unclear whether the complexities of resolving this in practice are well understood.

Furthermore, at present holding both citizenships may lead to circumstances where rights associated with the other are blocked on the basis of being a dual citizen – this has been precisely the position of the Home Office in relation to Irish citizens in NI exercising EU rights (a situation that raises complex legal questions).

At the time of the last census (2011) only 1.67% of the NI resident population held both British and Irish passports. Around 57% held British passports only and 19% Irish Passports only. Clearly this picture may have changed since Brexit, with increased numbers of Irish passport holders in particular, but the base figure for dual passport holders is very low. A further caveat is the reliability of 'passport held' as an indicator of citizenship of choice, and indeed as a pathway to entitlements. It is notable that at the time of the last census the same figures record that around 19% of the NI resident population held no passport.¹⁹

EU rights not dependent on citizenship in the draft Withdrawal Agreement

Whilst the focus of this paper is the background to the 'paragraph 52' commitments linked to Irish citizenship in NI, it should be recalled that many rights and entitlements are not dependent on citizenship.

Human rights (e.g. fair trial) as the name suggests, are usually not just confined to citizenship. Some entitlements are based on residency (e.g. full NHS medical care is generally based upon lawful 'ordinary residence' not nationality). It is the case however that in recent times entitlements to work, and to access many public services and social security have increasingly been restricted by citizenship and related immigration status.

In relation to EU rights, some are tied to EU citizenship but others are applied to all in the jurisdiction. This is relevant to the Protocol in the draft Withdrawal Agreement where there

¹⁹ NISRA Census 2011, Key Statistics for Northern Ireland, December 2012 Table KS206NI: Passports Held (Classification 2);

are a number of workers' and other EU rights that will continue to apply across the board in Northern Ireland as part of the 'level playing field' commitments under the 'Backstop'.²⁰

Article 4 of the November 2018 Protocol contains a provision that commits to 'non diminution' of rights as a result of Brexit. The commitment in the Protocol covers only the 'Rights, Safeguards and Equality of opportunity' section of the GFA (in fact the GFA has two sections of that name). The original commitment, under Paragraph 53 of the Joint Report was much broader, not being restricted to this named section of the GFA. The 'non diminution' commitment was therefore itself 'diminished' in its translation into the Protocol.

The aforementioned GFA citizenship and parity of esteem provisions do fall outside these sections of the GFA, and hence are not explicitly covered by the non-diminution commitment. However, there are other rights covered in this section that may interface with the 'paragraph 52' commitments. For example, in paragraph 1 of the first section, a number of rights are 'affirmed'. These include 'the right to freely choose one's place of residence' this could be diminished by Brexit if cross-border entitlements, previously provided by EU rights, are eroded as a result of Brexit. The 'the right of women to full and equal political participation' in terms of Irish and hence EU citizens would also be undermined in the event no arrangements are entered into for ongoing EU political rights.

The implementation powers of this commitment, which are to be vested in the Human Rights and Equality Commissions, are yet to be clarified.

The next section examines the provisions for Irish citizens in the 'Phase 1' agreement and their fate.

²⁰ For an examination of these issues see Christopher McCrudden 'Brexit, Rights, and the Ireland-Northern Ireland Protocol to the Withdrawal Agreement' December 2018 British Academy / Royal Irish Academy; Colin Harvey, 'Safeguarding Rights and Equality in Northern Ireland' <http://qppl.gub.ac.uk/safeguarding-rights-equality-northern-ireland/> 20 November 2018.

2. The Phase I EU-UK agreement and the ‘paragraph 52’ commitments

The December 2017 Joint Report and EU Council Implementation Guidelines

Paragraph 52 of the December 2017 Joint Report (the UK-EU agreement at the end of Phase 1 of Brexit negotiations) made broad commitments to continued ‘access to’ and ‘exercise of’ EU ‘rights, opportunities and benefits’ of Irish citizens ‘where residing in Northern Ireland’.

The UK and EU also committed in paragraph 52 that Phase II of the negotiations would examine the ‘arrangements required’ for the continued ‘exercise of’ and ‘access to’ such rights.

