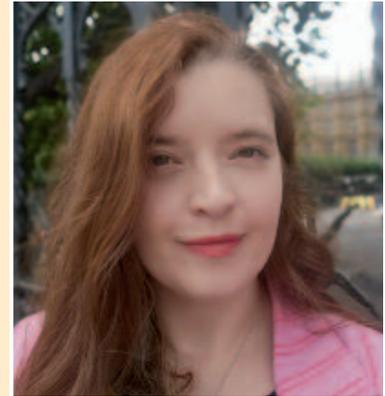


Implementation of the citizenship provisions of the Good Friday Agreement

Emma DeSouza

Emma DeSouza is a citizen's rights campaigner who reaffirmed the identity and citizenship provisions of the Good Friday Agreement through a high profile court case against the British Home Office. She is also the vice-chair and spokesperson for Northern Ireland for VotingRights.ie and a regular political commentator and public speaker.



Introduction

The question of citizenship and identity in Northern Ireland has been a particular point of contention and much travail since the creation of the border in 1921. If one looks at the historical context it can be of little surprise that the formation of a state that divided the island of Ireland and placed two rivalling communities into a shared space resulted in decades of division, segregation and sectarianism. Northern Ireland was created when Ireland was partitioned between Northern Ireland and Southern Ireland by the 1920 Government of Ireland Act.¹ Since partition the region has been dominated by political arguments over Northern Ireland's constitutional future and stability.

Identity in Northern Ireland cuts across and implicates questions of cultural, religious and national identities. Establishing equality between what had become two largely distinct communities lay at the centre of the Northern Ireland civil rights movement, and would become the centre of the decades of violence and conflict that followed. The 1998 Good Friday Agreement dealt with a number of human rights issues in the region and formed what many see as a constitutional starting point in healing division between the two main communities, and establishing devolution and political stability.² Widely seen as a model of peace, cooperation and compromise, the Agreement was the culmination of years of extensive negotiations, which required the intervention of the Irish, British and American governments in order to convince the vast majority of regional political parties to make a profound leap of faith. The Good Friday Agreement dealt with the question of identity and citizenship under article 1 (vi) of both the Multi-party Agreement (in the section on Constitutional Issues) and the British-Irish Agreement, with the latter being an international treaty between the Irish and British Governments registered at the United Nations. Article 1 (vi) is commonly referred to as the birthright provision or birthright protection. It concerned itself with ensuring that neither

of the two main identities or communities would be held above the other in Northern Ireland, and sought to protect identity so as to remove it as a point of contention. The identity provisions extend to the legal right to hold British and Irish citizenship simultaneously.

The Agreement set in place a peace accord founded on the principles of equality and mutual respect, with an onus on the co-guarantors to protect and enshrine these foundations into domestic policy and practice. A complex combination of legislation, reform and good will has been essential to the creation of newly-formed institutions, all of which flourished under the protective blanket of EU law. As a co-guarantor of the Agreement, the British government was required, under its international obligations, to give domestic legal effect to all relevant provisions of the Good Friday Agreement – yet there is no mention of the unique identity and citizenship provisions in domestic UK law.

This legislative gap has been exposed by a recent court challenge over the right to be accepted as Irish under the terms of the Good Friday Agreement and is being compounded by Brexit.

What does the agreement say?

The Good Friday Agreement was put to a referendum on May 22nd 1998. Over 71% of people in Northern Ireland voted for it. A simultaneous referendum held in Ireland produced an even larger majority of 94%.³

The Good Friday Agreement includes both the Multi-party agreement (MPA) and the British-Irish Agreement (BIA). The multi-party agreement was signed by the majority of Northern Ireland's political parties. The British-Irish agreement was annexed to the multi-party agreement and is a treaty between the governments of Britain and Ireland.

The MPA deals with many aspects relating to the political and civil rights conflict in Northern Ireland. There are a number of strands and articles containing detailed arrangements on a range of rights issues. Article 1 of the MPA is replicated in the British-Irish agreement and seeks to recognise the legitimacy of divergent political opinions and national identities. In order to give legitimacy to these divergent political ideologies and national identities Article 1 offers guarantees and commitments as to how they will be acknowledged, accommodated and respected.

Article 1 (vi) of the section on Constitutional Issues in the MPA and of the BIA confirms that the participants and the two governments:

“recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose and accordingly confirm that their right to hold both Irish and British citizenship is accepted for both governments and would not be affected by any future change in the status of Northern Ireland”.

Annex 2 of the BIA is titled ‘declaration on the provisions on paragraph (vi) of Article 1 in relation to citizenship’.

The Annex confirms that it is the joint understanding of the British and Irish Governments “that the term ‘the people of Northern Ireland’ in paragraph (vi) of article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or

is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence”.

It has been recently argued by some that Article 1 (vi) of the Good Friday Agreement is ambiguous, and can be interpreted as relating to identity, which is not the same as a legal right to hold citizenship.⁴ However, those making such an argument must in my view actively ignore the express wording of “be accepted as”, while also relying on a logical fallacy: that an international treaty concerns itself with bestowing a right to ‘feel’ a certain way.

