

Shifting Sands of the Common Travel Area

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Post-Brexit, the Irish and British governments have leaned on the Common Travel Area (CTA) concept to plug gaps left by the UK exiting the European Union. As a result, this area of law and policy has been subject to increased attention, and the CTA has become a buzzword for politicians and policy-makers. Alongside this change, there has been a shift in how the UK and Irish governments frame the CTA. Where the CTA previously focused on freedom of movement and border controls, it is now frequently referred to as the source of *reciprocal rights* for British and Irish citizens in the alternate state. This rhetoric risks limiting the CTA to British and Irish citizens and undermining its importance to many non-British and non-Irish people living on the island of Ireland. A 2018 paper by the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission referred to the CTA as “written in sand”.¹ Post-Brexit, those sands are shifting, negatively affecting migrant and minority ethnic communities across the island of Ireland.

The CTA and freedom of movement

The CTA is a long-standing administrative arrangement between the UK, the Republic of Ireland and the Crown Dependencies (Isle of Man, Guernsey and Jersey). It has been described as a special travel zone and dates back to the establishment of the Irish Free State in 1922.

The UK and the Republic of Ireland maintain separate immigration policies and have different approaches to conducting controls within the CTA. However, CTA countries have a significant degree of cooperation and alignment on immigration control. UK immigration policy applies in Northern Ireland.

In the UK, the CTA is founded in Section 1(3) of the Immigration Act 1971:

Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as “the common travel area.”²

Effectively, it establishes a presumption that when a person travels from within the CTA to the UK, they are not required to seek leave to enter the UK as would otherwise be necessary. Permission to enter granted by Jersey, Guernsey and the Isle of Man is recognised by the UK and entering the UK from the Republic of Ireland relies on a type of permission known as *deemed leave*. Limited exceptions apply, including some specifically relating to travel to the UK from the Republic of Ireland.³ For example, a person subject to a deportation order is not free to enter the UK and is not eligible for deemed leave.

The result is that there are no statutory powers for passport or ID checks to be carried out for immigration control within the CTA, including on the land border.

In the Republic of Ireland, under Section 11 of the Immigration Act 2004, gardaí have the power to carry out checks on ‘non-nationals’ entering the

state from within the CTA.⁴ Non-nationals are defined as persons who are not Irish or British citizens or persons exercising EU treaty rights. Section 12 of the Immigration Act 2004 also requires non-nationals to produce ID on demand in the state.⁵ In summary, the duty to carry and produce passports does not apply to British, Irish or most EU citizens travelling over the land border or other CTA routes but does apply to other non-EEA citizens.

It is important to note that individuals travelling within the CTA must have the required immigration permission for the country they seek to enter, even when there are no checks. *Visa nationals* refer to people needing a visa to enter the UK or the Republic of Ireland, and *non-visa nationals* are people who do not.

Before Brexit, the exemptions to passport controls and immigration controls were the main focus of CTA discourse.

Reciprocal rights of the CTA

Following Brexit, the CTA is frequently referred to as providing ‘associated reciprocal rights’ for British and Irish citizens. These rights include the right for British and Irish citizens to reside and work, without immigration restrictions, in the alternate state. Before Brexit, EU free movement law underpinned the majority of these rights. However, with the UK exiting the EU, a gap emerged, and the idea of ‘associated reciprocal rights of the CTA’ became the solution.

The post-Brexit Memorandum of Understanding (MoU) between the UK and Ireland on the Common Travel Area states:

The CTA is a long-standing arrangement involving the United Kingdom (“UK”), the Channel Islands and the Isle of Man, and Ireland that facilitates the ability of our citizens to move freely within the CTA. In addition, associated reciprocal rights and privileges have been enjoyed by British citizens in Ireland, and Irish citizens in the UK, since Ireland’s independence.⁶

The language used in the MoU reflects the changing rhetoric from the UK and Irish governments, implying that the CTA applies only to British and Irish citizens. Misleading language may undermine CTA policies that apply to non-British and non-Irish citizens and represents a concerning shift which is

unfortunately now reflected in many official sources of guidance, including the Department for Foreign Affairs website and GOV.UK.⁷ This shift fails to recognise the importance of free movement in the CTA for many non-British and non-Irish citizens. It also fails to recognise that on the island of Ireland, many non-British and non-Irish citizens utilised cross-border services such as healthcare and education. The focus on the rights of British and Irish citizens risks excluding others from the discourse.

CTA Free movement on the island of Ireland

Freedom of movement within the CTA applies across the UK and Ireland, but it has unique importance on the island of Ireland. The CTA is intrinsically linked with preventing a hard border and the peace process. The NI/Ireland position paper by the UK government states:

*Although it precedes the Belfast ('Good Friday') Agreement, the principle of free movement between the UK and Ireland carries symbolic significance in implementing the Agreement's commitment to the continued respect of the civil, political, social and cultural rights of the communities in Northern Ireland. It is a tangible example of East-West cooperation between the UK and Ireland ... including its significance in the context of the Agreement.*⁸

The *Protocol on Ireland/NI to the Withdrawal Agreement* (Ireland/NI Protocol) reflects this commitment in its objective to protect North-South cooperation and avoid a hard border. The Protocol also commits to the continued functioning of the CTA. Article 3 of the Ireland/NI Protocol states:

1. *The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the 'Common Travel Area'), while fully respecting the rights of natural persons conferred by Union law.*
2. *The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality.*⁹

Freedom of movement within the CTA has also been essential in supporting people on the island of Ireland to live cross-border lives. As the UK and Republic of Ireland maintain separate immigration regimes, legal residence in one jurisdiction does not automatically grant the right to enter the other. Freedom of movement within the CTA permits non-visa nationals to enter the UK or Ireland without prior immigration permission. Visitors are usually restricted to entering for limited periods, but it allows them to take part in life across the border: socialising, accessing services, and joining programmes and events. In addition, CTA free movement allows non-visa nationals to cross the border into Northern Ireland based on deemed leave - meaning their permission is automatic, and they are not required to obtain documents or go through checks.

