

ARTICLE

With or Without EU? The Common Travel Area After Brexit

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Abstract

The Memorandum of Understanding (MoU) concluded between the UK and Ireland in May 2019 provides one of the few clear legacies of Theresa May's premiership. The Common Travel Area (CTA) between Ireland, the UK, the Channel Islands, and the Isle of Man provides the basis for domestic immigration and nationality laws which permit Irish citizens to reside in the UK and for them to be treated as "not foreign" in the context of UK domestic laws concerning access to healthcare, employment, social security, political participation, and education. Yet it has long lacked legal definition. The UK and Ireland reciprocate, to a rough extent, these rights for each other's citizens. The MoU and related developments mark the first steps towards clarifying the CTA's scope. The rush to conclude this MoU and alter parts of both countries' domestic law relating to the CTA nonetheless illustrate the fragile state of Ireland–UK relations with Brexit looming. This Article explores whether these reforms will enable people who rely upon the CTA as a foundation of life outside their home country to protect their interests through litigation, and reflects upon the relationship between these arrangements and the protections for EU citizens proposed under the UK–EU Withdrawal Agreement.

Keywords: Brexit; Common Travel Area; freedom of movement; UK-EU Withdrawal Agreement

A. Legacy Issues

At the end of Theresa May's premiership, the Withdrawal Agreement¹ she had concluded with the European Union (EU) slipped out of her grasp, in something akin to a "here's-what-you-could-have-won" game show moment. Instead, she was left with the consolation prizes of the Common Travel Area (CTA) Memorandum of Understanding (MoU), signed in May 2019,² and the

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¹Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, (Nov. 25, 2018), <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration> (last visited Dec. 30, 2019) [hereinafter Draft Withdrawal Agreement]. The final Withdrawal Agreement, concluded in late 2019 after Boris Johnson became UK Prime Minister, included important amendments to the Protocol on Ireland-Northern Ireland. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, (Oct. 17, 2019), <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> (last visited Dec. 30, 2019) [hereinafter Withdrawal Agreement].

²Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and Associated Reciprocal Rights and Privileges, Ir.-U.K., (May 8, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800280/CTA-MoU-UK.pdf (last visited Dec. 30, 2019) [hereinafter MoU].

Convention on Social Security, concluded a few months earlier.³ They were intended to supplement her draft Withdrawal Agreement, which would have permitted the UK and Ireland to continue their substantive CTA arrangements.⁴ Indeed, the MoU seemingly sat ready-to-action for months, awaiting the ratification of the overarching Withdrawal Agreement.⁵ As those months passed, the UK Government's commitments to preserving the "special status" of UK and Irish citizens in each other's countries became less reassuring, especially as May could not persuade the UK Parliament to accept her draft Withdrawal Agreement and her premiership became more precarious.⁶ Her then-likely successor as Conservative leader, Boris Johnson, had already rejected key provisions of the Withdrawal Agreement relating to Ireland, threatening an imminent deterioration of UK–Ireland relations. A rush to confirm the new CTA arrangements, independent of the Withdrawal Agreement, ensued in the weeks before May announced her resignation.

This Article evaluates whether the UK and Ireland's new agreements, and related domestic law, will transcend the inauspicious circumstances in which they were concluded by "Brexit-proofing" the rights and entitlements associated with the CTA. Our focus upon the new bilateral CTA arrangements leaves to one side the pervasive influence of the UK–Ireland border, and particularly customs and regulatory arrangements, upon the UK–EU Brexit negotiations.⁷ Although these issues are connected, the CTA arrangements warrant specific analysis, and our account unfolds in three phases. First, we examine how Brexit threatens the existing CTA arrangements. Second, we explore the recasting of the CTA in light of these pressures. Third, we assess whether the additional certainty provided by the new CTA measures will do much to protect the rights at stake or reset Irish–UK relations, and how the measures relate to the proposed settled-status arrangements for EU citizens within the UK–EU Withdrawal Agreement. Our analysis leads us to conclude that these developments provide little by way of a consolation prize in terms of rights protections for many people who rely upon the CTA to conduct their day-to-day lives.

B. The Operation of the CTA

I. Immigration Arrangements

Having long operated without much debate, Brexit forced the CTA to the forefront of the UK's political discourse. Brexit's leading proponents acclaimed the CTA arrangements with David Davis, as Brexit Secretary, dismissing concerns that the UK–Ireland land border would become more difficult to traverse after Brexit with the assertion that "there was an open border before either of us was a member of the European Union, and we had the common travel area before we were members of the European Union."⁸ But little effort was made to define the CTA or

³Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Ir.-U.K., CP 49, Feb. 1, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778087/CS_Ireland_1.2019_Soc_Sec.pdf (last visited Dec. 30, 2019) [hereinafter Convention on Social Security].

⁴Draft Withdrawal Agreement, *supra* note 1; Protocol on Ireland/Northern Ireland, art. 5, (Oct. 17, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf.

⁵See Denis Staunton, *Deal Giving Reciprocal Rights for British, Irish Citizens is Signed*, THE IRISH TIMES (May 8, 2019, 8:03 PM), <https://www.irishtimes.com/news/politics/deal-giving-reciprocal-rights-for-british-irish-citizens-is-signed-1.3885417>.

⁶*Common Travel Area Guidance*, U.K. GOV'T, para. 1, <https://www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance> (last visited Dec. 30, 2019).

⁷For general coverage, see TONY CONNELLY, BREXIT AND IRELAND: THE DANGERS, THE OPPORTUNITIES, AND THE INSIDE STORY OF THE IRISH RESPONSE (2d ed. 2018) and SYLVIA DE MARS, COLIN MURRAY, AOIFE O'DONOGHUE & BEN WARWICK, BORDERING TWO UNIONS: NORTHERN IRELAND AND BREXIT (2018).

⁸614 Parl Deb HC (6th ser.) (2016) col. 54 (UK).

explain how it functioned in practice in the months before the Brexit referendum.⁹ Prior to Brexit, there was no urgency to determine the CTA's precise content, its legal status, or the extent to which it relied upon EU law.¹⁰ Arrangements upon which people moving between these jurisdictions base their daytoday lives remained opaque.

If the border in Ireland is one part of "the great wave of border creations after the First World War,"¹¹ the CTA followed as an attempt at mitigation. It was conceived in 1922 as an informal arrangement that relieved both the UK and Irish Free State of the troublesome task of immigration enforcement on the new border. Although restrictions were introduced in the early months of the Second World War, and would last for more than a decade, the CTA would be reinstated in its modern form in 1952. One of the most extraordinary aspects of these arrangements is that they have operated since then, despite being based upon "no international treaty of any kind."¹² Both the UK and Ireland have, at different times, emphasized that the CTA arrangements are not a function of binding international law but a policy maintained on the basis of mutual national self-interest. In the 1950s, Irish policy makers were adamant that the CTA did not formally bind Ireland's ability to set its own immigration policy, underscoring Ireland's status as fully independent from the UK.¹³ Various UK Governments, moreover, have used the CTA's non-binding nature to adjust the rights of Irish citizens resident in the UK, and even to unilaterally review the CTA's operation in 2008.¹⁴

In practice, the CTA's significance for Ireland has often resulted in the Irish Government swiftly acting to align with new UK immigration policies.¹⁵ The introduction of the much-criticized "direct provision" arrangements for asylum seekers in Ireland, for example, was explicitly justified on the basis that if Ireland operated a less restrictive policy towards asylum seekers than the UK, they would be enticed to move through the UK to Ireland using the CTA.¹⁶ Ireland's courts, moreover, have upheld the refusal of a visa on the basis that an individual is seeking to use Ireland purely as a means to access the UK, thereby circumventing UK checks.¹⁷ Ireland thus makes visible efforts to maintain the CTA's external face,¹⁸ which generally imposes visa requirements upon non-EU/EEA/Swiss

⁹A "you know it when you see it" heuristic prevailed, reminiscent of Justice Potter Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

¹⁰See Michael Dougan, *The "Brexit" Threat to the Northern Irish Border: Clarifying the Constitutional Framework*, in *THE UK AFTER BREXIT: LEGAL AND POLICY CHALLENGES* 53, 60–68 (Michael Dougan ed., 2017).

¹¹James Anderson & Liam O'Dowd, *Imperialism and Nationalism: The Home Rule Struggle and Border Creation in Ireland, 1885–1925*, 26 *POL. GEOGRAPHY* 934, 946 (2007).

¹²Graham Butler & Gavin Barrett, *Europe's 'Other' Open-Border Zone: The Common Travel Area under the Shadow of Brexit*, 20 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 252, 254 (2018). On the contrast between the CTA and the treaty-based Nordic Passport Union, see Protocol of Copenhagen, July 12, 1957, 322 *U.N.T.S.* 245; also concluded in the 1950s, see Päivi Leino & Liisa Leppävirta, *Does Staying Together Mean Playing Together? The Influence of EU Law on Co-operation Between EU and Non-EU States: The Nordic Example*, 43 *EUR. L. REV.* 295, 306–07 (2018).

¹³ELIZABETH MEEHAN, *FREE MOVEMENT BETWEEN IRELAND AND THE UK: FROM THE 'COMMON TRAVEL AREA' TO THE COMMON TRAVEL AREA* 22 (2000).

¹⁴See Elaine Fahey, *Swimming in a Sea of Law: Reflections on Water Borders, Irish (-British)-Euro Relations and Opting-Out and Opting-In After the Treaty of Lisbon*, 47 *COMMON MKT. L. REV.* 673, 680–81 (2010).

¹⁵For an account of the importance Ireland attached to negotiating the CTA Protocol as part of the Treaty of Amsterdam, see BOBBY McDONAGH, *ORIGINAL SIN IN A BRAVE NEW WORLD: AN ACCOUNT OF THE NEGOTIATION OF THE TREATY OF AMSTERDAM* 170 (1998).

¹⁶See Bernard Ryan, *The Common Travel Area Between Britain and Ireland*, 64 *MOD. L. REV.* 855, 873 (2001); Liam Thornton, *A View from Outside the EU Reception Acquis: Reception Rights for Asylum Seekers in Ireland*, in *THE RECAST RECEPTION CONDITIONS DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES* 49, 63–65 (Paul Minderhoud & Karin Zwaan eds., 2016).

¹⁷*Kweder v. Minister for Justice* [1996] 1 *IR* 381, 387 (Ir.).

¹⁸Aliens (Amendment) (No. 2) Order 1999, art. 5 (SI 24/1999) (Ir.), <http://www.irishstatutebook.ie/eli/1999/si/24/made/en/print>. Although the UK does not maintain comparable explicit measures for enforcing Irish rules, Ryan notes that the UK's immigration authorities could nonetheless be using more general powers to protect the CTA against abuse. See Ryan, *supra* note 16, at 865.

foreign nationals traveling between the CTA's constituent parts.¹⁹ The lists of third countries whose citizens are required by Ireland and the UK to obtain entry visas are largely aligned,²⁰ and the two countries share data on visa acceptances and refusals.²¹

The UK Immigration Act 1971 provided what were, for some time, the only significant references to the CTA in UK law.²² The Act specified that travel into the UK from the Channel Islands, Isle of Man, and the Republic of Ireland “shall not be subject to control under this Act,”²³ making exceptions for third-country citizens.²⁴ In other words, the UK permitted entry of individuals from other parts of the CTA without border checks.²⁵ Ireland long maintained equivalent arrangements but from the 1990s introduced passport checks on air travelers, on the basis that this documentation was required for an individual to demonstrate their CTA travel entitlement.²⁶ And despite the limited monitoring of cross-border travel for immigration purposes, citizens of third countries crossing the CTA's internal borders are legally required to possess any necessary permissions for entry. These lasting arrangements illustrate the continuing significance of immigration rules within the CTA framework. Ireland and the UK's special arrangements for each other's citizens, nevertheless, extend far beyond creating a free-movement zone.