The ‘identify is not a right to elect’ argument is a misinterpretation of Article 1 (vi) recently used by the British Home Office in the case of *Jake Parker DeSouza v Secretary of State for the Home Department*.⁵ The argument is at odds with the view of the Irish government who view Article 1 (vi) to translate to a right to elect citizenship and be accepted as Irish or British or both. The Irish government has been vocal in denouncing attempts to create a distinction between identity and the right to hold citizenship under this provision.⁶ As a consequence we have two divergent interpretations of a key tenet of an international agreement held by its two co-guarantors.

Background – citizenship on the island of Ireland

Citizenship across these islands has been complicated due to the historical context and independence of the 26 counties. After partition, under the 1922 constitution citizens in the South became citizens of Saorstát Eireann (the Irish Free State);⁷ however, UK law continued to treat them as British subjects. In 1935 the Irish government passed citizenship legislation that sought to reaffirm Dublin’s position, with Section 33.3 of the Irish Nationality and Citizenship Act stating that being a ‘natural born citizen of Saorstát Eireann’ did not confer any other citizenship.⁸ Under UK law the British courts disagreed, and found in *Murray v Parkes* (1942) that a Roscommon-born man who had moved to England, was a British subject under British law and had therefore been legitimately subject to British Army conscription.⁹

Subsequent Irish Nationality and Citizenship Acts implemented Articles 2 and 9 of the Constitution. The 1956 Irish citizenship legislation introduced into law the term ‘Irish Citizens’,¹⁰ with its provisions on birth and descent automatically conferring Irish citizenship on persons in Northern Ireland – an action considered by the then Stormont Parliament as inflicting ‘unwanted Irish republican nationality on the people of Northern Ireland.’¹¹

However, Ireland subsequently amended its citizenship legislation to reflect the ‘birthright’ provisions in the Good Friday Agreement. The changes were taken forward by new citizenship legislation in 2001 that amended Ireland’s 1956 Act. The Irish Nationality and Citizenship Act 2001¹² amended the Irish Nationality and Citizenship Act 1956 to give effect to the Good Friday Agreement. Section 7(1) of the 1956 Act had provided:

“Pending the re-integration of the national territory, subsection (1) of section 6 shall not apply to a person, not otherwise an Irish citizen, born in Northern Ireland on or after the 6th December 1922, unless, in the prescribed manner, that person, if of full age, declares himself to be an Irish citizen or, if he is not of full age, his parent or guardian declares him to be an Irish citizen. In any such case, the subsection shall be deemed to apply to him from birth”.

Ireland's nationality law is carefully constructed to provide an entitlement to Irish citizenship, a right of election and to avoid statelessness. Under the Nationality and Citizenship Acts, as currently in force, Irish citizenship is an entitlement unless no other entitlement to citizenship exists, at which point it is then automatic to avoid statelessness.

To give effect to this entitlement to become an Irish citizen, a person must do something that only an Irish citizen is entitled to do. This might seem peculiar but the Constitution of Ireland does specify a number of acts as being reserved for citizens.¹³ One of the most obvious ways to give effect to this entitlement is through acquiring an Irish passport, but other means include running for certain elected offices, or seeking consular support whilst abroad.

The concept in law of a 'British Citizen' began in 1983 with the commencement of the current British Nationality Act 1981,¹⁴ replacing the concept of a 'Citizen of the United Kingdom and the Colonies' from British nationality legislation in 1948. The 1948 Act ceased to consider the Republic of Ireland as part of the 'UK and the Colonies' and brought an end to the practice of automatic conferral of British Subject status on Irish citizens.¹⁵ The 1981 Act continued automatically to confer British citizenship on most persons born in the UK – including Northern Ireland.

Section 1(1) of the British Nationality Act 1981 provides that:

“A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is—

(a) a British citizen; or

(b) settled in the United Kingdom or that territory”.

An Irish citizen is considered settled in the UK, therefore under Section 1 of the British Nationality Act 1981 the people of Northern Ireland, as defined in the Good Friday Agreement, are considered automatically British at birth. This is where a conflict arises between Ireland's implementation of the birthright provisions of the Good Friday Agreement and that of the UK. The UK did not amend domestic UK citizenship law to reflect the unique status of the people of Northern Ireland.

Interaction with domestic UK immigration law

The failure of the UK government to amend domestic statute in line with the birthright provisions of the Good Friday Agreement went largely unnoticed, partly due to Ireland and the UK's joint membership of the European Union.

However, in 2012, the British Home Office latched on to the decision of *McCarthy v Secretary of State for the Home Department*,¹⁶ as a means to roll out a more restrictive family migration policy that would form part of the newly developed 'hostile environment'. The effect of this policy change was that British citizens/dual British citizens could no longer access more generous EU family reunification provisions and would instead have to apply under the UK's draconian domestic family migration route. This change was implemented UK-wide, without consideration or consultation on how it would affect the people of Northern Ireland.

This resulted in the first major barrier to GFA-rights in Northern Ireland with Irish and British citizens being denied a European Union entitlement that was granted by the Home Office up to 2012. This internal policy change not only ran contrary to the Good Friday Agreement but diverged from previous internal UK immigration policy in regards to Northern Ireland.

The DeSouza case

It was this discrepancy between domestic UK immigration policy and the Good Friday Agreement that prompted the Jake DeSouza case, of which I was a party.

