

# Continuing EU Citizenship “Rights, Opportunities and Benefits” in Northern Ireland after Brexit

Sylvia de Mars, Colin Murray,  
Aoife O’Donoghue & Ben Warwick

MARCH 2020



Coimisiún na hÉireann  
um Chearta an Duine  
agus Comhionannas  
Irish Human Rights and  
Equality Commission



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

This paper was written by Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick for the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. Dr Sylvia de Mars is a Senior Lecturer at Newcastle Law School, Newcastle University; Mr Colin Murray is a Reader at Newcastle Law School, Newcastle University; Professor Aoife O'Donoghue is a Professor at Durham Law School, Durham University; and Dr Ben Warwick is a Lecturer at Birmingham Law School, University of Birmingham. The views expressed within this paper do not necessarily represent the views of the Northern Ireland Human Rights Commission or the Irish Human Rights and Equality Commission, nor the employers of the authors. This paper is not intended to be relied upon as legal advice applicable to any individual case.

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Northern Ireland Human Rights Commission, Temple Court, 39 North Street, Belfast.  
Irish Human Rights and Equality Commission, 16-22 Green Street, Dublin 7.

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## About the Authors

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### **Sylvia de Mars, Senior Lecturer (Newcastle Law School, Newcastle University)**

Dr de Mars joined Newcastle University’s Law School in 2010, following the completion of a PhD in EU public procurement law at the University of Nottingham. Her research interests cover a variety of aspects of EU internal market law, with recent focuses on social security coordination, healthcare, public procurement, and data protection. She has given evidence to several Parliamentary select committees on topics related to Brexit and is also employed as a Senior Researcher in EU and International Law and Policy in the House of Commons Library.

### **Colin Murray, Reader (Newcastle Law School, Newcastle University)**

Mr Murray joined Newcastle University’s Law School in 2006, having previously held posts at Durham and Sheffield Universities. His research focuses on public law and human rights, particularly citizenship, voting rights and the UK’s interactions with the EU and Council of Europe. He is the co-author of *Constitutional and Administrative Law*, a textbook covering UK constitutional law. He served as the Special Advisor to the UK Parliament’s Joint Committee on the Draft Prisoner Voting Bill in 2013 and co-convened the Society of Legal Scholars’ Civil Liberties and Human Rights subject section from 2012-2015.

### **Aoife O’Donoghue, Professor (Durham Law School, Durham University)**

Professor O’Donoghue has worked at Durham University since 2007, having previously taught at NUI, Galway. Her research focuses on public international law with a particular interest in global constitutionalism. She has published widely on global constitutionalisation, trade and human rights. She is Co-Director of the Northern/Irish Feminist Judgments Project, which focuses on legal evolution across the island. She was also one of the founding contributors to humanrights.ie. She is Deputy Director of IBRU (Durham Centre for Border Research) and co-founder of Law and Global Justice at Durham.

### **Ben Warwick, Lecturer (Birmingham Law School, University of Birmingham)**

Dr Warwick has worked at the University of Birmingham since 2016, having previously taught at Durham University. His research explores how economic considerations affect the implementation of human rights (and especially socio-economic rights). This has led him to write on the related questions of crisis and how human rights bodies function under such pressures. In particular, he has published on non-retrogression in human rights. He has advised several governmental and non-governmental actors in relation to these topics. Ben is on the European Parliament’s list of legal experts, an Associate of the Oxford Human Rights Hub, Co-Coordinator of the Law and Society Association’s Economic and Social Rights network, and a member of the Queen Mary Human Rights Law Review’s Review Board.

## Executive Summary

With Brexit, British citizens’ loss of European Union (EU) citizenship and the rights associated with it, has become a source of anxiety for many. This anxiety is matched by that of EU citizens who at present rely upon their EU citizenship rights to enable them to live or work in the United Kingdom (UK). To understand the implications of Brexit upon EU citizenship rights it is necessary to understand the nature of both citizenship and nationality. These concepts have international, EU and domestic law dimensions. This report considers how these legal orders interact with each other to establish both categories of rights holders and to provide individuals belonging to these categories with the rights and privileges upon which everyday life depends.

In the context of Northern Ireland, citizenship is a particularly complex and emotive concept. Under the Belfast/Good Friday Agreement, the people of Northern Ireland are able to identify and be accepted as British, or Irish, or both. This means that, after Brexit, a large proportion of the people of Northern Ireland will continue to be EU citizens by virtue of their Irish citizenship. Many people will have the ability to claim Irish citizenship but choose not to do so. A large number of EU citizens from EU or EEA Member States other than Ireland also live in Northern Ireland. This report outlines how Brexit impacts upon each of these groups and the choices that individuals within them will have to make.

The emotiveness of the loss of EU citizenship often draws significant attention in the context of debates on Brexit, but this risks distorting the picture. Many rights associated with EU law are not facets of EU citizenship; they result from a person living or working in an EU Member State other than their “home” state. Brexit removes many such protections from UK law, independent of whether someone remains an EU citizen after ‘implementation period completion day’ as it has been styled under the UK’s European Union (Withdrawal Agreement) Act 2020, which, for the purpose of these provisions, will be the end of the transition period provided under the EU-UK Withdrawal Agreement (currently set to end on 31 December 2020).

Brexit therefore creates the potential for new and more extreme gaps in the rights and protections available to different groups of people living within Northern Ireland. There is clear danger that the GFA’s requirement of parity of esteem between those in Northern Ireland who identify as British and those who identify as Irish will come under increasing pressure. There are currently no proposals to address this serious concern for Northern Ireland; a concern which is only likely to grow as the UK and EU pursue different paths on rights and social protection in the future. This report addresses the substantive legal position of individuals, their routes to enforcing any given set of rights, the practicability of the systems and approaches established to date in the Brexit process and proposes recommendations which could ameliorate the competing priorities of the various legal frameworks.

Chapter 1 of this report outlines the domestic and international legal context of citizenship and nationality. In this regard, it sits alongside a report prepared for the Northern Ireland Human Rights Commission by Alison Harvey regarding the GFA’s provisions on identity and citizenship. As that report is focused upon citizenship entitlements, this report instead concentrates on the rights, entitlements and protections which attach to various types of citizenship. Chapter 2 charts the development of EU citizenship rights. Chapter 3 considers how EU citizenship shaped the specific UK/EU withdrawal negotiations on Northern Ireland. Because Brexit will affect different groups of rights holders in different ways, the subsequent chapters are divided by group. Chapter 4 addresses the implications of Brexit for the EU citizenship of the ‘people of Northern Ireland’ and Chapter 5 outlines where Brexit leaves other groups of rights holders living and working in Northern Ireland.

At this point, a note on terminology is necessary. Under the British Nationality Act 1981, UK domestic law uses the term “British citizenship” as shorthand for citizenship of the United Kingdom of Great Britain and Northern Ireland. In the course of the EU withdrawal negotiations, however, frequent reference is made to UK citizenship (which perhaps provides a more accurate shorthand). In the interests of clarity, and to ensure alignment with Alison Harvey’s report, we use the term British citizenship throughout this report unless we are directly quoting from source material.

This report demonstrates how the considerable pre-existing complexity in citizenship law applicable to Northern Ireland has been compounded by Brexit. Throughout we make recommendations which could tackle some of the unevenness that results from the Withdrawal Agreement’s arrangements. Some of these recommendations could be addressed through the UK and EU’s “future relationship” negotiations, while others envisage bilateral action by Ireland and the UK or unilateral action.



## Recommendations

1. The current legal position is that the people of Northern Ireland are entitled to apply for Irish citizenship – and as such EU citizenship – in addition to, but not as a substitute for, British citizenship. Both Governments should agree a common policy approach regarding the application of the GFA’s birthright provision in Northern Ireland. Even if the UK Courts continue to find in favour of the UK Government’s application of British citizenship law in the *de Souza* litigation, the two Governments’ divergent approaches to this issue undermines people’s ability to understand their entitlements and must be resolved.
2. The rights associated with EU citizenship are complex and the division between the rights of mobile and static citizens, and the nature of rights of EU citizens living or working in a non-EU Member State are subject to confusion. The UK Government and the NIHR must prioritise explaining these rights (and their limitations) in the context of post-Brexit Northern Ireland.
3. Preservation of the EU Charter of Fundamental Rights in Northern Ireland’s law, as a form of a ‘human rights backstop’, is recommended as an efficient way of ensuring compliance with the GFA’s ‘Rights, Safeguards and Equality of Opportunity’ provisions. This goal could be advanced through a range of avenues:
  - a) A bilateral agreement between Ireland and the UK to continue to apply the Charter to Northern Ireland would offer legal certainty to those in Northern Ireland relying on Charter rights.
  - b) Unilateral legislation on the part of the UK Parliament could retain Charter rights and ensure they can be accessed in Northern Ireland after Brexit in the same manner that they are now.
  - c) The Northern Ireland Assembly’s ad-hoc Committee on a Bill of Rights could take steps to build the Charter’s provisions into discussions regarding a Bill of Rights for Northern Ireland (but this would only provide a partial solution unless such a Bill of Rights is given a status which would allow its terms to alter the application of UK Acts of Parliament as well as Assembly legislation).
  - d) Negotiations towards the EU-UK future relationship agreement should be recognised as providing an opportunity for the UK and EU to build upon the baseline of protections for rights in Northern Ireland established in the Withdrawal Agreement, including continuing the operation of elements of the EU Charter of Fundamental Rights in post-Brexit Northern Ireland.
4. Residents of Northern Ireland will, at present, lose access to the EHIC system after the end of the Brexit transition/implementation period, regardless of whether they have the status of EU citizens. This loss of entitlements as a result of Brexit could be addressed by the UK and EU negotiating a continuation of UK access to healthcare coordination under EHIC as part of future relationship negotiations. If it is not addressed, we recommend that the Irish Government reactivate its proposals to introduce an Irish equivalent to the EHIC for Northern Ireland residents.
5. The right to vote in European Parliament elections attaches to EU citizenship, but the running of elections for the European Parliament is a shared competence. Ireland is an

outlier in not permitting its citizens to vote in EU elections when resident outside its territory (with exceptions to prevent EU citizens voting for MEPs twice) and in dividing up MEP representation into internal geographical constituencies. Ireland should therefore be encouraged to take steps to legislate to reform its European Parliament constituencies into a single list and extend European Parliament voting rights to Irish nationals resident outside of the EU.

6. The UK Government has made unclear commitments regarding third-country family member rights under *New Decade, New Approach*. We recommend a longstanding and expansive interpretation of these commitments, and that the UK produce CTA-related legislation to provide Irish citizens resident in the UK with third-country family residence rights akin to those available under the EU Settlement Scheme regardless of whether those Irish citizens have moved to the UK under the CTA or belong to the people of Northern Ireland.
7. Brexit creates the potential for new gaps in the rights of different groups of individuals living within Northern Ireland that endangers the GFA's requirement of parity of esteem. We recommend that the UK, Ireland, and the political parties of Northern Ireland should recommit to the terms of the parity of esteem principle in a new agreement. Such an agreement should set out how post Brexit divergences in rights provisions in Northern Ireland and across the island of Ireland will be monitored and addressed.
8. While the UK's implementation of the Withdrawal Agreement affords family rights and enforcement mechanisms to EU/EEA/Swiss citizens who are granted pre-Settled Status and Settled Status, the CTA does not. This could leave Irish nationals resident in the UK who have not applied under the EU Settlement Scheme with fewer rights than their EU/EEA/Swiss counterparts. The UK and Irish governments have frequently emphasised that Irish nationals are not required to register in that scheme. Life changes, and Irish nationals resident in the UK could find the residency rights in the UK of their future third-country family members restricted as a result of a decision not to apply under the EU Settlement Scheme. We recommend the following action to resolve this issue:
  - a) The UK makes an explicit statement that it understands Irish nationals who have moved to the UK under the CTA are covered by the terms of the Withdrawal Agreement even without an application for Settled Status.
  - b) The UK and Ireland revise their guidance to Irish nationals resident in the UK to register for Settled Status. This would need to be accompanied by a widespread public information campaign.
9. The CTA contains no enforcement mechanisms. Given the bilateral nature of the CTA arrangements, any litigation seeking to enforce its terms would be challenging, and inter-governmental action would be dependent upon the state of the UK-Ireland relationship. We therefore recommend the creation of a dedicated enforcement mechanism to secure rights for UK nationals in Ireland and Irish nationals in the UK. Such a mechanism could take a variety of forms:
  - a) An independent ombudsperson in the UK and in Ireland which scrutinised the extent to which the CTA rights were being vindicated. Such an ombudsperson would necessarily have close links to the work of NIHRC, IHREC, and ECNI, but there is merit in a separate mechanism to allow individual complaints, to ensure specific focus on CTA rights and to engage with the CTA's specific content.

- b) An intergovernmental oversight mechanism is created in the CTA MoU but would benefit from more frequent meetings and an explicit route for civil society/statutory rights bodies to inform the workings of that group.
  - c) Embedding the detail of CTA entitlements into domestic law of both the UK and Ireland would be an optimal approach. This would allow domestic courts to oversee the implementation of the rights afforded. This approach would likely require the CTA commitments to be included in a formal treaty, something which both the Irish and UK governments have to-date resisted.
10. The New European Campaign Group proposed a ‘European Greencard’ to ameliorate the consequences of Brexit for both EU and UK citizens. For individuals living in Northern Ireland possessing EU citizenship—from any of the EU27—a similar status that recognises that they are living in a former EU territory and can continue to access their EU citizenship rights could be granted. This would be an EU based programme, but could be married to the democratic rights that Ireland itself could extend to citizens living outside of Ireland.

## Chapter 1: Citizenships and Nationality

### 1.1 Introduction

Prior to Brexit, in both Ireland and the UK, the practical implications of citizenship and nationality were limited. In 2012, for instance, 19 percent of the Northern Irish population held no passport.<sup>1</sup> The symbolism of nationality and citizenship were always a significant factor in Ireland and Northern Ireland, but for those fortunate enough to possess a passport (or passports) and citizenship status which enabled them to travel and reside freely in many countries, the detail of the legal processes which underpinned the acquisition of nationality and citizenship was not of much relevance to their lives. But for those who did not possess Irish or British citizenship, or citizenship of one of the other EU member states, legal status assumed considerable practical importance.

From 31 December 2020, UK nationals will no longer have ‘access’ to the rights associated with EU citizenship. Additionally, no longer be able to rely on EU citizenship as a basis for their right to reside in what has become their home has become a cause of considerable anxiety for millions of EU nationals across the UK.<sup>2</sup> EU citizenship reduced the everyday impact of differences amongst the nationals of Member States. Non-EU citizens are frequently subject to particular restrictions and costs within EU states as their nationalities do not bring with them the rights attached to Member State nationality and EU citizenship.<sup>3</sup> Brexit affects the rights granted by UK and Irish nationality and citizenship. While EU citizenship comes with some of the attributes of nationality (such as consular protection), most of its rights are internal to the EU.

To understand the full implications of Brexit on EU citizenship rights, it is necessary to understand the nature of both citizenship and nationality, their international, EU, national and sub-national dimensions and how these interact with each other to establish a plethora of rights which are dependent on the ability to collect these identities beyond their symbolic utility.

While the issue of EU citizenship, its retention or loss have often – understandably – drawn significant attention, it risks distorting the overall picture. Rights deriving from EU citizenship are only a relatively limited category of rights and privileges that result from EU law. Many protections simply result from living in an EU member state. It is therefore the case that Brexit removes many such protections from the UK legal order, regardless of whether individuals maintain or lose their EU citizenship.

### 1.2 Citizenship, Nationality and International Law

While often used as synonyms, there are subtle differences between nationality and citizenship. Citizenship refers to rights and duties of an individual regarding the state – an internal category that is a matter of domestic law. Nationality refers to the rights and protections that a national has regarding the state within and outside of its territory – an external category that is partially regulated by international law.<sup>4</sup> At times, nationality and citizenship overlap and there is little practical difference (for instance, in Ireland). However, in other jurisdictions, like the UK, there are differences in legal rights held by citizens

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1 NISRA, *Census 2011: Key Statistics for Northern Ireland* (December 2012) 16. Available at: <https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/2011-census-results-key-statistics-northern-ireland-report-11-december-2012.pdf>

2 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7 (“Withdrawal Agreement”)

3 See also Colin Murray, Aoife O’Donoghue and Ben Warwick, *Discussion Paper on Brexit* (2018). Available at: [https://www.nihrc.org/uploads/publications/Discussion\\_Paper\\_on\\_Brexit.pdf](https://www.nihrc.org/uploads/publications/Discussion_Paper_on_Brexit.pdf)

4 In Europe there are historic reasons for this; for instance under limited franchises, gender and ethnic discrimination nationality and citizenship had very different consequences.

and nationals. The EU, meanwhile, has citizenship but not nationality.<sup>5</sup> That said, categorisations are not definite and often citizenship and nationality are used interchangeably by policy makers and in law. Further, the trend of intercitizenship, a growing trend where citizenship status extends citizenship rights beyond the traditional borders of the state of nationality, increases the difficulty in strictly differentiating between citizenship and nationality.<sup>6</sup>

Nationality is covered by Article 15 of the Universal Declaration on Human Rights:

**Article 15.**

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

### 1.2.1 NATIONALITY

The right to a nationality is a key concept within international law.<sup>7</sup> Nationality entitles an individual to diplomatic protection and is often the basis on which other rights are exercised. The International Court of Justice stated in the *Nottebohm* case that

According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.<sup>8</sup>

The key concept from this case is that of a ‘genuine and effective link’.<sup>9</sup>

Generally, nationality is acquired in three ways:

1. by birth on a State territory (*jus soli*);
2. by descent from a State national (*jus sanguinis*);
3. naturalisation.

Each state sets out the terms under which nationality is acquired within that specific territory. Generally, the deprivation of nationality is not a human rights violation in international law unless the individual is left stateless or it violates another human rights provision.

An element of nationality is the ability to travel. As the Quality of Nationality Index (QNI)

<sup>5</sup> Brian Ó Caoidealbháin, ‘Citizenship and Borders: Irish Nationality Law and Northern Ireland’ (*Institute for British-Irish Studies, Working Paper* 68, 2006).

<sup>6</sup> Dmitry Kochenov, ‘Inter-Legality – Citizenship – Inter-Citizenship’ in Jan Klabbbers & Gianluigi Palombella *The Challenge of Interlegality* (CUP 2019) 133.

<sup>7</sup> *Tunis and Morocco Nationality Decrees* (1923) PCIJ Series B No. 4.

<sup>8</sup> *Nottebohm Case (Liechtenstein v Guatemala)* (1955) ICJ Rep 4, Advisory Opinion No. 4, *Nationality Decrees Issued in Tunis and Morocco*, Permanent Court of International Justice, 7 February 1923.

<sup>9</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC 4/84 of 19 January 1984, Series A, No. 4, p. 94, para 32; *UN Convention on the Elimination of All Forms of Racial Discrimination* 1965 660 UNTS 195.

demonstrates, possessing a particular nationality enables a range of visa free or visa on arrival options to individuals.<sup>10</sup> The QNI also points to the phenomenon of intercitizenship. Classical citizenship ‘presumes a correlation between the legal status issued by the authority ... and the territory of rights (in particular, political rights and the right to reside and work) corresponding to the territory of the issuing state’.<sup>11</sup> Intercitizenship describes the trend where citizenship status extends rights beyond the territory of the issuing state. EU citizenship is a regional example of this phenomenon; it is an extension of possessing Member State nationality that entitles an individual to a further bundle of rights that enables holders to reside and settle in another EU Member State without prior permission. The loss of this access for the UK once its nationals stop being EU citizens will inevitably see it drop down the QNI index.

### 1.2.2 CITIZENSHIP

Citizenship sets out the rights, duties and benefits that accrue when one has the citizenship of a state. As outlined earlier, the alignment between citizenship and nationality varies across states.<sup>12</sup> Intercitizenship, of which EU citizenship is an example, then extends citizenship rights beyond the borders of the state of citizenship. EU citizenship rights, however, are unique, as many are triggered by movement outside of an individual’s home EU Member State into another EU Member State. Beyond specific human rights obligations which a state may have signed up to (such as, for instance, the European Convention on Human Rights), international law does not set a minimum set of rights that is connected to citizenship. For example, there is no requirement that citizenship be accompanied by a right to vote; rather, those rights are guaranteed in each state according to its national laws or the human rights treaties it has assented to.

International law does not set an upper limit on rights, nor does it limit a state’s ability to extend citizenship and/or nationality or to create specific categories of rights and obligations.<sup>13</sup> Several countries have provisions which favour the acquisition of nationality for particular ethnic groups. Armenia’s constitution allows for a simplified procedure for those of Armenian ethnicity.<sup>14</sup> Bulgaria similarly allows for a simplified process.<sup>15</sup> Israel’s Law of Return gives all Jews, persons of Jewish ancestry with at least one Jewish grandparent, and spouses of Jews the right to immigrate to and settle in Israel and obtain citizenship, and obliges the Israeli government to facilitate their immigration.<sup>16</sup> In Ethiopia, meanwhile, it is not possible to hold dual nationality; however, those who have acquired new nationality can receive an identity card making them a ‘foreign national of Ethiopian origin’ who can travel visa-free, reside, work, own property and access public services.<sup>17</sup>

10 Dimitri Kochenov & Henley & Partners, *Quality of Nationality Index* 2017 (2018). Available at <https://www.nationalityindex.com/> (accessed 31 January 2020).

11 Ibid, 40.

12 See Constitution of Mexico, Article 34. Available at [https://www.oas.org/juridico/mla/en/mex/en\\_mex-int-text-const.pdf](https://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf) (accessed 31 January 2020).

13 See *Convention on Certain Questions Relating to the Conflict of Nationality Law* 1930, Article 1; ‘it is for each state to determine under its own law who are its nationals’ 179 *LNTS* 4137. See, for instance, debates over Russia conferring citizenship *en masse* to South Ossetians in Georgia; Kristopher Natoli, ‘Weaponizing Nationality: An Analysis of Russia’s Passport Policy in Georgia’ (2010) 28 *Boston University International Law Journal* 389, *Independent International Fact-Finding Mission on the Conflict in Georgia* (2009) Volumes I-III, available at [https://www.echr.coe.int/Documents/HUDOC\\_38263\\_o8\\_Annexes\\_ENG.pdf](https://www.echr.coe.int/Documents/HUDOC_38263_o8_Annexes_ENG.pdf) (accessed 31 January 2020).

14 Constitution of the Republic of Armenia, Article 11.3. Available at <https://www.president.am/en/constitution-2005/> (accessed 31 January 2020).

15 Constitution of the Republic of Bulgaria, Article 25(2). Available at <http://www.online.bg/law/const/consto.htm> (accessed 31 January 2020).

16 Israel Law No. 5710-1950, The Law of Return.

17 Proclamation No. 270/2002: Providing Ethiopians resident abroad with certain rights to be exercised in their country of origin, 5 February 2002. See further Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (Open Society Foundation 2016) 101.

## 1.3 The development of EU citizenship

### 1.3.1 BASIC LEGAL STRUCTURE

Chapter 2 will discuss EU citizenship in detail, but a brief introduction follows to allow its operation to be compared with citizenship of a state. EU citizenship is tied to the possession of the nationality of an EU Member State. While it comes with some of the attributes of nationality (such as consular protection) most of the rights provided for by this status are internal to the EU. EU citizenship is a term employed in the Treaty on the Functioning of the European Union (TFEU) and will be used in this report to describe the status.<sup>18</sup>

As an example of intercitizenship in action, EU citizenship is unique amongst the examples across the world in the extent of rights that are granted. EU citizenship could also be described as multi-layered: within the EU, national, subnational and supranational citizenships coexist, with some of these some reliant on place of birth and some dependent upon possessing another nationality.<sup>19</sup> In the context of Northern Ireland, the ‘layers’ would currently include EU citizenship, British citizenship, Irish citizenship and what could be styled as “Northern Ireland citizenship”, available to the ‘people of Northern Ireland.’ EU citizenship also differs from other examples raised in this chapter in that many of its rights require movement across EU Member State borders for their activation, whereas national citizenship is sedentary.<sup>20</sup> We will explore this distinction in more detail in Chapter 2.

All nationals of EU Member States are automatically EU citizens. The rights and obligations of EU citizens are set out in Article 20 of the TFEU. *EU citizenship rights are further enumerated in Chapter V of the EU’s Charter of Fundamental Rights.*<sup>21</sup> These rights are operationalised through other EU laws.<sup>22</sup> Although EU citizenship is tied to the holding of citizenship of an EU Member State, this does not mean that the EU has the competence to regulate Member States’ domestic nationality or citizenship laws unless there is a specific violation of an element of EU law. For example, the citizens of several Member States can find themselves disenfranchised in their home EU Member State when living in another EU Member State at election time. Ireland’s law is particularly strict in this regard,<sup>23</sup> and the UK’s disenfranchisement of British citizens after 15 years absence from the state has been the subject of unsuccessful legal challenge.<sup>24</sup> The EU can acknowledge such disenfranchisement, but it does not have the competence to compel Member States to alter their domestic citizenship and/or nationality laws in this regard.<sup>25</sup>

18 See *Consolidated version of the Treaty on the Functioning of the European Union* [2012] OJ C326/47, Article 20.

19 Subnational citizenship would include federal and devolved states.

20 Dora Kostakopoulou, ‘Scala Civium: Citizenship Templates Post Brexit and the European Union’s Duty to Protect EU citizens’ (2018) 56 *Journal of Common Market Studies* 854, 856.

21 Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

22 For instance, Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely within the EU [2004] OJ L58/77 (‘Citizenship Directive’); Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] OJ L329/34; Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L368/38; Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

23 In Ireland, there is an ongoing debate over whether to permit citizens resident outside the state the right to vote in Presidential elections. See, for example, Harry McGee, ‘Referendum on extending presidential vote “highly unlikely” this year’ *Irish Times* (10 October 2019).

24 *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469; [2016] 3 WLR 1196.

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement (COM (2014) 33 final of 29 January 2014). The exception is if citizens are disenfranchised in a discriminatory fashion vis-à-vis European Parliament elections while resident in an overseas territory; see *Matthews v UK* App No 24833/94 [1999] 28 EHHR 361.