II. Reciprocal Rights and Obligations

The UK Government has repeatedly emphasized its ongoing commitment to the CTA after the 2016 Brexit referendum, identifying a range of reciprocal rights and entitlements for Irish citizens in the UK—and UK citizens in Ireland—as being derived from the CTA. These include the right to work without permit, the right to access education, the right to vote in local and parliamentary elections, and the ability to access social welfare entitlements and benefits, health services, and social housing.²⁷ But the fact that the CTA was not grounded in any comprehensive legal document called into question how this catalog was assembled.²⁸ By September 2017, the UK Government and EU Commission's Brexit negotiators had mapped some 142 aspects of cross-border cooperation in Ireland and acknowledged that, of these, ninety-six were facilitated by EU law and twenty-four were facilitated by the CTA.²⁹ Even if the details of this mapping exercise were not made public until June

¹⁹See Press Release, Alan Shatter & Damien Green, Joint Statement Regarding Co-operation on Measures to Secure the External Common Travel Area Border (Dec. 20, 2011), <http://www.inis.gov.ie/en/INIS/Pages/IRELAND-UK%20ACCORD%20TO%20FURTHER%20SECURE%20THE%20COMMON%20TRAVEL%20AREA>.

²⁰Ireland and the UK both impose visa requirements on 103 states, but the UK requires visas for citizens of six states where Ireland does not, and Ireland requires visas for citizens of seven states where the UK does not. HM GOVERNMENT, NORTHERN IRELAND AND IRELAND: POSITION PAPER, at para. 22 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf.

²¹See CONNELLY, *supra* note 7, at 242–43. For a detailed account of joint visa and visa waiver schemes, see Butler & Barrett, *supra* note 12, at 274–77.

²²These arrangements provided the “qualifying CTA entitlement” as an exception to the application of UK immigration law. British Nationality Act 1981, § 50A(5) (UK), as inserted into the legislation by the Borders, Citizenship and Immigration Act 2009, § 48(1) (UK).

²³Immigration Act 1971, § 1(3) (UK).

²⁴*Id.* § 9(2).

²⁵David W. Williams, *British Passports and the Right to Travel*, 23 INT'L COMP. L.Q. 642, 646 (1974).

²⁶Aliens (Amendment) (No. 3) Order 1997, art. 3 (SI 277/1997) (Ir.), <http://www.irishstatutebook.ie/eli/1999/si/24/made/en/print>. See also Immigration Act 2004 § 4 (Act No. 1/2004) (Ir.).

²⁷*Citizens' Rights - UK and Irish Nationals in the Common Travel Area*, U.K. GOV'T, <https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area> (last visited Sept. 30, 2019).

²⁸See Joint Committee on Human Rights, Legislative Scrutiny: Immigration and Social Security Co-ordination (EU Withdrawal) Bill, 2019–20, HC Bill [569], HL Bill [324] paras. 20–21 (UK).

²⁹*North-South Cooperation: Scoping Exercise*, U.K. PARLIAMENT, <https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/1.%20Draft%20mapping%20table,%20sent%20to%20the%20Commission%20on%2013%20September%202017.pdf> (last visited Dec. 30, 2019).

2019, the UK Government was increasingly conflating the free-movement zone with distinct issues relating to the rights and obligations of people using this zone.³⁰

Ireland and the UK treat each other's citizens differently from other foreign nationals in their domestic law. In Ireland, individuals who are not Irish citizens are categorized in law as "non-nationals."³¹ Over the decades, various statutory instruments have separated out UK citizens from this status.³² In the UK, the Ireland Act 1949 establishes a presumption that Ireland—and its citizens—are not to be treated as "foreign" for domestic law purposes.³³ But this language is dated and open to interpretation. When modern UK immigration law is framed in terms of UK citizens and non-UK citizens, any rights supposedly provided by a status of "not foreign" are inherently ambiguous.³⁴ Both countries' laws regarding immigration status are supported by other provisions that, while not mentioning the CTA, support broad equivalence of treatment between people from its constituent parts and home citizens. For example, both Ireland and the UK's electoral law makes explicit provision for voting rights for each other's citizens in parliamentary elections.³⁵ In light of the informality of the CTA arrangements, such "reciprocity" is rarely exact; in considering the impact of Ireland and the UK's opt-out from Schengen on the application of EU law, the UK Supreme Court affirmed that "it would be going too far to insist on a precise match between the arrangements on one side of the Irish Sea and the other."³⁶

Neither the UK nor Ireland guarantees that the other's citizens will continue, indefinitely, to be treated in a manner that is in most respects equivalent to its own citizens. Instead, both effectively maintain a separate category in nationality and immigration law for the other's citizens. This category is conditioned by an understanding that each state will treat the other's citizens as roughly equivalent to home citizens. The UK Government's catalog of reciprocal rights therefore follows from the Ireland Act 1949's recognition that Irish citizens are not foreign. Specific manifestations of this principle are, however, scattered across disparate areas of domestic law and policy. For instance, conditions for accessing public healthcare once a resident is in the other jurisdiction are found within domestic healthcare law, whereas admissions policies for publicly-funded primary and secondary education are found in domestic education law.³⁷ In practice, these rights subsist only so long as the UK and Ireland's legislatures maintain them.

III. UK-Ireland Arrangements and EU Law

Brexit has therefore exposed significant shortcomings inherent in the CTA's historical informality. Most of what the UK Government calls CTA "rights" rest on no firmer legal basis than dated language in aging domestic legislation. At a more fundamental level, upon Brexit the land border between the UK and Ireland will become a frontier of the EU. The continuation of the CTA after

³⁰32 Dáil Deb., Engagement on Citizenship Rights (May 8, 2019) col. 20 (Ir.), https://www.oireachtas.ie/en/debates/debate/seanad_special_committee_on_the_withdrawal_of_the_united_kingdom_from_the_european_union/2019-05-08/2/ [hereinafter Seanad Special Committee].

³¹Immigration Act 1999, § 1(1) (Act No. 22/1999) (Ir.). Foreign nationals had previously, in terminology inherited from UK law, been described as aliens. Aliens Act 1935 (Act No. 14/1935) (Ir.).

³²See, most recently, the Aliens (Exemption) Order 1999 (SI 97/1999) (Ir.).

³³Ireland Act 1949, § 2(1) (UK).

³⁴See SIMON COX, BREXIT AND IRISH CITIZENS IN THE UK: HOW TO SAFEGUARD THE RIGHTS OF IRISH CITIZENS IN AN UNCERTAIN FUTURE, THE TRAVELLER MOVEMENT, at 10 (2017), https://travellermovement.org.uk/phocadownload/userupload/reports/TTM-Brexit_and_Irish_citizens_in_the_UK_web-report.pdf.

³⁵See Electoral (Amendment) Act 1985, § 2 (Act No. 12/1985) (Ir.); Representation of the People Act 1983, § 1 (UK).

³⁶Patmalniece v. Secretary of State for Work and Pensions [2011] 1 WLR 783, [60].

³⁷Irish nationals in the UK hold rights under the National Health Service Act 2006 (UK) and the Education Act 1996 (UK). UK nationals in Ireland hold rights under the Health Act 1970 (Act No. 1/1970) (Ir.), the Education Act 1988 (Act No. 51/1998) (Ir.), and the Education (Admissions to Schools) Act 2018 (Act No. 14/2018) (Ir.). See Sylvia de Mars, Colin Murray, Aoife O'Donoghue & Ben Warwick, *Discussion Paper on the Common Travel Area* 32–34, 63–65 (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission 2018).

Brexit therefore required negotiations and compromises between the UK, Ireland, and the EU. For the UK, individuals who are not citizens of the CTA members could take advantage of the absence of passport or visa checks at this land border. The resultant “backdoor” is difficult to square with the Brexit narrative of “taking back control” of immigration.³⁸ For the EU, by contrast, the exceptions to EU border controls—which it had made for Ireland and the UK when both were Member States to enable them to maintain the CTA³⁹—become harder to sustain in the context of Brexit.⁴⁰ This EU dimension is significant, for although the CTA predated Ireland’s EU membership, Ireland will have to fulfill EU law obligations after Brexit which did not affect the operation of the CTA before 1974.⁴¹

The CTA’s mutual benefits, alleviating the burden of administering the land border and improving population flows across the Atlantic Islands, have largely sustained versions of the arrangement for a century.⁴² It is dependent on trust between the parties and a certain measure of tolerance by the EU. There is, however, no obvious legal recourse if trust breaks down, or slowly erodes, in the context of Brexit. The Police Service of Northern Ireland (PSNI), for example, has complained that shortcomings in Ireland’s immigration enforcement in recent years contributed to a spike in immigration offenses within Northern Ireland.⁴³ Westminster responded with more extensive immigration enforcement powers for the PSNI along the land border,⁴⁴ but the episode evidences the tensions surrounding border enforcement. Westminster’s EU Committee has thus warned that “both Governments need to take action to convince EU colleagues of its [the CTA’s] necessity, in particular in the context of the unique circumstances in Northern Ireland.”⁴⁵ As we will discuss below, protecting the CTA became an area of commonality between the UK and Ireland in the Withdrawal Agreement negotiations.⁴⁶

Notwithstanding the EU’s ultimate consent to the CTA continuing, Brexit continues to pose challenges, in particular because of the degree to which EU law currently supports CTA arrangements that could otherwise be abridged by domestic law and policy. When the CTA was instituted, state welfare provision was limited and Irish and UK citizens continued to share the overarching status of British subjects.⁴⁷ There was, therefore, no need for legalized arrangements for reciprocal access to welfare provisions until the late 1940s, when welfare provision expanded, Ireland left the Commonwealth, and the UK reformed its nationality law.⁴⁸ Legislation in both countries at this critical juncture affirmed reciprocal treatment of each other’s citizens, but these measures were not couched in terms of legal protections against discriminatory treatment on the basis of nationality. In Ireland, the relevant statutory instrument contained a particularly vague assurance that

³⁸CONNELLY, *supra* note 7, at 244. See also John Doyle & Eileen Connolly, *Brexit and the Northern Ireland Question*, in *THE LAW & POLITICS OF BREXIT* 139, 150–51 (Federico Fabbrini ed., 2017).

³⁹Treaty on the Functioning of the European Union, Protocol 20, May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

⁴⁰For pressure on the special arrangements predating moves towards Brexit, see Pieter Jan Kuijper, *The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects*, 41 *COMMON MKT. L. REV.* 609, 621–23 (2004).

⁴¹See Dagmar Schiek, *Brexit on the Island of Ireland: Beyond Unique Circumstances*, 69 *N. IR. L.Q.* 367, 384–85 (2018); Dougan, *supra* note 10, at 67–68.

⁴²See Ryan, *supra* note 16, at 874.