The case began in 2015 when the British Home Office, under the remit of the 2012 *McCarthy v Secretary of State for the Home Department* case, refused to grant a Northern Irish-born Irish citizen an application for an EEA residence card for their US-born spouse. This was despite the fact that they held an Irish passport only, and identified solely as an Irish citizen under the terms of the Good Friday Agreement. The British government ignored the stark differences between McCarthy (a British citizen born and residing in England, who obtained Irish citizenship solely by descent), and a person of Northern Ireland – who under the terms of the Good Friday Agreement, has an explicit right to be accepted as Irish or British or both. As a workaround, the Home Office recommended that the people of Northern Ireland renounce British citizenship, a process which involves a legal declaration that they are British citizens, costs £372, and removes each person's freedom of movement for up to six months, amongst other limitations and detriments. The case went to appeal.

In 2017, Judge Gillespie, who presided over the First-tier Tribunal (Immigration and Asylum) (FtT), ruled in favour of DeSouza, citing the constitutional nature of the Good Friday agreement:

*“The constitutional changes effected by the good Friday agreement with its annexed British-Irish agreement, that latter amounting to an international treaty between two sovereign governments, supersede the provisions of the British nationality act 1981 in so far as the people of Northern Ireland are concerned. He or she is permitted to choose their nationality as a birthright. Nationality cannot therefore be imposed upon them by birth”.*¹⁷

The Home Office in turn lodged an appeal against the FtT decision. While initially refused, a second appeal was lodged to the Upper Tribunal, and subsequently granted to the Home Office in May 2018. However, the case wasn't heard by the Upper Tribunal until September of 2019 due to two consecutive adjournments requested by the Home Office. During the court proceedings, Judge Rintoul and Judge Lane presided over the hearing via video link from London. The Upper Tribunal ruled in favour of the Home Office and released their decision via a written judgment on October 14th 2019.¹⁸

The tribunal stated that they viewed their task to be 'to ascertain what the parties to that agreement intended by way or article 1 (vi)/(iv)', yet concerned itself primarily with parliamentary sovereignty and the dualist nature of the UK's legal system. Some believed the tribunal had overreached and considerable concern was raised as to its interpretation of the Good Friday Agreement and failure to engage with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights in any meaningful way.¹⁹

The Home Office argument consisted of two main points: firstly, that Article 1 (vi) relates to identity and not citizenship, despite the corollary section on citizenship; and secondly even if

it were to relate to citizenship, that provision does not exist in domestic UK law and therefore under the UK's dualist system cannot be relied upon. The Upper Tribunal agreed with this view.

The submissions by the Home Office were remarkable in that they sought to relieve the British Government of its responsibilities to both the Good Friday Agreement and international law, going so far as to contend that a, "A treaty HMG is a party of does not alter the laws of the United Kingdom", and that "The courts of the United Kingdom do not have the power to force the British Government to uphold its commitments under international law".²⁰

In written submissions to the Upper Tribunal the Home Office created an unsupported distinction between the identity and citizenship entitlements in Article 1 (vi),²¹ stating that: "The birthright provisions of the British-Irish agreement allow for choice of identity, which is not the same as a right to choose one's citizenship in law".²²

In addition to this the department claimed that the absence of the birthright provisions from the Northern Ireland Act 1998 indicated that the provision was not intended to have legal scope in terms of citizenship. This is the first time that such an interpretation has been put forward by any Government department or body. Surprisingly, the Upper Tribunal agreed after considering what it deemed to be 'inherent problems' with a system of nationality by consent, namely the risk of statelessness and when consent would be applied:

"These examples of the problems inherent in a system of nationality based on consent make it plain that the omission from the 1998 Act of anything touching upon the issues of self-identification and nationality was entirely deliberate on the part of the United Kingdom Parliament".²³

There was much to digest in the Upper Tribunal decision with considerable concern raised over the Tribunal's confidence in claiming to know the intent of parliamentarians in 1998, despite there being no submissions to support such a view. The Tribunal considered the UK's failure to give domestic legal affect to Article 1(vi) to mean that the treaty provision related to identity and not citizenship:

"The omission [from the 1998 Northern Ireland Act] also underscores the correctness of the Secretary of State's submission that, properly construed, Article 1(iv)/(vi) does not, in fact, involve giving the concept of self-identification the meaning for which the claimant argues. If the parties to the multiparty agreement and the governments of Ireland and the United Kingdom 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".²⁴

Of course, the Irish government would contend that it did just that through the express wording of Article 1(vi). It should be noted here that the Home Office claimed Article 1 (iv) of the Good Friday Agreement had an effect on Article 1 (vi), in that Article 1 (iv) reaffirmed Northern Ireland's place in the United Kingdom until such time as the people decide otherwise. However, there is nothing in the Good Friday Agreement to connect these two provisions or to suggest that either have an effect on the other. The argument is equally unsupported.

The Upper Tribunal misdirected itself on a number of occasions and made some notable errors in law. One such error was a failure to determine whether the right to self-determination was engaged under Article 8 of the European Convention on Human Rights, which led to a failure in assessing whether that right was breached.

Additionally, if the legitimate aim was to avoid statelessness, the Upper Tribunal failed to consider whether that aim could be achieved by less intrusive means or by interpreting legislation in a less draconian way.