Paragraph 52 reads:

52. Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. **The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland.** Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, **in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.**²¹ (Emphasis added)

Straight after the publication of the Phase 1 agreement, on 15 December 2017 the European Council adopted ‘Article 50’ Guidelines on the Brexit process, paragraph 1 provided that:

[The Council] underlines that negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible.²²

The first draft Withdrawal Agreement and NI Protocol

On 28 February 2018, the European Commission published a draft Withdrawal Agreement, which included a draft Protocol on Ireland/Northern Ireland. The Protocol is intended to be a temporary provision until a future agreement is reached. There were sixteen substantive Articles in the Protocol – however none of these translated the ‘paragraph 52’ commitments into legal terms. The only reference in the Protocol to the ‘paragraph 52’ commitments was in the non-binding preamble. This reference reads:

RECOGNISING that Irish citizens in Northern Ireland, by virtue of their Union citizenship, 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 for the people of Northern Ireland who choose to assert their right to Irish citizenship as

²¹ Joint EU-UK Phase 1 Report, TF50 (2017) 19, 8 December 2017, paragraph 52 (emphasis added).

²² European Council, Guidelines on the application of Article 50 to the UK (EUCO XT 2001 1/17, BXT 69 CO EUR 27 CONCL 8)

defined in Annex 2 of the British-Irish Agreement ‘Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship’;²³

Whilst this provision references continued enjoyment of EU rights, opportunities and benefits, the Protocol does not contain any of the ‘arrangements required’ to actually make non-diminution of such provision a reality.

Positions set out in Parliamentary Questions

In April 2018, a number of Parliamentary questions in London, Dublin and Brussels further drew out the status of implementation of the ‘Paragraph 52’ commitments.

In Westminster an MP sought a list of the rights that would be included and confirmation that they would include all those EU rights normally associated with residency in a Member State. The British Government declined to confirm this or provide a list, but did reiterate that:

*‘The UK has been clear that we are committed to turning all of the commitments made under the Joint Report into legally binding text - that includes those on citizenship rights for the people of Northern Ireland under the terms of the Belfast Agreement’.*²⁴

In the Oireachtas, questions were asked regarding the Paragraph 52 commitments but also on the question of assuring equivalence for British Citizens in NI in accordance with the GFA. The Irish Government responded:

Discussions on the rights of individuals are ongoing as part of the Phase 2 negotiations on issues related to Ireland and Northern Ireland. Further engagement is needed on which EU rights, opportunities or benefits can be exercised by the people of Northern Ireland who are Irish and therefore EU citizens, when they are resident in Northern Ireland, which will be outside the territory of the European Union after the UK departure.²⁵

Perhaps tellingly, the Irish Government also impressed in its response its position that the British Government should be responsible for the discharge of the commitment:

As the UK leaves the European Union, there is an onus on its Government to ensure that it provides as necessary for the recognition in the Joint Report that the people of Northern Ireland who choose to identify as Irish, and therefore as citizens of the EU, can continue to enjoy the rights, opportunities and benefits of EU citizenship, including where they reside in Northern Ireland.²⁶

²³ *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (February 2018), Another version of the Draft Agreement was published by the Commission on 19 March 2018 (TF50 (2018) 35) with colour-coding which highlighted the progress which had been made with the UK in the negotiation round of 16-19 March 2018. The above paragraph was coloured yellow meaning that the ‘policy objective’ had been agreed at negotiators level between the EU and UK.

²⁴ John Grogan MP to Brexit Minister [Nationality: Northern Ireland: Written question - 137432](#)

²⁵ David Cullinane TD to Tánaiste and Minister for Foreign Affairs, Simon Coveney TD [Thursday, 26 April 2018 Questions \(54, 55, 56, 57, 58\)](#)

²⁶ As above.

The Irish Government also stated that there were obligations on the UK under the GFA to ensure persons could continue 'to identify themselves and be accepted as Irish or British, or both, as they may so choose'. Adding that the means by which all of these obligations can be upheld by the UK required further discussion between the EU and UK.²⁷

In Brussels, a similar parliamentary question was answered by President Juncker but not until late June 2018. The response indicated significant regression in the commitment, to one essentially whereby Irish citizens in NI would maintain the (largely dormant) rights of EU citizens in existing third countries, but that other opportunities and benefits would be lost with Brexit. President Juncker stated:

Following the United Kingdom's withdrawal from the European Union, Irish citizens in Northern Ireland will no longer reside in a Member State. They will nevertheless continue to enjoy their rights as Union citizens under the Treaties. However, Irish citizens in Northern Ireland will no longer benefit from United Kingdom's participation in Union programmes, policies and activities when this participation ends following the United Kingdom's withdrawal from the Union.²⁸

The EU Commission President in this response in one area – continued representation of MEPs, did however point to Ireland, stating that this was a matter to be determined by Irish law.