⁴³George Hamilton QPM, Chief Constable, Police Serv. of N. Ir., Oral Evidence to Northern Ireland Affairs Committee (Dec. 13, 2016), HOUSE OF COMMONS, Dec. 2016, at HC 700, Q165, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/northern-ireland-affairs-committee/future-of-the-land-border-with-the-republic-of-ireland/oral/44564.pdf>.

⁴⁴Counter-Terrorism and Border Security Act 2019, sch. 3, paras. 2–6 (UK).

⁴⁵European Union Committed, *Brexit: UK-Irish Relations, 2016-17*, HL 76, para. 114 (UK).

⁴⁶Withdrawal Agreement, *supra* note 1, at art. 38(2); Protocol on Ireland/Northern Ireland, *supra* note 4, at art. 3.

⁴⁷What Barnard and Ludlow describe as the “notion of ‘undeserving’ migrant” accessing UK public services had yet to exert the grip over public consciousness which it would achieve in the latter part of the twentieth century. Catherine Barnard & Amy Ludlow, “Undeserving” EU Migrants “Milking Britain’s Benefits”? *EU Citizens Before Social Security Tribunals*, *PUB. L.* 260, 279 (2019).

⁴⁸Irish citizens could apply to become UK citizens under the British Nationality Act 1948, § 2(1) (UK).

UK citizens “enjoy in Ireland *similar* rights and privileges to those enjoyed by Irish citizens in the United Kingdom and Colonies.”⁴⁹

The UK’s Ireland Act 1949, moreover, has not played a prominent part in the litigation initiated to protect the legal interests of Irish citizens resident in the UK. In the rare cases in which it has been invoked, such as *Re O’Conor’s Application*,⁵⁰ it has not had a meaningful impact. In this case, Mr Justice Girvan responded to claims that, under the terms of the 1949 legislation, Irish citizens are not foreign, by emphasizing that “neither are they British citizens.”⁵¹ Instead they fell into an intermediate category, in which it was up to the courts to determine whether differentiated treatment was acceptable. As a result, the rights which have come to be associated with the CTA can sometimes be threatened by proposals which take little account of its operation. For example, the Goldsmith Report into UK citizenship, commissioned by Gordon Brown’s Labour Government, advocated removing Irish citizens from the UK parliamentary franchise in order to bolster the connection between UK citizens and Westminster.⁵² Although the proposals came to nothing, they illustrate how the CTA can be overlooked within UK policy making.

Only after Ireland and the UK joined the European Economic Community (EEC) in 1974 did Irish citizens in the UK and UK citizens in Ireland gain an effective framework through which to mount legal challenges against applications of domestic law that discriminated against them as foreign nationals. Free movement rights proved harder to circumvent than the CTA’s vagaries. In 1974, following the Birmingham and Guilford bombings by the Provisional Irish Republican Army, UK Prime Minister Harold Wilson ordered contingency planning for travel restrictions on Irish citizens travelling into Great Britain. Officials agonized that such controls would cause “resentment,” and could therefore exacerbate the threat of terrorist attacks in Great Britain.⁵³ They also identified a vital legal impediment; while any affected European Convention on Human Rights obligations could be subject to derogation,⁵⁴ there was no such means to prevent an EEC Commission enforcement action against the UK “on the grounds that it was failing to meet its obligations under the [EEC] Treaty.”⁵⁵

The use of European law in litigation began to influence the CTA’s workings. In *Singh*,⁵⁶ the European Court of Justice (ECJ) recognized that UK nationals could—by setting up residence in another Member State, including Ireland—activate their EU law rights and circumvent UK restrictions on the residency of spouses who are third country nationals. The development of EU citizenship after the Maastricht Treaty reinforced this trend.⁵⁷ In *Zhu and Chen*,⁵⁸ the CTA offered little protection for a Chinese citizen and her child, who had Irish citizenship by virtue of her birth in Belfast, against UK Home Office officials’ refusal to grant them residence permits. The ECJ, however, decided that the child—for as long as she had sickness insurance and was not a burden on the public finances of the UK as host State—enjoyed “a right to reside for an

⁴⁹Citizens of the United Kingdom and Colonies (Irish Citizenship Rights) Order 1949, art. 2 (SI 1/1949) (Ir.) (emphasis added).

⁵⁰See, e.g., *Re O’Conor’s Application* [2005] NIQB 11 (N. Ir.).

⁵¹*Id.* at [5].

⁵²PETER GOLDSMITH, CITIZENSHIP: OUR COMMON BOND 75–76 (2008), <http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf>.

⁵³GROUP ON ENTRY CONTROL, REPORT, 1975, UK National Archives File FCO 50/549, para. 8.3.3.

⁵⁴*Id.* at para. 7.5.1.

⁵⁵*Id.* at para. 7.4.1.

⁵⁶ECJ, Case C-370/90, *R v. Immigration Appeals Tribunal & Surinder Singh*, *Ex parte* Sec’y of State for the Home Dep’t, ECLI:EU:C:1992:296, Judgment of 7 July 1992.

⁵⁷TFEU arts. 20, 21, 26; Directive 2004/38, of the European Parliament and of the Council on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 158/77) (EC) [hereinafter *Citizenship Directive*]. See Stephanie Reynolds, *May We Stay? Assessing the Security of Residence for EU Citizens Living in the UK*, in *THE UK AFTER BREXIT: LEGAL AND POLICY CHALLENGES* 181, 196–98 (Michael Dougan ed., 2017).

⁵⁸ECJ, Case C-200/02, *Zhu and Chen v. Sec’y of State for the Home Dep’t*, ECLI:EU:C:2004:639, Judgment of 19 Oct. 2004.

indefinite period in that State.”⁵⁹ Furthermore, these EU law rules also “allow a parent who is that minor’s primary carer to reside with the child in the host Member State.”⁶⁰ A decade later, in *McCarthy*,⁶¹ the Court confirmed that the UK and Ireland’s opt-out from the Schengen free movement area “does not permit the United Kingdom to determine the conditions for entry of persons who have a right of entry under EU law.”⁶² These cases contributed to a narrative in the UK that the ECJ was enabling individuals to abuse the rights available to them under EU law.⁶³ Without such judicial oversight, however, freedom of movement would have conferred no meaningful protections upon individuals.

EEC membership also necessitated extensive reforms to protectionist labor market practices, which had persisted—in both the UK and Ireland—despite the CTA.⁶⁴ The vestiges of such practices, such as provisions in Northern Ireland’s child benefit law that disadvantaged some cross-border workers into the 1990s, were broken down only through litigation which drew upon European law. In *McMenamin*,⁶⁵ the claimant was not paid the full rate of child benefit, which would ordinarily apply as a result of her employment in Northern Ireland, because she and her children were resident in Ireland. The ECJ ruled that in these circumstances, the UK was obliged to top up any payments by Ireland to ensure that the claimant received a level of child benefit equivalent to that of her colleagues resident in Northern Ireland.⁶⁶ Cases like this built up the detailed provisions coordinating social security under EU law.⁶⁷ Gráinne McKeever emphasizes the value of this body of EU law in the CTA context, in harmonizing “hugely complex tax systems” and mapping them to “the complexity of individual lives.”⁶⁸ More recently, EU rights of access to services⁶⁹ enabled a parent from Northern Ireland to challenge the decision of HM Revenue & Customs that she had not been entitled to tax credits on the basis that she had used a childcare provider which the scheme did not support because it was based in the Republic of Ireland.⁷⁰

The tendrils of EU law therefore stretch deep into the existing cross-border arrangements between the UK and Ireland.⁷¹ People circulating between these countries under the CTA rely upon this framework of rules to conduct their lives. Figures recently released to Dáil Éireann reveal that social security coordination on pensions alone covered some 132,000 people living in Ireland in receipt of UK state pensions, and that 28,760 people living in the UK received some state pension contribution from Ireland.⁷² Brexit, however, promises to end the UK’s obligations to EU citizens, including Irish citizens, which derive from EU law. UK citizens in Ireland, moreover,

⁵⁹*Id.* at para. 41.

⁶⁰*Id.* at para. 46.

⁶¹ECJ, Case C-202/13, *McCarthy v. Sec’y of State for the Home Dep’t*, ECLI:EU:C:2014:2450, Judgment of 18 Dec. 2014.

⁶²*Id.* at para. 64.

⁶³See Christopher Vincenzi, *European Citizenship and Free Movement Rights in the United Kingdom*, 1995 PUB. L. 259, 267–69 (1995); Patricia Brazil & Catherine Cosgrave, *The Implications of Brexit for British Citizens in Ireland Navigating the Irish Immigration System*, 32 J. IMMIGR. ASYLUM & NAT’LITY L. 10, 15 (2018).

⁶⁴See de Mars et al., *supra* note 37, at 27–28.

⁶⁵ECJ, Case C-119-91, *McMenamin v. Adjudication Officer*, ECLI:EU:C:1992:503, Judgment of 9 Dec. 1992.

⁶⁶*Id.* at para. 27.

⁶⁷See Commission Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, 2004 O.J. (L 166) 1 (EC); Commission Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 Laying Down the Procedure for Implementing Regulation 883/2004, 2009 O.J. (L 284) 1 (EC).

⁶⁸Gráinne McKeever, *Brexit, the Irish Border and Social Security Rights*, 25 J. SOC. SEC. L. 34, 48 (2018).

⁶⁹TFEU art. 56; Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. (L 376) 36 (EC).

⁷⁰*NB v. HMRC* [2016] NICom 47, [105] (N. Ir.). HM Revenue & Customs withdrew their planned appeal against this decision in late 2018. For more information, see McKeever, *supra* note 68, at 49–55.

⁷¹For coverage across sectors, see de Mars et al., *supra* note 37, at 31–82.

⁷²Regina Doherty TD, Minister, Emp’t Affairs & Soc. Prot., Opening Remarks at the Select Committee on Employment Affairs and Social Protection, 2 (last updated Oct. 2, 2019), <https://www.welfare.ie/en/pressoffice/pdf/sp210219a.pdf> (last visited Dec. 30, 2019).

will “no longer enjoy the same level of rights and safeguards as currently provided by EU law.”⁷³ Without the support of EU law’s binding obligations, the rights and entitlements hitherto extended by Ireland and the UK to each other’s citizens appear increasingly vulnerable to the shifting sands of post-Brexit politics.