Most striking, however, was paragraph 39 where the Tribunal erred in law by presupposing the intention of the drafters of the British-Irish Agreement/The Multi-Party Agreement of failing to apply the purposive and generous approach to interpretation required to ensure the British Nationality Act 1981 was interpreted consistently with the Good Friday Agreement.²⁵

What all of these errors point to is a failure of the Upper Tribunal to engage with the historical context of Northern Ireland. The Tribunal could only view the granting of British citizenship as a privilege and did not consider that in a contested region with divergent political and national identities, that the granting of British citizenship on those that don't want it, could be seen as an imposition.

An appeal against the Upper Tribunal decision was lodged to the Court of Appeal for Northern Ireland which set a preliminary date of June 3rd 2020.²⁶

A political campaign

Over a number of years, the high profile case received significant cross-party political support domestically and further afield, with support from both the European Commission and members of US Congress.²⁷

In the background to the ongoing legal proceedings was the *We Are Irish Too* campaign,²⁸ which had gained considerable momentum. On 9 January, as part of the New Decade New Approach deal to restore devolution in northern Ireland,²⁹ the British government made a commitment in relation to the DeSouza case, thanks to an intervention from the Irish Government who had sought to find a resolution.³⁰

The commitment stated that:

“The Government has reviewed the consistency of its family migration arrangements, taking into account the letter and the spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it” (New Decade, New Approach, Annex A: UK Government Commitments to Northern Ireland, paragraph 39).

Of course, negating the fact that this issue became prevalent not due to those wishing to retain British citizenship but rather by those asserting that they wanted to be accepted as Irish, not British, under the terms of the Good Friday Agreement.

The British Government committed to changing domestic UK immigration law to align with both the letter and the spirit of the Good Friday Agreement, and stated that these changes would be available to the family members of all the people of Northern Ireland, “no matter whether they hold British or Irish citizenship or both” (New Decade, New Approach, Annex A: UK Government Commitments to Northern Ireland, paragraph 15).

This commitment was brought forward in domestic UK legislation shortly before the Court of Appeal hearing in the DeSouza case.³¹

On 14 May 2020, the Government announced these changes in its Statement of Changes to the Immigration Rules.³² The changes took effect from 24 August 2020. From that date the ‘family members’ of the ‘people of Northern Ireland’ are able to apply to the EU Settlement Scheme, whereas previously the family members of NI born citizens were unable to apply as they weren’t considered ‘EEA nationals’ but rather were treated as British citizens.

The changes amended the Home Office’s Immigration Rules-Appendix EU,³³ adding the ‘people of Northern Ireland’ to the definition of an EEA national. Notably, the definition of the people of Northern Ireland under the Good Friday Agreement was replicated, stating that such a person may be ‘an Irish citizen, or a British citizen, or a dual British and Irish citizen.’

These changes represented a significant climb-down in the Home Office position in the DeSouza case and set a precedent for recognition of the birthright provisions of the Good Friday Agreement in domestic UK law. They also place the people of Northern Ireland in an advantageous position, particularly those who identify as British, who not only gain more favourable family reunion rights, which aren’t available to British citizens elsewhere in the United Kingdom, but who also could apply to the scheme themselves which provides EU protections.

However, the changes are temporary and the window to access this scheme is incredibly narrow, raising some suspicions that this temporary concession worked in favour of the British government who, through these changes, brought an end to the litigation in the DeSouza case and avoided having to address the wider question of imposing British citizenship on the people of Northern Ireland.

Constitutional status of the Good Friday Agreement

The Northern Ireland Office refers to both the Belfast/Good Friday Agreement and the Northern Ireland Act 1998 as forming the basis of the constitutional framework of Northern Ireland. Both the FtT and Upper tribunal considered the constitutional status of the Agreement, with the latter questioning whether the document can be seen as such. This was a divergence from the widely held view that the Good Friday Agreement is a constitutional document with judicial consideration reaffirming that constitutional status.

The case of *Robinson vs Secretary of State for Northern Ireland* concerned the legality of the election of the First Minister and deputy First Minister by the Northern Ireland Assembly. The House of Lords considered the history and constitutional status of the Good Friday Agreement and the Northern Ireland Act 1998. Lord Bingham clarified that the object of the Good Friday Agreement was:

*“to achieve ‘reconciliation, tolerance and mutual trust’ and ‘the protection and vindication of the human rights of all’ [...]. The parties committed themselves to ‘partnership, equality and mutual respect’ [...]. They also pledged themselves in good faith to work to ensure the success of the arrangements to be established under the Agreement”.*³⁴

The Northern Ireland Act 1998 was explained by Lord Bingham as being enacted to implement the Good Friday Agreement:

“The 1998 Act, as already noted, was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism” (paragraph 10).

“The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously, and purposively, bearing in mind the values which the constitutional provisions are intended to embody” (paragraph 11).

In a country without a written constitution it is considered of jurisprudential relevance that Northern Ireland is regarded as having a written constitution.

International obligations

In addition to the question of the constitutional nature of the Good Friday Agreement is whether the UK can be relied upon to uphold its commitments under international law. The United Nations’ Vienna Convention on the Law of Treaties (VCLT),³⁵ which both the UK and Ireland are parties to, enshrines many of the principles of customary international law, including that of *pacta sunt servanda*, meaning agreements/treaties must be observed. This principle is found in Article 26 of the VCLT which states: “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

Article 27 also states “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Therefore, not incorporating provisions of a treaty into British domestic law (if they are not provided for already) does not absolve the UK of those obligations under international law.