### 1.3.2 FREE MOVEMENT OF PERSONS AND THE ORIGINS OF EU CITIZENSHIP

EU citizenship has its origins in the free movement of workers, which developed into the free movement of persons and then into citizenship. Free movement of workers is a concept already found in the Treaty of Rome creating the European Economic Community (EEC).<sup>26</sup> While free movement of goods, services and capital are often regarded as automatic elements of a system of free trade, free movement of persons, and particularly workers, was also seen as essential to the completion of a truly single market with no barriers to trade. The law on free movement of persons extended over time to better support movement of workers and also to include freedom from discrimination, the right to have family accompany workers, the right to social welfare, and tax and social security coordination provisions. Over time, free movement law not only removed the immigration restrictions on workers but also prevented borders being closed for protectionist economic motivations: the movement of persons with Member State nationality was to be free and full.

Article 45 TFEU guarantees freedom of movement for workers and the right not to be discriminated against on grounds of nationality.<sup>27</sup> EU citizenship was created by the Maastricht Treaty, extending at least some of the rights held by workers with Member State nationality to Member State nationals more generally (including those who are not economically active), following several decades of negotiating these rights. The Lisbon Treaty extended EU citizenship and explicitly connected citizenship to political rights under EU law.<sup>28</sup>

It should be noted that EU citizenship is not intended to be absolute or independent. The conditions and limits set out in the EU Treaties, as discussed below, circumscribe its scope, as do national citizenship laws. For instance, derogations based on public policy, public security and public health under Articles 45 and 53 TFEU are permitted and where a situation does not involve direct discrimination against an EU citizen in another EU Member State, limits may be placed based on legitimate and proportionate public interest rationales.<sup>29</sup> If an individual loses the nationality of a Member State – by expressly denouncing it or via a criminal sanction – they also lose their EU citizenship. The rights provided under Chapter V of the Charter of Fundamental Rights are available only to EU citizens. Chapter 2 evaluates the core content of EU citizenship and its beneficiaries in more detail.

## 1.4 Irish Citizenship and Northern Ireland

**Article 2 of the Constitution of Ireland states:**

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

This creates two categories: those who are part of the Irish nation, and those who are citizens, with only members of the latter category bearing rights. The GFA referendum also introduced Article 29.8, which enables Ireland to extend nationality beyond Ireland’s borders and permits other extra-territorial rights, potentially including voting.

<sup>26</sup> Treaty Establishing the European Community, Rome Treaty, 25 March 1957.

<sup>27</sup> Citizenship Directive. See also Case 75/63 *Hoekstra* [1964] ECLI:EU:C:1964:19, Case 53/81 *Levin* ECLI:EU:C:1982:105.

<sup>28</sup> Article 20, Article 15(3) and Article 25 TFEU.

<sup>29</sup> Citizenship Directive. See also Case C-220/12 *Thiele Meneses* ECLI:EU:C:2013:683, para 29.



The Irish Nationality and Citizenship Acts 1956-2004 implement Articles 2 and 9 of the Constitution. Under the Nationality and Citizenship Acts as currently in force, Irish citizenship can be claimed by anyone born on the island of Ireland on or after 1 January 2005 if at least one of their parents is:

- » an Irish citizen (or someone entitled to be an Irish citizen);
- » a UK citizen;
- » a resident of the island of Ireland who is entitled to reside in either the Republic or in Northern Ireland without any time limit on that residence; or
- » a legal resident of the island of Ireland for three out of the 4 years preceding the child’s birth.<sup>30</sup>

To give effect to such an entitlement to become an Irish citizen, a person must do some act that only an Irish citizen is entitled to do. This might appear to be a circular definition, but the Constitution of Ireland specifies a number of acts as being reserved for citizens. This requirement would most obviously be satisfied by applying for an Irish passport,<sup>31</sup> but running for certain elected offices (including Teachta Dála and President), or seeking consular support whilst abroad, would be other ways in which a person with a citizenship entitlement could assert citizenship.

An automatic right to Irish nationality applies to anyone born on the island between 2 December 1999 and 31 December 2004.<sup>32</sup> The provisions that applied prior to December 1999 were those in operation under the Nationality and Citizenship Act 1956 (which had replaced the Nationality and Citizenship Act 1935). Some people will be entitled to both UK and Irish nationality under these older rules. Under the UK’s Ireland Act 1949, those born on the territory of Ireland as a UK subject (or their descendants) who did not receive Irish citizenship under the Ireland Act’s interpretation of the 1922 Constitution and the Irish Nationality and Citizenship Act 1935 are potentially British citizens.<sup>33</sup> Irish citizens who were UK subjects prior to the coming into force of the British Nationality Act 1948 could give notice that they wished to retain their status under the Ireland Act.

Nationality by descent is possible if, at the time of birth, at least one parent is an Irish citizen.<sup>34</sup> Irish citizenship via naturalisation is a matter of discretion of the Minister for Justice, requiring three years of residence for those married to Irish citizens, and five for those not.<sup>35</sup> Ireland permits dual citizenship. Renunciation of Irish citizenship is possible if a person is at least eighteen years old, is ordinarily resident outside the state and is or is about to become a citizen of another country.<sup>36</sup> All those born today in Northern Ireland are entitled to Irish nationality if they meet with the parental criteria set out in the Nationality and Citizenship Acts 1956-2004.

## 1.5 British Citizenship and Northern Ireland

### 1.5.1 THE DEVELOPMENT OF UK NATIONALITY LAW

The British Nationality Act 1948 set out that any person who ‘is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned

<sup>30</sup> Nationality and Citizenship Acts 2004 (Ireland), s 6(1), 6A(2)(b)-(d) and 6B.

<sup>31</sup> Nationality and Citizenship Acts 2004 (Ireland), s 6(2); *McGimpsey v Ireland* [1990] IR 110.

<sup>32</sup> Nationality and Citizenship Act 2001 (Ireland).

<sup>33</sup> Ireland Act 1949 (UK), s 5.

<sup>34</sup> Nationality and Citizenship Acts 2004 (Ireland), s 7.

<sup>35</sup> Irish Nationality and Citizenship Act 1956 (Ireland), s 15(1) (as amended).

<sup>36</sup> Nationality and Citizenship Acts 2004 (Ireland), s 6(5).

in subsection (3)’, which covered Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon, ‘is a citizen of that country shall by virtue of that citizenship have the status of a British subject’.<sup>37</sup> This was not a form of Commonwealth citizenship but it did mean that those from the UK and its existent Colonies at the time were British citizens.<sup>38</sup> It also created a category of individuals who were not citizens of the listed Commonwealth countries but remained British Protected Persons.<sup>39</sup>

This Act was introduced at the same time as the passage through the Oireachtas of the Republic of Ireland Act 1948, which took Ireland out of the Commonwealth and cut any remaining legal ties with the UK. The British Nationality Act 1948 had made no provision for Irish citizens and how they were to be treated in UK law. It did, however, provide for the creation of ‘Irish British subjects’, for individuals born prior to 1948, and granted them the ability to register their desire to remain British subjects.<sup>40</sup> The British Nationality Act 1981 updates that provision to enable those people who made their declaration to retain British subject status.<sup>41</sup> Irish British subjects comprise a relatively small group of people, but what is perhaps surprising is that they retain the status of subject while also retaining their Irish citizenship. The UK’s Ireland Act 1949 subsequently dealt with Irish citizens in general, by declaring them not to be ‘foreign’ for the purposes of relevant UK law.<sup>42</sup> They were not subject to the increasingly restrictive immigration regime applicable to Commonwealth citizens.

### 1.5.2 CURRENT LAW

The British Nationality Act 1981 introduced significant changes to the previous law and is now the basis of the operation of British citizenship, although it has thereafter been significantly amended. Under this statute there are now six different forms of UK nationality:

- a) British citizen
- b) British overseas territories citizen
- c) British overseas citizen
- d) British subject
- e) British national (overseas)
- f) British protected person

#### a) British Citizen

British citizenship as a status can be achieved by birth, naturalisation or registration.<sup>43</sup> A British citizen is entitled to a British passport and consular assistance, is exempt from UK immigration control and currently is also an EU citizen. They also have a right to abode:

All those who are expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go from, the United Kingdom without let or hindrance except such as

<sup>37</sup> British Nationality Act 1948 (UK), s 1.

<sup>38</sup> Lord Lester of Herne Hill, *Halsbury’s Laws of England Centenary Essay* (LexisNexis Butterworths 2007) i.

<sup>39</sup> British Nationality Act 1948 (UK), s 13.

<sup>40</sup> British Nationality Act 1948 (UK), s 2.

<sup>41</sup> British Nationality Act 1981 (UK), s 31(2) and s 32. A person can renounce this status under s 34, or be deprived of it under s 40.

<sup>42</sup> Ireland Act 1949 (UK), s 2(1).

<sup>43</sup> British Nationality Act 1981 (UK), s 1(1) and s 4C.

may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.<sup>44</sup>

British citizenship is obtained by birth in the UK or one of the qualifying British Overseas Territories to a parent who is a British citizen or has indefinite leave to remain in the UK or overseas territory. Citizenship is also possible by descent but is only transferable to one generation.<sup>45</sup> Citizenship is also possible by naturalisation and registration.<sup>46</sup> Renunciation and resumption of citizenship is also possible.<sup>47</sup>

#### **b) British Overseas Territories Citizens**

British Overseas Territories citizen status can be achieved by birth, naturalisation or registration. The status holder is entitled to a British passport and consular assistance.<sup>48</sup> They are subject to UK immigration control and are not EU citizens (except if they are from Gibraltar).

#### **c) British Overseas Citizens**

A British Overseas citizen is entitled to a passport and consular assistance but is subject to immigration control and is not an EU citizen.<sup>49</sup> A British Overseas citizen was a citizen of the UK and colonies on 31 December 1982, but such individuals did not become British citizens or British Overseas Territories Citizens when changes to the law took effect on 1 January 1983.

#### **d) British Subject**

A subject (including Irish British subjects) is entitled to a British passport and consular assistance.<sup>50</sup> The entitlement of such individuals to be exempt from immigration control and to be an EU citizen varies.

#### **e) British National (Overseas)**

A British National (Overseas) is entitled to a British passport and consular assistance but is subject to immigration control and is not an EU citizen.<sup>51</sup>

#### **f) British Protected Person**

A British Protected Person is entitled to a British passport and consular assistance but is subject to immigration control and is not an EU citizen.<sup>52</sup>

Anyone having any of the six statuses above may be deprived of that status under section 40 of the British Nationality Act 1981 by the Secretary of State ‘if the Secretary of State is satisfied that deprivation is conducive to the public good.’<sup>53</sup> The critical element of these categories is that holding a UK passport does not necessarily mean that the individual is also an EU citizen. It also means that rights of abode do not necessarily follow holding a UK passport.

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<sup>44</sup> Immigration Act 1971 (UK), s 1.

<sup>45</sup> British Nationality Act 1981 (UK), s 2 and s 14.

<sup>46</sup> British Nationality Act 1981 (UK), s 2 and s 3.

<sup>47</sup> British Nationality Act 1981 (UK), s 2 and s 12-13.

<sup>48</sup> British Nationality Act 1981 (UK), s 2 and 4.

<sup>49</sup> British Nationality Act 1981 (UK), s 26.

<sup>50</sup> British Nationality Act 1981 (UK), s 30-31.

<sup>51</sup> British Nationality Act 1981 (UK), s 4 and s 37. See also the Hong Kong (British Nationality) Order 1986, S.I. 1986/948 (UK), art 7(8).

<sup>52</sup> British Nationality Act 1981 (UK), s 4, s 38 and s 50.

<sup>53</sup> British Nationality Act 1981 (UK), s 40.

## 1.6 Citizenship Law in Northern Ireland under the Good Friday Agreement

Under the terms of the GFA ‘the people of Northern Ireland’ is a distinct group, imbued with rights which are particular to them. The GFA recognised the privileged position of people within this group to assert either Irish or British identities, or to maintain both:

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.<sup>54</sup>

UK nationality and citizenship law, however, maintains that everyone who is part of the people of Northern Ireland who is entitled to British citizenship is automatically deemed to be a British citizen unless they expressly renounce this status. This position has been subject to an unsuccessful legal challenge in *De Souza*.<sup>55</sup> This decision is subject to appeal, and has done little to quell uncertainty around the compatibility of these provisions with the GFA, exacerbated by contradictory official statements.<sup>56</sup> The Irish position, by contrast, is that latent citizenship is granted to anyone born in Northern Ireland who qualifies, but this citizenship must be activated by doing something that only an Irish citizen can do.

The GFA required that Ireland, which at the point of the GFA’s conclusion had not taken steps to enshrine the ECHR into domestic legislation, act to ‘ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland’.<sup>57</sup> As a result of Brexit, should there be rights consequences of choosing Irish citizenship, and thereby maintaining the EU citizenship attached to that status, this outcome could undermine the GFA’s concept of ‘parity of esteem’ between the manifestation of Irish and British identities.<sup>58</sup>

## 1.7 The Common Travel Area

The Common Travel Area (CTA) which exists between the UK, Ireland, the Isle of Man and the Channel Islands provides a set of arrangements in which each CTA member grants special privileges to citizens from the other members.<sup>59</sup> The CTA arrangements predate Ireland and the UK joining the EU, and EU-UK Withdrawal Agreement’s Protocol on Ireland/Northern Ireland (PINI) confirmed that these arrangements could continue post-Brexit provided that they did not conflict with Ireland’s ongoing EU law commitments.<sup>60</sup>

The CTA began in the 1920s as an informal set of immigration arrangements. It did not need to do more, given the common notion of imperial subject status which covered residency and welfare rights. As imperial subject status collapsed as a concept, however, both the UK and Ireland moved to recognise

<sup>54</sup> *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998* 2114 UNTS 473 (‘GFA’), Constitutional Issues, para 1(vi).

<sup>55</sup> See *Secretary of State for the Home Department v De Souza* (2019) EA/06667/2016 (UKUT).

<sup>56</sup> For example, the Northern Ireland Direct website appears to be closer to the Irish Government’s current interpretation of the UK’s GFA commitments, and remains live despite the judgment, at para 47, asserting that it is incorrect as a matter of UK law. Available at: <https://www.nidirect.gov.uk/articles/about-northern-ireland#toc-2> (accessed 31 January 2020).

<sup>57</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 9.

<sup>58</sup> GFA, Constitutional Issues, para 1(v).

<sup>59</sup> For a more detailed explanation of the CTA and its operation post-Brexit, see Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, *Discussion Paper on the Common Travel Area* (2018). Available at <http://www.nihrc.org/publication/detail/discussion-paper-on-the-common-travel-area> (accessed 31 January 2020).

<sup>60</sup> Withdrawal Agreement, PINI, Article 3.

the special status of each other’s citizens within their respective jurisdictions.<sup>61</sup> This domestic law meant that Irish citizens in the UK and British citizens in Ireland came, for most purposes, to be treated in a position akin to that of home citizens. The CTA was not grounded in any formal international agreement and any reciprocal domestic arrangements were not explicitly linked to it. It therefore provided an uncertain basis for ongoing rights.<sup>62</sup>

Under the impetus of Brexit, the CTA and its related rights have been recently been formalised through new intergovernmental commitments: the UK-Ireland Convention on Social Security (which is a binding legal instrument under international law) and the UK-Ireland CTA Memorandum of Understanding (which both Governments have stated is not legally binding).<sup>63</sup> The Memorandum of Understanding explicitly confirms that the CTA provides for free movement; a right to reside; the right to work; the right to healthcare; the right to social protection (or social security); the right to social housing; the right to education; and the right to vote. These are listed in detail for clarity (on the basis that both the UK and Ireland find it ‘desirable to provide a contemporary articulation’).<sup>64</sup>

These developments are significant, and if steps are taken which threaten aspects of the CTA or its related rights in the future, there is a possibility that litigants could highlight these measures in the course of legal challenges. This is not, however, the same as having CTA-related rights that are clearly articulated in domestic law. Ireland and the UK have already taken some legislative steps to address these developments, but UK immigration law remains dated, and does not reflect the realities of modern international travel.<sup>65</sup> The UK’s commitments in this regard were to have been addressed through the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, but this has yet to be reintroduced to Parliament, having been abandoned when Parliament was prorogued ahead of the 2019 UK general election. Any new version of the Bill may be amended from previous iterations to reflect the Johnson administration’s priorities.

## 1.8 Conclusion

The aftermath of the Second World War saw two concomitant developments with regards to rights frameworks in Europe. Civil and political rights came to be increasingly protected as human rights enjoyed by everyone within a state’s jurisdiction, embedded in core documents like the European Convention on Human Rights. At the same time, however, the state’s increasing role in fields such as education, housing and healthcare brought benefits which were usually ringfenced for citizens, as were rights to work. Amid increasingly fraught debates about immigration across Europe, EU law provided special protections for EU nationals moving between Member States, and eventually for a concept of EU citizenship (as we will explore in depth in the next chapter).<sup>66</sup> The CTA provided for a separate, but now overlapping, free-movement zone for the Atlantic Isles.

A tapestry of interlocking legal arrangements therefore covers categories of rights holders in Ireland and the UK. This tapestry is the product of both countries’ tangled historic relationships and their

61 See, for example, the Ireland Act 1949 (UK) and Aliens Act 1935 (Ireland).

62 See *Discussion Paper on the Common Travel Area* (n 59) 9.

63 UK/Ireland Convention on Social Security [CS Ireland No.1/2019], *Memorandum of Understanding between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the Common Travel Area and associated reciprocal rights and privileges* (8 May 2019) (‘MoU’). Available at: <https://www.dfa.ie/media/dfa/eu/brexit/brexitandyou/Memorandum-of-Understanding-Ireland-version.pdf> (accessed 31 January 2020).

64 MoU, *ibid*, para 5.

65 See *Discussion Paper on the Common Travel Area* (n 59) 16-19.

66 See, for example, C. Barnard and A. Ludlow, “Undeserving” EU Migrants “Milking Britain’s Benefits”? EU Citizens before Social Security Tribunals’ [2019] Public Law 260.

cooperation together within the EU. Brexit poses a distinct challenge; it is very difficult to cut certain threads out of this tapestry without doing more extensive damage to the pattern. The terms of the UK's withdrawal from the EU therefore require detailed analysis, alongside the other steps which are being, or can be, taken to ameliorate negative effects of these changes. Before turning to that analysis, however, the next chapter will detail EU citizenship's operation.

## **1.9 Recommendation**

- The current legal position is that the people of Northern Ireland are entitled to apply for Irish citizenship – and as such EU citizenship – in addition to, but not as a substitute for, British citizenship. Both Governments should agree a common policy approach regarding the application of the GFA's birthright provision in Northern Ireland. Even if the UK Courts continue to find in favour of the UK Government's application of British citizenship law in the *de Souza* litigation, the two Governments' divergent approaches to this issue undermines people's ability to understand their entitlements, and must be resolved.

## Chapter 2: EU Citizenship Rights

### 2.1 Introduction

As Chapter 1 briefly described, free movement of persons (or, at least, workers) has been a part of the EU project since the Treaty of Rome, but the status of EU citizen is significantly newer. It was introduced in the Maastricht Treaty as a means of making the European population feel more connected to the EU, but in its very first guise was little more than a ‘title’ without significant contents beyond what free movement of persons rights already covered. This changed over time, not least of all because of the work of the CJEU, but also because the Member States themselves agreed to give more specific rights to EU citizens on the basis of their EU citizenship, rather than their nationality of one of the Member States.

This chapter elaborates upon EU citizenship as a status, and explains the rights enjoyed by those covered by that status under the Treaty of Lisbon. It should be noted that there is substantial overlap between ‘EU citizen rights’ and ‘free movement of persons rights’: many of the rights held by EU citizens originated as ‘free movement’ rights, but have become associated with EU citizenship, as all EU citizens also have ‘free movement’ rights. The distinctions are nonetheless important, especially in light of the NIHRC’s duty to educate the general public in Northern Ireland regarding applicable rights protections.<sup>67</sup> In this chapter we use the term ‘EU citizenship’ to refer to the status of EU citizenship, and the term ‘Member State national’ to mean those holding the nationality or citizenship (as relevant) of an EU Member State. Those not holding EU citizenship will be referred to as ‘non-EU nationals’.

### 2.2 An Overview of Citizenship

#### 2.2.1 DEVELOPMENT

As stated in Chapter 1, EU citizenship was formally established in 1992. It did not come out of thin air in the Maastricht Treaty; expansions in free movement of persons rights were underway on a number of fronts from the 1970s onwards, even if the establishment of a citizenship itself was seen as too radical a proposal in 1975, when a report for the European Council, the Tindemans Report, first suggested it might be created.<sup>68</sup>

Both the personal scope of Article 45 TFEU on the free movement of workers and the free movement rights of non-‘workers’ were expanded from the 1980s onwards. By the 1990s, the CJEU had made clear that those seeking employment (‘job-seekers’) fell within the scope of Article 45 TFEU. They do not have identical benefits and rights to workers, but they do have certain rights deriving directly from a primary law provision.<sup>69</sup>

For other economically inactive Member State nationals, the Treaties did not offer a basis of legal rights in the 1980s and 1990s. However, the EU legislature was willing to extend them free movement rights as well – albeit under certain conditions. Three separate directives in the 1990s consequently made it so that students, pensioners, and the independently wealthy could exercise free movement to another Member State as well, providing they would not become an ‘unreasonable burden’ on that Member State.<sup>70</sup>

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70 See Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence [1990] OJ L180/26, Art 1; Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28, Art 1; and Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students [1993] OJ L317/59, Art 1.



By the 1990s, virtually all Member State nationals consequently enjoyed some movement rights. However, these were not directly based on a Treaty provision, for example, what is now Article 45 TFEU; while for economically inactive Member State nationals, their ‘movement’ rights were elaborated on in secondary legislation alone. And, importantly, Member State nationals who did not ‘move’, meanwhile, did not have any rights originating from the EU Treaties.

It is important to stress once again that presence in Member State territory is a key aspect of the EU’s framework of free movement rights as established in the Treaties: it applies to those moving to a *new* Member State, or those returning to their *home* Member State—but those living outside of Member State territory are not covered by the substance of EU law unless they move *back* to a Member State.

The establishment of EU citizenship changed all of this to some degree. As a consequence of EU citizenship, both static and ‘moving’ Member State nationals now had certain rights stemming from primary EU law; and a very limited number of these rights even operate outside of Member State territory. These rights have since been elaborated on in further secondary legislation, primarily the so-called Citizens’ Directive (Directive 2004/38/EC), and the Charter of Fundamental Rights.

## 2.2.2 SOURCES OF RIGHTS

The rights and duties linked to EU citizenship are now set out in Articles 20–25 TFEU. Article 20 TFEU sets out what rights are ‘contained’ by EU citizenship:

### Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
  - (a) the right to move and reside freely within the territory of the Member States;
  - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
  - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
  - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.



The personal scope of EU citizenship is set out very explicitly in Article 20(1) TFEU. First, being an EU citizen is conditional on being a Member State *national*. It is not a status open to anyone who does not hold the nationality of an EU Member State. As a consequence of Brexit, British citizens will consequently all lose their EU citizenship, unless they hold the citizenship of *another* Member State. Meanwhile, the last sentence of Article 20(1) TFEU makes it clear that the drafters of the Treaties envisioned EU citizenship as providing something of a bonus to national citizenships, but not a replacement: it is intended to be a secondary status to national citizenship.

The CJEU has been asked if the conditions for obtaining one of the Member State nationalities are within the scope of EU law. Its answer has consistently been that this is matter for national law alone, albeit with the caveat that nationality law in the Member States must have ‘due regard’ for EU law.<sup>71</sup> For several decades, this seemed to purely mean that nationality was a matter for national law – and the introduction of EU citizenship did not appear to have changed this position. However, the 2010 CJEU decision in *Rottmann* established that a Member State can only strip a Member State national of their (adopted) Member State nationality (and thus leave them without EU citizenship) where this is justifiable because they have committed a particularly grave offense.<sup>72</sup>

Article 20(2) TFEU sets out, in very general terms, the substantive rights associated with EU citizenship. These are further articulated in Articles 21 through 25 TFEU, which will be discussed below. However, for the current purposes, it is the final paragraph of Article 20 TFEU that is next relevant. It makes clear that *whatever* rights associated with EU citizenship are, they can be limited by both ‘conditions and limits’ set out in the Treaties, *and* ‘conditions and limits’ set out in any secondary legislation adopted under the Treaties.

The most important of these ‘conditions and limits’ are set out in the Citizenship Directive, which replaces all earlier EU directives on the free movement of different categories of persons and addresses all ‘EU citizens’ at once. A specific regulation (492/2011) has been adopted to set the specific rights available for those with ‘worker’ status under the Treaties; where it contains different rights than the Citizenship Directive, this will be made explicit further below when we set out the rights content of citizenship status.

The final source of rights for EU citizens is the Charter of Fundamental Rights. In short, the Charter codifies long-standing Court of Justice case law and sets out several other ‘principles’ that underpin the European Union as a project. The Court’s case law on these so-called ‘general principles of EU law’, sourced from international human rights law and the constitutions of the Member States, has long been a primary source of EU law, much as the Charter itself now is. Where EU institutions act, or where Member States are acting within the scope of EU law, individuals can rely on these general principles as well as the Charter of Fundamental Rights for protection.<sup>73</sup> While the majority of the rights in the Charter are neutral as to nationality—where they are human rights, rather than EU citizenship rights—Title V and a few other rights are specific to Member State nationals holding EU citizenship.

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<sup>71</sup> Case C-369/90 *Micheletti* ECLI:EU:C:1992:295.

<sup>72</sup> Case C-135/08 *Rottmann* ECLI:EU:C:2010:104.

<sup>73</sup> It is important to recognise that the Charter has not ‘abolished’ the general principles that it is based on – the CJEU can continue to apply general principles as well as, or instead of, the rights articulated in the Charter.

## 2.3 EU Citizenship Rights for Static Citizens

This section considers how EU citizenship works for two different types of EU citizens. First, there are those who make use of their Treaty right to move to a different EU Member State. These will be called ‘mobile EU citizens’, and the rights they hold will be termed ‘mobile’ rights. Second, there are EU citizens who have not moved to a different Member State, but who (on account of their EU citizenship status) do hold a right to free movement. They will be called ‘static EU citizens’, and the rights they hold (which are independent from having exercised free movement) are called ‘static’ rights. Finally, for ‘static’ EU citizens, free movement rights persist, but are not being exercised; they are thus termed ‘passive’ rights.