IV. The CTA and the People of Northern Ireland

Brexit brings with it a further Northern Ireland-specific complication to the CTA arrangements. Ireland has, since the 1950s, made explicit a statutory provision enabling people born in Northern Ireland to claim Irish citizenship.⁷⁴ Following the 2004 citizenship referendum, this right was restricted to children born in Northern Ireland with at least one parent who was an Irish or UK citizen.⁷⁵ These changes were, in part, a response to cases such as *Chen and Zhu*, and the pressures that the Irish Government argued they were putting on the CTA.⁷⁶ Notwithstanding this amendment, most people born in Northern Ireland remain automatically entitled to both UK and Irish citizenship. Indeed, the Belfast/Good Friday Agreement (GFA) acknowledges the “birthright” of the people of Northern Ireland to identify and be accepted “as Irish or British, or both, as they may so choose.”⁷⁷

This birthright creates a distinct body of Irish citizens living within the UK whose rights derive from the GFA and not from the CTA. Some measures, such as the UK Civil Service Nationality Rules,⁷⁸ already divide Irish citizens based upon whether or not they form part of the people of Northern Ireland.⁷⁹ Irish citizens who belong to the people of Northern Ireland are EU citizens and will remain so after Brexit. But because such individuals were born in the UK and have not moved to another EU Member State, they find it difficult to assert that they have activated some of their rights under EU law.⁸⁰ The UK Government moreover insists—drawing upon the definition of a UK citizen in British Nationality Act 1981⁸¹—that such individuals are *prima facie* also UK citizens, and that as dual nationals living in their “home” country, they cannot benefit from EU free movement law.⁸²

This position is being challenged in the ongoing *De Souza* litigation,⁸³ in which a Northern Ireland-born woman who identifies as Irish is seeking to rely on her EU citizenship to secure the residency of her spouse, a third-country national. The Home Office contested these claims on the basis that to claim EU citizenship rights relating to third-country national spouses, Emma de Souza would have to first renounce her UK citizenship—a status which she does not recognize and regards as incompatible with her GFA birthright. The Upper Tribunal made

⁷³See Brazil & Cosgrave, *supra* note 63, at 26.

⁷⁴Irish Nationality and Citizenship Act 1956, § 6(a) (Act No. 26/1956) (Ir.). Previously, Irish law had extended citizenship by descent, which had covered many people born in Northern Ireland if their families had lived there prior to partition. Bernard Ryan, *The Ian Paisley Question: Irish Citizenship and Northern Ireland*, 25 DUBLIN U.L.J. 145, 152–55 (2003).

⁷⁵Irish Nationality and Citizenship Act 2004, § 3(d) (Act No. 38/2004) (Ir.).

⁷⁶See Bernard Ryan, *The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland*, 6 EUR. J. MIGRATION & L. 173, 186–88 (2004).

⁷⁷Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with Annexes), Ir.-U.K., Apr. 10, 1998, 2114 U.N.T.S. 473, at Constitutional Issues, para. 1(vi) [hereinafter GFA].

⁷⁸Civil Service Nationality Rules (2007) (UK), para. 1.16, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/536134/civil_service-nationality_rules_20_june_2016.pdf (last visited Dec. 30, 2019).

⁷⁹These exclusions have been upheld by the Northern Ireland courts. See Re O’Boyle’s Application [2000] 4 Eur. L. Rep. 637 (N. Ir.).

⁸⁰See *McCarthy*, Case C-202/13 at para. 36; ECJ, Case C-127/08, *Metock v. Minister for Justice, Equal. & Law Reform*, ECLI:EU:C:2008:449, Judgment of 25 July 2008, para. 73.

⁸¹British Nationality Act 1981 at § 1.

⁸²The Immigration (European Economic Area) Regulations 2016, reg. 2(1) (SI 2016/1052) (UK) (“In these Regulations . . . ‘EEA national’ means a national of an EEA State who is not also a British citizen.”). This exception was introduced into the EEA Regulations after the CJEU’s *McCarthy* decision. *McCarthy*, Case C-202/13.

⁸³*Sec’y of State for the Home Dep’t v. Jake Parker De Souza* [2019] UKUT 355.

short work of Emma de Souza's birthright claims, noting that if the parties to the GFA had "intended the concept of self-identification necessarily to include a person's ability to reject his or her Irish or British citizenship, it is inconceivable that the provisions would not have dealt with this expressly."⁸⁴ Such a conclusion demonstrates little appreciation for the open-textured quality of peace agreements such as the GFA, which is necessary to allow them to address contentious subject matter.

Despite its Tribunal victory, the UK Government responded to the furor surrounding the case by pledging to treat people of Northern Ireland in the same manner as Irish citizens resident in the UK under the CTA for the purpose of rights of third-country spouses.⁸⁵ The subsequent adjustments to the immigration rules were applied to all of the people of Northern Ireland, independent of how they identify, in light of the GFA's parity-of-esteem requirements.⁸⁶ Under these adjustments, third-country spouses and dependents of members of the people of Northern Ireland became eligible to protect their residence rights as if they were doing so with regard to an EU citizen under the EU Settlement Scheme.⁸⁷ Even if the UK Government's response was grudging and delayed, the episode illustrates how the GFA's obligations can exert a pull on public policy beyond what judges have ruled to be their effects in domestic law. The new rights are, however, temporary, because the EU Settlement Scheme is only open to applications until June 2021 and, as we shall see, this response has not settled Emma de Souza's claims.

The Irish authorities are also weighing up whether to differentiate between these groups of Irish citizens resident in the UK after Brexit (those who belong to the people of Northern Ireland and those who do not). This is demonstrated by the Taoiseach's announcement that Ireland would—in the event of a no-deal Brexit—establish an alternate provision to the European Health Insurance Card (EHIC) for the people of Northern Ireland and EU citizens resident in Northern Ireland, but not for Irish residents of Great Britain.⁸⁸ The imperative for the UK Government must nonetheless remain to provide for broadly similar rights and entitlements to both groups. Failure to do so will generate not only the administrative burdens of distinguishing between different groups who self-identify as Irish citizens on the basis of the rights and entitlements at issue but also inevitable high-profile legal challenges drawing upon the post-GFA protections for equality of treatment.⁸⁹

C. The CTA and Brexit Negotiations

The CTA has seen both Ireland and the UK treat each other's citizens more favorably than the citizens of other EU Member States, providing a level of equivalence to home citizens that EU law does not require. The UK therefore entered withdrawal negotiations with the EU braced for

⁸⁴*Id.* at [39].

⁸⁵New Decade, New Approach (January 2020), Annex A, paras. 13–15, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf (last visited Jan. 30, 2020).

⁸⁶GFA, *supra* note 77, at Constitutional Issues, para. 1(v).

⁸⁷UK GOVERNMENT, STATEMENT OF CHANGES IN IMMIGRATION RULES: CP 232, 6 (2020).

⁸⁸265 Dáil Deb. Statement by Leo Varadkar (May 8, 2019) col. 4 (Ir.). If measures equivalent to the EHIC are not included in any Agreement on the future relationship between the UK and EU resultant from ongoing negotiations, the Irish Government will find itself under renewed pressure to make good on these pledges. See Sylvia de Mars, Colin Murray, Aoife O'Donoghue & Ben Warwick, *Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland After Brexit* 52–53, Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission (2020).

⁸⁹These were incorporated into domestic law as protections against discrimination on the grounds of political opinion under the Northern Ireland Act 1998, §§ 6, 75–76 (UK). See Christopher McCrudden, *Equality and the Good Friday Agreement*, in *AFTER THE GOOD FRIDAY AGREEMENT: ANALYSING POLITICAL CHANGE IN NORTHERN IRELAND* 97 (Joseph Ruane & Jennifer Todd eds., 1999).

confrontation over the CTA's retention.⁹⁰ Ireland, however, had worked assiduously to convince the EU Commission of its importance, and its retention became an uncontroversial element of the December 2017 Joint Report on the UK–EU withdrawal negotiations⁹¹ and ultimately the Withdrawal Agreement.⁹² In keeping with the existing arrangements under Protocol 20 to the Treaty on European Union (TEU), Article 3 of the Protocol on Ireland/Northern Ireland allows for the continued existence of the CTA, but does not mandate how the CTA operates nor clarify the legal regimes—whether domestic or EU law in origin—which will underpin its functioning. It moreover includes a potential sting in the tail, in that it authorizes the CTA's continuation only insofar as it does not conflict with Ireland's EU obligations. At the very least, this will mean that Ireland cannot match any freedom of movement restrictions placed upon the citizens of other EU/EEA Member States imposed by the UK after Brexit. Some commentators have suggested that such provisions could allow the EU's judges to examine whether Ireland's application of EU-equivalent social security rules to UK citizens moving to Ireland advantage them over any EU citizens who move from the UK into Ireland.⁹³ As such, the Withdrawal Agreement produced at best a tolerance of the CTA, but no safeguards ensuring that the rights that are associated with the CTA will be maintained.

Irish citizens resident in the UK have nonetheless been assured by the UK Government that they need not concern themselves with the settled-status scheme for EU citizens resident in the UK. In 2019, the UK's then Immigration Minister, Caroline Nokes, used a prominent article in the *Belfast Telegraph* to assert that “Irish citizens will not need to apply to the EU Settlement Scheme.”⁹⁴ This statement risks being disingenuous. It masks the fact that one group of Irish citizens in the UK, those who belong to the people of Northern Ireland, were excluded from the operation of the scheme on the premise that they were British within the terms of the British Nationality Act 1981.⁹⁵ For the other group of Irish citizens resident in the UK, the Minister's assurance is premised upon the rights they retain as a result of the CTA's operation.⁹⁶ As there are no CTA arrangements that are binding upon the UK, however, these rights could be varied at will by future UK legislation.

The settled-status scheme assured by the Withdrawal Agreement, by contrast, held out enforceable rights secured by the oversight—in the first eight years after Brexit—of the Court of Justice of the European Union (CJEU)⁹⁷ and also by an Independent Monitoring Authority.⁹⁸ The Withdrawal Agreement also provided for the continued enjoyment of specific EU citizenship rights, such as the ability of immediate third-country national family members to reside in the UK under EU freedom of movement rights. As we have seen in the context of the *De Souza*

⁹⁰CONNELLY, *supra* note 7, at 327–28.

⁹¹NEGOTIATORS OF THE EU AND UK GOVERNMENT, 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 EU para. 54 (2017), https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

⁹²Withdrawal Agreement, *supra* note 1, at art. 38(2); Protocol on Ireland/Northern Ireland, *supra* note 4, at art. 3.

⁹³See Reynolds, *supra* note 57, at 198. Such a challenge to the UK's pension arrangements was rejected by the UK Supreme Court in *Patmalniece* as being indirectly discriminatory but justified on the basis of nationality. Yet this was against the backdrop of both Ireland and the UK being EU Member States. See *Patmalniece* [2011] 1 WLR 783.

⁹⁴Caroline Nokes, *Settlement Scheme Will Help Reassure 60,000 EU Citizens Living in Northern Ireland*, BELFAST TELEGRAPH (Mar. 30, 2019, 8:16 AM), <https://www.belfasttelegraph.co.uk/news/northern-ireland/settlement-scheme-will-help-reassure-60000-eu-citizens-living-in-northern-ireland-37965178.html>.

⁹⁵See Caroline Nokes, Answer to *Immigration: EU Nationals: Written Question 213222*, UK PARLIAMENT (Feb. 5, 2019), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-01-28/213222/> (last visited Dec. 30, 2019).

⁹⁶UK HOME OFFICE, EU SETTLEMENT SCHEME: STATEMENT OF INTENT para. 2.6 (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf.

⁹⁷Withdrawal Agreement, *supra* note 1, at art. 158.