Counsel on behalf of the Home Department in the case of DeSouza argued that the dualist tradition of the UK’s legal system has the consequences that whilst binding in international law, an international treaty provision does not bind in domestic law and is not justiciable before the domestic courts.

However, under the UK’s international obligations, a failure to give domestic legal effect to a provision of a treaty does not absolve the Government of its obligations.³⁶ It remains an important principle of public policy to obey an instrument binding under international law, and as such the British Nationality Act 1981 should be read in such a way as to conform with the international law obligations of the 1998 British-Irish Agreement.

Whether or not the UK considers itself bound to the principles of international law is of particular interest given the UK’s departure from the European Union.

Previous interpretations of the birthright provision

Whilst the subject of citizenship in this region has received renewed attention, previous UK interpretations of Article 1(vi) did not lend themselves to the position that a person of Northern Ireland could not choose to be considered an Irish citizen only.

The 2008 Citizenship Review conducted by the former UK Attorney General Lord Goldsmith QC contained the interpretation that, “the Good Friday Agreement confirms the right of the people of Northern Ireland to take either British or Irish citizenship or both”.³⁷

That same year, the Northern Ireland Human Rights Commission in its GFA-mandated advice on the content of a Northern Ireland Bill of Rights also interpreted the birthright provisions as providing for persons to be British or Irish citizens, or both. The Commission recommended the incorporation of a birthright to citizenship in the Bill of Rights. The proposed right, which would have required an amendment to domestic UK citizenship law referred to “The right of the people of Northern Ireland to hold British or Irish citizenship or both [...] with no detriment or differential treatment of any kind”.³⁸

Until recently the Government website, “nidirect”,³⁹ contained the view, under the heading of Citizenship in Northern Ireland, that “The people of Northern Ireland can choose to be British citizens, or Irish citizens or both. If they choose to be both British and Irish citizens, this means they have a dual citizenship”. This definition was replaced after the Upper Tribunal decision in the DeSouza case so as to align with the Government’s new interpretation of the birthright provisions.

Ultimately the Home Office used to recognise the sensitivity and complexity of identity in Northern Ireland. A historical example is provided by the ill-fated UK Identity Cards scheme,⁴⁰ where the Home Office ultimately conceded that it was incompatible with the GFA to compel NI-born Irish citizens to carry planned UK Identity Cards which identified the holder as a ‘British Citizen’. The scheme was abandoned in 2010. The new approach of openly declaring the people of Northern Ireland as British represents a shift in Government policy with little indication as to what prompted this change in attitude.

Why is this so important?

Identity in Northern Ireland remains a complex interaction of political, religious and national identities. According to the academics John Garry and Kevin McNicholl in work presented in the 2014/15 Northern Ireland Assembly Knowledge Exchange Seminar Series, 29% of those surveyed in Northern Ireland described themselves as Northern Irish, around 40% as British, and 25% as Irish.⁴¹ When the responses are broken down by religious affiliation there is a strong relationship between being Protestant and feeling British and between being Catholic and regarding oneself as Irish.

There are any number of subsequent polls relating to identity in Northern Ireland, with a Lucid Talk poll conducted in 2018 for the BBC showing that fewer people in Northern Ireland thought of themselves as British than any other part of the UK.⁴² The 2019 National Life and Times Survey results indicated a possible retrenchment of traditional political allegiances, with an increase in those identifying as unionist (33%) and nationalist (23%), and a squeeze on the community who identify as neither unionist or nationalist, a community that has significantly grown since the 1998 Agreement and that remains under the NILT survey as the majority at 39%.⁴³

The Brexit referendum is expected to have an ongoing impact on both identity and citizenship in the region with an influx of applications for Irish passports since the UK’s decision to leave the European Union. According to figures from Ireland’s Department of Foreign Affairs there’s been an increase of 76% in passport applications between 2016-2019 versus the previous four years of 2012-2015. In total 831,779 Irish passports had been issued to the people of Northern Ireland between 2010-2019.⁴⁴ In contrast, in figures obtained by *The Irish Times* through a freedom of information request, the number of British passports issued in Northern Ireland has been steadily declining over the past four years since the Brexit referendum.⁴⁵

Identity in Northern Ireland cuts across religion, political expression and national identity, leaving all citizens of – and around – the region vulnerable. Imposing citizenship upon those who do not want it serves only to harden identities, and for the past two decades – thanks only to the blanket of EU law and the Good Friday Agreement – Irish citizens, British citizens and anyone in-between, have had an open space to slowly soften identity lines.

Bill of Rights

Beyond citizenship under the Good Friday Agreement, there is a wider question of discrimination, and whether the commitments under the Agreement have been successfully implemented to provide for equal treatment for those identifying as Irish or British (or both).

It was envisioned that many of the human rights principles in the Agreement would be brought forward under the scope of a bill of rights, including the right to equal opportunity, freedom and expression of religion, and the right to pursue democratically national and political aspirations.