### 2.3.1 TREATY RIGHTS

As mentioned above, the introduction of EU citizenship in the Maastricht Treaty marks the first time that Member State nationals who did not leave their Member State of nationality also gained personal rights from EU law. Article 20(2)(a) TFEU sets out the ‘classic’ EU personal right: free movement of persons, and its related right to reside in a different Member State. For static Member State nationals this is a *passive* right: it can be exercised, but until it is exercised, the relevant EU law rights related to freedom of movement of persons will not apply to an individual. The right, for these static Member State nationals, is thus one of the ability to move. However, Articles 20(2)(c) and (d) set out ‘novel’ rights that are not dependent on a Member State national first moving to another Member State, or living in a Member State.

Article 20(2)(c) gives EU nationals a right to diplomatic and consular protection of any other Member State if their own does not have consular presence in the third country they are in. This is the first Treaty-based provision that explicitly covers both mobile and static ‘citizens’: tourists, who have not actually moved to another Member State, will also be able to access this consular and diplomatic protection. It is further elaborated on in Article 23 TFEU, which requires the EU institutions to coordinate and start the international negotiations that will make this right to diplomatic/consular protection operational in practice.

Article 20(2)(d) also sets out a right that is movement-neutral and operates outside of the territory of the EU: the ‘right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.’ This is elaborated on further in Article 24 TFEU, which also sets out a right new to the Lisbon Treaty: that of the ‘citizens’ initiative’, introduced in Article 11(4) TEU.

#### Article 11(4) TEU

Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens’ initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 24 TFEU makes clear that the EU institutions can set out the specific procedural operation of the ‘citizens’ initiative’. In its current form, it requires an ‘initiative’ to be launched by at least 7 EU citizens living in at least 7 different Member States, and then requires 1 million signatures from other EU citizens to be considered by the Commission.

### 2.3.2 CHARTER RIGHTS

As mentioned in Chapter 1, Title V of the Charter of Fundamental Rights contains express ‘citizens rights’. These are not the only time that EU citizens are discussed in the Charter, however.

Article 12(2) CFR, after setting out freedom of assembly and association, stresses that ‘political parties at Union level contribute to expressing the political will of the citizens of the Union.’ It is unclear if this provision is justiciable, and so if EU citizens could go to a domestic court and challenge the actions of a domestic political party in the European Parliament *or* challenge one of the European Parliament’s ‘groupings’ more generally. If it is justiciable, however, it is clearly a ‘static’ right.

The Title V rights recapitulate and elaborate upon those rights set out in Articles 21-25 TFEU. The ones of these that are applicable to ‘static’ EU citizens, as well as EU citizens not resident in Member State territory, are Articles 41, 42, 43, 44, and 46 CFR. Articles 41-44 CFR elaborate on Article 20(2)(d) TFEU. Article 41 CFR sets out a right of ‘good administration’ – the text extends it to ‘every person’, but as it is contained in Article V, it will be treated here as an EU citizenship right. The ‘good administration’ right means that all EU citizens are entitled to impartial, fair, and reasonably fast handling of ‘his or her affairs’ by any of the EU bodies, agencies, institutions or offices. Article 41(2) CFR specifies that this includes a right to be heard before any measures are taken against an EU citizen; the right to documentary access so as to aid the EU citizens’ ‘defence’, within the bounds of confidentiality and professional/business secrecy; and the right for ‘reasons’, which obliges the relevant EU bodies to set out reasons for their decisions. Article 41(3) CFR adds to this a right for restitution for damages caused by the EU institutions, suggesting this is a ‘general principle’ of Member State law. Finally, Article 41(4) CFR gives EU citizens the right to approach EU institutions in any of the EU’s official languages, and they are equally entitled to receive a response in that same language.

Article 42 CFR adds to this a more general right of access to documents. It gives any citizen of the Union, *as well as* any body or person established/resident in the Union, the right to access ‘documents of the [EU institutions], whatever their medium’. The Charter makes it seem like this is an unconditional right, though clearly the Article 41 allusion to confidentiality and professional/business secrecy as legitimate interests mean that the right to access documents will be balanced by those considerations whenever exercised.

Article 43 CFR gives any EU citizen and resident/established person/entity the right to refer any incidences of maladministration on the part of EU bodies to the European Ombudsman. The only EU institution immune from this referral process is the CJEU when it is acting in its judicial role.

Article 44 CFR gives any EU citizen as well as all resident/established persons/entities the right to petition the European Parliament. This is a very wide-ranging right, further elaborated on in the European Parliament’s Rules of Procedure.<sup>74</sup> The Parliament has set up a Committee on Petitions that evaluates any petitions sent to it in light of its Rules of Procedure. The only true limitation on petitions is that they must relate to an EU field of activity or competence (rather than a Member State

74 See Title IX of the Rules of Procedure of the European Parliament 2019-2024. Available at [http://www.europarl.europa.eu/sipade/rules20190702/Rules20190702\\_EN.pdf](http://www.europarl.europa.eu/sipade/rules20190702/Rules20190702_EN.pdf) (accessed 31 January 2020).

competence), and they must *directly* affect the petitioner.<sup>75</sup> Any actions taken by the Committee are transmitted to the petitioner, alongside reasons for those decisions and relevant further documentation (in line with Article 41 and 42 CFR).

Finally, Article 46 recapitulates the right to diplomatic and consular protection also set out in Article 20(2)(c) TFEU.

## 2.4 EU Citizenship Rights for Mobile Citizens

As the previous section and Chapter 1 both will have suggested, most of the rights associated with EU citizenship are conditional on the exercise of some form of ‘movement’ to another Member State. In terms of personal rights, most internal situations are outside of the scope of EU law: the EU Treaties and EU secondary legislation are most obviously concerned with EU citizens who move between Member States, work across Member State borders or supply or consume products and services across Member State borders. This section commences with an evaluation of the ‘mobile’ Treaty rights, then considers secondary legislation and the rights and limitations on the ‘mobile’ rights it sets out, before concluding with the Charter of Fundamental Rights’ ‘mobile’ rights.

Certain provisions in Article 20 TFEU only apply to ‘mobile’ EU citizens. One of these is Article 20(2)(b), as elaborated on in Article 22 TFEU, which sets out an EU citizen right to vote and stand in both European Parliament elections *and* municipal elections in the Member State they live in. The CJEU has turned the voting right into one that is neither purely territorial—residing in the EU—nor nationality-based—having EU nationality; the Member States can in essence permit anyone in their territory, regardless of nationality, or anyone with their nationality, regardless of where they live, to vote in European Parliament.<sup>76</sup> Its only requirement is that comparable situations are treated equally, in light of the general principle of equal treatment.

The right to vote in what the Treaties call ‘municipal’ elections is also interesting. Ordinarily, when a word in the Treaties can have different meanings, the CJEU will develop an EU-specific meaning that is then applicable across the Member States – but that has not happened here. It has left the Member States the freedom to determine what ‘municipal’ means, meaning that in Member States with several levels of below-parliamentary elections, EU nationals might have the right to vote in all of those. In the UK, EU nationals cannot vote in Parliamentary elections, but they can vote in local elections.

The ‘free movement’ provisions aside, one further Treaty provision related to EU citizenship (though not directly alluding to it) is Article 18 TFEU, which prohibits discrimination on the basis of nationality. Because of the nature of EU law, this is in practice only a ‘right’ that will benefit those Member State nationals who have moved to another Member State: how a Member State treats its own nationals is a so-called ‘wholly internal situation’ that falls outside of the scope of EU law.<sup>77</sup>

For mobile EU citizens, Article 18 TFEU ensures that (unless there are specific exceptions legislated for) they are treated equally to nationals of the Member State to which they have moved (but are not nationals of). The combination of Article 21 TFEU, which articulates the right of free movement for EU citizens, and Article 18 TFEU consequently means that there cannot be discrimination against mobile EU citizens that find themselves in equivalent situations to static Member State nationals of their Member State of residence.

<sup>75</sup> Note this concept of ‘directly’ is interpreted broadly; the European Parliament gives examples of anything to do with ‘environmental matters, consumer protection’; the internal market; employment and social policy; recognition of professional qualifications; or Member State implementation of EU law. European Parliament, ‘Enforcing your rights’. Available at [http://www.europarl.europa.eu/unitedkingdom/en/about-us/faqs/enforcing\\_your\\_rights.html](http://www.europarl.europa.eu/unitedkingdom/en/about-us/faqs/enforcing_your_rights.html) (accessed 31 January 2020).

<sup>76</sup> Case C-145/04 *Spain v United Kingdom* ECLI:EU:C:2006:543; Case C-300/04 *Eman and Sevinger* ECLI:EU:C:2006:545.

<sup>77</sup> See, for example, Case C-212/06 *Walloon Government* ECLI:EU:C:2008:178.

Out of the four ‘fundamental freedoms’ that underpin the Single Market, two are of direct relevance to individuals. These are free movement of persons, and freedom of establishment/to provide services.

## 2.5 Free Movement of Persons (and related rights)

Article 20(2)(a) TFEU makes clear that all EU citizens have the ‘right to move and reside freely within the territory of the Member States’. It is repeated in Article 45 CFR, and elaborated on in Article 21 TFEU.

Article 21(1) TFEU thus repeats the basic right, but also makes clear that this right is ‘subject to the limitations and conditions’ laid down in both the Treaties and secondary legislation. Articles 21(2) and 21(3) TFEU grant the EU legislature the power to adopt measures to both facilitate free movement of persons *and* related social security/social protection in so-called ‘host’ Member States for those EU citizens who are exercising their freedom of movement.

This is all the EU Treaties say about the ‘free movement of persons’. Given the history of EU citizenship, it is perhaps unsurprising that it is rather the ‘free movement of workers’ that has further elaboration on it in EU primary legislation.

### Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - (a) to accept offers of employment actually made;
  - (b) to move freely within the territory of Member States for this purpose;
  - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Article 48 TFEU adds to this that the EU legislature will enact measures that ensure that free movement of workers is practically possible. As such, their social security will move with them and be aggregated, with EU-level rules for determining which Member State authorities have the primary responsibility for paying out social security benefits—which may also be exportable to a different Member State.

### 2.5.1 WORKERS

A closer look at the rights to free movement for workers will be illustrative of the rights held by EU citizens more generally. EU ‘workers’ are the most privileged of the EU citizens, and hold the most rights under EU law; the rights of the economically inactive, as set out in secondary legislation, are significantly more limited.

Article 45(2) sets out a *specific* right to non-discrimination for workers, and it should be noted that this non-discrimination right has been interpreted expansively by both the legislature and the CJEU.

The Workers Regulation (Regulation 492/2011) sets out several examples of discrimination in hiring processes in Article 3. These include separate recruitment procedures for foreign nationals; limitations or restrictions on the advertising of vacancies; and eligibility for employment being restricted somehow (i.e., by a residency requirement, like ‘you must have lived in Austria for five years’, or a requirement to register with specific employment offices, such as the UK’s Jobcentres). Likewise, Article 7 offers examples of employment conditions and benefits that are covered by the equal treatment clause in Article 45(2) TFEU. These include conditions on pay, conditions for dismissal and reinstatement, all social and tax advantages that are linked to the employment, and access to training and re-training.

The CJEU has expanded on what is meant by ‘equal treatment’ when it comes to both access to employment and employment conditions and benefits, and has also made broad interpretations of what qualifies as a ‘tax’ and a ‘social advantage’.

First, it has made clear that all direct discrimination is caught by Article 45(2) TFEU. Direct discrimination here means the existence of separate rules for EU citizens as opposed to home nationals, such as ‘hiring quotas’.<sup>78</sup> Direct discrimination in employment conditions, meanwhile, covers situations like those where only home nationals are covered by certain employment protection measures.<sup>79</sup>

Indirect discrimination sets out requirements that significantly disadvantage EU nationals as compared to home nationals. Examples include German laws ignoring employment in *other* Member States when considering job experience in a recruitment process,<sup>80</sup> or ignoring work in other Member States was not taken into account when considering promotions.<sup>81</sup> The CJEU ruled in both these cases that such conditions violated Article 45(2) TFEU, for the reason that ignoring activity *abroad* was significantly more likely to harm EU citizens than home nationals.<sup>82</sup>

However, the CJEU has gone further than simply looking at direct and indirect discrimination. It has interpreted Article 45(2) TFEU as covering also restrictions on free movement of workers that do not amount to discrimination. The CJEU has thus found that requiring permission for the use of a foreign academic title is liable to *hamper or to render less attractive* the exercise by EU nationals of fundamental freedoms guaranteed by the Treaty.<sup>83</sup>

Article 45, however, also already starts introducing the idea of limits and restrictions to free movement. First, Article 45(3) makes it clear that movement of workers can be restricted in circumstances where public health, public security or public policy require it. This is a test subject to a strict proportionality test when before the CJEU, and it finds very few Member State justifications are actually persuasive when faced with them. We will revisit this when considering what Directive 2004/38 says about

<sup>78</sup> Case 167/73 *Commission v France* ECLI:EU:C:1974:35.

<sup>79</sup> Case 44/72 *Marsman v Roskamp* ECLI:EU:C:1972:120.

<sup>80</sup> Case C-419/92 *Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* ECLI:EU:C:1994:62.

<sup>81</sup> Case C-15/96 *Schöningh-Kougebetopoulou v Freie und Hansestadt Hamburg* ECLI:EU:C:1998:3.

<sup>82</sup> See also C-237/94 *O’Flynn v Adjudication Officer* ECLI:EU:C:1996:206.

<sup>83</sup> Case C-19/92 *Kraus v Land Baden-Württemberg* ECLI:EU:C:1993:125, para 32.



restricting free movement of persons.

One final aspect of the material scope of Article 45 TFEU is found in Article 45(4) TFEU, which makes clear that not *all* employment is covered by the equal treatment provision in Article 45(2) TFEU. The so-called public service exemption explicitly allows discrimination in access to public service employment.

The CJEU has stressed that the meaning of ‘public service’ must be an EU-wide meaning, rather than a domestic meaning.<sup>84</sup> When setting out qualities of Article 45(4) TFEU ‘public service’ employment, the Court furthermore has made it clear that this is not just every job in a host Member State government. In *Commission v Belgium*, the CJEU specified that a job would count as being in the ‘public service’ for Article 45(4) TFEU purposes if it involved ‘direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or other public authorities’.<sup>85</sup>

### 2.5.2 SECONDARY LEGISLATION

Article 6 of the Preamble to the Workers’ Regulation states that to make free movement of workers exercisable, ‘obstacles to the mobility of workers [must] be eliminated, in particular as regards the conditions for the integration of the worker’s family into the host country’. There is very little in the Workers’ Regulation that elaborates on this, however. Article 10 of the Regulation sets out a right to schooling for children of workers, and that is all.

As of 2004, the EU rules on free movement of family members of an EU citizen are all contained in Directive 2004/38, or the Citizens’ Directive. This Directive also contains the rights of economically inactive EU citizens who want to or are exercising freedom of movement—whether students, pensioners, independently wealthy, seeking work, or involuntarily unemployed. As such, the Citizenship Directive is now the primary source of information on the specific rights (and limitations thereto) applicable to EU citizens. We will consider its contents on the rights of workers, the economically inactive, and family members of EU citizens in turn, before concluding on the Citizenship Directive’s provisions on expelling EU citizens who have exercised free movement.

### 2.5.3 WORKERS UNDER THE CITIZENSHIP DIRECTIVE

In many ways, the Citizenship Directive simply articulated earlier legislation and CJEU’s case law on the rights of workers. Only a few novelties specifically pertaining to EU citizen workers are found in its provisions. The most important of these is the stress that the free movement rights of workers, including their rights to access to benefits, are *unconditional* from the day of their arrival in the host Member State.

Under Article 16 of the Citizenship Directive, five years of residence in accordance with the Citizenship Directive results in an EU national obtaining a status of permanent residence in that Member State. For workers, this does not come with explicit further rights – but should they become unemployed and no longer qualify for worker status once they are permanent residents, this new status means they have integrated enough to still be entitled to benefits in their host State. Article 24(1) of the Citizenship Directive also reiterates that workers are entitled to equal treatment in accessing all social security and social assistance in their host Member State.

<sup>84</sup> Case 152/73 *Sotgiu v Deutsche Bundespost* ECLI:EU:C:1974:13.

<sup>85</sup> Case 149/79 *Commission v Belgium* ECLI:EU:C:1982:195, para 10.

#### 2.5.4 ECONOMICALLY INACTIVE PERSONS UNDER THE CITIZENSHIP DIRECTIVE

The CJEU’s case law has long made clear that while job-seekers are *close* to workers, and covered by Article 45(3) TFEU in principle, they are not *identical* to workers.<sup>86</sup> The Citizenship Directive, in Article 24(2), makes this explicit by stating that job-seekers are not entitled to ‘social assistance’ in their host State.<sup>87</sup>

The Citizenship Directive also makes clear that a job-seekers’ right to reside in the host State is not unconditional: Article 14(4)(b) of the Citizenship Directive makes clear that their right to reside exists only providing they can evidence that they are ‘genuinely seeking work’. The CJEU has made it clear that the host Member State can challenge a job-seeker’s ‘genuine work-seeking’ by considering if they have registered with an unemployment agency, and how long they have been attempting to seek work.

Those who are not seeking work, such as students, pensioners, and the economically inactive by choice, are subject to further limitations before they can exercise their movement rights for a period longer than three months. As implied by Article 7(1), host State residence of *all* EU citizens is unconditional for three months. A stay of three months or less is effectively treated as a ‘visit’ rather than a ‘move’ under the Directive; Article 24(2) thus also makes clear that during this ‘visit’ period, economically inactive citizens are not entitled to benefits.

Article 7(1) of the Citizenship Directive then requires that economically inactive EU citizens have sufficient resources and sickness insurance in order to have a right to reside in the host State *beyond* three months. During this period, economically inactive EU citizens in principle are entitled to equal treatment when it comes to benefits... but they are also expected to not be ‘unreasonable burdens’ on the host welfare State. The rights of the economically inactive to ‘stay’ (rather than ‘visit’) are thus conditional until they reach five years of residence and are eligible for permanent residence.<sup>88</sup> What the Citizenship Directive does is introduce an incremental approach to the residency rights of EU citizens, regardless of their economic activity.

The Citizenship Directive has one very particular caveat in it when it comes to equal treatment for students: it is that they are *not* entitled to student grant and loans in the host State, per Article 24(2). The compromise has one exception to it: students who are family members of *workers* in the host State are entitled to equal treatment in student grants and loans.

#### 2.5.5 FAMILY MEMBERS OF EU CITIZENS IN THE CITIZENSHIP DIRECTIVE

Finally, the Citizenship Directive addresses those who are not themselves EU citizens, but instead are given rights because of their relationship to EU citizens. In the remainder of the report we will refer to these as ‘family rights’. Workers have had the right for their families to move with them and also benefit from equal treatment since the 1970s, and with several limitations in place, similar rights were extended to family members of economically inactive EU nationals in the 1990s. The Citizenship Directive consolidates these rules and sets out *two* categories of ‘family’ members, which benefit from different rules under the Directive.

<sup>86</sup> See C-138/02 *Collins* ECLI:EU:C:2004:172.

<sup>87</sup> For an analysis of this term, see Case C-22/08 *Vatsouras* ECLI:EU:C:2009:344.

<sup>88</sup> See, for example, Herwig Verschueren, ‘Free Movement of EU Citizens: Including for the Poor?’ (2015) 22 *Maastricht Journal* 10 and Floris de Witte, ‘The End of EU Citizenship and the Means of Non-Discrimination’ (2011) 18 *Maastricht Journal* 86.



First, Article 2(2) defines direct family members. This includes spouses, children, and any other directly dependent relatives in ‘the ascending line’ – so grandparents.<sup>89</sup> These are the family members that *must* be admitted by the host State according to Article 3(1). Their rights stem from the EU national, meaning that as long as the EU national qualifies for the right to reside in the host State, their family members will as well.

However, the Citizenship Directive also sets out rules for a second category in Article 3(2): that of extended family members. This is anyone *else* in the family tree who is dependent on an EU national, or anyone in a partnership that is not formally registered – a so-called ‘durable relationship’. Under Article 3(2) of the Citizenship Directive, the Member States only have a *duty to facilitate* entry and residence for the ‘family’ of the EU national – which suggests that while the Member State must make it *possible* for these extended family members to move with the EU national, the exact rules dictating their movement can be set out in national law, and are not themselves EU law rights. The CJEU has indicated in *Rahman and Others*<sup>90</sup> that this places extended family members somewhere *between* direct family members and third-country nationals (non-EU/EEA/Swiss citizens) in their case of ‘movement’ to a host State.

Prior to the adoption of the Citizenship Directive, the CJEU applied two distinct sets of rules when it came to the free movement of EU family members. Where those family members were *themselves* EU nationals, or where they were third-country nationals who were already legally living in another Member State (via national immigration law), they *accompany* or *join* the EU national in the intended host Member State under EU law. However, in *Akrich*<sup>91</sup>, the CJEU found that EU nationals with third-country national family members could not rely on EU law in order to have their third-country national family member *enter* the EU.

The CJEU revisited *Akrich* in its 2010 *Metock*<sup>92</sup> judgment. It reconsidered the importance of EU citizenship as a status, and the impact of restrictive immigration rules on ‘family life’ for EU nationals and their families in the host State. It also highlighted that the EU legislature’s own Citizenship Directive did not actually require ‘prior lawful residence’ for third-country nationals – and so found that EU nationals could rely on EU law to both have their third-country national family members *enter* the EU and move *with* them elsewhere in the EU.

#### 2.5.6 EXPELLING EU CITIZENS

The Treaty-based grounds for derogating from free movement of persons rights are repeated in Articles 27-33 of the Citizenship Directive. There are a total of three grounds: public policy, public health, and public security. These can be grounds both to restrict *entry* and *residence* of an EU citizen – but the CJEU has stressed that they have to be interpreted in a way that is ‘particularly restrictive’ given the fundamental nature of EU citizenship.<sup>93</sup>

The contents of the Citizenship Directive on these points is a codification of long-standing CJEU case law. Article 29(2) is very clear on the limits that apply to public policy and security derogations, which are considered to be of the same variety:

<sup>89</sup> As of Case C-673/16 *Coman* ECLI:EU:C:2018:385, this includes same-sex spouses even when EU citizens are moving to Member States that do not recognize same-sex marriages.

<sup>90</sup> Case C-83/11 *Rahman and Others* ECLI:EU:C:2012:519.

<sup>91</sup> Case C-109/01 *Akrich* ECLI:EU:C:2003:491.

<sup>92</sup> Case C-127/08 *Metock and Others* ECLI:EU:C:2008:449.

<sup>93</sup> C-482/01 *Orfanopoulos and Oliveri* ECLI:EU:C:2004:262.

**Directive 2004/38/EC, Article 29(2)**

Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

A further step taken by the Citizenship Directive is in offering EU nationals and their family members a certain degree of protection against Member States expansively applying derogations on the grounds of public policy or security. Article 28 of the Directive consequently sets out a number of factors the host Member State must take into account before expelling an EU national or their family member:

**Directive 2004/38/EC, Article 28**

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: (a) have resided in the host Member State for the previous 10 years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child...

The longer an EU citizen has lived in the host State, the more difficult it is to expel them from that host State—and after 10 years, this can only be done exceptionally. Examples of what the CJEU has considered to be ‘imperative’ grounds of public security are dealing of narcotics as part of organised crime,<sup>94</sup> the sexual exploitation of children,<sup>95</sup> and terrorism.<sup>96</sup>

There is no case law on the public health restriction, and it is designed to apply only in the case of infectious and contagious diseases. However, restrictions on the ground of public health can *only* take place if the EU citizen has not already resided in the host State for more than three months – after that time, they must be treated or quarantined, as relevant, *within* the host State, as opposed to be turned around for treatment in their home State.

<sup>94</sup> Case C-145/09 *Tsakouridis* ECLI:EU:C:2010:708.

<sup>95</sup> Case C-348/09 *PI* ECLI:EU:C:2012:300.

<sup>96</sup> Case C-300/11 *ZZ* ECLI:EU:C:2013:363.

## 2.6 Freedom of Establishment and the Freedom to Provide Services

EU citizenship is most commonly associated with the rights of individuals to move to and live in another Member State; however, the EU Treaties do (and always have) also give rights for EU citizens (or, as Article 49 TFEU calls it, ‘nationals of the Member States’) to ‘establish’ in another Member State. Establishment is, effectively, setting up a business. For the sake of brevity, it can be noted that as an individual who *has* established, EU citizens are simply treated as any other ‘mobile’ EU citizens from that point onward. The CJEU’s case law has meant that the self-employed are largely treated equivalently to those in work, albeit that their rights stem from a separate set of Treaty rules and they do not have a specific ‘Regulation’ to elaborate on those rights. They, too, benefit from a right to equal treatment to equivalent home State nationals – who here would be the self-employed, rather than the employed.

The final way in which an ‘individual’ can exercise free movement rights is through the provision of services, as set out in Article 56 TFEU. Services are the leftover category of EU freedoms: an EU citizen who permanently sets up a business abroad is ‘establishing’, but anything short of such permanent settlement can be seen as providing ‘services’ under EU law.<sup>97</sup> Because services describe a *temporary* activity abroad, many of the Citizenship Directive’s provisions are irrelevant to service providers (who, *inter alia*, are unlikely to be abroad long enough to cross the three month ‘visit’ period or require social assistance). Key to the EU provisions on free movement of services, however, is that someone can only be an EU service provider if they are *established* in a Member State and providing services to *another* Member State.

The primary advantage EU citizens hold over non-EU citizen service providers is that of equal treatment in exercising their service: Article 57 requires that they can provide their service ‘under the same conditions as are imposed by [the host State] on its own nationals.’ The CJEU, meanwhile, has made clear that the freedom to provide services also implies a freedom to *receive* services – thus enabling tourism and getting haircuts or financial advice in any other Member State.