The democratic rights to 'participate in the democratic life of the EU, with EU Citizens directly represented in the European Parliament'²⁹ is a core EU citizens' right, which is usually exercised in the member state of residence.³⁰ However, many EU member states do extend the franchise to citizens extra-territorially, and Irish law is unusually restrictive in that it requires all MEP electors to be ordinarily resident in the State.³¹

The delivery of continued rights to return MEPs could have been delivered by a 'special status' type model for Northern Ireland, agreed by the EU and UK, and that would provide for an ongoing UK Northern Ireland jurisdiction for the Parliament. The UK was not inclined to accept such a model. On 24 June 2018, the European Council adopted a decision on the number of MEPs for the incoming 2019–2024 parliamentary term that formally removed this as an option by redistributing all of the UK's (73) former seats to other Member States – including two further MEPs for Ireland (from 11 to 13). This is dependent on Brexit becoming legally effective by the beginning of the European Parliament's 2019 term (otherwise the status quo would remain).³²

In July 2018, the Irish Government opened a consultation on how to redistribute the additional two MEPs seats, but maintained that the seats would be distributed within the State (ultimately to Dublin and the South region) and not to a Northern Ireland constituency.³³

²⁷ As above.

²⁸ Martina Anderson MEP, EN E-002232/2018 (response by President Juncker 22 June 2018);

²⁹ Treaty on European Union Article 10(2).

³⁰ TFEU Article 20(2)(b).

³¹ Mark Bassett 'Voting Rights for all, a legal opinion on retaining EU democratic rights in the North Post-Brexit'

³² EUCO 7/1/18 REV <http://data.consilium.europa.eu/doc/document/ST-7-2018-REV-1/en/pdf>

³³ See Minister Murphy establishes Constituency Committee to review European Parliament constituencies, statement 25 July 2018. See outcome at <https://www.irishtimes.com/news/politics/boundary-changes-as-ireland-gets-two-more-meps-1.3640125>

Response of TF50 regarding paragraph 52 implementation

In July 2018, CAJ and a number of British and Irish citizens in NI wrote to President Junker to complain as regards the failure of implementation and mistranslation of the Paragraph 52 and related rights based commitments.

A response from TF50 to the letters from individual citizens again set out an approach of Irish citizens maintaining only EU citizens' rights open to those in third countries, listing a number of largely administrative rights³⁴ and then stating:

The United Kingdom's decision to withdraw from the European Union, and the fact that Union law will cease to apply to and in the United Kingdom after the end of transition, will however also end the UK's participation in EU frameworks, policies and programmes ...³⁵

Complaints that the EU had mistranslated the 'paragraph 52' commitments, and failed to fully and faithfully give them legal form, in accordance with the Council Guidelines, were then made to the EU Ombudsman.³⁶ These complaints were considered by the Ombudsman at first instance to be outside her mandate due to the ongoing political negotiations.³⁷ An appeal was partially allowed in that CAJ correspondence to the European Commission had not been responded to at the time, but the Ombudsman upheld the position that the broader questions were outside her mandate.

The November 2018 draft Withdrawal Agreement and Political Declaration

On the 14 November 2018 the UK and EU agreed and published a revised Withdrawal Agreement, and NI Protocol. At the time of writing this is yet to be approved by the respective Parliaments.

No provisions were added into the Protocol to give legal affect to the 'paragraph 52' commitments. The text in the Preamble in the Protocol on the matter remained the same as in the earlier drafts in February/March 2018.³⁸

Also published was an EU-UK Political Declaration on the framework for a future relationship. This document makes no reference to taking forward the 'paragraph 52' commitments. It does make a reference to protecting the GFA in all its parts.³⁹ The Northern Ireland Office (NIO) in correspondence to CAJ does however make reference to paragraph 52 having been a 'political commitment' for which policy is still under development.⁴⁰

³⁴ TF50 response on file, 30 July 2018 'Irish citizens in Northern Ireland will continue to enjoy the right to access to European Parliament, Council, and Commission documents, the right to petition the European Parliament and the right to apply to the European Ombudsman in order to bring to his attention any cases of poor administration by the EU institutions and bodies, with the exception of the legal bodies as well as the right to apply to the EU institutions in one of the official languages and to receive a reply in that same language.'

³⁵ As above.

³⁶ See https://www.rte.ie/news/2018/1009/1001863-ni_brexit_rights/

³⁷ <https://www.rte.ie/news/2018/1024/1006446-eu-ombudsman-human-rights/>

³⁸ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018 (TF50(2018)55).

³⁹ Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom, 25 November 2018 [139].