The Northern Ireland Human Rights Commission completed its GFA mandated work and set forward proposals in 2008, however, this was set aside by the British Government and many of the rights protections under the Agreement have either yet to be implemented or have been mis-implemented. It can be reasonably assumed that if the 2008 Bill of Rights recommendations from NIHRC were implemented in full then the outstanding issues around citizenship under Article 1 (vi) would have been resolved.

As part of the New Decade New Approach deal a newly formed ad hoc committee has been formed at Stormont to revisit the work on a bill of rights for Northern Ireland, but with Brexit already undermining adherence to the European Charter on Human Rights and the Human Rights Act 1998 it may prove all the more difficult at this late stage to ring-fence rights in this region.

Is there a solution?

The next step from the DeSouza case will be establishing a legal solution that is both consistent with the birthright provisions of the Good Friday Agreement and avoids unintended consequences. In a report published earlier this year commissioned by the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission,⁴⁶ and completed by leading nationality law barrister Alison Harvey,⁴⁷ legislative solutions were put forward. The report contained a raft of careful, considerate and creative recommendations to bring domestic UK citizenship law in line with the Good Friday Agreement. The key recommendations include:

- “To limit the power of the UK State to make an assumption as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen” (p.48).
- To use the language of the 1954 UN Convention on the Status of Stateless Persons (p.45) – “recognised by any State as a national by operation of its law”⁴⁸ – in combination with “An express prohibition on statelessness” (p.44).
- Section 1(1) of the British Nationality Act 1981 should continue to express that all those born to a British citizen or settled parent in the UK are British citizens with a new

subsection in s1 of the British Nationality Act that should provide that no assumption may be made as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen (p.48).

- The use of the ‘right of abode’ to distinguish the ‘people of Northern Ireland’ from other Irish citizens in the UK and highlight their special status (p.61).

The report also contains a number of recommendations on the right of election: that a parent can elect for their child once, and that a person of age can make multiple elections whether they want to be British or Irish or both, with one free election and subsequent elections incurring fees. This system honours the spirit of a birthright, as an inalienable right that continues in perpetuity.

The report on incorporating the birthright commitment into domestic UK law was released in partnership with a report on continuing EU rights and entitlements post-Brexit.⁴⁹ The latter report also contained a recommendation in relation to the current citizenship status in Northern Ireland which noted that the current legal position is that the people of Northern Ireland are entitled to apply for Irish citizenship in addition to but not as a substitute for British citizenship. It recommended that “Both Governments should agree a common policy approach regarding the application of the GFA’s birthright provision in Northern Ireland”, and that “The two Governments’ divergent approaches to this issue undermines people’s ability to understand their entitlements, and must be resolved” (p.4).

Conclusion

Brexit will create real difficulties in adhering to the parity of esteem principle of the Good Friday Agreement. The UK’s exit from the EU complicates questions around citizenship, identity and immigration with British and Irish citizens holding a different set of rights. This is despite the temporary change to the immigration rules that treats both British and Irish citizens born in Northern Ireland as EU citizens.

There remains a significant implementation gap in giving domestic legal effect to the citizenship entitlements of the Good Friday Agreement. Those who identify as British will have to obtain Irish citizenship in order to access EU entitlements and be on a level playing field with their Irish counterparts. No-one should be forced to adopt or renounce a citizenship in order to access rights. At present, there is no tangible solution to this issue. Without adequate legalisation underpinning the unique identity and citizenship provisions, as expressed in the Good Friday Agreement there’s likely to be further litigation, possibly on the grounds of discrimination.

There is no default citizenship in the Good Friday Agreement, no mention of citizenship being dependent on Northern Ireland’s place in the UK, and yet such an argument is actively pursued by London.

This system creates a special place for those who identify as British in Northern Ireland, with Irish citizenship being perceived by the British Government and some commentators as only possible in addition to being British. Such a policy seeks to place one identity over the other and is notably, not consistent with the letter and the spirit of the Good Friday Agreement.

It relies on the idea that a section of an international treaty concerns itself with bestowing a right to ‘feel’ a certain way. One must actively perform a series of mental gymnastics to imagine such a concept, and to do so must actively ignore the express wording of the provision itself. There is no evidentiary material to support such a view outside of the recent arguments made by the Home Office. What’s needed is a consensus between both the Irish and British governments as to how citizenship in Northern Ireland should operate, especially given the consent principle of the Good Friday Agreement that could see the region reunified in the event of a majoritarian vote.

As an aside to the subject of citizenship implementation under the Good Friday Agreement I want to take this opportunity to highlight wider citizenship concerns in this region. There is a cohort of people in Northern Ireland who fall outside the term ‘people of Northern Ireland’, who equally face uncertainty with Brexit. Both the Irish and British governments should look to creating a safety net for those who fall outside of this remit but who call Northern Ireland home.