## 2.7 Additional Benefits and Opportunities for EU Citizens

In addition to the express rights articulated in the Treaty and the Citizenship Directive, the EU legislature has also made available other reciprocal benefits and opportunities that can be accessed by EU citizens in specific circumstances. These are related to, but not directly stemming from, the general non-discrimination obligation set out in Article 18 TFEU.

The most important of these further ‘benefits’ held by EU citizens are related to healthcare abroad. Here, the EU legislature has made provision for EU citizen tourists to access any necessary treatment while they are abroad through the reciprocal European Health Insurance Card scheme, and it has also made it possible for EU citizens to access treatment in another Member State under the cover of the public healthcare system in the Member State that they are covered by. EHIC, and the Patients’ Rights Directive, thus establish a system of ‘healthcare abroad’ access for EU citizens without requiring them to take out insurance in a different Member State.<sup>98</sup>

97 See Article 57 TFEU: ‘Services shall be considered to be “services” ... where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. ... Without prejudice to the provisions ... relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided...’

98 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare [2011] OJ L88/45.

Other specific iterations of the non-discrimination obligation also manifest as distinct opportunities. As such, the ability for all EU students to attend universities in other Member States at the same costs as students *from* those Member States hails directly from the prohibition on nationality-based discrimination but has opened up mobility in ways that the Treaties did not expressly anticipate. The EU legislature has restricted the ‘non-discrimination’ obligation’s application to EU citizen students by expressly not extending it to student finance in Article 24(2) of the Citizenship Directive, but the ability to obtain an education in another Member State at ‘home fees’ has remained in place.

Finally, an ‘additional’ benefit that exists for Member State nationals<sup>99</sup> is that the EU has set up a framework for the coordination of social security between the Member States, which ensures that anyone who has moved between the Member States does not ‘lose’ their accrued social security contributions. The framework determines which Member State is responsible for what aspect of social security coverage and ensures that EU citizens are treated equally to host Member State nationals in terms of that coverage; and also ensures all contributions made by a Member State national within the Member States are aggregated, and certain benefits are ‘exportable’ to other Member States when EU citizens exercise free movement. These rules are set out in Regulation 883/2004.<sup>100</sup>

## 2.8 Conclusion

Static EU citizens do not gain very many rights from their EU citizenship or the legal sources that underpin citizenship. The rights to ‘good administration’ and approach the EU institutions via both petitions and a citizens’ initiative and the diplomatic and consular protection when their own Member State does not have diplomatic or consular presence in a third country are the only rights that affect mobile and static EU citizens in the same way.

Mobile EU citizens, on the other hand, benefit from broad ‘equal treatment’ rights that make up the bulk of EU citizenship. While these are conditional for economically inactive EU citizens on not becoming a financial ‘burden’ on the State they reside in, those in work or self-employment above are entitled to full equal treatment as relevant from the day of their arrival, and the EU coordinates their social security contribution accrual so as to ensure that the resultant entitlements “travel” between Member States. EU citizens are also free to establish a business (or be self-employed) and provide services in any other Member State, and they are entitled to vote in the European Parliament and ‘municipal’ elections of the Member State they reside in. Expelling mobile EU citizens is restricted, and will in practice be rare for those EU citizens who have lived in their host Member States for longer than five years.

## 2.9 Recommendations

- The rights associated with EU citizenship are complex and the division between the rights of mobile and static citizens, and the nature of rights of EU citizens living or working in a non-EU Member State are subject to confusion. The UK Government and the NIHR must prioritise explaining these rights (and their limitations) in the context of post-Brexit Northern Ireland to the general public.

<sup>99</sup> As of 1 January 2011, non-EU nationals and their families legally resident in the EU who engage in cross-border movement are also covered by the relevant rules in all Member States except the UK and Denmark. See Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality [2010] OJ L344/1.

<sup>100</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1; and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L284/1.

The table below summarises which EU citizenship rights are mobile and which are static, as well the sources of these rights:

Source of Rights	Mobile EU Citizen	Static EU Citizen
Treaty on the Functioning of the European Union (TFEU)	<p>Article 20-25 TFEU: rights of movement, residence, diplomatic and consular protection, electoral rights (European Parliament and municipal elections), ‘good administration’ rights, rights to contact the EU institutions, ‘citizens’ initiative’.</p> <p>Article 18 TFEU: prohibition of nationality discrimination</p> <p>Articles 45-48 TFEU: free movement of workers (only limited by public health/policy/security)</p> <p>Article 49 TFEU: freedom of establishment (only limited by public health/policy/security)</p> <p>Article 56 TFEU: freedom to provide/receive services (only limited by public health/policy/security)</p>	Article 20, 24, 25 TFEU: diplomatic and consular protection, ‘good administration’ rights, rights to contact the EU institutions, ‘citizens’ initiative’.
Charter of Fundamental Rights	Title V, Articles 39-46: repetition of the TFEU EU citizenship rights.	Title V, Articles 39-46: repetition of the TFEU EU citizenship rights.
Workers’ Regulation (Regulation 492/2011)	Additions to Article 45 TFEU rights, including specific non-discrimination rights and rights to fully social security and tax equal treatment and schooling for children.	
Citizenship Directive	<p>Conditional right to equal treatment with host state Nationals – unlimited for workers, limited for five years for economically inactive EU citizens;</p> <p>Significant restrictions on deporting mobile EU citizens (depending on length of residency);</p> <p>Rights for EU citizen family members to enjoy identical rights to EU citizen when with EU citizen in host State</p>	

## Chapter 3: Brexit Negotiations over Northern Ireland and Citizenship

### 3.1 Introduction

It is now necessary to consider how the rights of the people of Northern Ireland (including those resident or working in Great Britain and Ireland) have factored in the EU-UK Withdrawal Agreement. The EU and the UK, over the course of the Brexit negotiations, addressed these issues in three documents: first, in the Joint Report on progress in phase 1 of the negotiations published in December 2017,<sup>101</sup> second, in the draft Withdrawal Agreement of November 2018,<sup>102</sup> and third, in the revised (and final) Withdrawal Agreement of October 2019.

Although the 2019 revisions to the Withdrawal Agreement do not make substantive changes to the previous iteration’s citizenship arrangements, there are distinct differences between the Joint Report’s pledges and the text of the final Withdrawal Agreement. These have contributed to widespread misunderstandings as to the protections provided (and the degree to which a distinct regime relating to EU citizenship operates in Northern Ireland). This chapter explains how these texts diverge.

### 3.2 The 2017 Joint Report

The Phase 1 Joint Report was agreed at governmental level between the UK and the EU. For the purposes of our Report, the important sections of the Joint Report were those that address issues pertaining to so-called ‘citizenship rights’, both in general and in Northern Ireland.

#### 3.2.1 GENERAL CITIZENS’ RIGHTS PROVISIONS

The Joint Report makes a series of general commitments with regard to citizens’ rights post-Brexit, setting out the overall objective of these commitments in paragraph 6:

The overall objective of the Withdrawal Agreement with respect to citizens’ rights is to provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by the specified date.

Paragraph 10 explains that these provisions are intended to cover EU citizens (including Irish citizens) legally resident or working in the UK (including Northern Ireland) and British citizens (including from Northern Ireland) legally resident or working in the EU27 when Brexit occurs. Provided that those covered have exercised their free movement rights by the date of the UK’s withdrawal from the EU, they and their family members (covered by the terms of Directive 2004/38/EC)<sup>103</sup> will benefit from a range of ‘retained’ rights, similar to their current EU rights.

For those covered by these arrangements, paragraph 11 stated that the existing EU law prohibitions on discrimination on the basis of nationality would continue to apply in their country of work or residence. According to paragraph 12 the UK and EU pledged that such individuals will continue to have the right to be joined in their country of residence by their family members and children (provided that they

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<sup>101</sup> 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 (8 December 2017). Available at: [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf) (accessed 31 January 2020).

<sup>102</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (25 November 2018). Available at: [https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement\\_o.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_o.pdf) (accessed 31 January 2020).

<sup>103</sup> See Chapter 2.5 above.



are family members on the day of the UK’s withdrawal from the EU). Exceptions to these proposals were identified if both parents did not fall within the groups which would be protected under the terms of the Withdrawal Agreement. This raised the possibility that families in Northern Ireland where one parent is an EU citizen and the other is a citizen of neither the UK nor an EU/EEA Member State (a third-country citizen) might enjoy fewer rights under the ultimate Withdrawal Agreement.

Paragraph 13 outlined that the EU rules on what amounts to a “durable” relationship<sup>104</sup> would continue to apply to those UK and EU citizens who have exercised their free movement rights before the date of Brexit, but relationships which began after that date would instead be subject to the relevant national law. Under paragraph 15, these protections would also apply to individuals who are acting as frontier workers on the date of Brexit, a commitment which would be of particular importance to those living on one side of the border between Ireland and Northern Ireland and working on the other.

In order to avail of these protections, individuals would be obliged to complete a registration process. Under paragraph 17 the process of registration for EU citizens living/working in the UK and British citizens living/working in the EU27 must be straightforward, meaning proportionate and as light-touch as possible. It was also intended that registration for what became known as settled status must not be overly expensive: the maximum charge suggested by the Joint Report is the cost to nationals of getting comparable documentation (such as a passport). The UK in practice has made ‘settled status’ applications free of charge.

On EU citizens’ rights generally, paragraph 36 of the Joint Report required that the relevant parts of the final Withdrawal Agreement would be implemented in the UK in an Act of Parliament. Such a rights-bearing statute, once enacted, would inevitably be treated by the UK courts as a constitutionally significant measure. As such, the UK Government would be required to clearly explain what they were doing if the courts were to accept that any later statutes undermined the rights contained within that Act of Parliament.<sup>105</sup>

### 3.2.2 PROVISIONS SPECIFIC TO NORTHERN IRELAND

On the specific operation of EU citizenship rights in the context of Northern Ireland, paragraph 52 of the Joint Report is significant:

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.

This paragraph seemed to offer a choice to the people of Northern Ireland. It flagged up their ability to choose ‘to be Irish or British or both’. This language draws directly upon the GFA’s ‘birthright’ of the people of Northern Ireland.<sup>106</sup> It then emphasised that if they did exercise this choice and took up Irish citizenship, they would ‘continue to enjoy rights as EU citizens, including where they reside in Northern Ireland’. Furthermore, the statement that the Withdrawal Agreement would be drafted ‘without

<sup>104</sup> Citizenship Directive, Article 3(2)(b).

<sup>105</sup> See *Thoburn v Sunderland City Council* [2002] EWHC 195.

<sup>106</sup> GFA, Constitutional Issues, para 1(vi). See Chapter 1.6 above.

prejudice to the rights, opportunities and identity’ associated with these peoples’ EU citizenship clearly suggested that they would continue to be permitted to exercise those rights in Northern Ireland as far as is practicable.

The provision is less clear on the post-Brexit position of those amongst the people of Northern Ireland who do not choose to assert their Irish citizenship, but the implication is that they will not enjoy such rights. As was flagged at the time, this proposal raised serious parity of esteem issues in terms of the apparent advantaging of Irish over British identity. As the Joint Committee’s *Discussion Paper on Brexit* identified in the immediate aftermath of the Joint Report, these provisions could make individuals ‘feel obliged to claim Irish citizenship for practical reasons, even if they self-identify as British’.<sup>107</sup> The Joint Report was also unclear as to whether these particular commitments to Irish citizens would extend to other EU citizens resident in Northern Ireland.

Paragraph 53 furthermore stated that the UK and EU agreed that Brexit will result in ‘[n]o diminution of rights’ across the island of Ireland. This provision appeared to envisage human rights institutions on the island stepping into the void left by Brexit’s removal of the EU rights architecture and thus safeguarding the ongoing application of human rights and equality standards. It proceeded to explain what this ‘no diminution’ guarantee covered, noting that it would operate ‘including in the area of protection against forms of discrimination enshrined in EU law’. The use of the term ‘including’ is significant; it implied that the ‘no diminution’ extended beyond discrimination law.<sup>108</sup> For example, it could be read as suggesting that the EU Charter of Fundamental Rights would continue to apply to any aspect of retained EU Law operating in Northern Ireland, in spite of it not being retained in UK law under the EU (Withdrawal) Act.<sup>109</sup>

What was agreed in December 2017 was far-reaching. The Joint Report suggested that there would be no loss of EU citizenship rights, opportunities or benefits for Irish citizens in Northern Ireland. Moreover, the concept of ‘no diminution of rights’ could be interpreted as a commitment to retain all rights available to EU citizens in Northern Ireland after Brexit. How this was meant to be put into practice without Northern Ireland being part of an EU Member State, however, was unaddressed by the Joint Report. These commitments would have required a significant new departure for the EU, as our analysis in Chapter 2 has illustrated how residence within an EU Member State is normally a requirement for the exercise of many EU rights.<sup>110</sup>

### 3.2.3 THE (APPARENT) COMBINED EFFECT OF THE JOINT REPORT’S TERMS

The Joint Report’s proposals, read as a whole, in combination with existing arrangements on nationality law applicable in the UK and Ireland, created the potential for multiple categories of rights holder, each with particular rights, who would be either resident in or working in Northern Ireland after the date of Brexit. The major categories can be summarised as follows:

1. One of the ‘people of Northern Ireland’ (who has taken Irish citizenship)
2. One of the ‘people of Northern Ireland’ (who has not taken Irish citizenship)

<sup>107</sup> *Discussion Paper on Brexit* (n 3) 28.

<sup>108</sup> *Ibid.*, 17 and 60.

<sup>109</sup> European Union (Withdrawal) Act 2018, s 5(4).

<sup>110</sup> See Chapter 2 above; eg, the free movement rights generally are to and from Member States, and free movement of services is premised on being *established* in a Member State and providing services to another member State.



3. Other Irish citizen (no British citizenship entitlement)
4. Other British citizen (no Irish citizenship entitlement)
5. Other EU citizens (not Irish)
6. Independent third-country nationals
7. Third-country nationals who are dependants or spouses of UK or EU citizens
8. Frontier worker, living in the UK and working in Ireland with British or EU27 citizenship
9. Frontier worker, living in Ireland and working in the UK with EU27 citizenship<sup>111</sup>

As we have seen, the Joint Report suggested different rights entitlements for the people of Northern Ireland, depending upon whether they chose to take Irish citizenship (and hence claim their EU citizenship rights). This would create clear divisions between the rights entitlements of people in groups 1 and 2. In recognising that the CTA could remain in effect after Brexit, paragraph 54 of the Joint Report effectively recognised that Irish citizens living or working in Northern Ireland who were not part of the people of Northern Ireland would also enjoy rights which other EU citizens did not enjoy. This would create clear divisions between the rights entitlements of people in groups 3 and 5. Family members of EU citizens living in Northern Ireland who are not themselves either UK or EU citizens would find themselves in a further distinct category. Indeed, the legal rights of people in this group become dependent upon whether the EU citizen within the family has exercised their movement rights, or is an Irish citizen who has lived their whole life in Northern Ireland.

After Brexit, new categories of rights holder would be added to the picture envisaged by the Joint Report, as EU citizens who were not entitled to settled status under the Withdrawal Agreement moved into Northern Ireland, and frontier workers took up new jobs. This multiplication of the categories of rights holder created the potential for considerable administrative difficulties and the risk that rights could be lost if registration deadlines were missed.<sup>112</sup> The pressure of these realities impacted upon the translation of these commitments into legal form in the drafting of the Withdrawal Agreement.

### 3.3 The Withdrawal Agreement: Citizens’ Rights

The Withdrawal Agreement between the UK government and the EU27 was initially concluded in November 2018, amended in October 2019 and came into operation in January 2020. It contains two sets of provisions on EU citizens’ rights, giving effect to the commitments made in the Joint Report. The first set of provisions, addressing EU citizenship rights for all British citizens living/working in an EU Member State at the end of the Withdrawal Agreement’s transition/implementation period, and for all EU citizens in the UK as a whole, is found in Part 2 of the Withdrawal Agreement. This period is set to end on 31 December 2020, and the UK Government is currently precluded from further extending this date under UK domestic law.<sup>113</sup>

<sup>111</sup> This list draws upon, but does not precisely duplicate, the list presented in *Discussion Paper on Brexit* (n 3) 3.

<sup>112</sup> *Ibid*, 33-35.

<sup>113</sup> European Union (Withdrawal Agreement) Act 2020 (UK), s 33. Parliament, under UK law, remains sovereign, and could act to repeal this provision.

### 3.3.1 PART 2 OF THE WITHDRAWAL AGREEMENT

The intention of Part 2 of the Withdrawal Agreement is, in essence, to ensure that anyone who was exercising EU free movement rights prior to the end of the Withdrawal Agreement’s transition period will continue to benefit from those free movement rights in the Member State they find themselves in when Brexit occurs. The Withdrawal Agreement is premised on a transition/implementation period of twenty-one months from March 2019, which effectively means that all those EU nationals in the UK and UK nationals in the EU by 31 December 2020 would be covered by Part 2’s provisions.<sup>114</sup> This part of the Withdrawal Agreement is little changed from the EU Commission’s March 2018 draft; although we will highlight the restrictions on how this baseline of rights will operate after Brexit, they are clearly acceptable to both the UK and EU.

In terms of coverage, Part 2 is intended to apply to all those currently covered by the scope of the Citizenship Directive (Directive 2004/38/EC), and the conditions it imposes on their residence map on to the terms of that directive. As we discussed in Chapter 2, that Directive grants a right of residence to those who are economically active, and to those who have sufficient resources and health insurance.<sup>115</sup> The rights extend to cover the immediate family members of such EU citizens. Once such EU citizens has resided in a Member State other than their ‘home’ State on these terms for five years, the Directive translates their time-limited residence rights into permanent residence.<sup>116</sup>

The Withdrawal Agreement duplicates this structure of residence rights for those who have moved before 31 December 2020. Beyond residence, the substantive rights provided by those covered by Part 2 are derived from certain elements of EU free movement law, including a prohibition of discrimination on grounds of nationality,<sup>117</sup> a right to equal treatment,<sup>118</sup> rights of workers<sup>119</sup> and the self-employed<sup>120</sup> (including frontier workers<sup>121</sup>).

However, the rights of those covered by Part 2 of the Withdrawal Agreement do not map exactly onto those currently available under EU freedom of movement law. This is unsurprising; the UK Government has made restricting freedom of movement one of its Brexit priorities.<sup>122</sup> The first and most obvious of these differences is that the rights of those with UK nationality are limited to the particular EU Member State in which they are resident when the transition period ends on 31 December 2020. They do not retain free movement rights more generally, as made clear in Article 9(c). EU citizens in the UK do, of course, but for UK nationals in the EU, their ‘status quo’ in one Member State is protected, rather than the broader movement rights they enjoyed under EU law.

A further limitation is that of mobility. In principle, Part 2 of the Withdrawal Agreement gives potentially lifelong rights to eligible persons.<sup>123</sup> Under Article 15(3), however, if an EU or British citizen benefiting from Part 2 leaves their state of residence for a period of longer than 5 years, they lose their Part 2 status, and would find themselves subject to domestic immigration law if wanting to return to that state. This is not currently the case; while an EU citizen who moves away will lose their ‘permanent residence’ status in a host Member State after two years, they maintain the right to freely move to and reside in that same host Member State again.

<sup>114</sup> Withdrawal Agreement, Article 126.

<sup>115</sup> Citizenship Directive, Articles 6-7.

<sup>116</sup> Citizenship Directive, Articles 16-18.

<sup>117</sup> Withdrawal Agreement, Article 12.

<sup>118</sup> Withdrawal Agreement, Article 23.

<sup>119</sup> Withdrawal Agreement, Article 24(1).

<sup>120</sup> Withdrawal Agreement, Article 25(1).

<sup>121</sup> Withdrawal Agreement, Articles 24(3) and 25(3).

<sup>122</sup> See EU Select Committee, *Brexit: The revised Withdrawal Agreement and Political Declaration* (2020) HL 4, para 80.

<sup>123</sup> Withdrawal Agreement, Article 39.

A significant change from the current operation of EU law is found in relation to refusals or the right to expel EU citizens from the Member State in which they reside. As outlined in Chapter 2, the combination of CJEU case law and the Citizenship Directive means that EU citizens can only be removed from their host States (and thus denied residence) where they are a current and sufficiently serious threat to public policy/public security/public health. Article 18 of the Withdrawal Agreement, however, makes it clear that the UK and the EU27 can carry out ‘criminality and security checks ... systematically on applicants’. The UK, in processing EU ‘settled status’ applications, is carrying out such checks, with findings of a criminal record resulting in applications being held for ‘case by case consideration’.<sup>124</sup>

Such consideration, in and of itself, would not be permitted under the Citizenship Directive, which explicitly requires limited administrative formalities for the granting of documents giving residency rights and does not, in setting those out, permit systematic criminality and security checks. However, Article 20(1) of the Withdrawal Agreement cross-references this provision to the Citizenship Directive’s restrictions of free movement right, suggesting that the systematic checks could only result in a refusal of a residency right where an applicant is a current and sufficiently serious threat.

Article 20(2) of the Withdrawal Agreement is potentially more problematic. It states that after 31 December 2020, residency restrictions of those benefiting from Part 2 will take place in light of domestic law. Domestic law may not contain the safeguards held in the Citizenship Directive, and thus we find that even though the retained EU citizenship rights in Part 2 of the Withdrawal Agreement (including ‘family rights’) are intended to be lifelong, it in practice may be significantly easier to actually strip Part 2 citizens of their right to reside than it is under EU law itself after Brexit.<sup>125</sup>

Other areas in which the Withdrawal Agreement is less explicit about the retention of rights currently held by EU citizens are those that have been primarily given effect by CJEU case law, rather than being expressly stated in the Citizenship Directive. The personal scope of Part 2 of the Withdrawal Agreement covers all those beneficiaries listed in the Citizenship Directive, but does not address certain situations where a personal or family situation was not explicitly addressed by the Directive.

In *Teixeira*, the CJEU found that if children of EU citizen workers are going to have a meaningful right to education, this would mean that their primary carer would have to have a right to reside in the host Member State even where the EU citizen worker (the originator of these rights) had left that State or ceased working.<sup>126</sup> Article 24(2) of the Withdrawal Agreement appears to give effect to this case – but a close reading reveals that it only preserves these residency rights for carers if the EU citizen worker has left the host State. There is no mention in the Withdrawal Agreement of what happens to rights the children of EU citizens in the UK, or UK citizens in the EU, who cease to be economically active.

In *Chen* and, more recently, *Ruiz Zambrano*, the CJEU found that if an EU citizen child would have to leave the EU altogether unless their non-EU citizen parents were given a right to reside, Member States were obliged to give those residency rights.<sup>127</sup> *Zambrano* situations are wholly unaddressed by the Withdrawal Agreement, suggesting that it will be domestic law instead that determines if the parents of EU citizen children can stay in that host Member State. The current UK domestic law related to *Zambrano* carers already restricts their access to social security benefits, as they are not to be treated

124 See Home Office, ‘EU Settlement Scheme: suitability requirements’ (version 1.0) 11. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/791597/EUSS\\_suitability\\_guidance\\_v1.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791597/EUSS_suitability_guidance_v1.0.pdf) (accessed 31 January 2020).

125 Such questions are likely to occupy a good deal of time in court proceedings. For example, the exact boundaries and dependencies of family members’ rights in cases where they, or the EU citizen upon whose status they draw rights, are convicted of criminal offences.

126 Case C-480/09 *Teixeira* ECLI:EU:C:2010:83.

127 Case C-200/02 *Chen* ECLI:EU:C:2004:639 and Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124.

as ‘habitually resident’.<sup>128</sup> It is thus not inconceivable that UK legislation may limit or remove *Zambrano* rights further.

And, in *Surinder Singh*, the CJEU found that where EU citizens return to their home Member State after a period of genuine residence (in accordance with EU treaty rights) in another Member State (or States), they can continue to benefit from EU free movement rights in their home Member State.<sup>129</sup> The family-member beneficiaries of such EU citizenship rights are also not addressed by the Withdrawal Agreement – and that has the potential to be significant for UK citizens who return to the UK as movers (as was the case in *Singh*). In November 2018 the then UK Immigration Minister, Caroline Noakes, informed the UK Parliament that while they are not covered by the Withdrawal Agreement, as a matter of domestic policy the UK will recognise *Singh* movers and family members as eligible for Part 2 rights if they register for these before the completion of the transition/implementation period.<sup>130</sup>

Several other rights held by EU citizens currently living in the UK are not addressed by the Withdrawal Agreement, because they will simply cease to function after Brexit. Primary amongst these are electoral rights; as the UK no longer has Members of European Parliament (MEPs) representing it from 31 January 2020, there will also not be a right for EU citizens resident in the UK to vote in elections to the European Parliament (unless their home Member State permits overseas voting). The UK could legislate unilaterally to grant municipal electoral rights to EU citizens who benefit from Part 2, and legislation is currently before the Scottish Parliament which would enable EU citizens legally resident in Scotland to participate in Scottish Parliament elections.<sup>131</sup>

### 3.3.2 IMPLEMENTATION OF PART 2 UNDER UK LAW

In light of the pressure to start the process of preparing for Brexit, the UK’s EU Settlement Scheme was launched in March 2019. Even though the Withdrawal Agreement had yet to be concluded, the Scheme mapped closely to the eligibility criteria and structure of the resultant residency rights (“settled status” for those EU Citizens who could demonstrate five years of legal residence, “pre-settled status” for those who did not yet meet this threshold, being converted into settled status if they do so).<sup>132</sup> In some regards, it is more generous in operation than the Withdrawal Agreement’s provisions, with the UK Government deciding to waive fees for applications under the Scheme.

Other elements of the UK’s implementation of Part 2 only fell into place with the enactment of the European Union (Withdrawal Agreement) Act 2020. The Withdrawal Agreement made provision for the creation of an independent body responsible for overseeing the implementation of the UK’s obligations under Part 2 (matching the EU Commission’s responsibilities in this regard):

In the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the “Authority”) which shall have powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries. The Authority shall also have the right, following

<sup>128</sup> See, inter alia, the Social Security (Habitual Residence) (Amendment) Regulations 2012, the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 and the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012.

<sup>129</sup> Case C-370/90 *Surinder Singh* ECLI:EU:C:1992:296.

<sup>130</sup> C. Nokes, MP, HC Deb., WA188868 (6 November 2018).

