



Preliminary Findings Report - Brexit and the Border

What is the theme?

The Common Travel Area (CTA) is an arrangement whereby UK legislation provides there are no border (i.e. passport) controls across the land border on the island of Ireland. Common EU membership has also ended customs controls. Any restriction on freedom of movement over the land border engages compatibility with the Belfast/Good Friday Agreement (GFA 1998). The planned Brexit, including Northern Irish withdrawal from the customs union and single market, changes this context, particularly as the leave campaign in the June 2016 EU referendum had a determined focus on the UK ‘taking back control of its borders’. At the same time assurances have been given that the UK does not wish for a return to the ‘borders of the past’ and the expressed aim is for the border to be as ‘seamless’ and ‘frictionless’ as possible. The practical arrangements for this are yet to be determined and much confusion remains on whether the expressed desire for an ‘invisible’ border is practically possible (given the nature of the proposed Brexit).

What are the main issues?

It is still unclear how the UK administration intends to achieve its aim of increased immigration control (including of most EU nationals) whilst not introducing border controls. The past 20 years have seen a rise in new communities settling in Northern Ireland. Some exercising their EU rights of free movement, others subject to various levels of immigration control. The GFA 1998 can be reasonably interpreted as providing for entitlements to freedom of movement within the CTA and not just the UK. The UK Government, in its own position paper on Northern Ireland, is of this view. It is worth noting in this context, that the UK is also bound by human rights commitments on internal freedom of movement (subject to potential limitations).

It is uncontested that land border controls would be deeply impractical and disruptive, given the high number of crossings and of essentially local journeys across the border. There is general political opposition to land border checks. There is also strong unionist opposition to checks between ports and airports on journeys between Northern Ireland and Great Britain. Any such checks would also engage UK commitments to freedom of movement, and could disadvantage persons who do not have passports.

In the absence of fixed border controls the UK is highly likely to take alternative measures to control migration, including of EU nationals. The UK has indicated it will exempt Irish nationals from EU checks, which will require legislation. Certain types of measures however could have serious human rights implications for minority ethnic communities. The greatest concerns are that checks will be conducted on the basis of racial profiling (the form of racial discrimination whereby persons are singled out on the basis of skin colour or other ethnic indicators); there will be a dramatically increased use of administrative detention for persons who cannot ‘satisfy’ immigration officers as to their status; and increased racial discrimination in access to services.

In 2008-9 the UK proposed ‘ad hoc’ land border checks targeting ‘non British and Irish citizens’ (who would not have to carry documents whereas all others would have). There were serious concerns from the Northern Ireland Human Rights Commission this would lead to widespread racial profiling and the proposal was defeated in the UK Parliament. However despite not having a clear legal basis (under ‘Operation Gull’) some immigration checks have taken place and 468 suspected undocumented migrants were removed in 2014/2015, at times



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within 48 hours of checks and without access to independent legal advice. There are already serious concerns about the lawfulness of ‘Operation Gull’ and racial profiling. Powers under the 2014 and 2016 Immigration Acts are also relevant. These essentially envisage the subcontracting of immigration controls to other public and private actors (private landlords, banks and building societies, driving licence agencies, hospitals and employers) with the introduction of criminal penalties and the threat of imprisonment for those who fail to comply.

The current Position Paper on Northern Ireland indicates that there are plans to increase both forms of control. The paper is limited to stating that there will be no ‘routine’ controls on the land border, opening the way for irregular controls. It also explicitly alludes to the use in-country checks by employers and the social security system as a vehicle for further migration control in Northern Ireland. Customs controls are also likely to lead to checks on people given the UK Border Force engages both customs and immigration functions. There is therefore a real risk that post-Brexit Northern Ireland will become the most ‘immigration policed’ jurisdiction on these islands, with the existing practices and problems of racial profiling being replicated on an industrial scale.

There are a range of other rights that function on a cross-border basis (including in relation to cross-border working) that could be adversely affected by Brexit. There is also a real risk that the framework for accountable policing would be undermined by the deployment of the UK Border Force into Northern Ireland.

What problems have been identified and what solutions have been proposed?

The main concern is that increased immigration enforcement as a result of Brexit will have a damaging impact on the BME community in Northern Ireland. Other rights for British and Irish citizens could also be affected. It is not possible to meet the demands of the ‘Leave’ campaign around increased immigration control without significant risks of racial profiling. It is simply not possible to seal the land border and act compatibly with the principles on which the GFA 1998 is based.

The rights of British citizens to equality of rights with Irish citizens are undermined by a Brexit that would afford continued freedom of movement in the EU for Irish and not Northern Irish British citizens. The ‘equality of citizenship’ model means that ongoing EU freedom of movement rights for British citizens in Northern Ireland should be sought, and could only be negotiated with the EU on the basis of continued freedom of movement for other EU nationals within Northern Ireland, recognising its unique circumstances. This would negate any perceived requirement for *ad hoc* border and in-country immigration checks. Continued freedom of movement into Northern Ireland under the CTA could be enshrined in the Northern Ireland Bill of Rights and/or expressly recognised as part of the Withdrawal Agreement (and, as noted elsewhere there is an urgent need for further thought on the legal basis for the CTA and the rights it supposedly provides). Practices entailing racial profiling should be explicitly outlawed and the spread of immigration control into every area of public and private life should be resisted.

The Republic of Ireland and the UK should develop an enhanced mutual visa recognition scheme which would allow migrants access to both jurisdictions on a single visa, thereby again potentially reducing any justification for increased immigration control in



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Northern Ireland. ‘Operation Gull’ should be discontinued and all UK Border Force activities must be carried out in an open and transparent manner with disaggregated figures made available for Northern Ireland. Those detained under this scheme must be provided with independent legal advice prior to removal. Among other things, immigration enforcement staff must be trained on the unlawfulness of identifying someone via racial profiling.