⁹⁸Withdrawal Agreement, *supra* note 1, at art. 159.

litigation, these rights are notably more generous than those of UK citizens, who must pass strict income tests if third-country spouses are to be granted UK residence.⁹⁹ These rights are not protected under the CTA—which, at best, draws equivalence to home citizens—but would require an Irish citizen to apply to the EU Settlement Scheme, as the May’s Immigration Minister admitted; “[u]nder the settlement scheme in a deal scenario, close family members who are not already resident in the UK will be able to join an EU citizen—that includes Irish citizens—under the same conditions as now, where the relationship pre-existed the end of the implementation period.”¹⁰⁰

Although these rights, originating from EU law, are thus available to those Irish citizens resident in the UK before the end of the Withdrawal Agreement’s transition/implementation period, Irish citizens who move to the UK after Brexit will, by contrast, be reliant upon the reciprocal arrangements linked to the CTA for their rights and obligations. If their future rights and obligations are built on these limited foundations, then the same can be said of UK citizens in Ireland. The UK Government’s difficulties with ratifying the Withdrawal Agreement also threw into doubt its carefully assembled transitional arrangements for social security coordination.¹⁰¹ These factors combined to push reform of the CTA to the forefront of UK–Ireland relations.

D. Reforming the CTA

Whereas EU membership committed Ireland and the UK to provide EU citizenship rights, the CTA has historically amounted to a set of practices rather than a binding guarantee that Irish citizens will continue to enjoy equivalent rights to home citizens in the UK, and vice versa. Insofar as overlaps exist between these regimes, EU law currently injects protections against discrimination on the basis of nationality into much of the CTA’s practical application. But upon the end of the Brexit transition/implementation period those EU obligations fall away. At this point, goodwill regarding the CTA arrangements cannot be equated to binding obligations upon Ireland and the UK not to discriminate against people from other parts of the CTA. This reality spurred efforts to Brexit-proof the CTA’s arrangements through domestic legislation and bilateral agreements between the UK and Ireland.

I. UK Domestic Law

Brexit, it is trite to say, necessitates a major overhaul of the UK statute book.¹⁰² Part of this effort updates domestic legal provisions relating to Irish citizens and their status in the UK. The European Union (Withdrawal) Act 2018 establishes a default rule whereby EU law and related UK measures are retained after Brexit, with fresh legislation being required to move away from this position.¹⁰³ One such piece of legislation, the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, has been repeatedly delayed, abandoned, and restarted because of the saga over the Withdrawal Agreement’s ratification and, latterly, the Covid-19 crisis. When it is eventually enacted, it will end the application of EU freedom of movement law for EEA and Swiss citizens.¹⁰⁴

Against this backdrop of curtailing freedom of movement, specific saving provisions are included within the legislation for Irish citizens, clarifying how they are to be treated for immigration purposes after Brexit. At present, the Immigration Act 1971 formally applies exemptions from immigration control only for Irish citizens making “local” journeys, meaning those between the constituent parts of the CTA.¹⁰⁵ This provides for a poor fit with contemporary international

⁹⁹See JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 28, para. 19.

¹⁰⁰26 Feb. 2019, Parl Deb HC (2019) col. 174 (UK) [hereinafter Public Bill Committee].

¹⁰¹Withdrawal Agreement, *supra* note 1, at art. 31.

¹⁰²KENNETH ARMSTRONG, BREXIT TIME: LEAVING THE EU – WHY, HOW AND WHEN? 182–83 (2017).

¹⁰³European Union (Withdrawal) Act 2018, §§ 2–4 (UK).

¹⁰⁴Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2020, cl. 1, sch. 1 (UK).

¹⁰⁵Immigration Act 1971, § 1(3) (UK).

travel, and EU free movement law produced a situation whereby these statutory point-of-departure rules became inoperative.¹⁰⁶ As soon as the UK moves to restrict freedom of movement, it therefore also becomes necessary to amend the 1971 Act to clarify that Irish citizens do not require “leave to enter or remain in the UK,” as a general rule.¹⁰⁷

The Immigration Bill’s proposals furthermore clarify the exceptions to free movement into the UK for Irish citizens, in the form of deportation orders, public good exclusions, and international law exclusions.¹⁰⁸ Deportation of Irish citizens has been possible under UK immigration law since 1962.¹⁰⁹ Under the Immigration Act 1971, a narrow class of Irish citizens was exempted from deportation from the UK, establishing that all others are subject to deportation.¹¹⁰ Irish citizens currently enjoy protections under EU free movement law, which explicitly sets a high threshold for a host Member State to deport an EU citizen to their home country.¹¹¹ An EU citizen must be a current threat to public security or policy in order to be deportable, and deportation decisions must take account of the duration of residency in the host State.¹¹² The Immigration Bill, as drafted, provides that the UK Home Secretary will be able to order the deportation of an Irish citizen if this is considered to be necessary in the public interest.¹¹³ This provision sits uneasily with existing policy, contained within a ministerial statement, whereby “Irish citizens will only be considered for deportation where a court has recommended deportation in sentencing or where the Secretary of State concludes . . . the public interest requires deportation.”¹¹⁴ Existing regulations, moreover, prevent the UK Home Secretary’s power to deport foreign prisoners at the end of their sentence from applying to Irish citizens.¹¹⁵ Under Irish law, by contrast, UK citizens are explicitly exempt from deportation in any circumstances, illustrating the limits to reciprocity across the CTA jurisdictions.¹¹⁶

The Bill’s deportation provisions, moreover, do not take account of the special position of Irish citizens who are from Northern Ireland.¹¹⁷ The Bill describes a general power to deport Irish citizens but does not mention the status of individuals who form part of the “people of Northern Ireland” and exercise their GFA “birthright” by choosing to identify as Irish alone. As we have already seen in the *De Souza* litigation, the Home Office is insistent that such individuals are automatically UK citizens, whether they choose to identify as such or not.¹¹⁸ The *De Souza* appeal, which would have addressed these issues, was dropped in May 2020 (after the success of their campaign with regard to the rights of third-country national dependents of the people of

¹⁰⁶See The Immigration (European Economic Area) Regulations 2016, *supra* note 82, at reg. 2(1). These regulations cover Ireland in the application of EU free movement law alongside other EEA states and Switzerland. See also Public Bill Committee, *supra* note 100.

¹⁰⁷Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2020, at cl. 2(1).

¹⁰⁸Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2020, at cls. 2(2)–(3).

¹⁰⁹Commonwealth Immigrants Act 1962, § 6(3) (UK).

¹¹⁰Immigration Act 1971, § 7(1)(b) (UK).

¹¹¹Citizenship Directive, *supra* note 57, at arts. 27–28; The Immigration (European Economic Area) Regulations 2016, *supra* note 82, at reg. 27(5).

¹¹²See Sec’y of State for the Home Department v. Dumlauskas [2015] EWCA (Civ) 145, [2015] Imm AR 773 [54] (Burnton J); Elspeth Berry, *The Deportation of “Virtual National” Offenders: The Impact of the ECHR and EU Law*, 23 J. IMMIGR. ASYLUM & NAT’LITY L. 11 (2009).

¹¹³Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2020, cl. 2(3)(a) (UK).

¹¹⁴457 Parl Deb HC (6th ser.) (2007) col. 4WS (UK). This commitment is acknowledged in the Bill’s Explanatory Notes.

¹¹⁵UK Borders Act 2007, § 32 (UK), as amended by The Immigration, Nationality and Asylum (EU Exit) Regulations 2019, reg. 17 (SI 2019/745) (UK).

¹¹⁶See Immigration Act 1999, § 3 (Act No. 22/1999) (Ir.); see also de Mars et al., *supra* note 37, at 78.

¹¹⁷See Sylvia de Mars, Colin Murray, Aoife O’Donoghue & Ben Warwick, *Written Evidence to the Public Bill Committee on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019* para. 7 (2019), <https://publications.parliament.uk/pa/cm201719/cmpublic/Immigration/memo/ISSB02.pdf>; see also Bernard Ryan, *Written Evidence to the Immigration and Social Security Co-ordination (EU Withdrawal) Public Bill Committee 11* (2019), <https://publications.parliament.uk/pa/cm201719/cmpublic/Immigration/memo/ISSB05.pdf>.

¹¹⁸See *Jake Parker De Souza* UKUT 355.

Northern Ireland). This outcome does not, however, get the UK Government out of the woods. Clause 2 makes no allowance for those among the people of Northern Ireland who took the advice that the Home Office gave to Emma De Souza and renounced this underlying UK citizenship.

As a result of these concerns the UK Government faced amendments in Committee to the first version of the Immigration Bill that aimed to protect such Irish citizens from Northern Ireland. To see these off, Theresa May's Immigration Minister was obliged to provide assurances that, given "the citizenship provisions in the Belfast agreement, we would consider any case extremely carefully and not seek to deport a person from Northern Ireland who is solely an Irish citizen."¹¹⁹ These assurances could provide the basis of future efforts to resist deportation based on these provisions. But they were not incorporated into the Bill's text when it was reintroduced into the Commons after Johnson's 2019 election success (and previous mentions of the GFA were excluded from the Bill's Explanatory Notes). Much will thus depend on whether these assurances are reaffirmed. In summary, this legislation takes some steps to give effect to the rights to enter and reside associated with the CTA, but its terms fail to take express account of the unique status of the people of Northern Ireland—necessitating patching up through ministerial statements—and might in some circumstances facilitate deportation of Irish citizens from the UK, especially as they will no longer enjoy EU law's protections post-Brexit.¹²⁰

II. The UK–Ireland Convention on Social Security

If a particular dimension of the operation of CTA has been all but completely usurped by EU mechanisms, it is the coordination of social security benefits between Member States. To support free movement of EU citizens, the Member States have all agreed to make many social security benefits portable; accumulations travel with EU citizens to different Member States, as a lack of portability would discourage anyone from exercising free movement.¹²¹ Social security coordination is therefore an activity which is often associated with the CTA, but which has long operated largely under the auspices of EU law.

That said, the portability of social security entitlements is deep and more organized than other aspects of the CTA. Between 1960 and 1971, Ireland and the UK concluded a series of agreements on aspects of social security, which were consolidated into a Convention on Social Security in 2004.¹²² These bilateral arrangements do not, however, provide for more intense coordination between the UK and Ireland than the EU social security coordination regime. Instead, they provide for an extended zone of application. Notwithstanding the UK and Ireland's shared EU membership, the 2004 Convention was necessary to extend social security cooperation to cover the Crown Dependencies—and to cover their citizens in Ireland and the UK—which are also part of the CTA but outside the ambit of EU law.¹²³ The effects of these developments can be seen in UK unemployment benefits, which count residence in any part of the CTA towards their "habitually resident" requirement.¹²⁴

With the then-presumptive Brexit date of March 29, 2019 looming, the UK and Ireland had to confront the extent to which their bilateral social security coordination rested on EU law.

¹¹⁹Public Bill Committee, *supra* note 100, at col. 175.

¹²⁰The UK Parliament has already legislated to provide for deportation powers regarding settled-status and pre-settled-status EU citizens post-Brexit, which are more wide ranging than those currently permitted under EU law. See The Immigration, Nationality and Asylum (EU Exit) Regulations 2019, *supra* note 115, at reg. 43.

¹²¹See *supra* note 67.

¹²²Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, with Exchange of Notes, Dec. 14, 2004, Ir.-U.K., GR. BRIT. T.S. No. 30 (2007) (Cm. 7277).

¹²³EUROPEAN UNION COMMITTEE, SCRUTINY OF INTERNATIONAL AGREEMENTS: TREATIES CONSIDERED ON 5 MARCH 2019, 2017-19, HL 306, para. 7 (UK).

¹²⁴See, e.g., The Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013, reg. 2 (SI 2013/3196) (UK), amending The Jobseeker's Allowance Regulations 1996, reg. 85A (SI 1996/207) (UK).