<sup>131</sup> Scottish Elections (Franchise and Representation) Bill 2019, cl 1-3.

<sup>132</sup> Eligibility criteria for the Settled Status scheme are set out in the UK’s Immigration Rules Appendix EU. Available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu> (accessed 31 January 2020).

such complaints, to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking an adequate remedy.<sup>133</sup>

Under the European Union (Withdrawal Agreement) Act 2020 the Independent Monitoring Authority for the Citizens’ Rights Agreements (IMA) is established to meet this obligation.<sup>134</sup> This effective operation of this body is particularly important to securing Part 2’s commitments in practice, so much so that the EU chief negotiator has explicitly warned the UK’s Secretary of State for Brexit that the IMA must be able ‘to act rapidly and in full independence on complaints from Union citizens and their family members’.<sup>135</sup> Schedule 2 of the 2020 Act provides that the IMA will enjoy wide-ranging powers to address the requirements of Part 2,<sup>136</sup> but it remains to be seen if it is provided with resources adequate to this wide-ranging task.<sup>137</sup>

The text of Part 2, in terms of citizens’ rights, is sufficiently precise to trigger the Withdrawal Agreement’s requirements of direct effect within the domestic courts of the UK and EU Member States.<sup>138</sup> This means that the IMA and affected private parties will be able to rely upon these provisions in litigation. If the terms of Part 2 are considered to be in any respect unclear, the domestic courts have the ability to refer questions of their interpretation to the CJEU for eight years after the end of the transition period.<sup>139</sup> The Courts can order the disapplication of any provisions of domestic law, whether in the UK or EU Member States, which are found to breach the requirements of Part 2 of the Withdrawal Agreement.

The 2020 Act also gave UK Government ministers wide-ranging powers to alter the operation of the EU Settlement Scheme by statutory instrument, which could provide for rapid adaptation of the Scheme if more extensive protections for EU migrants become part of the future relationship negotiations between the EU and the UK.<sup>140</sup>

### 3.4 The Withdrawal Agreement: Northern Ireland

The second set of provisions relevant to this report, addressing the rights and obligations of those resident/working in Northern Ireland and Ireland specifically, is found in the Agreement’s Protocol on Ireland and Northern Ireland (PINI).

#### 3.4.1 THE PROTOCOL ON NORTHERN IRELAND AND IRELAND (PINI)

The preamble of the Protocol reflects what the Joint Report also appeared to promise:

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 defined in Annex 2 of the British-Irish Agreement

<sup>133</sup> Withdrawal Agreement, Article 159(1).

<sup>134</sup> European Union (Withdrawal Agreement) Act 2020 (UK), s 15 and Sch 2.

<sup>135</sup> Jim Brunsden, ‘Brussels uneasy over EU citizens’ rights after Brexit’ Financial Times (8 January 2020). Available at: <https://www.ft.com/content/f14f5eb8-3220-11ea-9703-eea0cae3f0de> (accessed 31 January 2020).

<sup>136</sup> European Union (Withdrawal Agreement) Act 2020 (UK), Sch 2, cl 22-35.

<sup>137</sup> The Joint Committee must review the IMA’s operation within eight years of the end of the Withdrawal Agreement’s transition period; Withdrawal Agreement, Article 159(3).

<sup>138</sup> See Withdrawal Agreement, Article 4(1).

<sup>139</sup> Withdrawal Agreement, Article 158.

<sup>140</sup> European Union (Withdrawal Agreement) Act 2020 (UK), s 7.

“Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship”...

This commitment, however, is not reflected in any of the articles of the Protocol which are intended by the UK and EU to have binding legal effect. It thus does not provide any particular guarantees of the practical continuation of EU citizenship rights for those resident or working in Northern Ireland who hold EU citizenship.

As our discussion in chapter 2 illustrated, the only way it would be possible for the loss of such rights to be avoided would be for Northern Ireland was declared to be EU Member State territory, or equivalent, in the Protocol. As the following paragraph of the Preamble makes clear, this is explicitly not the case. As such, the preamble reflects a state of affairs whereby individuals holding EU citizenship in Northern Ireland will either benefit from the Part 2 provisions in the Withdrawal Agreement (if they have activated these rights) or will possess passive EU citizenship rights which will only become effective if they exercise movement to an EU Member State.

With regard to Northern Ireland’s constitutional status, Article 1(1) of the Protocol affirms that it operates ‘without prejudice’ to the GFA principle that Northern Ireland’s status as part of the UK cannot be altered without the consent of the people of Northern Ireland.<sup>141</sup> It is necessary to note, at this juncture, that the UK Supreme Court has affirmed that the GFA’s principle of consent relates only to Northern Ireland’s overarching constitutional status, not to changes that fall short of Northern Ireland leaving the UK.<sup>142</sup>

The commitment to ‘no diminution of rights’ has also been diluted from the seemingly all-encompassing terms of the Joint Report of December 2017.<sup>143</sup> Article 2(1) of the Protocol reads:

The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

Under these terms, whereas EU law that is not reflected in the GFA’s ‘Rights, Safeguards and Equality of Opportunity’ provisions is not covered by the ‘non-diminution’ commitment, any EU law that is relevant to those GFA provisions is protected against diminution as a result of the UK’s ‘withdrawal from the Union’, and this commitment must be overseen by ‘dedicated mechanisms’ maintained by the UK. Because of the manner in which the Protocol and the Withdrawal Agreement are structured, however, different sources of EU law related to the GFA’s ‘Rights, Safeguards and Equality of Opportunity’ provisions will operate differently after Brexit.

The specific obligations contained in Article 2(1) of the Protocol regarding the ‘Annex 1’ EU directives, is separate from the overarching non-diminution obligation. The relevant EU directives in Annex 1 will not simply be maintained as they are at the end of the Withdrawal Agreement’s transition/implementation period. Under the Protocol, the UK has agreed to ‘keep pace’ with those directives, meaning that as they are amended under EU law, the UK will also amend their implementation in Northern Ireland.<sup>144</sup> Annex 1 covers the EU Directives on equal treatment between men and women

<sup>141</sup> GFA, Constitutional Issues, para 1(i).

<sup>142</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [135].

<sup>143</sup> For a detailed discussion, see Christopher McCrudden, ‘Brexit, rights and the Northern Ireland Protocol to the Withdrawal Agreement’ (BA/RIA, 2018). Available at: <https://www.thebritishacademy.ac.uk/sites/default/files/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement.pdf> (accessed 31 January 2020).

<sup>144</sup> Withdrawal Agreement, PINI, Article 13(2) and 13(3).



in accessing/supplying goods and services and accessing social security;<sup>145</sup> in matters of employment/occupation and self employment;<sup>146</sup> a Directive on equal treatment irrespective of racial or ethnic origin;<sup>147</sup> a Directive that more generally addresses equal treatment in employment and occupation;<sup>148</sup>

The least change to rights enjoyed in Northern Ireland will thus be seen in EU discrimination law, where the UK has agreed to ensure that the law applicable in Northern Ireland will ‘keep pace’ with developments in the relevant EU secondary legislation. These measures are particularly important in terms of excluding, for example, discrimination on the basis of nationality, and thereby protecting the operation of parity of esteem by public authorities and private actors in the Northern Ireland context. The UK has agreed to maintain ‘dedicated mechanisms’ for the monitoring and enforcement of its non-diminution obligation.<sup>149</sup>

Beyond this commitment, all other EU law that corresponds to the GFA’s ‘Rights, Safeguards and Equality of Opportunity’ provisions will also have to be retained in order to comply with Article 2 of the Protocol. There is no clear articulation of the extent of these commitments, and challenges might therefore be expected following Brexit to determine whether this commitment encompasses elements of the EU Charter of Fundamental Rights. What is clear, however, is that the UK’s general non-diminution commitment only covers the extent of these obligations at the end of the Withdrawal Agreement’s transition/implementation period.<sup>150</sup> These commitments are thus “frozen”, and do not track extensions to these provisions under EU law.

This is not an unimportant series of protections, but it is a long way short of comprehensive and dynamic non diminution of the broad range of EU rights protections suggested by the Joint Report. The protections in question, moreover, cannot be characterised as covering EU citizenship rights.

### 3.4.2 THE PINI UNDER THE UK’S EUROPEAN UNION (WITHDRAWAL AGREEMENT) ACT 2020

Under the Withdrawal Agreement Act the UK has not developed new institutions to address its commitment of maintaining ‘dedicated mechanisms’ to secure Article 2 of the Protocol, but augmented the powers of the NIHRC and the Equality Commission for Northern Ireland (ECNI) to fulfil this requirement (by inserting new provisions into the Northern Ireland Act 1998).<sup>151</sup> Schedule 3 of the Act provides these bodies with powers to feed concerns about Article 2’s implementation into the Withdrawal Agreement’s dispute settlement system.<sup>152</sup> The Withdrawal Agreement’s Specialised

145 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37 and Directive 79/7/EEC — progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.

146 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L 204/23 and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1.

147 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

148 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

149 Withdrawal Agreement, PINI, Article 2(1).

150 Withdrawal Agreement, Article 4(4): ‘The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period’.

151 European Union (Withdrawal Agreement) Act 2020 (UK), Sch 3.

152 Northern Ireland Act 1998, s.78A(9).



and Joint Committees,<sup>153</sup> however, make a poor substitute for judicial enforceability, and once again the enforcement of Article 2 of the Protocol depends upon whether the general non-diminution commitment or specific protected EU law directives are at issue. The EU Commission does not have the ability to institute enforcement proceedings that accompanies the Protocol’s arrangements regarding trade and the land border between the UK and Ireland.<sup>154</sup>

Article 4 of the Withdrawal Agreement makes all of its provisions directly effective where they meet the required conditions for direct effect.<sup>155</sup> The directives specified in Annex 1 of the Protocol are all sufficiently clear to carry direct effect.<sup>156</sup> The more general “non-diminution” commitment under Article 2(1) of the Protocol potentially lacks the necessary specificity.<sup>157</sup> Under the 2020 Act, however, the NIHRC and ECNI are given a specific ability to bring or intervene in judicial review proceedings related to potential breaches of Article 2(1).<sup>158</sup>

Moreover, although the UK’s implementing legislation provides that ‘such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement ... are without further enactment to be given legal effect or used in the United Kingdom’, the vagueness of the general non-diminution commitment in Article 2 puts the applicability of this commitment in doubt.<sup>159</sup> If the general commitment against diminution can be litigated by the NIHRC and ECNI, then public bodies could potentially be held to account in the Northern Ireland courts for breaches of any aspect of this commitment, not simply those explicitly set out in the retained EU directives. The NIHRC and ECNI’s new power is, however, subject to the explicit caveat that it does not create a new cause of action.<sup>160</sup> As such, multiple legal barriers exist to litigating the Withdrawal Agreement’s general non-diminution commitment.

## 3.5 Lost in Translation

### 3.5.1 FROM JOINT REPORT TO WITHDRAWAL AGREEMENT

When the Withdrawal Agreement turned the Joint Report’s political commitments into legal provisions, the range of special measures regarding citizenship and human rights which it envisaged for Northern Ireland were revealed to be more limited than it appeared to be in December 2017. Much of the problem resulted from the difficulty inherent in translating the guarantees provided in paragraph 52 and 53 of the Joint Report into legal protections.

In terms of paragraph 52 (regarding EU citizenship in Northern Ireland), the notion of applying EU citizenship to the people of Northern Ireland posed a legal conundrum. Providing “full” EU citizenship rights within Northern Ireland for Irish citizens would have undermined conceptions of parity of esteem between British and Irish identity required by the GFA. To address this issue (and some of the administrative complexity seemingly inherent in the Joint Report), the *Discussion Paper on Brexit* prepared for the Joint Committee in early 2018 mooted a “levelling up” process, whereby the same EU rights would be extended to all the people of Northern Ireland, and not simply to those with EU

<sup>153</sup> Withdrawal Agreement, PINI, Article 14.

<sup>154</sup> Withdrawal Agreement, PINI, Article 12(4).

<sup>155</sup> See Withdrawal Agreement, Article 4(1).

<sup>156</sup> See the classic criteria established in Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1. For a detailed account of the application of this principle to directives, see Paul Craig, ‘The legal effect of Directives: policy, rules and exceptions’ (2009) 34 *European Law Review* 349.

<sup>157</sup> The UK Government has recently provided a welcome confirmation that it accepts that Article 2(1) is capable of carrying direct effect, see Lord Duncan of Springbank, Written Answer HL4040 (28 January 2020).

<sup>158</sup> Northern Ireland Act 1998, s 78C(1).

<sup>159</sup> See, for example, *De Souza* (n 55) [28].

<sup>160</sup> Northern Ireland Act 1998, s 78C(2).

citizenship (on the basis that all could have EU citizenship if they took steps to assert or manifest their Irish *citizenship*).<sup>161</sup>

For the EU, however, extending EU citizenship rights to the territory of Northern Ireland, even when it was no longer part of the EU, was all but impossible to reconcile with the territorial nature of most EU citizenship rights. They, for the most part, apply within the EU. Moreover, any effort to extend these rights to all of the people of Northern Ireland (regardless of whether they had asserted their Irish citizenship entitlement) would fundamentally alter the basis of EU citizenship as parasitic upon citizenship of an EU Member State (as discussed in Chapter 2, above). This has been critiqued as a ‘lowest common denominator’ approach, in which the need for equivalence between British and Irish identities has hollowed out the concept of special protections for EU citizenship rights in Northern Ireland.<sup>162</sup>

In terms of paragraph 53 (no diminution of rights), the expansive language of the Joint Report has again been confronted with the restricted ambit of EU competences.<sup>163</sup> The EU, put simply, does not have the competence to secure rights protections within Northern Ireland outside the ambit of EU law. The EU consequently could never have required that Charter of Fundamental Rights apply beyond the scope of the EU law which continues to apply in Northern Ireland. However, the ‘general principles’ of EU law which the Charter encodes will continue to apply to a significant body of ongoing EU law in Northern Ireland, as required under Article 4 of the Withdrawal Agreement.

### 3.5.2 OMITTING THE CHARTER FROM ‘RETAINED’ EU LAW

As we noted in Chapter 2, the EU Charter of Fundamental Rights draws upon and codifies pre-existing general principles of EU law. The Charter itself, however, will not be ‘retained’ in UK law following Brexit; its removal has been a consistent UK Government commitment in the Brexit process. This has direct consequences for UK law post Brexit:

It is clear beyond doubt that non-retention of the Charter will lead to a loss of the current level of rights protection available to individuals and businesses under EU law, in at least three ways. First, the Charter protects rights that do not otherwise enjoy clear legal protection, such as the right to protection of personal data. Second, the Charter provides a direct cause of action in respect of those rights including access to legal remedies. Third, as a matter of EU law those legal remedies currently include a power in the courts to disapply legislation.<sup>164</sup>

Beyond its specific requirements, the Withdrawal Agreement places no obligations on how the UK treats the general bulk of ‘retained’ EU legislation after Brexit, and so it will be possible for ‘retained’ EU law to be amended in ways that are not Charter-compliant. It does, however, require that the ‘general principles’ of EU law (a formulation which could include those principles underpinning the Charter) be used to interpret the UK’s obligations during the transition/implementation period.<sup>165</sup> It furthermore requires that any directly effective elements of EU law contained within the Withdrawal Agreement

<sup>161</sup> *Discussion Paper on Brexit* (n 3) 61.

<sup>162</sup> Brexit Law NI, ‘What Happened to the “Paragraph 52” Commitments for Irish Citizens to Continue to Exercise EU Rights, Opportunities and Benefits where Residing in Northern Ireland?’ (9 April 2019) 9. Available at <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2019/04/09135143/Paragraph-52-Briefing-Note.pdf> (accessed 31 January 2020).

<sup>163</sup> See Colin Murray and Ben T C Warwick, ‘The Strange Case of Northern Ireland’s Disappearing Rights in the EU-UK Withdrawal Negotiations’ (2019) 19 *European Yearbook of Human Rights* 35, 51.

<sup>164</sup> The Bingham Centre for the Rule of Law, ‘The EU (Withdrawal) Bill A Rule of Law Analysis of Clauses 1-6’ (21 February 2018). Available at: [https://www.biicl.org/documents/1865\\_bingham\\_centre\\_report\\_on\\_eu\\_withdrawal\\_bill\\_clauses\\_1-6\\_final\\_v2.pdf?showdocument=1](https://www.biicl.org/documents/1865_bingham_centre_report_on_eu_withdrawal_bill_clauses_1-6_final_v2.pdf?showdocument=1) (accessed 31 January 2020).

<sup>165</sup> Withdrawal Agreement, Article 127(3). See also European Union (Withdrawal) Act 2018, s 5(4)-(5) and s 6(3).

continue to be interpreted in accordance with the ‘general principles’ of EU law as they stand at the end of the transition/implementation period.<sup>166</sup>

With regard to the role these ‘general principles’ play vis-à-vis the EU law which the Protocol makes applicable to Northern Ireland, the most significant change will involve the role of the Commission and the CJEU in enforcing EU law (including the Charter) falling away after Brexit. Their obligations will instead fall to the NIHR and ECNI in their function as the ‘dedicated mechanisms’ responsible for oversight of the rights and equalities protections provided in Article 2 of the Protocol, as well as to domestic UK courts.

Given the Withdrawal Agreement commitment to no diminution of rights, the severely reduced application of the Charter of Fundamental Rights is problematic from a ‘rights’ perspective. The invocation of ‘general principles’ of EU law will be opaque and difficult to explain to the general public. Preservation of the Charter in Northern Ireland’s law, as a form of a ‘human rights backstop’, would thus provide an efficient way of ensuring compliance with the letter and spirit of the GFA’s ‘Rights, Safeguards and Equality of Opportunity’ provisions. Aspects of the Charter’s functioning will inevitably change after Brexit, as the EU institutions will not be involved in its enforcement,<sup>167</sup> but the rights content and people’s ability to rely on it before domestic courts can be maintained in domestic law. A bilateral agreement between Ireland and the UK to continue to apply the Charter to Northern Ireland specifically would offer the greatest legal certainty to those in Northern Ireland relying on Charter rights; in the absence of such an agreement, unilateral legislation on the part of the UK could equally retain these rights and ensure they can be accessed in Northern Ireland after Brexit in the same manner that they are now.

In the *New Decade, New Approach* Agreement to restore power-sharing in Northern Ireland, provision was made for a Northern Ireland Assembly committee to work towards the drafting of a Northern Ireland Bill of Rights.<sup>168</sup> The work of this committee, when it becomes operational, should address the possibility of incorporating elements of the EU Charter directly into the law of Northern Ireland. Some of this work could be done by the Assembly itself. The National Assembly of Wales, for example, took steps to incorporate the UN Convention on the Rights of the Child into the law of Wales.<sup>169</sup> Such legislation by the Assembly, however, will not reproduce the Charter’s enforcement mechanisms in EU law, and will lack the status necessary to allow for challenges to UK Acts of Parliament. The 1998 Agreement envisaged Westminster legislating for a Bill of Rights for Northern Ireland (Rights, Safeguards and Equality of Opportunity, paragraph 4), and this approach remains the best means of countering these difficulties. In fast developing areas such as data protection, legislation to partially incorporate the Charter could permit Northern Ireland’s courts an invaluable opportunity to draw upon CJEU case law.

A more far-reaching approach would be for the UK and EU to agree to treat Northern Ireland as EU territory for the application of aspects of the Charter. This would enable those with EU citizenship in Northern Ireland, including those with Irish citizenship, to exercise rights of good administration, documentary access, rights to petition EU institutions, and rights to petition the European Parliament.<sup>170</sup> This would not only bolster the democratic legitimacy of the Withdrawal Agreement’s special

<sup>166</sup> Withdrawal Agreement, Article 4(3). The UK Government has put in place powers which could allow it to restrict such practice by the UK’s courts; European Union (Withdrawal Agreement) Act 2020 (UK), s 26(1).

<sup>167</sup> *New Decade, New Approach* (January 2020), Part 2, para 28. Available at: <https://static.rasaset.ie/documents/news/2020/01/new-decade-new-approach.pdf> (accessed 31 January 2020).

<sup>168</sup> Note that where cross border trade is at issue, the enforcement powers of the EU Commission and jurisdiction of the CJEU to apply general principles of EU law remains in effect.

<sup>169</sup> Rights of Children and Young Persons (Wales) Measure 2011.

<sup>170</sup> These rights are found in the Charter of Fundamental Rights, Title V.

arrangements for Northern Ireland, but it would ensure that Irish nationals in Northern Ireland were not treated dissimilarly from Irish nationals in the Republic of Ireland – and as such preserve the equality and non-diminution commitments made in the GFA.

### 3.6 Conclusion

Under the Withdrawal Agreement, British citizens in Northern Ireland, even if part of the ‘people of Northern Ireland’, will not retain their EU citizenship (and associated rights). The Agreement, moreover, leaves EU citizens in Northern Ireland (including Irish citizens) with an EU right to access consular and diplomatic protection, and the ability to choose to exercise broad free movement rights into EU Member States (thereby activating EU law’s protections against discrimination by comparison to the citizens of those states). Any EU citizen living in any part of the UK can take such steps and it is worth noting that these rights are in no way dependent upon the Withdrawal Agreement; they are no different from the rights which apply to any EU citizen currently living outside a Member State territory. These do not, in short, amount to meaningful special EU citizenship arrangements for Northern Ireland.

We will unpack the application of Part 2 of the Withdrawal Agreement to Northern Ireland in detail in Chapter 4, but for now it suffices to say that the exclusions applicable to dual nationals mean that these “EU citizenship” provisions are of limited significance for the people of Northern Ireland. The terms of the Withdrawal Agreement therefore leave much to be desired when it comes to rights protections and EU citizenship in the Northern Ireland context. People with EU citizenship in Northern Ireland are not given any special allowance to overcome the conditions (in terms of presence in a Member State territory and (prior) exercise of movement) which underpin so many EU citizenship rights; and the commitment to non-diminution has been watered down in its practical effect.

### 3.7 Recommendations

- Preservation of the EU Charter of Fundamental Rights in Northern Ireland’s law, as a form of a ‘human rights backstop’, is recommended as an efficient way of ensuring compliance with the GFA’s ‘Rights, Safeguards and Equality of Opportunity’ provisions. This goal could be advanced through a range of avenues:
  - a) A bilateral agreement between Ireland and the UK to continue to apply the Charter to Northern Ireland would offer legal certainty to those in Northern Ireland relying on Charter rights.
  - b) Unilateral legislation on the part of the UK Parliament could retain Charter rights and ensure they can be accessed in Northern Ireland after Brexit in the same manner that they are now.
  - c) The Northern Ireland Assembly’s ad-hoc Committee on a Bill of Rights could take steps to build the Charter’s provisions into discussions regarding a Bill of Rights for Northern Ireland (but this would only provide a partial solution unless such a Bill of Rights is given a status which would allow its terms to alter the application of UK Acts of Parliament as well as Assembly legislation).
  - d) Negotiations towards the EU-UK future relationship agreement should be recognised as providing an opportunity for the UK and EU to build upon the baseline of protections for rights in Northern Ireland established in the Withdrawal Agreement, including continuing the operation of elements of the EU Charter of Fundamental Rights in post-Brexit Northern Ireland.

## Chapter 4: Brexit, EU Citizenship and the People of Northern Ireland

### 4.1 Introduction

This Chapter evaluates how EU citizenship will operate for the people of Northern Ireland after Brexit, and the extent to which the Joint Report’s promises will translate into practice. At a speech at Queen’s University Belfast in January 2020, EU Chief Negotiator Michel Barnier drew attention to the ongoing benefits of EU citizenship for the people of Northern Ireland:

Whilst Northern Ireland will no longer be part of the EU, people born and raised here that choose to be Irish citizens will still be EU citizens. This means they can continue to move and reside freely within the EU, The [sic] UK has committed to upholding their rights. They cannot be discriminated against on the basis of nationality.<sup>171</sup>

This statement, of itself, elides citizenship rights and the Withdrawal Agreement’s provisions retaining the EU Directives protecting against discriminatory practices in Northern Ireland’s law. In reality, those amongst the people of Northern Ireland who choose to claim Irish citizenship, and with it EU citizenship, gain no meaningful operative rights within Northern Ireland from the Withdrawal Agreement as a result of their EU citizenship. And because of Brexit, they lose a range of rights in Northern Ireland which are commonly associated with EU citizenship. This chapter details these important shortfalls, and explores avenues by which they could be addressed during Brexit’s transition/implementation period.

### 4.2 Who are the People of Northern Ireland

#### 4.2.1 THE GFA’S TERMS

As we detailed in Chapter 1, the distinct status of the people of Northern Ireland was recognised in the GFA. Exactly who falls within the ‘people of Northern Ireland’ however, lacks precise definition. Annex 2 to the GFA’s UK-Ireland Agreement sets out what the UK and Irish Governments understand the term to mean;

[A]ll 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.<sup>172</sup>

Such an understanding is, by its nature, different from an explicit legal definition. It nonetheless ‘seriously qualifies’ the birthright provision.<sup>173</sup> It was subsequently used as a baseline in the 2004 interpretive declaration between the UK and Ireland on the extent of these GFA provisions (permitting Ireland’s restrictive interpretation of citizenship entitlements which provided the basis of the 2004 Citizenship Referendum).<sup>174</sup> On the basis of its terms, several groups with close connections to Northern Ireland are excluded from the people of Northern Ireland. These include at least:

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<sup>171</sup> Michel Barnier, ‘Speech at the William J. Clinton Leadership Institute’ (27 January 2020). Available at [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_133](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_133) (accessed 31 January 2020).

<sup>172</sup> GFA, UK-Ireland Agreement, Annex 2.

<sup>173</sup> A. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (Belfast Press 2000) 562.

<sup>174</sup> *Citizenship Referendum: Interpretative Declaration by the Irish and British Governments Regarding the British Irish Agreement* (Dáil Debate, 21 April 2004).

- 1) People born outside of Northern Ireland to parent(s) who are from Northern Ireland;
- 2) People born inside Northern Ireland to parents who have yet to establish permanent residency;
- 3) British citizens and Irish citizens who move into Northern Ireland after birth.