⁴⁰ Correspondence on file to CAJ from NIO Equality Officer, 30 November 2018.

What happened to the paragraph 52 commitment in Phase II?

The 'arrangements required' to implement the paragraph 52 commitment were to have been examined under Phase II of the negotiations. However, it appears no document has yet been made public that sets out which arrangements were examined and the outcome of that exercise.

There is still little clarity therefore as to what actually happened to reduce such a broad commitment at the time of the December 2017 Phase 1 agreement, to a situation a year on whereby no 'arrangements required' have either been put in place, or are planned to be put in place, to ensure ongoing exercise of paragraph 52 rights.

In response to Freedom of Information requests, both the UK Brexit Ministry (DExEU) and TF50 stated they held no documents in relation to the matter.⁴¹ The NIO by contrast cited a cost exemption to decline to search and release any documents held on the matter. This decision is currently subject to a complaint to the Information Commissioner.⁴²

From what is in the public domain, it appears that one issue has been contestation between the UK and Ireland as to who is responsible for the implementation of the commitment. The Irish Government has regarded this as a UK responsibility. Whilst politically it is going to be difficult for Dublin to argue that the rights of Irish citizens in NI are entirely a matter for the British (and there are some 'paragraph 52' areas which can only now be implemented by Ireland - most notably democratic rights) there is some legitimacy in this position.

The UK recognises under the GFA the rights of NI-born persons to be Irish and hence EU citizens, and it is the form of Brexit being currently proposed by the UK Government which strips such persons of EU rights that they currently hold. Furthermore, Irish citizens in NI who apply and are granted, alongside EU26, retained EU rights under the Withdrawal Agreement, will continue to be provided for by the UK, in reciprocity for British citizens in EU member states continuing to retain their rights. Such provision under the 'settled status' will not be provided for those arriving after Brexit, and the UK argues Irish citizens will derive entitlements under the CTA; these matters are discussed in the next section.

In December 2018 further correspondence was received by CAJ from TF50 in relation to the fate of the Paragraph 52 commitments, further to an information request. TF50 responded as follows, pointing towards the 'future relationship' and the issue of implications for other NI-resident EU citizens should rights be retained by Irish citizens only:

In addition to these rights directly derived from EU citizenship, there are additional opportunities and benefits of being an EU citizen residing in an EU Member State, such as the coordination of social security systems or the possibility to participate in EU programmes such as Erasmus. These will in principle no longer be available to EU citizens residing in Northern Ireland once the UK has become a third State following its withdrawal from the EU.

Whilst we understand the argument that the Good Friday Agreement aimed to ensure not only equal rights, but also equal opportunities and benefits for the

⁴¹ Freedom of Information responses from Department of Exiting the EU, ref DEX001571 1 Jan 2019; & from TF50 (2019) 121740 of 10 January 2019.

⁴² Northern Ireland Office CAJ FOI 18/275.

people on the island of Ireland regardless of their place of residence or their citizenship, the fact that the UK and Ireland will no longer share the same regulatory space after Brexit, will have consequences for the extent to which opportunities and benefits will be identical in the future.

Extending all existing opportunities and benefits to Irish citizens residing in Northern Ireland would raise questions not only as to a possible discrimination against other EU citizens residing in Northern Ireland or the wider UK, but would also imply an extension of EU law to Northern Ireland which would go beyond what is necessary as part of ensuring an orderly withdrawal of the UK from the EU. Any such arrangement is therefore rather a matter for the negotiations on the future relationship with the UK.

Consequently, giving effect to the opportunities and benefits for EU citizens in Northern Ireland other than their Treaty rights seems to rather be for consideration in the context of arrangements as part of the future relationship, except for instances in which these are a matter for domestic law to address it (e.g. when it comes to eligibility criteria for benefitting from domestic tuition fees at universities or the participation in EP elections).

The next two sections will examine the alternative options and frameworks for Irish citizens in Northern Ireland to retain some rights and opportunities that are currently provided for by EU law. This relates to both entitlements to reside and access services and other benefits when in Northern Ireland but also EU rights when travelling to other member states.

First examined will be the framework of the UK-Ireland Common Travel Area, before analysis of the potential to retain rights under the EU Withdrawal Agreement citizens' rights provisions.

3. The Common Travel Area (CTA) ‘associated rights’

On what legal basis can Irish citizens live in NI without EU rights?

An immediate question, prompted by the analysis above, is upon what legal basis do Irish citizens have a right to reside, work, study, access services or benefits or any other measure that is restricted by UK immigration legislation?