They agreed a new Convention on Social Security.¹²⁵ The UK Parliament's EU Committee summarized its effect:

[I]t seeks to roll over certain rights hitherto enjoyed by UK and Irish citizens in respect of each other's countries under various provisions of EU law . . . that support "free movement", while limiting the enjoyment of those rights (so far as the UK is concerned) to Irish citizens.¹²⁶

In Ireland, this Agreement was rapidly reflected in primary legislation scheduled to enter into force upon Brexit.¹²⁷ The oversight of the specialist EU Committee notwithstanding, this Agreement received little attention in UK Parliament, paralyzed as it was by Theresa May's efforts to secure the ratification of the UK–EU Withdrawal Agreement. It was ratified without debate and quietly actioned by Order in Council,¹²⁸ separating Irish citizens using the CTA from the arrangements for other EEA and Swiss citizens, which were being drawn up under the Immigration and Social Security Co-ordination (EU Withdrawal) Bill. The fact that the UK and Ireland concluded this specific new agreement prompted the EU Committee to wonder whether it needed to be supplemented by further legislation or additional international agreements in order to replicate other aspects of EU law that the CTA relies upon. It cautioned, however, that it "is unclear . . . whether a series of patchwork CTA agreements will provide the assurances that are needed on such a sensitive matter."¹²⁹ The stage was thus set for further CTA developments.

III. The CTA Memorandum of Understanding

For all of this preparatory work, the subsequent conclusion of the CTA MoU on May 8, 2019 would appear to be something of an anti-climax. The MoU was not intended to recast the CTA but rather "reaffirms the arrangement . . . in relation to the Common Travel Area . . . and the associated reciprocal rights and privileges enjoyed by British and Irish citizens in each other's state."¹³⁰ The subsequent provisions set out what the UK and Ireland understand the CTA to be, and the "associated reciprocal rights and privileges" that accompany it. The MoU is drafted to make it clear that both parties agree that the relevant arrangements already exist, and are being recapitulated in the MoU, because it is "desirable to provide a contemporary articulation" of them.¹³¹ The associated rights recognized in the MoU are 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. This effectively mirrors the list of CTA-related rights previously identified by the UK Government¹³² and could therefore be interpreted as containing no substantive extensions to the CTA.

Nonetheless, it is significant that both countries formally acknowledge that the CTA is not simply a free-movement zone and explicitly tie the reciprocal rights for each other's citizens to the CTA. It is no longer an act of conflation to talk of these as being CTA rights. Both parties commit "to ensuring that any necessary steps are taken to give effect to" the CTA rights, and identify in particular that domestic legal responses "and further, more detailed, bilateral

¹²⁵Convention on Social Security, *supra* note 3.

¹²⁶EUROPEAN UNION COMMITTEE, *supra* note 123, para. 2.

¹²⁷Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019, §§ 84–85 (Act No. 8/2019) (Ir.) [hereinafter Consequential Provisions Act].

¹²⁸The Social Security (Ireland) Order 2019, (SI 2019/622) (UK).

¹²⁹EUROPEAN UNION COMMITTEE, *supra* note 123, para. 11.

¹³⁰MoU, *supra* note 2, at para. 1 (emphasis added).

¹³¹MoU, *supra* note 2, at para. 5.

¹³²See *supra* note 27.

agreements” may be needed to protect these rights.¹³³ The UK and Ireland further agree to hold annual meetings between senior officials regarding the MoU, presumably to consider any aspect of the functioning of CTA-related rights in practice.¹³⁴ These arrangements, however, remain diplomatic in nature; the MoU provides for no remedial mechanism if disagreements arise in one of these meetings, and expressly recognizes that it “is not of itself intended to create legally binding obligations.”¹³⁵ Whereas the Convention on Social Security is a binding agreement under international law, the CTA MoU thus merely reflects the parties’ “common understanding” of the CTA’s requirements. As such, the MoU required no ratification process before the UK Parliament and was not subject to any debate amongst legislators.¹³⁶

IV. The New CTA: Brexit-Proof?

We have seen three different forms of “Brexit-proofing” to date: Domestic legislative actions in the UK and Ireland, a binding international agreement on social security, and a bilateral political commitment to the CTA more generally. These efforts have been focused upon the CTA-related rights to reside and work, and to access social security protections. This has not been a process intended to strengthen rights but one to provide an alternate legal basis to EU law. Although other CTA rights have yet to be addressed by bilateral arrangements at the time of writing, further activity is clearly envisaged. In January 2019, Ireland’s Minister for Foreign Affairs informed the Dáil that “[b]ilateral arrangements as appropriate to each area of the CTA, will be concluded in due course and at the appropriate time.”¹³⁷ The implication is that a broad range of CTA measures could follow.

Ireland’s Brexit legislation, moreover, permits the Health Minister to make orders “to continue in being or carry out any reciprocal or other arrangements in relation to health services which were in operation between the State and the United Kingdom immediately before the withdrawal of the United Kingdom from membership of the European Union.”¹³⁸ This suggests that arrangements have been made with the UK for steps to be taken, following Brexit, to protect reciprocal health care access for each other’s citizens. Ministers confirmed that these provisions envisaged a no-deal scenario, when the rights of Irish citizens resident in the UK would not be covered by any overarching arrangements for settled EU citizens.¹³⁹ But such statements also highlight the patchwork of Ireland-specific and so-called EU “settled status” measures which could apply to Irish residents of the UK after Brexit. The closed-room inter-governmental dealings to which these measures allude¹⁴⁰ might be entirely in keeping with the history of the CTA, but they provide precious little reassurance to affected individuals. We must, therefore, evaluate whether this ongoing activity is sufficient to sustain the CTA-related rights after Brexit.

¹³³MoU, *supra* note 2, at para. 14.

¹³⁴MoU, *supra* note 2, at para. 16.

¹³⁵MoU, *supra* note 2, at para. 17.

¹³⁶The UK Parliament does not routinely have to take positive steps to approve treaties. Constitutional Reform and Governance Act 2010, § 20(1) (UK). See Jill Barrett, *The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms*, 60 INT’L & COMP. L.Q. 225 (2011).

¹³⁷Simon Coveney TD, Answer to *Brexit Issues: Written Answer 5292/19*, HOUSES OF THE OIREACTHAS (Feb. 5, 2019), <https://www.oireachtas.ie/en/debates/question/2019-02-05/148/> (last visited May 24, 2020).

¹³⁸Consequential Provisions Act, § 4.

¹³⁹980 Dáil Deb., Speech by S. Coveney (Mar. 5, 2019) col. 377 (Ir.).

¹⁴⁰As the Tánaiste informed the Dáil, “[w]e have a commitment that the UK will fulfil its side of the bargain and we will do ours, which is what we are trying to do in the Bill.” 980 Dáil Deb., Speech by S. Coveney (Mar. 5, 2019) col. 379 (Ir.).

E. Evaluating the CTA Reforms

I. Replacing the Irreplaceable?

Under an orthodox account of the UK's dualist legal order, the UK's international agreements do not affect rights and obligations within the UK's domestic jurisdictions; short of the UK Parliament incorporating treaty provisions into domestic law, they are not enforceable before domestic courts.¹⁴¹ Even then, it is not the treaty but the statute that is being enforced.¹⁴² EU law, however, is distinct in the UK's domestic legal system because of its overarching principles of direct effect and supremacy.¹⁴³ In order to join the EEC, the UK was obliged to make the provisions of the EEC legal order enforceable before domestic courts under certain conditions.¹⁴⁴ It was also obliged to accept the Commission's enforcement action as an oversight mechanism, whereby the Commission can bring any Member State before the CJEU if they are failing to comply with either the letter or the spirit of EU law.¹⁴⁵ On a constitutional level, Theresa May's administration conceived of Brexit as a means of ending these impositions: "Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that."¹⁴⁶

Once Brexit stops the enforceable protections—provided by the EU legal order—applying within UK law, bilateral arrangements concluded between the UK and Ireland to cover Brexit's aftermath will inevitably be a poor substitute for EU law.¹⁴⁷ This is not to say that EU law is currently working effectively for EU citizens attempting to rely upon it in the UK's domestic legal systems. As Charlotte O'Brien has highlighted, even though "EU citizenship was always extremely limited in terms of the social protections it offered EU migrants," those limited rights have been implemented and applied in the UK in ways that has made them even more difficult to access and exercise.¹⁴⁸ For instance, UK courts have tended to interpret domestic implementing legislation of EU citizenship rights in narrow and conflicting ways.¹⁴⁹ If we consider the future of the CTA post-Brexit, it is worrying that O'Brien already finds that because the EU social security coordination regulation is "complex, contradictory and incomplete," it has resulted in "imaginative and exclusionary domestic interpretation" in the UK courts.¹⁵⁰ There is no reason why UK courts would interpret related coordinating legislation, such as the Order in Council that implements the Convention on Social Security, in a less exclusionary manner after Brexit.

Even under the Withdrawal Agreement, the protections afforded by the oversight of the Commission and CJEU will lapse in the medium term. The enforceability of affected rights will therefore inevitably diminish in practice. Indeed, in the broader context of settled-status rights for

¹⁴¹See *R v. Sec'y of State for the Home Dep't, Ex parte Brind* [1991] 1 AC 696, [718] (Lord Donaldson of Lynton), [762]–[763] (Lord Ackner); *Miller v. Sec'y of State for Exiting the EU* [2017] UKSC 5, [2018] AC 61, [54]–[55] (Lord Neuberger); see also MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS 7 (1997).

¹⁴²*R v. Lyons* [2002] UKHL 44, [2003] 1 AC 976, [27] (Lord Hoffmann).

¹⁴³See, e.g., PAUL CRAIG & GRÁINNE DE BURCA, EU LAW: TEXT, CASES AND MATERIALS, chs. 7, 9 (2015).

¹⁴⁴European Communities Act 1972, §§ 2–3 (UK).

¹⁴⁵TFEU art. 258.

¹⁴⁶HERESA MAY, THE UNITED KINGDOM'S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION, 2017, Cm. 9417, at para. 2.1.

¹⁴⁷EU law on citizenship rights and social security is, admittedly, far from perfect and has been read in a restrictive manner by EU judges in recent years. See, e.g., Charlotte O'Brien, *The ECJ Sacrifices EU Citizenship in Vain: Commission v. UK*, 54 COMMON MKT. L. REV. 209 (2017); Stephen Coutts, *Citizens of Elsewhere, Everywhere and . . . Nowhere? Rethinking Union Citizenship in Light of Brexit*, 69 N. IR. L.Q. 231 (2018).

¹⁴⁸CHARLOTTE O'BRIEN, UNITY IN ADVERSITY: EU CITIZENSHIP, SOCIAL JUSTICE AND THE CAUTIONARY TALE OF THE UK 4 (2017) (exposing access and exercise difficulties surrounding rights and entitlements linked to EU law in the UK, caused by a combination of administrative barriers and erroneous first-tier immigration tribunal decisions).

¹⁴⁹For a discussion of conflicting—and predominantly narrow—interpretations of the EU law requirements relating to sickness insurance for economically inactive migrants, see Sylvia de Mars, *Economically Inactive EU Migrants and the United Kingdom's National Health Service: Unreasonable Burdens without Real Links?*, 39 EUR. L. REV. 770, 779–82 (2014).