No direct provisions cover people who are adopted into families in Northern Ireland, having been born outside of Northern Ireland. The joint understanding, however, includes individuals born in Northern Ireland to a parent of any nationality with permanent UK residency. Although this might appear counter-intuitive, as we outlined above in Chapter 1, as a function of British citizenship law, people who fulfil these criteria are automatically British citizens and, as a function of Irish citizenship law, they are entitled to claim citizenship.

In the context of Brexit, the EU-UK Joint Report<sup>175</sup> and the EU-UK Withdrawal Agreement<sup>176</sup> both draw upon this category of rights holders in detailing how the GFA’s requirements shaped the Brexit negotiations and deal. These texts, it would appear, rely upon the term ‘the people of Northern Ireland’ as set out in the GFA’s Annex 2.

Some rights provided under the GFA relate directly to the people of Northern Ireland. Under the GFA’s terms, only the people of Northern Ireland, for example, are entitled to take part in a referendum on the constitutional status of Northern Ireland as part of the UK.<sup>177</sup> In this regard, a person of Northern Ireland is already potentially able to exercise a right by virtue of that status which is not enjoyed by all British citizens. The UK’s withdrawal from the EU, however, affects the birthright of the people of Northern Ireland ‘to identify themselves and be accepted as Irish or British, or both, as they may so choose’.<sup>178</sup> It furthermore raises issues relating to the obligation upon public authorities in Northern Ireland not to discriminate on the basis of how anyone within the people of Northern Ireland chooses to identify.<sup>179</sup>

#### 4.2.2 TWO GROUPS OR THREE?

The GFA appears to contemplate three categories of identity within the people of Northern Ireland which have relevance to understanding people’s rights after Brexit: people who identify as Irish, people who identify as British and people who maintain both identities. These categories have direct legal implications. The choice of anyone who is part of the people of Northern Ireland to manifest their identity as British, or Irish or both must be protected by the authorities, and asserting citizenship, as we discussed in Chapter 1, is a direct manifestation of such identity. The link between the birthright to choose identity and the ability to manifest citizenship were explicit within the negotiations surrounding the GFA and affirmed by the Joint Declaration in 2003.<sup>180</sup>

Under UK domestic legislation, however, anyone born in the UK to a parent who is a British citizen or who is legally able to permanently reside in the UK is automatically a British citizen.<sup>181</sup> In the *McCarthy*

<sup>175</sup> Joint Report (n 101), para 52.

<sup>176</sup> Withdrawal Agreement, PINI, preamble.

<sup>177</sup> GFA, Multi-Party Talks Agreement, Article 1(iv) and UK-Ireland Agreement, Annex 2. Within the UK’s domestic legislation implementing its GFA commitments, the Secretary of State for Northern Ireland has the power to make arrangements for a special franchise with regard to a so-called “border poll”; Northern Ireland Act 1998, sch. 1. See Morgan (n 172) 124.

<sup>178</sup> GFA, Multi-Party Talks Agreement, Article 1(vi).

<sup>179</sup> GFA, Multi-Party Talks Agreement, Article 1(v). With regard to the UK’s domestic legislation implementing its related GFA commitments, see Northern Ireland Act 1998, ss 75-76.

<sup>180</sup> Morgan (n 172) 123-124.

<sup>181</sup> British Nationality Act 1981, s 1.



case, the CJEU clarified the application of EU law rights to dual nationals. It ruled that a dual Irish-British citizen who had been resident in England for her whole life could not rely on her (static) EU citizenship rights to provide a basis for allowing her Jamaican spouse residency in the UK.<sup>182</sup> Following this decision, the UK Home Office asserted the automatic imposition of British citizenship upon the people of Northern Ireland, in an overt effort to restrict the application of family-member rights under EU freedom of movement law.<sup>183</sup>

In 2016, the UK Government legislated to prevent dual nationals holding British citizenship from relying upon their EU citizenship in the UK; an EEA national is now defined in the Immigration Regulations as ‘a national of an EEA State who is not also a British citizen’.<sup>184</sup> These developments, in effect, reduce the number of citizenship categories generally applicable to the people of Northern Ireland from three to two unless a person takes formal steps to renounce their underlying British citizenship.<sup>185</sup> For official purposes, such individuals are either British citizens or dual nationals with both UK and Irish citizenship.

The *De Souza* litigation explores the meaning of birthright and identity within these provisions, and is the subject of a legal analysis prepared for Alison Harvey for the NIHR alongside this report. As a result, this report does not cover the substance of the *De Souza* litigation, but will proceed to address how the approach adopted by the UK Home Office affects the rights of the people of Northern Ireland in the context of Brexit. The most important consequence is that the UK’s EU Settled Status scheme is closed to the people of Northern Ireland, because of the automatic nature of their underlying British citizenship.<sup>186</sup>

EU law, however, is also an imperfect fit with the GFA’s birthright arrangements. This misalignment has been increasing evident in case work which has arisen independent of the Brexit backdrop. One of the people of Northern Ireland, Gemma Capparelli, took the drastic step of renouncing her British citizenship, and attempted to rely on her Irish citizenship to secure the residency of her third-country national spouse in the UK, she found that the significant EU free movement rights (which are to be protected under Part 2 of the EU-UK Withdrawal Agreement) remained out of her grasp.<sup>187</sup>

As we illustrated in Chapter 2, EU law provides its most extensive protections, in terms of access to a wide variety of benefits and rights, to those EU citizens who move outside their home Member State (and to another Member State). The rules contained in Part 2 of the Withdrawal Agreement would therefore still have no application to Irish citizens amongst the people of Northern Ireland because, for EU law purposes, they continue to reside in the country of their birth.<sup>188</sup> They are not, as we discussed in chapter 2, mobile EU citizens. Even if the *De Souza* litigation ultimately vindicates the claim regarding the automatic imposition of citizenship breaching the GFA, a distinct question remains over the application of EU rights to the people of Northern Ireland.

182 C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* (2011) ECLI:EU:C:2011:277.

183 See ‘What Happened to the “Paragraph 52” Commitments’ (n 161) 7.

184 The Immigration (European Economic Area) Regulations 2016 (SI 2016/1052), Reg 2(1).

185 British Nationality Act 1981, s 12. This option currently costs £372 per applicant.

186 The definition of an EU/EEA/Swiss citizen eligible to apply under the Settled Status scheme, set out in the UK’s Immigration Rules Appendix EU (created under The Immigration (European Economic Area Nationals) (EU Exit) Order 2019 (SI 2019/686), Article 7), explicitly excludes EU/EEA/Swiss citizens who also hold British citizenship. Available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu> (accessed 31 January 2020).

187 See J. Vassiliou, ‘Renouncing your British citizenship is rarely a good idea’ *Free Movement Blog* (7 Nov 2018). Available at: <https://www.freemovement.org.uk/revoking-british-citizenship-northern-ireland/> (accessed 31 January 2020).

188 If they have historically exercised free movement, this does not bring them within the scope of Part 2 of the Withdrawal Agreement generally, as this only applies to those who *after the end of transition* are living in either the UK or a Member State as a ‘host state’; it merely preserves their entitlement to social security built up in a Member State under the EU social security coordination rules.



When we consider the implications of the Withdrawal Agreement, we therefore explore these in terms of two categories; people of Northern Ireland who have asserted their Irish citizenship (including Irish-UK dual nationals) and people of Northern Ireland who have only asserted their British citizenship.

### 4.3 The Withdrawal Agreement

#### 4.3.1 IRISH CITIZENS WITHIN THE ‘PEOPLE OF NORTHERN IRELAND’ CURRENTLY LIVING IN THE UK

Despite the promises of the EU-UK Joint Report that Irish citizens will ‘continue to enjoy rights as EU citizens, including where they reside in Northern Ireland’,<sup>189</sup> special provisions to this effect failed to materialise in the operative provisions of the Withdrawal Agreement. Individuals who belong to the people of Northern Ireland, and have asserted their Irish citizenship rights are in no better position by virtue of their EU citizenship if they live in Northern Ireland by comparison to other parts of the UK. In terms of rights derived from their EU citizenship, after Brexit such individuals will, under the terms of the Withdrawal Agreement, find themselves in a materially worse position than other EU citizens living in the UK. This is because Irish ‘people of Northern Ireland’ are affected by EU law’s ‘wholly internal situations’ rule, especially as it has been applied by the UK Home Office since the *McCarthy* case. On the basis of this case law, Irish citizens who were born in Northern Ireland are not covered by Part 2 of the Withdrawal Agreement, because they are ‘static’ EU citizens; they have not activated their full range of EU-law rights by moving to another Member State. Even had they previously exercised movement rights, by living in another Member State for a decade but *not* during the transition period and thereafter, they will not be captured by the rules in Part 2 beyond those on social security aggregation. Nothing in the Part 2 text suggests an exception to this general EU law exclusion of so-called ‘wholly internal situations’ for those born in Northern Ireland. In short, their rights as EU citizens will remain ‘passive’ until they move to the territory of an EU Member State.

Notwithstanding the conclusion of the Withdrawal Agreement, Irish ‘people of Northern Ireland’ thus derive their rights in UK law primarily from the fact that, under the UK Government’s interpretation of domestic law, they are automatically treated as British citizens under the British Nationality Act 1981. They can rely upon the legal protections in UK domestic law which are associated with the Common Travel Area, but do not need to do so unless they formally renounce this underlying British citizenship. The CTA, as outlined in Chapter 1, provides them with no more extensive protections than it provides to Irish citizens who are not part of the people of Northern Ireland.

The GFA provides such individuals some additional rights and additional safeguards against discrimination on the basis of aspects of their Irish identity which would continue to apply even if they formally renounce British citizenship. The GFA is, in some senses, a strong source of rights as it has the status of a treaty between the UK and Ireland and continues to be seen the foundation stone of the Northern Ireland peace process. Irish citizens who are ‘part of the people of Northern Ireland’ can therefore be reasonably assured of continued respect for the GFA provisions which have been incorporated into domestic law under the Northern Ireland Act 1998.

The GFA, for example, requires that public authorities exercising powers relating to Northern Ireland treat UK and Irish nationals who are ‘part of the people of Northern Ireland’ with ‘rigorous impartiality’ in order to secure ‘parity of esteem’ between these identities. These provisions, however, only go so far as a solution to the rights issues created by Brexit. First, recent attempts to use the GFA as a basis of

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<sup>189</sup> Joint Report (n 101) para 52.

litigation in domestic courts and tribunals have not generally been successful.<sup>190</sup> Second, the GFA does not cover aspects such as the family rights for EU migrants provided in the Withdrawal Agreement. Despite the UK Government’s headline support for the GFA in the context of Brexit, action on its specific requirements has often been deficient, as this chapter has illustrated.

#### **4.3.2 BRITISH CITIZENS WITHIN THE ‘PEOPLE OF NORTHERN IRELAND’ CURRENTLY LIVING IN THE UK**

British citizens who are part of the people of Northern Ireland and living in Northern Ireland, or anywhere else in the UK, can rely on their rights as a British citizen within their home state. They can also, as with Irish people of Northern Ireland, draw upon the protections associated with the GFA which have been incorporated into Northern Ireland’s law. People who fall into this category have not asserted their right to Irish citizenship (and with it EU citizenship). After Brexit, therefore, they will not be able to move to and reside in an EU Member State under the terms enjoyed by EU citizens under EU law (until they take steps to activate their Irish citizenship).<sup>191</sup>

#### **4.3.3 BRITISH CITIZENS WITHIN THE ‘PEOPLE OF NORTHERN IRELAND’ CURRENTLY LIVING IN IRELAND**

British citizens living and working in Ireland, including those who belong to the people of Northern Ireland, will be able to draw upon the rights associated with the Common Travel Area in Ireland, which ensures that they do not have to meet immigration or residency requirements and provides the basis for ongoing rights in fields including employment, education, health and social security. Those who belong to the people of Northern Ireland could also exercise their entitlement to claim Irish citizenship. Even if they do not, they will have exercised the ‘movement’ that will see them covered by the EU-UK Withdrawal Agreement in the same way that other UK nationals currently residing in EU Member States other than the UK have.

The EU-UK Withdrawal Agreement provides for a range of rights and enforcement mechanisms which in some regards extend beyond those of the CTA. The clearest example of such a right, provided to British citizens living or working in EU countries under the terms of Part 2 of the Withdrawal Agreement, is with regard to their ability to be joined by non-EU/EEA/Swiss family members.<sup>192</sup>

At present, however, Ireland has not set up a registration scheme covering British citizens who are exercising their rights as EU migrants. The Irish Government has taken the position that the CTA will deal with many of the rights/entitlements issues which would otherwise arise. This approach does not, however, address the issues surrounding non-EU/EEA/Swiss family members of such British citizens. Such individuals are currently being asked to register by Ireland’s Department of Justice, but the relationship between this registration process and the rights under Part 2 of the Withdrawal Agreement has not been fully articulated by the Irish Government.<sup>193</sup> At their most harsh, the relationship between registration and rights is an entirely dependent one (no rights under the WA

<sup>190</sup> See, for example, *McCord v Prime Minister* [2019] NIQB 78 and *De Souza* (n 55).

<sup>191</sup> In line with the Withdrawal Agreement’s terms relating to ‘identifying as Irish’, it is possible that something less than Irish citizenship might be accepted by the EU as a sufficient to activate these rights. Such an approach is administratively fraught with difficulties (there would need to be a mechanism to ensure that those identifying as Irish had at least some basis for doing so) and in the sensitive Northern Ireland context risks assigning (or being perceived to assign) Irishness by default.

<sup>192</sup> Withdrawal Agreement, Article 10(1)(c).

<sup>193</sup> Luke Butterly, Natalie Bloomer and Samir Jeraj, ‘Brexit: Non-EU family of UK citizens in Ireland get ‘worrying’ letters’ (18 September 2019). Available at: <https://www.irishtimes.com/news/social-affairs/brexit-non-eu-family-of-uk-citizens-in-ireland-get-worrying-letters-1.4021343> (accessed 31 January 2020).

unless registration occurs), but looser forms are possible (for example, the registration process simply being an aid to officially proving residency etc). Ultimately, however, and especially when compared to ‘people of Northern Ireland’ with Irish citizenship in Northern Ireland, it is important to note that British citizens in Ireland (and non-EEA spouses and dependents) will be protected by the Withdrawal Agreement in the same way British citizens will be in EU/EEA Member States and Switzerland.

#### 4.4 Making up for the Residency-Based Rights Shortfall

The EU rights which are lost in Northern Ireland upon Brexit are those that rely upon residency in an EU Member State, rather than the more limited rights which attach to EU citizenship itself. For all the limitations of EU citizenship rights for individuals who remain in their country of birth, Member State coordination with regard to mobile EU citizens makes extensive provision for EU citizens who move to another Member State. Three issues require particular attention: healthcare rights, democratic rights and residency rights for third-country (non-EU/EEA/Swiss) family members.

##### 4.4.1 THE EUROPEAN HEALTH INSURANCE CARD

The European Health Insurance Card (EHIC) system provides an important example of Member State coordination regarding EU migrants in practice.<sup>194</sup> As we discussed in Chapter 2, EHIC is an EU healthcare coordination system which operates when residents of one EU healthcare system require emergency medical treatment whilst short-term travelling within the EU.<sup>195</sup> Under the system, a person with an EHIC card travelling within an EU Member State (other than their State of residence) is entitled to public healthcare treatment on the same basis as a resident.

A person’s EU Member State of residence will reimburse the healthcare costs incurred by the Member State where they require treatment. The EHIC system produces benefits for individuals which are not, in express terms, EU citizenship rights, but EU citizens are the primary beneficiaries of the system. Although third-country nationals resident in an EU Member State and covered by its public healthcare system can apply for EHIC cards, some EU/EEA Member States (Denmark, Iceland, Liechtenstein and Norway), together with Switzerland, do not generally extend the coverage of this coordination scheme to them (unless they are refugees or family members of EU citizens).

EU citizens resident in Northern Ireland therefore stand to lose their entitlements under this coordination system. After the end of the transition/implementation period they will not be covered by an EHIC when travelling in an EU Member State because, being resident in Northern Ireland, their ‘home’ is no longer in a Member State. This issue could form part of EU-UK future relationship negotiations, but unless such a deal is concluded, this healthcare coordination measure will cease on 31 December 2020.<sup>196</sup>

The UK could alternatively seek to conclude specific reciprocal arrangements with individual EU Member States to make up for this shortfall. When a no-deal Brexit appeared to be an imminent possibility, the focus of UK Government policy shifted towards seeking agreements with individual EU

<sup>194</sup> The EHIC system is enabled by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L284/1, Article 25(4).

<sup>195</sup> See Chapter 2.7 above.

<sup>196</sup> Theresa May’s premiership, the UK Government had outlined that it ‘wants UK and EU nationals to continue to be able to use the European Health Insurance Card (EHIC) to receive healthcare should they need it while on holiday’. UK Government, *The Future Relationship between the United Kingdom and the European Union* (2018) Cm 9593, para 84.

Member States.<sup>197</sup> Such deals are already in place with the EEA countries and Switzerland, and non-EU countries such as Australia and New Zealand,<sup>198</sup> but the specific nature of free-at-the-point-of-use National Health Service provision can complicate such international cooperation arrangements.<sup>199</sup>

In September 2019, in light of the risk of a no-deal Brexit, the Irish Government announced that Ireland would unilaterally make up for this loss of the EHIC for Northern Ireland residents after Brexit. This announcement did not mark a bilateral deal with the UK, but the provision of an Irish equivalent of the EHIC which would cover travellers from Northern Ireland in EU/EEA Member States and Switzerland. This would not be the EHIC itself (as a creature of EU law). The Taoiseach explained the plan in the following terms:

[W]e made a commitment to do all that we could to extend the European health insurance card, EHIC, to all residents in Northern Ireland and also Erasmus+. ... The Minister for Health got approval this morning from the Cabinet to draft legislation. We intend to have that done by 31 October. That means that Irish, EU and UK citizens living in Northern Ireland will still be able to have their health expenses refunded should they require emergency medical services in another part of the European Union.<sup>200</sup>

This implied that such a scheme will operate for people resident in Northern Ireland who could have applied for an EHIC prior to Brexit (rather than being an entitlement introduced for Irish citizens in Northern Ireland). The broad scope of Ireland’s offer is determined by its legal obligations; excluding citizens from other EU Member States from accessing this EHIC-equivalent would have risked falling foul of EU non-discrimination law, and excluding British citizens would have raised GFA “parity of esteem” concerns. Whereas non-EU citizens resident in Northern Ireland can currently apply for an EHIC, they are not mentioned in the Taoiseach’s outline of an equivalent Irish scheme.

With the conclusion of the Withdrawal Agreement, the urgency went out of the proposals for an Irish EHIC equivalent; the promised draft legislation has not been published as of the end of January 2020. The problem, however, will not go away unless a comprehensive replacement or extension of EHIC is agreed in the EU-UK future relationship negotiations. In the absence of such an agreement, the crisis point for these entitlements has simply shifted to 31 December 2020.

#### 4.4.2 DEMOCRATIC RIGHTS

The democratic deficit inherent in the Withdrawal Agreement’s proposition that a broad range of EU law rules should continue to apply to Northern Ireland after Brexit has been noted since the Joint Report was first published.<sup>201</sup> UK Government ministers had referred to the Theresa May Withdrawal Agreement’s backstop arrangements as ‘undemocratic’.<sup>202</sup> The new cross-border trade arrangements for Northern Ireland – which makes the Northern Ireland Assembly the decision point for their continuation – does not alter the lack of input from Northern Ireland on the content of EU law.<sup>203</sup> On one level, these complaints need to be put in context; all EEA countries subscribe to a broader range of EU rules than would apply to Northern Ireland under the Withdrawal Agreement without any having

197 See Edward Argar, MP, HC Deb., vol.664, col.33-34WS (26 September 2019).

198 See the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019.

199 See Sylvia de Mars, ‘Managing Misconceptions about EU Citizens’ Access to Domestic Public Healthcare: An EU-Level Response?’ (2019) 25 *European Public Law* 709.

200 Leo Varadkar, Dáil Debates, 17 September 2019, 15.

201 *Discussion Paper on Brexit* (n 3) 24.

202 Dominic Raab, MP, *The Marr Show*, BBC 1 (22 September 2019) 5. Transcript available at: <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/22091902.pdf> (accessed 31 January 2020).

203 Withdrawal Agreement, PINI, Article 18.

direct input into the running of the EU institutions (the EU Council, EU Commission or European Parliament).<sup>204</sup> This does not, however, mean that nothing can be done to enhance the say of Northern Ireland’s EU citizens in these matters.

As we noted in Chapter 2, the right to vote in European Parliament elections attaches to EU citizenship: ‘Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State’.<sup>205</sup> This provision appears to tie the right to vote in EU law to residence within an EU Member State. In reality, however, the running of elections for the European Parliament is a shared competence.

When the then-EU Commission President Jean-Claude Juncker was asked in the European Parliament about voting rights for Irish citizens resident in Northern Ireland after Brexit, he responded that ‘[e]ligibility to vote and stand as candidates in elections to the European Parliament is determined by Irish law which requires Irish citizens to be ordinarily resident in Ireland’.<sup>206</sup> Ireland’s electoral law is a combination of constitutional and statutory regulation which currently limits voting to those resident and present in the state at the time of the vote. This excludes Irish citizens resident in Northern Ireland.

Ireland is an outlier in not permitting its citizens to vote in EU elections when resident in another state.<sup>207</sup> Many EU states permit their citizens to vote in EU elections when they reside in another EU Member State, provided they do not vote twice (in their home Member State and Member State of residence). The Oireachtas Committee on EU Affairs has noted that the severity of Ireland’s restriction could be subject to challenge at the CJEU.<sup>208</sup>

For as long as both Ireland and the UK are EU Member States, there is no loss of EU citizenship rights for hundreds of thousands of Irish EU citizens resident in Northern Ireland in requiring them to vote in European Parliament elections in the UK as their country of residence. The CJEU, however, has asserted that any restrictions upon the right of EU citizens to vote in elections for the European Parliament must be ‘provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others’.<sup>209</sup> The loss of EU citizenship rights on this scale after Brexit is therefore likely susceptible to legal challenge.

This shortfall can be addressed through unilateral amendment of Irish law. The recent Irish Constitutional Convention recommended the extension of voting in Presidential elections to citizens living outside the state and, as a result, the Irish Government has plans to hold a referendum on that question in the coming years. This process could provide a trigger for Ireland to re-examine all of its exclusions from the franchise, including those for the European Parliament. This is not, however, the only trigger point, and no constitutional referendum is necessary where European Parliament elections are at issue. Under sections 6 and 8 of the European Parliament Elections Acts 1997 to 2013, to be registered to vote in EU elections an individual has to be a national of an EU Member State, Ireland or the UK. Post-Brexit, this statutory framework will need to be revised to exclude the specific references to the eligibility of British citizens to vote.

204 Murray and Warwick (n 162) 58.

205 Articles 39(1) and 52(1) of the Charter of Fundamental Rights. See also Articles 10(3) and 14(3) TEU.

206 President Jean-Claude Juncker, Response to a question by M. Anderson, MEP, EN E-002232/2018 (22 June 2018).

207 See D.S. Hutcheson and J.-T. Arrighi, “Keeping Pandora’s (ballot) box half-shut”: A comparative inquiry into the institutional limits of external voting in EU Member States’ (2015) 22 *Democratization* 884.

208 Joint Committee on European Union Affairs, ‘Report on Voting Rights of Irish Citizens Abroad’ (November 2014) 31ENUA0018, 3.

209 Case C-650/13 *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* ECLI:EU:C:2015:648, para 46.

Assertions that the vote should not be provided to citizens who are resident outside of Ireland as a state, on the basis of their lack of connection with Ireland, are dubious in the connection with rights associated with EU citizenship. Irish law, moreover, already permits postal votes from non-resident voters in elections to the Seanad seats representing the National University of Ireland and Trinity College Dublin, and as noted, a referendum is planned regarding the extension of voting rights for the President of Ireland to Irish citizens resident outside of the state. The law with regard to voter eligibility for European Parliament elections in Ireland, however, is not contained within the Constitution of Ireland but within ordinary legislation.<sup>210</sup> This law could therefore be amended to protect the rights of Irish EU citizens in Northern Ireland without the need for a constitutional referendum.

Reform of Ireland’s law with regard to EU elections is not a threat to the status of Northern Ireland as part of the UK. Prior to Brexit, French citizens resident in Northern Ireland exercised their rights as EU citizens to vote in EU elections. Each EU Member State is entitled to decide the franchise within its own constituency, providing its approach does not discriminate against other EU citizens.<sup>211</sup> The CJEU has, however, ruled that Member States cannot make distinctions between the voting rights of their own nationals living outside the EU which depend upon their place of residence or birth.<sup>212</sup> If it is to be compliant with EU law, any move on Ireland’s part to extend its franchise for European Parliament elections must therefore extend generally to Irish citizens resident outside of the EU, and not be restricted to cover Northern Ireland. Although the Charter of Fundamental Rights will not, on the present Withdrawal arrangements, cover Northern Ireland after Brexit, the potential remains for Irish citizens living outside Ireland to litigate their lack of voting rights for the European Parliament in Ireland’s courts.

Ireland is also unusual amongst EU Member States in dividing up MEP representation into internal geographical constituencies.<sup>213</sup> France currently operates a single constituency candidate list – this is a common model within the EU – that includes both the territory of France and overseas territories.<sup>214</sup> Prior to 2018 France maintained eight separate constituencies including one reserved for its overseas territories.<sup>215</sup> Given the sensitivities inherent in Ireland including Northern Ireland as a territory covered by one of its constituencies (when Northern Ireland is not part of Ireland as a state), the most appropriate course of action would be for Ireland to reform its approach to European Parliament elections to enable all Irish citizens to vote on a single list of candidates for Ireland’s MEPs.

If rights to vote for Ireland’s MEPs are to be extended to Irish citizens in Northern Ireland, special arrangements will need to be made to cover the registration of voters. In this regard, it is important to note that holding an Irish passport is only one way in which Irish citizenship, and thus eligibility to vote, can be manifested.<sup>216</sup> Given the expense inherent in holding multiple passports, this special registration process should enable those within the people of Northern Ireland to assert their EU citizenship without having to first apply for an Irish passport.