Following Brexit, official UK emphasis has been placed on the ‘associated rights’ of the CTA, as already providing for reciprocal rights for British and Irish citizens in the alternate jurisdiction. However, to the extent that such rights were ever provided for by the CTA they are largely not currently reflected in the UK legal framework.

The areas of rights covered by the CTA have been set out by the UK as including the following:

- the right to enter and reside in each other’s state without being subject to a requirement to obtain permission;
- the right to work without being subject to a requirement to obtain permission;
- the right to study;
- access to social welfare entitlements and benefits;
- access to health services; and
- the right to vote in local and parliamentary elections.

Official discourse has contended that the above CTA ‘reciprocal rights’ have always been present since partition in 1921, as such predate the EU membership of both countries, and have run in parallel to EU rights.

This is misleading. Firstly, it is modern UK immigration law that has restricted access by nationality to employment and public services. Such restrictions were not introduced until decades after partition, and some only relatively recently.

Secondly, rather than relating to the CTA, per se, rather the provisions have related to the manner in which citizenship and immigration law have evolved in the UK. From partition until 1948 citizens of the Irish Free State remained British Subjects, and subsequent to this under the Ireland Act 1949 were granted a status analogous to commonwealth citizens of being neither British nor ‘foreign’. When rights of commonwealth citizens were restricted in 1962 this was not applied to Irish citizens as a matter of policy, ultimately in return for Ireland also restricting entry of UK commonwealth citizens. By the time of the subsequent, and last overhaul of UK immigration law into the early 1970s, policy was developed in the context of both states joining the then EEC. Therefore, whilst it is the case there are some residual provisions for Irish citizens dating back to the 1960s, in reality many have been repealed and replaced with EU provisions since both states joined over 40 years ago. One authoritative study has set out that, with the exception of voting, none of the core areas above are clearly provided for in UK (including NI) legislation.⁴³ It is currently only EU law that facilitates equal access for Irish citizens to all of the above.

⁴³ Traveller Movement, Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future (December 2017) paragraphs 34 & 35.

The UK took an initial position of (erroneously) stating that CTA rights were already provided for in law alongside EU rights.⁴⁴ More recently the language has changed. Whilst the line that the same reciprocal rights will be continued has been maintained, the UK has conceded that ‘Where required, domestic legislation and agreements will be updated’ to ensure there is continued legal framework for the CTA.⁴⁵ Work on this has started, evident in, for example, the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.⁴⁶ A treaty on social security (including pensions) has been recently concluded by the two States, but there is no commitment to a treaty on other areas of what are now being tabled CTA rights.⁴⁷

Current gaps in the legal framework relating to the right of Irish citizens to enter and reside in NI from outside CTA

Given the starting position that CTA rights in NI were already provided for, some of the gaps in the legal framework that require ‘updating’ are quite startling.

An example of where legislation would need to be ‘updated’ is that remarkably despite the GFA there is no basis at all in which an Irish citizen *per se* can enter and reside in Northern Ireland on the way back in to NI from any trip outside the CTA. The only basis that an Irish citizen - including the NI born - can return to their place of residence is through EU law.⁴⁸

As noted, the Home Office has begun this ‘updating’ exercise by introducing legislation into Westminster on the eve of the 2018 Christmas recess. Clause 2 of The Immigration and Social Security Co-ordination (EU Withdrawal) Bill (HC Bill 309, introduced 20 December 2018) would amend the 1971 Immigration Act to ensure that: ‘An Irish citizen does not require leave to enter or remain in the United Kingdom.’ This is subject to some exemptions – including a power vested in the Secretary of State by direction ‘for the Irish citizen not to be given entry to the United Kingdom on the ground that the Irish citizen’s exclusion is conducive to the public good’.

An alternate basis for entry and residence is to treat NI born persons in NI as continuing to have access by virtue of being British citizens – this however is entirely at odds with the GFA for those who choose to identify as, and are entitled to be accepted as, Irish. In a practical

⁴⁴ HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017, Paragraphs 22-24.

⁴⁵ Home Office Guidance ‘Travelling within the Common Travel Area and the associated rights of British and Irish citizens if there is no Brexit deal’ Updated 19 December 2018 (accessed 23 Jan 2019), section on ‘After March 2019 if there is no deal’, paragraph 2 <https://www.gov.uk/government/publications/travelling-in-the-common-travel-area-if-there-is-no-brexit-deal/travelling-within-the-common-travel-area-and-the-associated-rights-of-british-and-irish-citizens-if-there-is-no-brexit-deal>

⁴⁶ For comment, see NI Human Rights Commission, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill: Submission to Public Bill Committee* (February 2019) and the [written evidence from CAJ](#).