¹⁵⁰O'BRIEN, *supra* note 148, at 199.

EU citizens, the EU has conceded that the protections afforded by its legal order cannot be replicated in a third country; the rights agreed upon under the Withdrawal Agreement will be enforced by the Commission in the EU—for UK citizens resident there—and, after a transition/implementation period, by a national body—the Independent Monitoring Authority—in the UK, for resident EU citizens.¹⁵¹ Given that an element of enforceability is lost even under the Withdrawal Agreement, bilateral arrangements between the UK and Ireland make for even less of a safeguard.

II. The Nature of the New CTA Arrangements

Ireland and the UK have used a range of approaches to secure the CTA after Brexit. The Convention on Social Security is a bilateral international treaty covering some CTA-related rights, enforceable by the state parties through arbitration. The first step in any dispute over the Convention is for the state parties to make “all reasonable efforts” to resolve these through diplomatic channels, but arbitration is provided for as a follow-up option.¹⁵² The outcome of arbitration will be “binding on both parties.”¹⁵³ Whereas a violation of EU measures coordinating social security could be challenged before a UK or Irish court by affected private individuals, the Convention’s arbitration provision is a tool employed at the state level, and various issues could dissuade one of the states from taking up an individual’s complaints. On a purely diplomatic level, Ireland might be reluctant to commence arbitration against the UK, as a larger trading partner, unless significant violations were at issue.¹⁵⁴

The overarching CTA MoU, by contrast, is something short of a bilateral treaty. As Brian Gormally, Director of the Northern Ireland-based NGO, the Committee for the Administration of Justice, observed before the Dáil: “The problem with memoranda of understanding is that they are not, generally speaking, legally enforceable.”¹⁵⁵ His deputy, Daniel Holder, elaborated upon these concerns:

The Governments might agree to an administrative arrangement, but who knows who the next Prime Minister will be or make up the next government of Britain or what attitude it will take to those administrative arrangements? What we really need is an enforceable right.¹⁵⁶

The name of an international agreement is not particularly significant in determining its nature. While MoUs are often non-binding agreements, if the parties had intended to make its terms enforceable, the CTA MoU could have provided for bilateral obligations.¹⁵⁷ Yet the MoU itself leaves no room for interpretation, stressing that it does not produce “legally binding obligations.”¹⁵⁸ It can also be contrasted with the UK’s MoUs, with countries such as Jordan and Algeria, regarding the deportation of individuals suspected of involvement in terrorism to their countries of origin. Each of these MoUs was intended to constitute “an exceptionally

¹⁵¹Oversight of these arrangements involves a form of arbitration before a Joint Committee of UK and EU representatives, which cannot issue decisions and recommendations without mutual consent. Withdrawal Agreement, *supra* note 1, at art. 166(3).

¹⁵²Convention on Social Security, *supra* note 3, at art. 62(2).

¹⁵³Convention on Social Security, *supra* note 3, at art. 62(3).

¹⁵⁴For an account of how such power imbalances influence the use of international legal mechanisms, see Bhupinder Chimni, *Third World Approaches to International Law: A Manifesto*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 47–73 (Antony Anghie et al. eds., 2003).

¹⁵⁵32 Dáil Deb., Rights and Equality in the Context of Brexit: Discussion (Jan. 23, 2019) col. 89 (Ir.), https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2019-01-23/speech/89/.

¹⁵⁶Seanad Special Committee, *supra* note 30, at 11.

¹⁵⁷Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331.

¹⁵⁸MoU, *supra* note 2, at art. 17.

strong political commitment” against the country of origin practicing torture, and their common understandings were undergirded by monitoring arrangements and specific rules for withdrawal.¹⁵⁹ The CTA MoU, by contrast, provides for no such formal mechanisms, and so it becomes necessary to consider whether these new arrangements will be of any value in domestic litigation after Brexit.

III. Enforceability in Domestic Litigation

Question marks remain over whether the new CTA arrangements can provide any meaningful assistance to individuals seeking to challenge alleged breaches of their terms before the domestic courts in the UK—or, indeed, Ireland. The first distinct issue is the value of the Convention on Social Security. As we have seen, this treaty has been brought into effect in the law of Ireland and the UK through domestic measures. In such circumstances, the UK courts have long accepted the principle that statutes or statutory instruments designed to give effect to an international obligation “are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation.”¹⁶⁰ Irish claimants should thus be able to rely upon the Convention to secure their interests within UK social security law; indeed, the terms of the incorporating Order in Council explicitly provide that a range of social security legislation is “modified to the extent required to give effect to the provisions contained in the Convention.”¹⁶¹ In Ireland, the specific amendments to the Social Welfare Consolidation Act 2005, adopted to give effect to the Convention, would similarly be interpreted in light of the Convention’s provisions.¹⁶² The above concerns about UK policy makers limiting the effect of the relevant provisions aside, individuals will be able to directly rely on these domestic measures before domestic courts.

By contrast, the CTA MoU provides comparatively little support for any individual seeking to use it to protect the CTA’s “reciprocal rights and privileges” in litigation in Ireland or the UK.¹⁶³ Some recent decisions suggest that both countries’ judges are becoming more receptive towards considering unincorporated treaties and other international arrangements, especially where individual rights are at issue, in the application of relevant domestic law. For Lord Kerr, such consideration is not a backdoor incorporation but “is merely allowing directly relevant standards to infuse our thinking about what the content of the domestic right should be.”¹⁶⁴ In Ireland’s Supreme Court, Justice Barrington, dealing with the then-unincorporated European Convention on Human Rights, similarly opined that “it may be helpful to an Irish court to look at the Convention when it is attempting to identify unspecified rights [under Ireland’s Constitution].”¹⁶⁵ The UK House of Lords, moreover, relied upon the MoU concluded between the UK and Jordan to determine whether the UK had fulfilled its obligations under the Human Rights Act 1998 in the deportation of Abu Qatada.¹⁶⁶ As such, the domestic courts could

¹⁵⁹See the UK Government’s account of these measures before the Special Immigration Appeals Commission in *Othman v. Sec’y of State for the Home Dep’t* [2007] SC/15/2005, [296].

¹⁶⁰*Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751, [771] (Lord Diplock); see also *Assange v. Sweden* [2012] UKSC 22, [2012] 2 AC 471, [122] (Lord Dyson).

¹⁶¹The Social Security (Ireland) Order 2019, reg. 2(1) (SI 2019/622) (UK).

¹⁶²See, for example, discussion of the application of the Extradition (European Convention on the Suppression of Terrorism) Act 1987 (Act No. 1/1987) (Ir.) in light of Ireland’s international obligations in *Finucane v. McMahon* [1990] 1 IR 165, 212–17 (Ir.).

¹⁶³MoU, *supra* note 2, at art. 2.

¹⁶⁴*R (SG) v. Sec’y of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, [261].

¹⁶⁵*Doyle v. Comm’r of An Garda Síochána* [1999] 1 IR 249, 268 (Ir.).

¹⁶⁶See *RB (Algeria) v. Sec’y of State for the Home Dep’t* [2009] UKHL 10, [2010] 2 AC 110. It is notable that after a challenge to these arrangements succeeded before the European Court of Human Rights in *Othman v. United Kingdom*, 55 Eur. Ct. H.R. I (2012), <http://hudoc.echr.coe.int/eng?i=001-108629>, the UK-Jordan MoU was replaced with a treaty. Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, Mar. 24, 2013, Jordan-U.K., GR. BRIT. T.S. No. 25 (2013) (Cm. 6861). For an overview of

opt to treat the CTA MoU as something akin to an explanatory memorandum for domestic laws—which, in practice, give effect to aspects of the CTA or which provide for special treatment of Irish citizens in UK law—or vice versa—such as the Immigration Bill currently before the UK Parliament. But the problem remains that domestic courts are not obliged to consider the MoU as an interpretative tool in the way that they are currently obliged to read any UK law implementing EU obligations in line with the original EU legislation.¹⁶⁷ They may, moreover, be reluctant to place particular weight on the MoU, on the basis that they are dealing not with a formal treaty but a mere understanding of the CTA's operation.

The distinction between the MoU and a binding treaty also has specific enforcement consequences within the UK's devolution settlement. The Scottish, the Welsh, and Northern Ireland institutions are all restricted in their legislative and executive competences, through statutory obligations to respect the UK's commitments under international law.¹⁶⁸ As a result, due to its competences with regard to social security, the Scottish Parliament had to pass legislation covering the Social Security Convention between Ireland and the UK.¹⁶⁹ These obligations, however, do not apply to the non-binding terms of the CTA MoU. In the UK's increasingly complex jurisdictional landscape, restrictions upon supposedly reciprocal rights could therefore emerge from the devolved institutions. In this regard, it is worth remembering that some of the most egregious breaches of reciprocity prior to Ireland and the UK joining the EU came as a result of legislation passed by the Unionist-dominated Northern Ireland Parliament, which functioned between 1922 and 1972.¹⁷⁰

Finally, the Northern Ireland Human Rights Commission's Chief Commissioner has suggested that the new CTA MoU could form the basis of legitimate expectations for individuals, permitting them to institute judicial review challenges in the UK and Ireland if executive actors sought to take steps which diluted the reciprocal rights arrangements that it covers.¹⁷¹ The concept of legitimate expectations functions similarly in the administrative law of Ireland and the UK, permitting claimants who acted reasonably—in reliance on public authorities' promises or practices—to challenge attempts by the public authority to resile from that promise or practice.¹⁷² The aim of the courts is to ensure that public bodies “deal straightforwardly and consistently with the public.”¹⁷³ But in the UK the courts have been reluctant to treat international agreements as the basis for legitimate expectations. Lord Justice Laws, for one, was unequivocal in his rejection of this idea, asserting that the UK's domestic courts “must not be seduced by humanitarian claims to a spurious acceptance of a false source of law.”¹⁷⁴ Even if the courts became willing to reconsider this position, the CTA MoU is a different proposition from the unincorporated treaties Lord Justice

the saga of the litigation, and eventual deportation, see Matthew Garrod, *Deportation of Suspected Terrorists with “Real Risk” of Torture: The House of Lords Decision in Abu Qatada*, 73 MOD. L. REV. 631 (2010).

¹⁶⁷They are subject to the duty of consistent interpretation—also known as “indirect effect” or “harmonious interpretation”—as developed by the Court of Justice in cases such as ECJ, Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, Judgment of 10 Apr. 1984; ECJ, Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, ECLI:EU:C:1990:395, Judgment of 13 Nov. 1990; and ECJ, Joined Cases 397 & 403/01, *Pfeiffer v. Deutsches Rotes Kreuz*, ECLI:EU:C:2004:584, Judgment of 5 Oct. 2004.

¹⁶⁸Scotland Act 1998, §§ 29, 57–58 (UK); Government of Wales Act 2006, § 82; Northern Ireland Act 1998, §§ 6, 26.

¹⁶⁹Social Security (Ireland) (Further provision in respect of Scotland) Order 2019, (SSI 2019/93) (Scot.).

¹⁷⁰See, for example, the work permit system imposed under the Safeguarding of Employment (Northern Ireland) Act 1947 (N. Ir.); Henry Patterson, *In the Land of King Canute: The Influence of Border Unionism on Ulster Unionist Politics, 1945–63*, 20 CONTEMP. BRIT. HIST. 511, 521–24 (2006).