210 Electoral Act 1992 (Ireland), s 9 and European Parliament Act 1997 (Ireland).

211 Case C-145/04 *Spain v United Kingdom of Great Britain and Northern Ireland* (2006) ECLI:EU:C:2006:543.

212 Case C-300/04 *Eman and Sevinger* ECLI:EU:C:2006:545; The Netherlands generally permitted Dutch nationals living anywhere in the world to vote in European Parliament elections, but excepted those with Dutch nationality born in the Netherlands’ overseas territories. This exception was declared to contravene EU law.

213 See Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press 2018) 140.

214 Law Number 509 of 25 June 2018 (France). See Mark Bassett, *Voting Rights for All* (GUE/NGL European Parliamentary Group, 2018) 10-11.

215 Law Number 224 of 21 February 2007 (France).

216 As we noted in Chapter 1, rights as an Irish citizen can be asserted, based upon *McGimpsey*, by performing an act that only an Irish citizen can do. New legislation on voting rights for Irish citizens resident in Northern Ireland could make an application under its processes suffice as such an action.



#### 4.4.3 RIGHTS FOR “THIRD-COUNTRY” FAMILY MEMBERS

The *New Decade, New Approach* agreement does not deal with the dispute at the centre of the De Souza litigation on the automatic imposition of British citizenship upon the people of Northern Ireland. It does, however, seek to address the second element inherent in that litigation: the rights of the people of Northern Ireland with regard to being joined by and residing with third-country family members. This issue is addressed in three closely worded paragraphs within the UK Government’s commitments:

The Government has reviewed the consistency of its family migration arrangements, taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it.

The Government will change the rules governing how the people of Northern Ireland bring their family members to the UK. This change will mean that eligible family members of the people of Northern Ireland will be able to apply for UK immigration status on broadly the same terms as the family members of Irish citizens in the UK.

This immigration status will be available to the family members of all the people of Northern Ireland, no matter whether they hold British or Irish citizenship or both, no matter how they identify.<sup>217</sup>

Legislation has not yet been promulgated to give effect to these commitments, but they can be interpreted as linking the rights of Irish citizens within the people of Northern Ireland to those of other Irish citizens. This approach would ignore the impact of the underlying British citizenship of all of the people of Northern Ireland.

Irish nationals resident in the UK who are not part of the people of Northern Ireland, it must be noted, do not gain any special residence rights for third-country national family members as a result of the CTA. At present, they gain such rights as EU citizens, and such rights will only continue if they are resident in the UK ahead of the expiration of the Withdrawal Agreement’s transition/implementation period, and they are granted settled or pre-settled status under the UK’s EU Settlement Scheme. As such, these provisions might amount to little change in practice (and their impact might elapse in a matter of months). An alternate, and preferable, reading of these provisions would require the development of special CTA family member rights akin to those available under the EU Settlement Scheme.

#### 4.4.4 PARITY-OF-ESTEEM CONSEQUENCES

Efforts to address these rights shortfalls will potentially create disparities in the rights of different groups in Northern Ireland. There is clear danger that the GFA’s requirement of parity of esteem will be come under increasing pressure (especially as the UK and EU pursue different paths on rights and social protection in the future). There has been no overarching response to this concern in *New Decade, New Approach*. For all this agreement’s provisions relating to identity, the implications of Brexit are relegated to its margins.<sup>218</sup>

The UK, Ireland, and the political parties of Northern Ireland should therefore recommit to the terms of the GFA’s parity of esteem principle in a new agreement. Such an agreement should set out how

<sup>217</sup> *New Decade, New Approach* (n 166) Annex A, para 13-15.

<sup>218</sup> See Clare Rice, *Briefing on: The ‘New Decade, New Approach’ deal in Northern Ireland – Governance and Identity* (24 January 2020) 7-8. Available at: <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/22091902.pdf> (accessed 31 January 2020).



emerging divergences (including those that emerge as attempts to correct EU rights losses) will be handled within Northern Ireland and across the island of Ireland, and how they will be monitored. This could involve a levelling up arrangement whereby differences would be remedied according to a set time frame by the jurisdiction with lower rights standards. Such an agreement would require robust, well-resourced, all-community, all-island monitoring mechanisms to highlight divergences promptly and sensitively.

## 4.5 Conclusion

In terms of rights derived from EU citizenship, this chapter has illustrated that the conclusion of the Withdrawal Agreement between the UK and the EU makes strikingly little difference for the people of Northern Ireland. As we noted in Chapter 3, the Withdrawal Agreement does retain important EU law protections in the law of Northern Ireland (most prominently with regard to EU discrimination law). But these protections are not EU citizenship rights and do not apply on that basis.

Residency in an EU Member State is essential to the operation of EHIC and many other EU law rights/entitlements, illustrating how little being an EU citizen in Northern Ireland will mean in practice after Brexit. Other examples are the EU rights to provide services under the free movement of services, which will be available for Northern Ireland’s EU citizens when they move to an EU Member State, but will not be available to them in Northern Ireland itself, as Northern Ireland will no longer be part of a Member State after Brexit. By the same token, unless already ‘established’ in the UK by the end of the transition period, EU citizens will also not be able to draw upon EU ‘rights’ in establishing or operating businesses in the UK (including Northern Ireland) after Brexit under the Withdrawal Agreement.<sup>219</sup>

Northern Ireland will become territory outside of the EU on the day of Brexit, and at that point most of the rights of EU citizens within Northern Ireland will cease to have meaningful effect, until such a person moves into the territory of an EU Member State. The limited rights EU citizens in Northern Ireland continue to hold is the right to diplomatic or consular protection from any EU embassy if they travel abroad (which will be important for Irish citizens if Irish consular or embassy services are unavailable in a particular third country or difficult to access), and several of the ‘access to EU institution’ rights set out in Title V of the Charter of Fundamental Rights.<sup>220</sup> These are the only EU citizenship rights that are not dependent on moving to, or working in, an EU Member State.

## 4.6 Recommendations

- Residents of Northern Ireland will, at present, lose access to the EHIC system after the end of the Brexit transition/implementation period, regardless of whether they have the status of EU citizens. This loss of entitlements as a result of Brexit could be addressed by the UK and EU negotiating a continuation of UK access to healthcare coordination under EHIC as part of future relationship negotiations. If it is not, we recommend that the Irish Government reactivate its proposals to introduce an Irish equivalent to the EHIC for Northern Ireland residents.
- The right to vote in European Parliament elections attaches to EU citizenship, but the running of elections for the European Parliament is a shared competence. Ireland is an outlier in not permitting its citizens to vote in EU elections when resident outside its

<sup>219</sup> The CTA compensates for this loss, to some extent, for people with British and Irish citizenship who wish to work anywhere on the island of Ireland, but as we discuss in Chapter 5, does not address the lost rights of other EU citizens resident in Ireland and Northern Ireland.

<sup>220</sup> See Chapter 2.3.

territory (with exceptions to prevent EU citizens voting for MEPs twice) and in dividing up MEP representation into internal geographical constituencies. Ireland should therefore be encouraged to take steps to legislate to reform its European Parliament constituencies into a single list and extend European Parliament voting rights to Irish nationals resident outside of the EU.

- The UK Government has made unclear commitments regarding third-country family member rights under *New Decade, New Approach*. We recommend an expansive interpretation of these commitments, and that the UK produce CTA-related legislation to provide Irish citizens resident in the UK with third-country family residence rights akin to those available under the EU Settlement Scheme regardless of whether those Irish citizens have moved to the UK under the CTA or belong to the people of Northern Ireland.
- Brexit creates the potential for new gaps in the rights of different groups of individuals living within Northern Ireland that endangers the GFA’s requirement of parity of esteem. We recommend that the UK, Ireland, and the political parties of Northern Ireland should recommit to the terms of the parity of esteem principle in a new agreement. Such an agreement should set out how post Brexit divergences in rights provisions in Northern Ireland and across the island of Ireland will be monitored and addressed.

## Chapter 5: Brexit and Other Rights Holders

### 5.1 Introduction

The Joint Report of 2017 appeared to separate out ‘the people of Northern Ireland’ as a special class of rights holder who would continue to enjoy EU rights within Northern Ireland after Brexit. The previous chapter detailed how this pledge has fallen flat. But if ‘the people of Northern Ireland’ do not derive EU rights from this status after Brexit, this chapter addresses whether other groups which are connected to Northern Ireland and Ireland will enjoy any special rights protections under the EU-UK Withdrawal Agreement. This includes the operations of protections for EU citizens in Part 2 of the Withdrawal Agreement which we have already addressed in Chapter 3, but we must also note that these protections extend to EEA and Swiss nationals under the EEA EFTA Separation Agreement.<sup>221</sup> Most of the chapter addresses the rights of people who are both living and working in the UK or Ireland, but in the later part of the chapter we consider the particular position of frontier workers (which can encompass people living in Northern Ireland and working in parts of the EU, or vice-versa).

### 5.2 Irish and British citizens not part of the people of Northern Ireland

#### 5.2.1 THE WITHDRAWAL AGREEMENT AND IRISH CITIZENS RESIDENT IN THE UK

Irish citizens who are not part of the people of Northern Ireland have frequently been presented as a well-catered-for group relative to other EU/EEA citizens. As the UK Home Secretary asserted in September 2019:

Irish citizens will continue to be able to enter, live and work in the UK without requiring permission. The UK and Irish Governments have made firm commitments to protect Common Travel Area arrangements, including the associated rights of British and Irish citizens in each other’s state.<sup>222</sup>

The status of Irish citizens living in the UK after Brexit is, however, more complicated than this statement suggests. In the event of a Brexit deal, Irish citizens resident in the UK will be able to rely upon two potential sources of rights: the Withdrawal Agreement (together with its related measures in UK domestic law), and the Common Travel Area (and its related measures in UK domestic law).

The CTA, as we discussed in chapter 1, covers an Irish citizen’s right to movement to and within the UK, provides a right to reside in the UK, and allows them to work in the UK. Irish citizens resident in the UK are entitled under the CTA arrangements to health care, social protection, social housing, education, and voting rights on the same basis as British citizens. These are substantively strong commitments, aligning the rights and entitlements of Irish citizens resident in the UK with those enjoyed by British citizens. Only in a situation where the provision for British citizens (e.g. for health care or social protection) was cut back would Irish nationals also suffer an equivalent loss of provision under the CTA arrangements.

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<sup>221</sup> *Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom’s membership of the European Union* (20 December 2018). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/861908/MS\\_1.2020\\_Agreement\\_on\\_arrangements\\_between\\_Iceland\\_Liechtenstein\\_Norway\\_and\\_UK\\_following\\_withdrawal\\_of\\_UK\\_from\\_EU\\_EEA\\_agreement\\_and\\_other\\_agreements\\_applicable\\_UK\\_and\\_EEA\\_EFTA\\_States.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/861908/MS_1.2020_Agreement_on_arrangements_between_Iceland_Liechtenstein_Norway_and_UK_following_withdrawal_of_UK_from_EU_EEA_agreement_and_other_agreements_applicable_UK_and_EEA_EFTA_States.pdf) (accessed 31 January 2020).

<sup>222</sup> Priti Patel, MP, HC Deb., HCWS1817 (4 September 2019).

Both the UK and Irish Governments have emphasised the importance of the CTA, and it has long been accommodated in EU law (and is accommodated under the Withdrawal Agreement).<sup>223</sup> Both governments have also made moves to agree a common position with regard to the CTA, through a Memorandum of Understanding between the two countries on the CTA’s general application,<sup>224</sup> a binding sectoral agreement on social security,<sup>225</sup> and related domestic legislation.<sup>226</sup> While both governments indicate that work on other sectors is at an advanced stage, it remains the case that detailed sectoral agreements on crucial areas such as health, immigration and education are still needed and that domestic legislation is required to sustain many of the CTA’s ‘associated reciprocal rights and privileges’.<sup>227</sup> This underscores the weakness of the Common Travel Area as a source of rights: they are dependent upon UK-Irish government relations, and are only enforceable in front of domestic courts to the extent that domestic law has been put in place to provide for them.

By contrast, the Withdrawal Agreement provides for a more legally unambiguous set of rights, as it is a detailed text with a range of rights enforcement and monitoring mechanisms built in. Under the Agreement, Irish citizens are treated as any other EU citizen. This would mean that Irish citizens who fulfilled the UK residency requirements prior to the end of the transition/implementation period (ending on 31 December 2020 if not extended<sup>228</sup>) are entitled to the protections of Part 2 of the Withdrawal Agreement.<sup>229</sup> In addition to residency, the Withdrawal Agreement allows the UK to require EU citizens in the UK to register in order to take advantage of its terms.<sup>230</sup> The UK, as discussed in chapter 3, instituted this process through the EU Settlement Scheme.<sup>231</sup>

Irish citizens in the UK have been explicitly advised by the UK government that they do not need to engage with the Settled Status scheme in order to continue to enjoy their rights in the UK. In the following terms, UK government advice notes; ‘[y]ou do not need to apply if you have ... British or Irish citizenship (including ‘dual citizenship’)’.<sup>232</sup> This assurance has, quite understandably, led the large number of Irish citizens living in the UK to regard the Settled Status scheme as irrelevant to them. In light of the clear nature of these assurances, it would potentially be unfair for the UK Government to reduce the protections associated with the CTA to the detriment of individuals who relied upon them. The terms of some UK Government statements have indeed been so unqualified that they could have created legitimate expectations amongst Irish citizens about the extent of the CTA’s protections relative to the Settled Status scheme.<sup>233</sup> It would, nonetheless, be burdensome for an individual to vindicate such a claim under UK administrative law, and the outcome uncertain,<sup>234</sup> so we turn to discuss what Irish citizens would gain from signing up to the Settled Status scheme.

The UK Government’s advice to Irish citizens is premised upon claims that the CTA secures rights and entitlements that are at least as substantial, and in many cases more substantial, than those

223 Protocols 19-21 attached to the TFEU; Withdrawal Agreement, Article 39(2).

224 MoU (n 63).

225 Convention (n 63).

226 The UK through The Social Security (Ireland) Order 2019 (SI 2019/622) and Ireland through the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019.

227 MoU (n 63) para 1.

228 Withdrawal Agreement, Article 126.

229 Withdrawal Agreement, Article 10(1)(a).

230 Withdrawal Agreement, Article 18.

231 See Chapter 3.3.

232 UK Government, ‘Apply to the EU Settlement Scheme (settled and pre-settled status)’. Available at: <https://www.gov.uk/settled-status-eu-citizens-families/eligibility?step-by-step-nav=0c79b832-75de-4854-8154-d62774a8dfb8> (accessed 31 January 2020).

233 See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; [2009] 1 AC 453, [62].

234 Unincorporated treaties cannot ordinarily form the basis of legitimate expectations in UK administrative law, so it may be particularly difficult to rely on statements regarding the effect of the CTA, which is not based upon a binding treaty; see S. Patel, ‘Founding Legitimate Expectations on Unincorporated Treaties’ (2010) 15 *Judicial Review* 74, 76.

of the Withdrawal Agreement. This position is likely the product of a desire to avoid the additional administrative burden of more than half a million Irish registrants to the Settled Status scheme. The Irish Government, too, has maintained that for most Irish citizens living in the UK it sees no need to register under the Settled Status scheme.<sup>235</sup> From the outset of the scheme, however, the UK Government has asserted that it operates ‘without prejudice to Common Travel Area arrangements between the UK and Ireland’; Irish citizens can apply for Settled Status without this undermining their CTA related rights.<sup>236</sup>

It is important to stress that there may be reasons for them to do so. The CTA will not provide Irish citizens resident in the UK before the end of the Withdrawal Agreement’s transition/implementation period with all of the benefits enjoyed by those with Settled Status. Observers have consistently warned that key differences exist between the citizens’ rights and entitlements which are provided through the Settled Status scheme and those which otherwise exist for Irish citizens in the UK.<sup>237</sup> The first key difference is that the rights of Irish citizens would be bound in with the rights of other EU citizens, making breaches of rights by the UK a priority issue for the EU as a whole. The second key difference is the legal certainties and sources of Withdrawal Agreement rights. The Withdrawal Agreement is a detailed legal text that cross references even more detailed provisions of EU law, and which reflects the CJEU’s established case law.<sup>238</sup> The UK is required to ensure its domestic law gives effect to the terms of the Withdrawal Agreement in a manner equivalent to the way that EU law applies in Member States.<sup>239</sup> The Withdrawal Agreement also includes a range of mechanisms, including CJEU oversight during the transition/implementation period, to monitor the UK’s performance of its obligations. The rights of EU citizens (including Irish citizens) are thus underwritten by the terms of a wide-ranging and high-profile agreement between the UK and EU and breaching that agreement would entail potentially significant political, legal and economic costs.

Without registration under the Settled Status scheme, Irish citizens resident in the UK before Brexit will lose out on the legal certainty and enforcement mechanisms available to them as of right under the Withdrawal Agreement. Most aspects of the Withdrawal Agreement and its enforcement mechanisms are not available to unregistered EU citizens. By contrast, the CTA Memorandum of Understanding concluded in May 2019 lacks the EU-UK Withdrawal Agreement’s enforcement mechanisms and instead relies upon the operation of ‘a group of senior officials from both jurisdictions ... which will meet at least once a year’.<sup>240</sup> The workings of this group could usefully be expanded upon, by increasing the frequency of its meetings and by providing an explicit route for civil society and statutory rights bodies to inform its workings.

The Memorandum of Understanding, moreover, explicitly states that it is not intended to create legally binding obligations and the prospects of relying upon it before the UK’s domestic courts are therefore limited.<sup>241</sup> While it might be argued that a strong bilateral relationship between the UK and Ireland protects the CTA-related rights and entitlements, it remains clear that as a legal matter, there are few

235 Embassy of Ireland, ‘Ambassador O’Neill’s letter to the Irish World on the Common Travel Area’ (21 March 2019). Available at: <https://www.dfa.ie/irish-embassy/great-britain/news-and-events/latest-news/ambassador-oneills-letter-to-the-irish-world-on-the-common-travel-area.html> (accessed 31 January 2020).

236 HM Government, *The United Kingdom’s Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU* (2017) Cm. 9464, para 5. Note, as discussed in Chapter 4, this is not available to Irish citizens who are part of the people of Northern Ireland, unless they renounce their underlying UK citizenship.

237 Colin Gannon, ‘Irish in UK should register as EU citizens, lawyers warn’ (21 November 2018). Available at: <http://www.theirishworld.com/irish-citizens-uk-register-eu-citizens-lawyers-warn/> (accessed 31 January 2020).

238 Withdrawal Agreement, Article 4(4).

239 Withdrawal Agreement, Article 4(2). It has done so through the EU (Withdrawal Agreement) Act 2020, s 5 and s 26(2).

240 MoU (n 63) para 16.

241 MoU (n 63) para 17.

routes for an individual Irish citizen to oblige the UK to address any deficiencies in its CTA provision.

In addition to these enforcement concerns, there are substantive differences in the scope of citizens’ rights and the CTA that are not brought to the attention of applicants by the UK’s official advice. While the CTA provides for some rights and entitlements which are more extensive than those available under the Withdrawal Agreement, the Withdrawal Agreement covers areas that are not protected by the CTA (such as non-EU/EEA/Swiss family rights, as we discussed in chapters 2, 3 and 4). The Irish Ambassador to the UK noted this discrepancy in his advice to Irish citizens resident in the UK; ‘Irish people will not have to register for Settled Status, although there are specific circumstances (such as having a spouse who is neither Irish or British) where you may wish to do so’.<sup>242</sup>

A choice between these mechanisms is not imposed on Irish citizens (beyond noting, as we discussed in chapter 4, that the settled-status rights under Part 2 of the Withdrawal Agreement are not open to dual Irish-UK nationals, including those belonging to the ‘people of Northern Ireland’). Irish citizens registering for Settled Status are entitled to make use of both sets of rights. In practice, therefore, Irish citizens resident in the UK prior to Brexit will only secure the full range of their rights and enforcement mechanisms if they register for Settled Status. Irish citizens who have registered in the UK for Settled Status could – in a ‘deal’ scenario – enforce their rights before courts and rely on CJEU oversight for a further 8 years, but Irish citizens who do not register and rely solely on the CTA will find that many of their rights and entitlements exist at the mercy of UK-Irish relations and the UK’s legislative process.

### 5.2.2 THE WITHDRAWAL AGREEMENT AND BRITISH CITIZENS RESIDENT IN IRELAND

British citizens resident in Ireland before the end of the Withdrawal Agreement’s transition period will find themselves in a similar position to Irish citizens living in the UK. They will be able to rely on the Withdrawal Agreement and the Common Travel Area as sources of rights. In the event of a deal, their position is somewhat more advantageous than their Irish opposite-numbers, however. Unlike the UK’s registration of EU citizens under its Settled Status scheme, the Irish Government has not chosen to run such a scheme.<sup>243</sup> This means that British citizens should be able to enjoy benefits of the Withdrawal Agreement without the need for registration.

The Common Travel Area arrangements provide all British citizens the right to movement to and within Ireland, provides a right to reside in, and allows them to work in Ireland. UK residents in Ireland are entitled under CTA-related arrangements in domestic law to health care, social protection, social housing, education, and voting rights in local and national parliamentary elections on the same basis as Irish nationals. These arrangements are subject to the same political and enforcement contingencies described in Chapter 5.2.1.

In the same way that the Withdrawal Agreement provides for EU/EEA and Swiss citizens resident in the UK to continue to enjoy their accumulated rights, a deal will also protect many of the rights of British citizens resident in an EU Member State, including Ireland, after Brexit.<sup>244</sup> As the Irish Government has chosen not to require registration of British citizens, those who are currently resident in Ireland will

<sup>242</sup> Embassy of Ireland (n 234).

<sup>243</sup> The UK arguably had more reason to run such a scheme because of the restrictions on the rights of EU/EEA/Swiss citizens inherent in Brexit, whereas Ireland will only have to process British citizens, with the maintenance of the CTA protecting most important rights they enjoy in Ireland.

<sup>244</sup> Note, however, that it does not protect the ability of British citizens to move freely between EU Member States, but their right to reside in the EU Member State of residence at the date these provisions of the Agreement take effect; Withdrawal Agreement, Article 10(1)(b).



roll over their accumulated EU residency rights in Ireland into the new legal basis provided under the Withdrawal Agreement. As we discussed in chapter 4 (with regard to British citizens resident in Ireland who are part of the ‘people of Northern Ireland’), the Withdrawal Agreement will be a particularly important source of rights for British citizens with non-EU/EEA/Swiss family members. The CTA does not address ‘family rights’, and the EU provisions are significantly more generous than domestic equivalents in immigration law. Ireland, as we noted above, is belatedly seeking to register British citizens with non-EU/EEA/Swiss family members who stand to be covered by these arrangements.

For many, the basis of their continued rights in Ireland (the Withdrawal Agreement or CTA) will be entirely irrelevant, but where the rights of non-EU/EEA/Swiss family members are at issue, or if enforcement action is necessary, the Withdrawal Agreement would in most cases be more a more effective basis than the CTA.

### 5.2.3 MOVEMENT AFTER THE END OF THE AGREED TRANSITION/IMPLEMENTATION PERIOD

Notwithstanding the provisions of the Withdrawal Agreement, Irish citizens moving to the UK, and British citizens moving to Ireland will continue to be able to rely on the full scope of the CTA after the end of the transition/implementation period agreed between the UK and the EU—insofar as movement between the UK and Ireland is concerned, at least. This prevents some of the potential stark disparities, which we will cover in the next section, which will set in with regard to movement and residency rights for other EU/EEA and Swiss nationals, with regard to the UK and for British citizens with regard to the remainder of the EU/EEA and Switzerland after 31 December 2020. Movement under the CTA, it should nonetheless be noted, will not be subject to the Withdrawal Agreement’s protections.

## 5.3 Non-Irish EU/EEA/Swiss citizens resident in the UK before Brexit

### 5.3.1 WITHDRAWAL AGREEMENT

Setting to one side the special CTA provisions covering Irish citizens, for any other EU/EEA/Swiss citizens ‘who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period’,<sup>245</sup> rights of residence will endure for as long as they remain continuously resident in the UK. Continuity is defined in EU law, which the Withdrawal Agreement draws upon, as not being affected by ‘temporary absences not exceeding a total of six months a year ... or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness...’<sup>246</sup> The Withdrawal Agreement (EEA EFTA Separation Agreement) affords EU/EEA/Swiss citizens resident in the UK in line with these terms a right of non-discrimination,<sup>247</sup> meaning they cannot be differentiated from British citizens (or each other) on the basis of nationality.<sup>248</sup> The Withdrawal Agreement thus secures the rights of EU/EEA/Swiss citizens resident in the UK ahead of the end of the transition period.

For those EU/EEA/Swiss citizens who have been continuously resident<sup>249</sup> in the UK for five or more years, the Withdrawal Agreement provides for a right of permanent residence.<sup>250</sup> The five years can

<sup>245</sup> Withdrawal Agreement, Article 10(1)(a).

<sup>246</sup> Withdrawal Agreement, Article 15(2); Citizenship Directive, Article 16(3).

<sup>247</sup> Withdrawal Agreement, Article 12.

<sup>248</sup> Note that the Withdrawal Agreement explicitly allows the UK to treat Irish citizens more favourably than other EU/EEA and Swiss citizens as a result of the two countries’ bilateral CTA arrangements; Withdrawal Agreement, Article 38(2).

<sup>249</sup> See Citizenship Directive, Article 16(3).