⁴⁷ Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland Dublin, 1 February 2019, UK Command Paper 49. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778087/CS_Ireland_1.2019_Soc_Sec.pdf

⁴⁸ The sole current basis is under The Immigration (European Economic Area) Regulations 2016. This is conceded in a Home Office ‘Policy paper, Factsheet 3: status of Irish citizens’ updated 21 December 2018. <https://www.gov.uk/government/publications/immigration-and-social-security-co-ordination-eu-withdrawal-bill/factsheet-3-status-of-irish-citizens> (accessed 23 January 2019).

sense it would also not be possible to reliably determine if a returning traveller with an Irish passport at a Belfast airport, was also a British citizen.

Whilst both British and Irish officials have indicated that work has been ongoing for some time as regards codification of CTA rights, there is yet to be any certainty as to how they will be legally underpinned or as to the detail of their scope.

Limitations and codification of CTA commitments

There are a number of limitations to the scope of CTA rights that are already apparent or are yet to be clarified, including:

- Whether, as has been consistently stated, CTA rights will only apply to British and Irish citizens, and will not extend to family members of same, or other permanent residents.
- Will CTA rights facilitate any cross-border access to services? And if so would individuals face a citizenship restriction (e.g. 500 children cross the border for school each day, but non-British or Irish children would be excluded)?
- Will cross-border healthcare provision be covered?
- Will 'study' cover third-level education or schooling or both?
- It is not clear what 'social welfare' and benefits will cover, does it cover housing?
- The right to vote is restricted to local and parliamentary elections, why does it not explicitly embrace referendums, including, for example, a border poll held under the terms of the GFA?⁴⁹

It is also the case that the CTA rights will clearly not apply outside the CTA, making provision more limited than retained EU rights that may apply on a visit to another member state.

A number of Parliamentary Questions were tabled by Conor McGinn MP with a view to seeking further clarification on many of the above matters.

- The UK has said that the CTA rights 'include' the above six areas. In response to a question as to what else would be included beyond this, government reiterated the above six areas.⁵⁰
- In relation to a question as to the differences between rights retained under the CTA and the Settlement Scheme, government generally responded by reiterating the six areas the CTA will cover. One difference that was mentioned was that family reunification rights would not cover the CTA.⁵¹ The Westminster Joint Committee on Human Rights has subsequently recommended that this changes.⁵²
- Government did confirm that the CTA would cover cross-border education provision at all levels, but did not commit to this in a similar question as to whether cross

⁴⁹ See Northern Ireland Act 1998 schedule 1 for the powers of the Secretary of State for NI on the holding of such a poll, including the question of entitlement to vote. Imagine the reaction if it was suggested that Irish citizens in N. Ireland were not entitled to vote in this referendum?

⁵⁰ WPQ [230084 answered 13 March 2019](#);

⁵¹ WPQ 229264 answered 11 March 2019;

⁵² <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/569/56906.htm>

border health care would be covered, restricting the response to when citizens are in the alternate jurisdiction.⁵³

- In relation to voting in referendums, and specifically a border poll, Government responded that as Ireland did not allow British citizens to vote in referendums, and that as CTA rights are reciprocal this would be reflected in the UK⁵⁴ – this implies Irish citizens would not be able to vote in a border poll, which would be both unthinkable and a significant departure from existing practice (e.g. Irish citizens were permitted to vote in the Brexit referendum, when EU 26 citizens were excluded).

A broader question remains as to the vehicle the legislative framework for future CTA rights will take. There is a related question as to whether the ‘associated rights’ of the CTA will actually be enshrined as rights, that can be guaranteed and with legal redress. Whilst the door has not been shut on a treaty or ‘enshrined’ legislation – it appears the UK is instead minded to take forward CTA rights as a series of bespoke amendments to legislation to roughly reflect the above framework. This could therefore be changed at any time.

In January 2019, the Tánaiste Simon Coveney gave an undertaking that some parts of the CTA rights would be enshrined in a treaty. This is, however, only to cover social security elements, and possibly some others, like education. On current plans the rest of the CTA, including the very principle of free movement, will remain a loose arrangement.⁵⁵

There are no plans for any fee to access CTA rights, and they are to apply to those who ‘arrive’ in NI both before and after Brexit. Beyond this however the scope of CTA rights, and the extent to which they are likely to be unenforceable, makes the CTA provisions much more limited than those on offer to EU (including Irish) citizens as retained EU rights under the Withdrawal Agreement. Whilst the UK position has been that Irish citizens ‘do not need’ to apply under the Settled Status scheme, there are a number of reasons why Irish citizens may wish to do so.