¹⁷¹Seanad Special Committee, *supra* note 30, at 17 (Les Allamby).

¹⁷²See *R v. N. & E. Devon Health Auth., ex parte Coughlan* [2001] QB 213, [62] (Lord Woolf CJ); *Glencar Explorations v. Mayo Cty. Council* [2002] 1 IR 84, 162–63 (Ir.).

¹⁷³*Abdi and Nadarajah v. Sec'y of State for the Home Dep't* [2005] EWCA (Civ) 1363, [68] (Laws LJ).

¹⁷⁴*R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2003] EWCA (Civ) 666, [2004] QB 811, [100]. See Sanjay Patel, *Founding Legitimate Expectations on Unincorporated Treaties*, 15 JUD. REV. 74, 76 (2010).

Laws had in mind. Its non-binding nature calls into question whether its terms could ever be treated as sufficiently committal to amount to a promise to affected individuals within the terms of legitimate expectations jurisprudence.¹⁷⁵ Therefore, legitimate expectations doctrine is highly unlikely to provide a basis for sustaining domestic law claims based upon the CTA.

IV. Coverage

Beyond issues with enforcement, the legislative materials being developed to address the status of Irish citizens in the UK after Brexit do not replicate all of the rights they currently enjoy as EU citizens. In particular, not all Irish citizens will enjoy the same rights to bring third-country spouses into the UK. Irish citizens who have moved into the UK under the CTA will be able to protect such rights under the settled-status regime covering EEA and Swiss citizens, if these provisions of the Withdrawal Agreement are ratified.¹⁷⁶ But, as discussed above, Irish citizens who are part of the people of Northern Ireland are excluded by the UK Government from the proposed settled-status measures for EU citizens, except with regard to the concession covering their third-country spouses and dependents.¹⁷⁷ Irish citizens who were born in Northern Ireland will be, in this material regard, less protected and more restricted in their ability to claim rights derived from EU law than Irish citizens born elsewhere, even when both groups will be resident alongside each other in post-Brexit Northern Ireland. This proposition is difficult to square with the GFA's commitments to ensuring that the people of Northern Ireland can fully express their British or Irish identities.¹⁷⁸ Under the Withdrawal Agreement, there are thus distinct advantages—in terms of the substantive rights on offer and available enforcement mechanisms—for Irish citizens who can register for settled status to do so, rather than rely solely on CTA mechanisms.

The Irish Government, by contrast, has not chosen to operate a settled-status scheme for UK citizens resident in Ireland. UK citizens will therefore be able to benefit from the Withdrawal Agreement, including rolling over their accumulated EU residency rights in Ireland, without the need for registration. Unlike the CTA, these rights are not based on “equivalence” with home citizens, and under the Withdrawal Agreement, more generous provisions derived from EU free movement law—particularly with regard to non-EEA spouses and family members—are retained.¹⁷⁹ For such families, who rely upon the rights derived from EU free movement law, the conclusion of a Withdrawal Agreement therefore took on particular importance.¹⁸⁰ For other UK citizens resident in Ireland, the CTA should suffice to support many of the needs of day-to-day life but by no means all. The CTA does not, for example, secure the recognition of the UK-issued driving licenses belonging to people resident in Ireland.¹⁸¹ In the summer of 2019, with the threat of a no-deal Brexit apparently looming, urgent public information

¹⁷⁵See *R (Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [2009] 1 AC 453, [62] (Lord Hoffmann).

¹⁷⁶They are able to do so “without prejudice” to their CTA rights. 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, at para. 5 (UK).

¹⁷⁷See *supra* note 77.

¹⁷⁸See *supra* note 89; see also Katy Hayward & Claire Mitchell, *Discourses of Equality in Post-Agreement Northern Ireland*, 9 *CONTEMP. POL.* 293, 296–97 (2003).

¹⁷⁹Withdrawal Agreement, *supra* note 1, at art. 10(1)(e).

¹⁸⁰Ireland has initiated efforts to register non-EEA family members whose rights would derive from the Withdrawal Agreement. See Luke Butterly et al., *Brexit: Non-EU Family of UK Citizens in Ireland Get 'Worrying' Letters*, *THE IRISH TIMES* (Sept. 18, 2019, 11:42 AM), <https://www.irishtimes.com/news/social-affairs/brexit-non-eu-family-of-uk-citizens-in-ireland-get-worrying-letters-1.4021343>.

¹⁸¹Without the transition period provided by the Withdrawal Agreement, the EU Directive on driving licenses will immediately cease to cover UK licenses. Directive 2006/126 of the European Parliament and of the Council of 20 December 2006 on Driving Licences, 2006 O.J. (L 403) 18 (EC).

campaigns in Ireland sought to persuade such drivers to immediately exchange their UK licenses for ones issued by Ireland.¹⁸² On this basis, the months after the Brexit transition/implementation period ends will undoubtedly reveal the myriad ways in which, notwithstanding the existence of the CTA, EU law has facilitated movement between the UK and Ireland.

V. Covid-19

Within weeks of the UK leaving the EU on January 31, 2020, Europe was plunged into the Covid-19 crisis. As the UK and Ireland went into varying states of lockdown to combat the pandemic, the CTA came under renewed strain. On one level, the crisis has confirmed the importance of the CTA, with both countries maintaining travel connections between them, even as borders across the Schengen Area closed to non-essential travel. Ireland chose not to align with EU measures restricting non-essential travel from third countries, to enable it to maintain the CTA.¹⁸³ When asked to justify Ireland's approach with regard to cross-border travel from Northern Ireland, the Taoiseach raised the issue of travelers on internal UK flights between London and Belfast: "The only way we could have stopped people on that flight travelling to just this jurisdiction would be to seal the land border between Northern Ireland and Ireland. We are certainly not going to do that."¹⁸⁴

This policy decision has meant that Ireland's restrictions on travel—to attempt to inhibit the spread of the virus—have not been applicable to people resident in Northern Ireland, potentially reducing their effectiveness. Moreover, although the CTA has so far been maintained through the crisis, this is not the same as saying that Ireland and the UK have acted in a coordinated manner when it comes to its requirements. There was little discernable high-level intergovernmental communication on the management of the CTA prior to the middle of May 2020, and even this communication did not produce immediate coordination. The UK, for example, has refused to apply quarantine requirements on travelers entering the UK on direct flights from Ireland. Ireland, for its part, has imposed quarantine restrictions on travelers on flights from the UK.¹⁸⁵ Such divergences flag up the contingent nature of any concept of CTA reciprocity. The CTA does not envisage complete alignment between the jurisdictions that it covers, and even if it did, it imposes no legally enforceable obligations. Indeed, the very fact that any restrictions on travel across Ireland's land border are so firmly off the table, notwithstanding this crisis, illustrates the fragility of the CTA, not its strength.

F. Flattering to Deceive

Since the end of 2018, the UK Government's misfiring efforts to achieve Brexit have caused havoc with the choreography of modernizing the CTA. Standard international relations might have created the expectation of a progression from the overarching Withdrawal Agreement's permission of ongoing bilateral relations between Ireland—as a continuing EU Member State—and the UK—as a withdrawing state—to the conclusion of bilateral terms, to their implementation in domestic legislation. Instead, under the pressures of Brexit, this process has become bizarrely inverted. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill began its

¹⁸²Aine McMahon, *At Least 30,000 UK Driving Licences Exchanged for Irish Ones This Year*, THE IRISH TIMES (Jul. 5, 2019, 8:20 PM), <https://www.irishtimes.com/news/ireland/irish-news/at-least-30-000-uk-driving-licences-exchanged-for-irish-ones-this-year-1.3948041>.

¹⁸³Commission Communication for COVID-19: *Temporary Restriction on Non-Essential Travel to the EU*, COM (2020) 115 final (Mar. 16, 2020).

¹⁸⁴992 Dáil Deb., Speech by Leo Varadkar (May 7, 2020) col. 38 (Ir.).

¹⁸⁵John Downing & Mairead Holland, *Boris Johnson's Quarantine Exemption for Republic of Ireland 'Won't Be Reciprocated'*, BELFAST TELEGRAPH (May 11, 2020, 7:07 AM), <https://www.belfasttelegraph.co.uk/news/health/coronavirus/boris-johnsons-quarantine-exemption-for-republic-of-ireland-wont-be-reciprocated-39195165.html>.

passage through the UK Parliament in an effort by the UK Government to have the necessary pieces of domestic law in place for the March 29, 2019 deadline—the UK’s putative “exit day”—but has yet to be enacted as of May 2020. Months later, the UK and Ireland concluded bilateral arrangements, even if they are binding only with regard to social security. The conclusion of the Withdrawal Agreement came last in this inverted process.

If this process has been tortuous for successive UK Governments, it has scarcely been easier for their Irish counterparts, who have had to balance the demands of reaching a bilateral accommodation with the UK with ensuring that any such arrangements are accepted by the EU. Irish ministers would undoubtedly have preferred for the new CTA arrangements to have been concluded after the Withdrawal Agreement. The responsibility for the delay in concluding the CTA MoU, and its non-binding nature, however, cannot be laid solely at the UK’s door. Events were shaped by Ireland’s need to be seen to be part of a common European front on Brexit, rather than cutting special deals with the UK, and its desire to allow every opportunity for Westminster to accept the Agreement. The last-minute scramble to sign the CTA MoU took place only when all hope for Westminster’s backing of Theresa May’s draft Withdrawal Agreement was lost. Both countries’ perceptions of the CTA have therefore diverged. For the UK, it remains a bilateral arrangement. For Ireland, it is an arrangement that must be accommodated within the country’s EU commitments.

Perhaps the topsy-turvy nature of these developments was all too predictable, given the inherently peculiar nature of the CTA, which has been maintained—excepting a hiatus during the Second World War and its aftermath—for nearly a century without clear formulation. And at least, when questions are asked about the nature of the CTA, there is now some level of clarity as to what the Irish and UK Governments understand it to involve. Though perhaps we should say “at most.” The CTA MoU does not—indeed, cannot—prevent the ongoing struggle over the openness of the Irish border after Brexit. An agreement to facilitate freedom of movement of persons between the UK and Ireland will not, of itself, keep the land border in Ireland all but invisible for private purposes. This will be achieved only if the provisions on the movement of goods under the Withdrawal Agreement’s Protocol on Ireland and Northern Ireland are implemented effectively.¹⁸⁶ More than that, as we have illustrated, the MoU does not bring with it the same legal architecture provided by EU law. Without such structures, individuals will struggle to rely on their supposed CTA-related rights in legal disputes.

As a result, the CTA MoU will ultimately do little to diffuse the tensions in UK–Ireland relations generated by Brexit or to prevent the CTA’s provisions from being eroded in the future. The MoU might even, in the best traditions of Brexit, come to be seen as trying to have its cake and eat it too. The two governments have sought to preserve the flexibility of the CTA arrangements, while also giving clarity to those affected. Without legal protection, however, the clarity is illusory. And now that the MoU has formalized the content of the CTA, there is less chance of new rights becoming associated with it over time, as they have over the last century. Even Theresa May’s Brexit consolation prize might ultimately turn out to be of little value.

¹⁸⁶Withdrawal Agreement, *supra* note 1; Protocol on Ireland/Northern Ireland, *supra* note 4, at arts. 4–12.