<sup>250</sup> Withdrawal Agreement, Article 15(1).



be accumulated both before and after the end of the transition period (but for the reasons covered in the previous paragraph, the period of accrual would need to begin prior to the end of the transition period).<sup>251</sup> For example, any EU/EEA/Swiss citizen resident in the UK for 9 months before the end of the transition period and 51 months after the end of the transition period would qualify for permanent residency (as long as all other criteria are met). This right of permanent residence comes with the same non-discrimination conditions as described above.<sup>252</sup> Once acquired, the right of permanent residence is lost only ‘through absence from the host State for a period exceeding five consecutive years’.<sup>253</sup>

As discussed above, the Withdrawal Agreement allows (but does not oblige) the UK to require EU/EEA/Swiss citizens to register in order to retain their rights. The UK has been engaged in such a registration process under its Settled Status and Pre-Settled Status schemes. Pre-Settled Status provides leave to remain for five years for EU/EEA/Swiss citizens who have residency in the UK ahead of the cut-off date, but have not at their date of application demonstrated five years of continuous residence, whereas indefinite leave to remain under Settled Status is afforded to those who are able to demonstrate that they have met this residency requirement. Once a person with Pre-Settled Status can demonstrate five years of continuous residence they can convert to Settled Status.<sup>254</sup> The running of this scheme has been beset by problems including technological issues<sup>255</sup> and apparent errors (with applicants with clear claims being rejected).<sup>256</sup> Large number of eligible individuals have yet to apply.<sup>257</sup>

### 5.3.2 MID- TO LONG-TERM

Following the conclusion of the Withdrawal Agreement, the rights of EU/EEA/Swiss citizens resident in the UK are fixed and secured under this deal, and might even be augmented in an EU-UK Future Relationship Agreement. It should be noted, however, that these rights are not completely the same as those which exist under EU law. New deportation thresholds (lower than those which currently pertain under EU law) are already on the UK statute book and will, after Brexit, apply to anyone with Settled Status or pre-Settled Status.<sup>258</sup> Beyond that, however, we can conclude ‘future relationship’ negotiations commencing in 2020 will not diminish the rights held by those EU/EEA/Swiss citizens covered by the Withdrawal Agreement.

## 5.4 Non-Irish EU/EEA/Swiss citizens resident in the UK after Brexit

### 5.4.1 WITHDRAWAL AGREEMENT

EU/EEA/Swiss citizens who move to the UK after the end of the transition period are afforded no rights by the Withdrawal Agreement or any other arrangement. As things stand, their status will be entirely dependent upon UK domestic law and policy. The current UK Government intends to introduce a

<sup>251</sup> Withdrawal Agreement, Article 16.

<sup>252</sup> Withdrawal Agreement, Article 12.

<sup>253</sup> Withdrawal Agreement, Article 15(3).

<sup>254</sup> Immigration Rules Appendix EU (created under The Immigration (European Economic Area Nationals) (EU Exit) Order 2019 (SI 2019/686), Article 7). Available at <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu> (accessed 31 January 2020).

<sup>255</sup> See Lisa O’Carroll, ‘Flawed Home Office app stops EU citizen getting settled status’ *The Guardian* (15 July 2019). Available at <https://www.theguardian.com/politics/2019/jul/15/flawed-home-office-app-stops-eu-citizen-getting-settled-status> (accessed 31 January 2020).

<sup>256</sup> See Amelia Gentleman, ‘Rise in EU citizens not getting UK settled status causes alarm’ *The Guardian* (30 August 2019). Available at: <https://www.theguardian.com/politics/2019/aug/30/eu-citizens-uk-settled-status-alarm> (accessed 31 January 2020).

<sup>257</sup> See Guardian Readers, ‘EU citizens: are you experiencing settled status issues in the UK?’ *The Guardian* (29 August 2019). Available at <https://www.theguardian.com/politics/2019/aug/29/eu-citizens-are-you-experiencing-settled-status-issues-in-the-uk> (accessed 31 January 2020).

<sup>258</sup> The Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019/745), Reg 43.

points-based immigration system whereby applicants are admitted to the UK based on labour market and other needs.<sup>259</sup>

Following the adoption of the Withdrawal Agreement, the next stage of the Brexit negotiations will cover the future relationship between the UK and EU. The Political Declaration attached to the Withdrawal Agreement makes clear those negotiations will address ‘mobility of persons’, but equally make clear that this will involve more limited rights than EU free movement of persons does.<sup>260</sup>

#### 5.4.2 MID- TO LONG-TERM

The rights of EU/EEA/Swiss citizens seeking to move to, and reside in, the UK after Brexit are at present highly contentious issues in UK politics. There is widespread pressure for immigration from the EU/EEA/Swiss to be ‘controlled’, based upon reasons of necessity, economic self-interest, political palatability, and the needs of reciprocal agreements. ‘Future Relationship’ negotiations and other forms of negotiation with the EU might create a range of exceptions to this general picture, but successive UK Government has regularly emphasised their desire to remove advantages applicable to EU/EEA/Swiss citizens (which currently apply under EU free movement law) and thereby make immigration law ‘fair’ by introducing a level playing field generally applicable to third-country nationals.<sup>261</sup> Therefore, it can be inferred that the present UK Government’s priority will be to avoid commitments which involve a special status for EU/EEA/Swiss citizens moving to the UK after the completion of Brexit.

### 5.5 Frontier Workers

#### 5.5.1 WITHDRAWAL AGREEMENT

EU/EEA/Swiss citizens, including Irish citizens, who work but do not reside in the UK fall into the category of cross-border or, in the technical language of EU law, ‘frontier’ workers. The Withdrawal Agreement includes a specific provision on these frontier workers: ‘Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and will continue to do so thereafter’.<sup>262</sup> The UK’s European Union (Withdrawal Agreement) Act 2020 makes provision for the UK Government to make regulations to give effect to the Withdrawal Agreement’s protections for EU/EEA/Swiss frontier workers.<sup>263</sup>

A frontier worker is defined in EU law as ‘any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week’.<sup>264</sup> The Withdrawal Agreement maintains this definition for as long as the UK is in the transition/implementation period towards leaving the EU. Under the Withdrawal

259 See Home Office and UKVI, ‘New immigration system: what you need to know’ (28 January 2020). Available at: <https://www.gov.uk/guidance/new-immigration-system-what-you-need-to-know> (accessed 31 January 2020).

260 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] OJ C34/1, Part 1 Title IX.

261 The outline of the post-Brexit system characterises the proposed change as the implementation of ‘a new, fairer immigration system that prioritises skills and what people can contribute to the UK, rather than where they came from’; Home Office, ‘Policy Paper: No deal immigration arrangements for EU citizens arriving after Brexit’ (5 September 2019). Available at: <https://www.gov.uk/government/publications/no-deal-immigration-arrangements-for-eu-citizens-moving-to-the-uk-after-brexit/no-deal-immigration-arrangements-for-eu-citizens-arriving-after-brexit> (accessed 31 January 2020).

262 Withdrawal Agreement, Article 10(1)(c). The resultant status protections for EU frontier workers are contained in Articles 24(3) and 25(3) of the Withdrawal Agreement, and for EEA/Swiss frontier workers in Articles 23(3) and 24(3) EEA/EFTA Separation Agreement.

263 European Union (Withdrawal Agreement) Act 2020 (UK), s 8.

264 Citizenship Directive, Article 1(f).

Agreement, the protections for frontier workers will therefore apply to anyone who can be included in the frontier worker category before 31 December 2020 at the latest.

As the *Discussion Paper on Brexit* prepared for the Joint Committee in 2018 noted, the best estimates available ‘suggest that there are around 9,000 Northern Ireland residents working in Ireland and 9,000 Irish residents working in Northern Ireland, and there will be further Great Britain residents travelling to Ireland for work and vice versa’.<sup>265</sup> In response to requests for more precise and up-to-date information, the UK Government has admitted that it has ‘not made an estimate of the number of frontier workers resident in Ireland and working in Northern Ireland’.<sup>266</sup>

The image sometimes cast of a frontier worker in the UK context is of someone in a high-paid job shuttling between a home in London and a job in another European capital. In the context of the island of Ireland, however, frontier workers belong to all socio-economic strata. The dramatic increase in their number in recent decades is a mark of the integration of the all-island economy. Because employment and social security rights ordinarily relate to the country in which someone works, the wide range of frontier workers working in Ireland increases the complexity of the issue. The Withdrawal Agreement’s frontier worker provisions create obligations for the UK with regard to UK residents (encompassing British citizens and EU/EEA/Swiss citizens) working in Ireland, and for Ireland with regard to residents of Ireland (encompassing British citizens and EU/EEA/Swiss citizens) working in the UK.

It might be thought that the CTA will deal with many of the issues posed by frontier workers (and the bilateral Agreement on Social Security of February 2019 is explicitly focused upon the rights of people who work, and accrue social security rights, in one of the CTA’s jurisdictions and live, or go on to live, in another<sup>267</sup>). The current UK Government guidance for frontier workers prominently states that ‘Irish citizens do not need to do anything to continue working in the UK after 31 December 2020’.<sup>268</sup> The frontier worker protections in the Withdrawal Agreement are, however, broader in application than the CTA. The Withdrawal Agreement’s terms, for one thing, do not apply only to Irish and British citizens, but also to any EU citizen who has made their home in Ireland or Northern Ireland and crosses the border between Ireland and the UK for work.

Even with regard to Irish and British citizens, the CTA has not always produced a reliable and straightforward basis for protecting rights and entitlements associated with work. A Northern Ireland resident, for example, recently had to rely upon EU law to secure the additional working tax credits to which she was entitled to support her use of a childcare provider in the Republic of Ireland.<sup>269</sup> Under EU law, people do not lose their status as frontier workers if they change jobs or have to stop work temporarily for reasons of illness, involuntary unemployment after a year or more employment, or to enable them to undertake vocational training.<sup>270</sup> Where recognition of qualifications is an element of employment, Brexit will bring consequences for the operation of the European Qualifications

<sup>265</sup> *Discussion Paper on Brexit* (n 3) 39.

<sup>266</sup> C. Nokes, MP, HC Deb., WA272856 (9 July 2019). For detailed estimates, see Centre for Cross-Border Studies, EU Reference Briefing Paper 4. Available at <http://crossborder.ie/site2015/wp-content/uploads/2016/06/CCBS-and-Cooperation-Ireland-EU-ReferendumBriefing-Paper-4.pdf> (accessed 31 January 2020).

<sup>267</sup> Convention (n 63).

<sup>268</sup> UK Home Office, ‘Right to work in the UK: frontier workers’ (19 July 2019). Available at: <https://www.gov.uk/government/publications/rights-and-status-of-frontier-workers-in-the-uk-after-brexits/right-to-work-in-the-uk-frontier-workers-2> (accessed 31 January 2020). We do not consider in the following analysis whether these assurances give rise to operative legitimate expectations in UK administrative law; in this regard see Chapter 5.2 above.

<sup>269</sup> *NB v HMRC* [2016] NICom 47, para 105. See G. McKeever, ‘Brexit, the Irish Border and Social Security Rights’ (2018) 25 *Journal of Social Security Law* 34.

<sup>270</sup> Citizenship Directive, Article 7.

Framework, which gives employers a means of assessing the equivalence of qualifications awarded in different EU Member States.<sup>271</sup> Given that the CTA currently has no equivalent mechanism, the CTA Memorandum of Understanding has prioritised the development of a system for the recognition of qualifications as ‘an essential facilitator of the right to work associated with the CTA’.<sup>272</sup>

Signing up for what the UK Government is labelling a “frontier worker permit” will therefore be a necessity for all those engaged in cross-border work to protect their full range of rights and entitlements after Brexit, and in particular those highlighted in the previous paragraph. The problem is that, at present, no system for applying frontier worker permits exists. In light of the persistent, if vague and inaccurate UK Government assurances that the CTA addresses all of these issues, there is therefore a pressing risk that people will not understand how to best protect their interests even in the event that a Brexit deal is agreed.

### 5.5.2 MID- TO LONG-TERM

The application deadline applicable to the Withdrawal Agreement’s protections for frontier workers is limited. The deal protects those who are engaged in cross-border work before 31 December 2020.<sup>273</sup> After that date, the UK Parliament will be able to impose restrictions on any non-Irish EU/EEA/Swiss citizen seeking to start work in the UK in line with the restrictions imposed on other nationals (notwithstanding the terms of any additional deal regarding the EU-UK future relationship). Whether or not a Brexit deal is secured, the rights of new EU/EEA/Swiss frontier workers in the UK will, in the near future, exist on a radically different basis to that which is currently in place.

## 5.6 Conclusion

This chapter has sought to highlight the extent to which the Withdrawal Agreement secures the status of broad groups of individuals whose rights and entitlements will be directly affected by the UK’s withdrawal from the EU. As we have established in previous chapters, while many rights are protected, even the Withdrawal Agreement will have serious consequences for many people who currently depend on EU rights as a basis for their living arrangements and livelihoods—and because of its time-limited nature, it does nothing to address the situations of those who move to the UK after the transition/implementation period ends, or who commence cross-border work on the island of Ireland at that point. In the next chapter we therefore look to some potential solutions to the most serious of these shortcomings.

## 5.7 Recommendations

- While the UK’s implementation of the Withdrawal Agreement affords family rights and enforcement mechanisms to EU/EEA/Swiss citizens who are granted pre-Settled Status and Settled Status, the CTA does not. This could leave Irish nationals resident in the UK have who not applied under the EU Settlement Scheme with fewer rights than their EU/EEA/Swiss counterparts. The UK and Irish governments have frequently emphasised that Irish nationals are not required to register in that scheme. Life changes, and Irish nationals resident in the UK could find the residency rights in the UK of their future third-country family

<sup>271</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2008] OJ C111/1.

<sup>272</sup> MoU (n 63) para 8.

<sup>273</sup> Note that frontier worker status is not necessarily ‘for life’ and can be lost by individuals in certain circumstances.

members restricted as a result of a decision not to apply under the EU Settlement Scheme. We recommend the following action to resolve this issue:

- a) The UK makes an explicit statement that it understands Irish nationals who have moved to the UK under the CTA are covered by the terms of the Withdrawal Agreement even without an application for Settled Status.
  - b) The UK and Ireland revise their guidance to Irish nationals resident in the UK to register for Settled Status. This would need to be accompanied by a widespread public information campaign.
- The CTA contains no enforcement mechanisms. Given the bilateral nature of the CTA arrangements, any litigation seeking to enforce its terms would be challenging, and inter-governmental action would be dependent upon the state of the UK-Ireland relationship. We therefore recommend the creation of a dedicated enforcement mechanism to secure rights for UK nationals in Ireland and Irish nationals in the UK. Such a mechanism could take a variety of forms:
  - a) An independent ombudsperson in the UK and in Ireland which scrutinised the extent to which the CTA rights were being vindicated. Such an ombudsperson would necessarily have close links to the work of NIHR, IHREC, and ECNI, but there is merit in a separate mechanism to allow individual complaints, to ensure specific focus on CTA rights and to engage with the CTA's specific content.
  - b) An intergovernmental oversight mechanism is created in the CTA MoU, but would benefit from more frequent meetings and an explicit route for civil society/statutory rights bodies to inform the workings of that group.
  - c) Embedding the detail of CTA entitlements into domestic law of both the UK and Ireland would be an optimal approach. This would allow domestic courts to oversee the implementation of the rights afforded. This approach would likely require the CTA commitments to be included in a formal treaty, something which both the Irish and UK governments have to-date resisted.

## Chapter 6: A More Holistic Approach?

As is evident throughout this report, citizenship is a complex and contentious phenomenon. The removal of it, and the benefits that (are perceived to) flow from it, is an even more complex and contentious proposition. Yet, the removal of a quasi-citizenship (i.e. EU citizenship) is exactly what Brexit entails for some in Northern Ireland. In our recommendations, which we thematically summarise in this conclusion, we have sought to knit together these complexities within the particular Northern Irish prioritisation of identity, parity and the birthright citizenship entitlements.

The report discussed the complexities of citizenship in some detail. It particularly dealt with the increasingly international and regional dimensions of citizenship entitlement. This, it was noted, creates an interesting mesh of entitlements and potential deprivations, the latter of which are closely regulated by international law. In the Northern Ireland context, the people of Northern Ireland experience the international character of citizenship, and the regional characteristics of citizenship which will also assert greater relevance following Brexit. This is because of the birthright commitment in the GFA, entitling the people of Northern Ireland to be British, Irish, or both. This causes them to be regulated by two separate national citizenship regimes. These two regimes (the British and the Irish), we showed, currently take different approaches. This leaves legal uncertainty (which currently finds itself in the UK courts) and difficulties for the people of Northern Ireland in understanding their fundamental (birthright) entitlements. Such divergence and confusion, in what is as sensitive an area for individuals as it is for governments, can only be addressed through close and urgent bilateral working between the British and Irish governments. An urgent resolution to such confusions is particularly urgent in light of the number of the people of Northern Ireland who are asserting a new entitlement to Irish citizenship in order to maintain EU citizens' rights.

The benefits of EU citizenship are a matter that has occupied much campaigning and thinking both in Northern Ireland and in Great Britain. We addressed the more subtle picture of the benefits of EU citizenship in chapter 2, above. In sum, however, there are fewer rights attached to EU citizenship than have generally been assumed (especially for those static and resident outside of the EU). Instead, the EU's benefits are more acutely felt in the general application of its laws rather than in specifically citizenship-linked aspects. As such, there will be a smaller rights differential than is often assumed between those in Northern Ireland with EU citizenship (including Irish citizens) and those without EU citizenship (British citizens). This rights differential is, of course, crucial to understanding the gaps that might exist in breach of the parity of esteem principle. The limitations of EU citizenship in general, and outside of the EU territory in particular, is something that – quite understandably – has been misunderstood by the general public. This requires a significant amount of raising of public awareness (a task perhaps best performed by the NIHRC and the UK Government) to avoid the damaging perception of significant parity of esteem issues arising.

While the citizenship-linked benefits and losses are of less consequence than might be thought, there are significant other harms to rights for the people of Northern Ireland. Despite the significant attention to Northern Ireland and its constitutional, territorial and trade dimensions, the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland say only a limited amount about rights. This entails a risk that foreseen and unforeseen damage to rights, and GFA ‘Rights, Safeguards and Equality of Opportunities’ provisions in particular, will arise as EU law ceases being EU law in the UK. Primary amongst these is the loss of the Charter of Fundamental Rights. We recommend that the content of the Charter is maintained as a form of ‘human rights backstop’. There are a number of routes to achieving this end, including a UK-Ireland bilateral approach, unilateral UK legislation, the NI Assembly building



the Charter into a rights instrument, presenting a consensus-driven Bill of Rights for Northern Ireland to Westminster for legislation, or through EU-UK negotiations on the future relationship.

Another structured approach to addressing rights gaps caused by Brexit is – rather than addressing the consequences of EU citizenship loss – to introduce an approximation of citizenship. In Chapter 1 we explored the efforts of various states to redefine traditional concepts of citizenship. This is not dissimilar to the proposal from the New European Campaign Group for a ‘European Greencard’ to ameliorate the consequences of Brexit for both EU and British citizens.<sup>274</sup> Under this proposal, British citizens who previously held EU citizenship and EU citizens living or working in the UK would continue to hold some of the benefits of EU citizenship after the UK’s withdrawal. The Greencard could continue to be issued to new individuals in the future. This proposal, however, has not gained traction in the UK or EU.

In the alternative, individuals living in Northern Ireland who have EU citizenship – from any of the EU<sup>27</sup> – could be offered a new status that recognises that they are living in a former EU territory and can continue to access (some) EU citizenship rights. Instead of unilateral action, such as Ireland’s plan for a replacement for the EHIC card in Northern Ireland (discussed in Chapter 4), any formulation of such a status would have to be a product of EU law, necessitating a new basis in EU Treaty law. The development of such a status would therefore mark a radical departure for the EU. Careful consideration of the operation of any such new status would also be necessary, as it would be essential that such a system operate in line with the GFA’s parity-of-esteem conditions. Establishing such a status would thus not be easy, but would make the preambular commitment in the Protocol to the continuance of ‘EU citizenship rights’ in Northern Ireland significantly more meaningful.

Much as British citizens in Northern Ireland might be concerned about the loss of EU citizenship, Irish nationals in the UK might have concerns about their ongoing rights and status as residents. The Common Travel Area, including the recent updates to it, has often been invoked as the solution to this latter set of concerns. However, as discussed in Chapters 4 and 5, there are a number of gaps in the CTA that remain outstanding. These include the weaker family rights that exist under the CTA compared with those provided for by the Withdrawal Agreement and accessed in the UK through the EU Settled Status scheme. There are additional concerns about the enforceability and monitoring of rights and entitlements that derive from the Common Travel Area. While there are provisions for monitoring mechanisms in the Withdrawal Agreement and the ability to enforce rights (for a period) in the courts, the CTA largely excludes court-based enforcement and the monitoring mechanisms are extremely minimal. We outlined a number of actions that the UK and Ireland should take to remedy this rights gap, and secure rights for Irish nationals in the UK that are equal to those of other EU nationals who enjoy Settled Status.

Finally, it is clear whatever precautionary measures are taken, Brexit opens up the potential for new and more pronounced gaps between Northern Ireland’s communities. There is a material risk to the GFA’s parity of esteem principle. No longer is the maintenance of the principle solely about the rights afforded to the two communities within Northern Ireland, or occasional changes to the citizenship laws of the UK and Ireland. Now, with Irish citizens enjoying access to EU citizenship and its related rights while British citizens do not, changes at the EU level will impact the parity of esteem between communities. This means that policy differences between the UK and the EU will have to be addressed to avoid parity of esteem issues. We recommend that this new threat to the parity of esteem principle be accompanied by a new approach. A bilateral recommitment to the principle by the UK and Irish

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<sup>274</sup> NewEuropeans, ‘#EUGreenCard/#GreenCard4Europe’. Available at: <https://neweuropeans.net/eugreencardgreencard4europe-o> (accessed 31 January 2020).



governments, in addition to a bilateral agreement on how divergences are to be addressed would be welcome. Such an agreement would need to pay close attention to the monitoring of the principle and the mechanisms and timeframe for addressing parity issues.

The complexities of disentangling the UK from the EU’s legal order are, by now, well established. For Northern Ireland, as has also been well seen, these complexities are compounded by a delicately woven set of peace principles and rights commitments. Yet, the complexities of changing citizenship add another layer. Citizenship changes involve disentangling the UK and EU legal orders, the unique Northern Ireland position, and a further set of complex and misunderstood entitlements and benefits. Brexit will affect all in Northern Ireland, but crucially the Brexit-related loss of EU citizenship and its rights will affect British citizens more. The UK and Irish governments, along with the NI Assembly, NIHRC, ECNI and IHREC, must be conscientious about identifying, remedying and explaining gaps that arise as a result of the loss of EU citizenship. Serious bilateral work, combined with unilateral legislative commitments and information campaigns, will be required to avoid substantive gaps and—just as important—the perception of gaps between Northern Ireland’s communities.

## **6.1 Recommendation**

- The New European Campaign Group proposed a ‘European Greencard’ to ameliorate the consequences of Brexit for both EU and UK citizens. For individuals living in Northern Ireland possessing EU citizenship—from any of the EU27—a similar status that recognises that they are living in a former EU territory and can continue to access their EU citizenship rights could be granted. This would be an EU based programme, but could be married to the democratic rights that Ireland itself could extend to citizens living outside of Ireland.

## Appendix 1: Summary Tables of Rights Changes

Note that these are summary tables (page 73-74) intended to give an overview of the vast range of circumstances and combinations of rights / residency / citizenships. It can, of its nature, not provide a detailed indication of the exact boundaries and nuances of each bundle of rights.

Rights after end of transition in UK									
		Withdrawal Agreement (or similar deal)				No Deal			
		Become NI Resident pre-Brexit	Become GB Resident pre-Brexit	Become NI Resident post-Brexit	Become GB Resident post-Brexit	Not resident (e.g. shorter visit)	Become NI Resident pre-Brexit	Become GB Resident pre-Brexit	Become NI Resident post-Brexit
British citizen (no Irish citizenship)									Not resident (e.g. shorter visit)
Dual UK-Irish citizen (no NI connection)									
Dual UK-Irish citizen (part of ‘people of NI’)									
Irish citizen (no British citizenship, no NI link)		Citizens’ Rights and Common Travel Area Rights		Common Travel Area Rights		Limited Common Travel Area Rights	Common Travel Area rights		Limited Common Travel Area Rights
Irish citizen (no British citizenship, but part of ‘people of NI’)*		Citizens’ Rights and Common Travel Area Rights (plus GFA Rights)	Citizens’ Rights and Common Travel Area Rights	Common Travel Area Rights (plus GFA Rights)	Common Travel Area Rights	Limited Common Travel Area Rights	Common Travel Area Rights (plus GFA Rights)	Common Travel Area Rights	Limited Common Travel Area Rights
Non-EU, Non-UK (e.g. Indian)				UK Domestic Law			UK Domestic Law		
Non-Irish EU (e.g. French)		Citizens’ Rights		UK Domestic Law			UK Domestic Law		

No change

Change, but with some clear rights provision

Change to unclear legal provision or very limited rights

\*N.B. Explicit (legal) revocation of British nationality and/or failing to meet the standards in EEA regulations for residency (such as employment or time resident), might complicate citizens’ rights claims for individuals. This will be particularly the case for individuals not currently resident in the UK (i.e. who are returning in order to establish their rights). See the Capparelli situation: <https://www.theguardian.com/uk-news/2018/oct/31/home-office-tells-northern-irish-woman-to-prove-right-to-live-in-belfast>

Rights after end of transition in Ireland						
	Withdrawal Agreement (or similar deal)			No Deal		
	Become Ireland Resident pre-Brexit	Become Ireland Resident post-Brexit	Not resident (e.g. shorter visit)	Become Ireland Resident pre-Brexit	Become Ireland Resident post-Brexit	Not resident (e.g. shorter visit)
Irish citizen (no British citizenship)	Full Irish National Rights & Full EU Law			Full Irish National Rights & Full EU Law		
Dual Irish-UK citizen (no NI connection)						
Dual Irish-UK citizen (part of ‘people of NI’)						
Non-EU, Non-UK (e.g. Indian)	Irish Domestic Law			Irish Domestic Law		
Non-Irish EU (e.g. French)						
	Full EU Law		Partial EU Law (as at present e.g. rights of tourists)	Full EU Law		Partial EU Law
British citizen (no Irish citizenship)	WA Rights and Common Travel Area Rights	Common Travel Area Rights	Limited Common Travel Area Rights	Common Travel Area rights		Limited Common Travel Area Rights
British citizen (no Irish citizenship, but part of ‘people of NI’)	WA Rights and Common Travel Area Rights (plus GFA Rights)	Common Travel Area Rights (plus GFA Rights)	Limited Common Travel Area Rights (plus GFA Rights)	Common Travel Area rights (plus GFA Rights)		Limited Common Travel Area Rights (plus GFA Rights)

No change

Change, but with some clear rights provision

Change to unclear legal provision or very limited rights