Notes

- ¹ Government of Ireland Act 1920, <https://www.legislation.gov.uk/ukpga/Geo5/10-11/67/contents/enacted>
- ² <https://www.gov.uk/government/publications/the-belfast-agreement>.
- ³ See Ulster University’s CAIN Web Service, “Results of the Referenda in Northern Ireland and Republic of Ireland, Friday 22 May 1998”, <https://cain.ulster.ac.uk/issues/politics/election/ref1998.htm>.
- ⁴ See, for example, Peter Weir, “Automatic UK Citizenship for Northern Ireland people is at risk from De Souza case” (20 September 2019). <https://www.newsletter.co.uk/news/politics/peter-weir-automatic-uk-citizenship-northern-ireland-people-risk-de-souza-case-938996>.
- ⁵ <https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-355> ; see also Diarmaid Ferriter, “Emma deSouza case is about much more than a technicality” (19 October 2019).
- ⁶ See Gráinne Ní Aodha and Press Association, “Varadkar says Emma DeSouza ‘is an Irish citizen’ and that he will raise case with Johnson” (15 October 2019).
- ⁷ Constitution of the Irish Free State (Saorstát Éireann) Act, 1922, <http://www.irishstatutebook.ie/eli/1922/act/1/enacted/en/print.html>.
- ⁸ Irish Nationality and Citizenship Act, 1935, <http://www.irishstatutebook.ie/eli/1935/act/13/enacted/en/html>.
- ⁹ See F.A. Mann, “The Effects of Changes of Sovereignty upon Nationality” (1942).
- ¹⁰ Irish Nationality and Citizenship Act, 1956, <http://www.irishstatutebook.ie/eli/1956/act/26/enacted/en/html>.
- ¹¹ See Daniel Holder, “The right to be British, Irish or both” (23 April 2019).
- ¹² Irish Nationality and Citizenship Act, 2001, <http://www.irishstatutebook.ie/eli/2001/act/15/enacted/en/html>.
- ¹³ Constitution of Ireland, <http://www.irishstatutebook.ie/eli/cons/en/html>.
- ¹⁴ British Nationality Act 1981, <https://www.legislation.gov.uk/ukpga/1981/61>.
- ¹⁵ British Nationality Act 1948, <https://www.legislation.gov.uk/ukpga/Geo6/11-12/56/enacted>.
- ¹⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0434>.
- ¹⁷ First-tier Tribunal decision in *De Souza v Secretary of State for the Home Department* (unpublished); see C.J. McKinney, “Good Friday Agreement doesn’t stop Northern Irish people being born automatically British” (2019).
- ¹⁸ <https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-355>.
- ¹⁹ Council of Europe, European Convention on Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

- ²⁰ Grounds of appeal lodged by the Secretary of State for the Home Department to the Upper Tribunal (unpublished).
- ²¹ See *BBC News*, “Emma de Souza ruling ‘out of spirit’ with Good Friday Agreement – Varadkar” (16 October 2019), and *BBC News*, “‘People born in NI remain British citizens’, Emma de Souza court hears” (10 September 2019).
- ²² Skeleton argument of the Secretary of State for the Home Department in *De Souza v Secretary of State for the Home Department* (unpublished).
- ²³ <https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-355>, paragraph 38.
- ²⁴ <https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-355>, paragraph 39.
- ²⁵ See House of Lords, *Judgements – Robinson v Secretary of State for Northern Ireland and Others (Northern Ireland)*, (25 July 2002), <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd020725/robin-1.htm>.
- ²⁶ See *The Irish Times*, “Emma DeSouza takes citizenship dispute to appeal court” (25 November 2019).
- ²⁷ See *The Irish Times*, “Emma DeSouza seeks US support for her case against British government” (5 February 2020).
- ²⁸ For more visit <https://www.weareirishtoo.com>.
- ²⁹ Northern Ireland Office, “New Decade, New Approach” (January 2020).
- ³⁰ See *RTE News*, “Coveney raises citizenship concern after UK court ruling” (14 October 2019).
- ³¹ See Freya McClements, “Emma DeSouza withdraws immigration case after British government concession” (21 May 2020).
- ³² Home Office, *Statement of Changes in Immigration Rules* (May 2020).
- ³³ Home Office, *Immigration Rules Appendix EU*, <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu>.
- ³⁴ House of Lords, *Judgements – Robinson v Secretary of State for Northern Ireland and Others (Northern Ireland)*, paragraph 2, <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd020725/robin-1.htm>.
- ³⁵ https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
- ³⁶ See John Curtis et al, “Northern Ireland, Citizenship and the Belfast/Good Friday Agreement”, House of Commons Library Briefing Paper (18 October 2019).
- ³⁷ Lord Goldsmith QC, *Citizenship: Our Common Bond* (2008), p.76.
- ³⁸ Northern Ireland Human Rights Commission, “A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland” (10 December 2008), p.41.
- ³⁹ <https://www.nidirect.gov.uk/articles/about-northern-ireland>.
- ⁴⁰ See *Legislative Scrutiny: Identity Documents Bill*, Human Rights Joint Committee, Written Evidence, Letter from the Deputy Director Policy, Identity and Passports Service to the Commons Clerk of the Committee (3 September 2010), <https://publications.parliament.uk/pa/jt201011/jtselect/jtrights/36/3608.htm>.
- ⁴¹ John Garry and Kevin McNicholl, “Understanding the ‘Northern Irish’ Identity” (2015).
- ⁴² See Mark Devenport, “Fewer NI people feel British than other UK regions – survey” (8 June 2018), *BBC News NI*, <https://www.bbc.co.uk/news/amp/uk-northern-ireland-44398502>.
- ⁴³ <https://www.ark.ac.uk/nilt/>.
- ⁴⁴ FactCheckNI, “Do more than 700,000 born in Northern Ireland have an Irish passport?” (5 March 2020).
- ⁴⁵ Brian Hutton, “Number of British passports issued in Northern Ireland falls” (12 August 2019).
- ⁴⁶ Alison Harvey, “Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998” (March 2020).
- ⁴⁷ See <https://www.no5.com/people/barristers/alison-harvey/court-of-protection/>.
- ⁴⁸ <https://www.unhcr.org/uk/un-conventions-on-statelessness.html>.
- ⁴⁹ Sylvia de Mars et al, “Continuing EU Citizenship ‘Rights, Opportunities and Benefits’ in Northern Ireland after Brexit” (2020).