These reasons include all of the above limitations, in particular that the CTA, in the words of a research report produced for the Joint Committee is currently ‘written in sand’⁵⁶, its scope is not clear, and that the rights under the Withdrawal Agreement will be legally underpinned and greater in scope.

Such retained rights under the Withdrawal Agreement will only be available to Irish citizens in NI who arrived (i.e. mostly were born) before the Brexit transition ends. It is only the CTA rights that will be available after the transition period. This again hardens the boundary between different groups of citizens, in this case between the current and subsequent generations of Irish citizens in NI.

The final section looks at the retained rights under the Withdrawal Agreement.

⁵³ WPQ [229265 answered 11 March 2019](#) and WPQ [229267 11 March 2019](#);

⁵⁴ WPQ 230086 answered 13 March 2019.

⁵⁵ ‘Rights of Irish in Britain and British in Ireland protected from no-deal Brexit’ *Irish Times* 15 Jan 2019.

⁵⁶ NIHRC Statement ‘New Research Recommends UK-Irish treaty is best solution to ensure Common Travel Area Rights’ 13 November 2018 <http://www.nihrc.org/news/detail/new-research-recommends-uk-irish-treaty-is-best-solution-to-ensure-common-t>

4. The retained EU citizens' rights under Withdrawal agreement

Scope of rights to be retained under the EU Settlement Scheme

Under Part II of the Withdrawal Agreement (Citizens' Rights) EU citizens in the UK, and British citizens in the EU, who exercised their right to reside under EU law before the end of the Brexit 'transition period' can retain certain EU rights including rights to:

- Residence (Art 13) and related rights (Art 22, employment and self-employment);
- Family Reunion (Art 13 (2) & (3));
- Equal treatment (Art 23) – including to family members;
- Rights of workers (Art 24);
- Rights of self-employed (Art 25);
- Frontier workers' rights (Art 26);
- Professional qualification recognition (Art 27-29);
- Coordination of social security rights (Art 30 on); and
- The right to enjoy lifelong protection of the above rights (Art 39), whilst continuing to meet the criteria.

The Withdrawal Agreement permits retained citizens' rights schemes to be free, the UK had planned a £65 fee for adult EU citizens to apply under the 'settled status' scheme and a lower fee for children to access these retained rights. There was a reversal of this policy in January 2019 whereby the Prime Minister announced applications would now be free.

Detailed examination of what each area will cover is key to its understanding. There are some areas that are less clear than others.

For example, there are subsidiary rights that are particularly necessary for some citizens. One example is ongoing access to the European Health Insurance Card (EHIC), for persons who are unlikely to be able to obtain (affordable) travel insurance to visit other parts of the EU. TF50 in response to aforementioned correspondence has stated that the EHIC will be available in NI under the retained EU rights of the Withdrawal Agreement:

As concerns the European Health Insurance Card, Irish citizens in Northern Ireland who are covered by the Withdrawal Agreement will continue to benefit from it also after withdrawal. This is however not an EU citizenship right, but the result of the coordination of social security systems between Member States, which regulates for instance the reimbursement of health treatment costs...

The UK Legal Position on the Withdrawal Agreement also makes reference to retention of the EHIC, using British citizens in other EU states as an example. However, the UK's interpretation is that retention of the EHIC will only apply to a journey (including a longer term one like study abroad) that begins and is still ongoing at the end of the planned transition period (i.e. on current plans December 2020):

The [Withdrawal] Agreement also provides for further special situations. For example, a UK national who is in a Member State for a holiday or for the duration of

a course of study at the end of the implementation period, and who is entitled to a UK European Health Insurance Card (EHIC), will be able to continue to benefit from that scheme for as long as the stay in that state continues...⁵⁷

The existence of a fee of £65 to retain EU rights conferred as a result of having been born in NI as an Irish and hence EU citizen, was clearly going to be politically highly contentious. In relation to non-discrimination it was difficult to see how the UK could waive the fee for Irish citizens in NI alone without also (rightly) waiving it for other EU nationals. The fee has now been revoked, although a potentially onerous registration process remains, with the experiences of the Windrush scandal still fresh in the mind.

What about the position of NI-Born Irish citizens and retained EU rights?