References

- BBC News* (2019), “Emma de Souza ruling ‘out of spirit’ with Good Friday Agreement – Varadkar” (16 October), <https://www.bbc.co.uk/news/amp/uk-northern-ireland-50060229>
- BBC News* (2019), “‘People born in NI remain British citizens’, Emma de Souza court hears” (10 September), <https://www.bbc.co.uk/news/amp/uk-northern-ireland-49655676>
- Curtis, J., Dawson, J., Sturge, G., and Wilkins, H. (2019), “Northern Ireland, Citizenship and the Belfast/Good Friday Agreement”, House of Commons Library Briefing Paper No 8571, <https://commonslibrary.parliament.uk/research-briefings/cbp-8571/>
- de Mars, S., Murray, C., O’Donoghue, A., and Warwick, B. (2020), “Continuing EU Citizenship ‘Rights, Opportunities and Benefits’ in Northern Ireland after Brexit”, Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission, https://www.nihrc.org/uploads/publications/Rights_Opportunities.pdf
- FactCheckNI (2020), “Do more than 700,000 born in Northern Ireland have an Irish passport?” (5 March), <https://factcheckni.org/articles/do-more-than-700000-born-in-northern-ireland-have-an-irish-passport/>
- Ferriter, D. (2019), “Emma DeSouza case is about much more than a technicality”, *Irish Times* (19 October), <https://www.irishtimes.com/opinion/emma-desouza-case-is-about-much-more-than-a-technicality-1.4055385>
- Garry, J., and McNicholl, K. (2015), “Understanding the ‘Northern Irish’ Identity”, Northern Ireland Assembly Knowledge Exchange Seminar Series (KESS), https://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series4/northern_ireland_identity_garry_mcnicholl_policy_document.pdf
- Harvey, A. (2020), “Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998”, Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission, <https://www.nihrc.org/uploads/publications/Birthright-Commitment-Report.pdf>
- Holder, D. (2019), “The right to be British, Irish or both”, *thedetail.tv* (23 April), <https://thedetail.tv/articles/the-right-to-be-british-irish-or-both>
- Home Office (2020), Statement of Changes in Immigration Rules, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885021/CCS207_CCS0520583832-001_Statement_of_changes_in_Immigration_Rules_CP_232_PRINT.pdf
- Hutton, B. (2019), “Number of British passports issued in Northern Ireland falls”, *The Irish Times* (12 August), <https://www.irishtimes.com/news/politics/number-of-british-passports-issued-in-northern-ireland-falls-1.3983176>
- Irish Times* (2020), “Emma DeSouza seeks US support for her case against British government” (5 February), <https://www.irishtimes.com/news/world/us/emma-desouza-seeks-us-support-for-her-case-against-british-government-1.4162363>
- Irish Times* (2019), “Emma DeSouza takes citizenship dispute to appeal court” (25 November), <https://www.irishtimes.com/news/ireland/irish-news/emma-desouza-takes-citizenship-dispute-to-appeal-court-1.4094636>

- Lord Goldsmith QC (2008), *Citizenship: Our Common Bond*, Citizenship Review, <https://webarchive.nationalarchives.gov.uk/20100217112353/www.justice.gov.uk/reviews/docs/citizenship-report-full.pdf>
- Mann, F.A. (1942), "The Effects of Changes of Sovereignty upon Nationality", *The Modern Law Review* 5 (3/4), pp.218-224, www.jstor.org/stable/1089976?seq=
- McClements, F. (2020) "Emma DeSouza withdraws immigration case after British government concession" (21 May), <https://www.irishtimes.com/news/ireland/irish-news/emma-desouza-withdraws-immigration-case-after-british-government-concession-1.4259245>
- McKinney, C.J. (2019), "Good Friday Agreement doesn't stop Northern Irish people being born automatically British", *freemovement*, <https://www.freemovement.org.uk/desouza-case-good-friday-agreement/>
- Ní Aodha, G., and Press Association (2019), "Varadkar says Emma DeSouza 'is an Irish citizen' and that he will raise case with Johnson", *thejournal.ie* (15 October), <https://www.thejournal.ie/varadkar-emma-desouza-irish-4852169-Oct2019/>
- Northern Ireland Human Rights Commission (2008), "A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland", <https://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>
- Northern Ireland Office (2020), "New Decade, New Approach", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf
- RTE News (2019), "Coveney raises citizenship concern after UK court ruling" (14 October), <https://www.rte.ie/news/2019/1014/1083271-desouza-citizenship/>
- Weir, P. (2019), "Automatic UK Citizenship for Northern Ireland people is at risk from De Souza case" (20 September 2019). <https://www.newsletter.co.uk/news/politics/peter-weir-automatic-uk-citizenship-northern-ireland-people-risk-de-souza-case-938996>