The UK position is that, due to the CTA, Irish citizens do not need to apply for settled status 'but may wish to do so'. This is aimed at Irish citizens in the UK in general rather than NI specifically. The Settled Status Scheme Statement of Intent provides:

2.6. Irish citizens enjoy a right of residence in the UK that is not reliant on the UK's membership of the EU. They will not be required to apply for status under the scheme (but may do so if they wish), and their eligible family members (who are not Irish citizens or British citizens) will be able to obtain status under the scheme without the Irish citizen doing so.⁵⁸

It is notable that the Home Office statement that Irish citizens enjoy a right to reside in the UK that was not based on EU law, was made six months before the Home Office introduced legislation into Westminster remedy the problem of Irish citizens not usually having a right to reside in the UK but for EU law.

The main criterion for application under the 'Citizens' Rights' scheme is set out under Article 10(1) of the Withdrawal Agreement, which refers to EU citizens and makes no distinction between Irish citizens and EU26, and thus applies equally to all (and a further Article 12 provides some protection against nationality based discrimination). The criterion under 10(1) is that retained EU rights are available to:

- (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;

There are separate provisions for British citizens in the EU and frontier workers in the UK.

It is likely that Irish citizens who have moved from the south of Ireland to NI or Britain will face no resistance from the UK Home Office in being consequently granted settled status, under the above criteria. However, the Home Office has taken a position that it will block NI-born Irish citizens from applying for settled status and retaining the EU rights under the settled status scheme. This is on the basis that the Home Office position is that all NI born are not to be 'accepted as' Irish in accordance with the GFA but are to be treated as British citizens.⁵⁹

⁵⁷ HM Government 'EU Exit: Legal position on the Withdrawal Agreement' [32] CM9747, December 2018.

⁵⁸ Home Office, 'EU Settlement Scheme: Statement of Intent' 21 June 2018 paragraph 2.6

⁵⁹ WPQ 226041 of 4 March 2019 and WPQ213222 of 5 February 2019.

This is highly controversial, firstly as it would make NI-born Irish citizens among the only EU citizens in the UK not permitted to apply for retained EU rights, alongside some other dual nationals. Secondly, the basis for doing this would conflict with the GFA. In essence the Home Office refusals would be grounded in variations of declining to accept such persons as solely Irish.

The Home Office argument could also be that NI-born Irish citizens have not ‘exercised a right to reside’ in NI under EU law, and are thus excluded from the Scheme on that basis (thus the argument would essentially be anchored in an interpretation of EU law provisions). In doing so, unless explicitly stating that it was treating all NI born persons as British, the Home Office would have to set out on what basis an Irish citizen in such a situation does otherwise have a right to reside in NI, and why the complexities of the GFA arrangements have not been adequately dealt with thus far. This also raises the question of why this particular circumstance of NI was not addressed more effectively and explicitly by both the UK and EU in the negotiations to date.

It would be difficult to argue that an Irish citizen in NI was not exercising a right to reside by virtue of EU law if the person in question has at any point ever left and returned to NI from anywhere outside the CTA (for reasons that are relevant for EU law purposes). This is in the context of the Home Office conceding, in introducing remedial legislation, there being no apparent other basis, but for EU law, whereby an Irish citizen could re-enter and reside in NI. Clearly this is also the case for persons who have resided elsewhere in the EU and returned. A differentiation between NI Irish citizens who have never been outside the CTA and those who have not is also likely to prove highly controversial and highlight the manner in which the UK has not fully implemented the GFA within its legal framework. This simply confirms the need for a special arrangement to address these circumstances.

The backdrop to the Home Office refusing applications from NI born persons, is prefigured in its current actions in cases such as that of Emma and Jake DeSouza. In such cases (involving Irish citizens in NI exercising EU rights to be joined by non-EU family members), the Home Office has refused to ‘accept as Irish’ the applicants, despite being required to under the framework of the GFA, and has instead treated such persons as British. It is difficult to see how the Home Office could continue to do this if it had granted settled status, as an EU citizen, to the applicants under the Withdrawal Agreement. The failure to recognise and implement the GFA birthright provisions therefore has serious practical consequences.

Notably the Home Office itself has argued such persons could exercise such EU rights through the renunciation of British citizenship which currently costs around £372 (although the Home Office has then queried the right to reside of Irish citizens in NI who have done so).⁶⁰

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⁶⁰ See ‘Home Office tells Northern Irish woman to prove right to live in Belfast’ *The Guardian* 31 October 2018