Post-Brexit, an example of a non-visa national for the UK is EU citizens. EU citizens now require a visa to reside in the UK, but they are permitted to enter the UK (including Northern Ireland) for up to six months as visitors without prior permission.¹⁰ With the loss of EU free movement, it is easy to see how essential CTA free movement rights will be for EU nationals living in border regions who are used to freely crossing the border into Northern Ireland.

Freedom of movement in the CTA has also been instrumental in developing all-island tourism, cross border peacebuilding programmes, all island cultural events and sports. These form an essential element of North-South cooperation and the peace process. All-island initiatives, such as tourism, have had significant economic benefits.

The UK and Irish governments have expressed an ongoing commitment to maintaining the CTA. The 2019 MoU reaffirms both countries' commitment to ongoing joint work and cooperation on matters relating to the CTA. In addition, following the UK government's recent challenges to the *Ireland/NI Protocol* in the *NI Protocol Bill*, the UK government assured that the CTA elements of the *Protocol* would be protected as they are "working".¹¹ However, the MoU is not legally binding, and both governments have resisted calls for the CTA to be placed on a stronger footing through a bilateral treaty.

These commitments have also been made in the context of the changing rhetoric on the CTA and the apparent attempt to limit the CTA to British and Irish citizens. For example, the 2019 MoU states: "*This MOU is concerned with the rights of British and Irish citizens*", which excludes any commitment to CTA rights applying to non-British and non-Irish citizens. Unfortunately,

this lack of clear commitments to CTA rights for non-British and non-Irish citizens seems reflected in recent legislative and policy changes.

Post-Brexit changes to the CTA

1. Document checks on Ireland-UK routes

As previously detailed, the Immigration Act 1971 exempts local journeys within the CTA from control under that Act. The UK government has confirmed that there are no checks on the land border and no ‘routine’ checks on all other CTA routes.¹²

Home Office immigration officers do not have all of their normal powers to carry out immigration controls concerning persons travelling within the CTA. The Home Office’s position is that they are permitted to undertake ‘intelligence-led operational activity’ to detect persons who fall under the limited list of exemptions to free movement within the CTA and require permission to enter the UK. This activity is not routine immigration control and must be targeted and supported by evidence of abuse of the CTA. Home Office operational guidance also makes it clear that these checks rely on voluntary cooperation and that individuals are under no obligation to comply with checks.¹³ A statement from the Home Office described the checks as: *“Immigration officers speak to members of the travelling public using these routes ... and a consensual request for photographic ID can form part of that conversation.”*¹⁴

The conduct of these intelligence-led operations on CTA journeys has come under criticism due to accusations of racial profiling, human rights abuses and discriminatory practices.¹⁵ In 2016 the Home Office paid £2,000 in settlement of a claim of alleged racial discrimination at Belfast City Airport.¹⁶ In 2018 a black British lawyer lodged a complaint with the Equality Commission over racial profiling he was subjected to when travelling between Northern Ireland and Scotland by ferry.¹⁷ Despite these criticisms, checks continue to occur. In June 2020, *The Detail* published statistics that show that the rate of immigration checks in Belfast is almost four times higher than in London. The Home Office’s response to queries on this startling statistic stated that they were combatting *“immigration abuse of the Common Travel Area and Ireland-UK border.”*¹⁸

In September 2021, the Home Office published guidance on travelling to the UK from Ireland, the Isle of Man, Guernsey or Jersey.¹⁹ The new guidance

details the documents people are *required* to produce if encountered by Border Force on that CTA route. The requirements differ depending on the person's nationality:

- For British and Irish citizens, the guidance states: *"You don't need to show your passport to a Border Force officer when travelling from Ireland to Great Britain. However, you may be asked to show a document that confirms your identity and nationality."*
- For EEA/Swiss citizens, it states: *"You may be asked to show your passport (which should be valid for the whole of your stay) or identity card to enter Great Britain when travelling from Ireland."*
- For non-EU citizens, it states: *"You may be asked by Border Force to show your passport, which should be valid for the whole of your stay, to enter Great Britain."*

Framed to make compliance with these checks appear compulsory, the requirements above contradict Home Office guidance and statements stating that compliance with any such checks within the CTA is voluntary. A response to a parliamentary question from Stephen Farry MP confirmed a Home Office view that producing the required documents is now compulsory.²⁰ This view represents a significant policy change, but no legislative reform has accompanied it, so currently, the guidance appears contradictory, misleading and has no legislative basis. Notably, this change particularly impacts non-British and non-Irish citizens, and the different document requirements are likely to increase incidents of racial profiling and discrimination during checks.

2. Electronic Travel Authorisation

The Nationality and Borders Act 2022 provides a pre-entry clearance system, Electronic Travel Authorisation (ETA).²¹ This system requires anyone who does not need a visa, entry clearance or another immigration status to obtain authorisation before travelling to the UK (including on journeys within the CTA). It does not apply to British or Irish citizens or those already granted leave to enter or remain in the UK. The system will mainly impact non-visa nationals, who can presently enter the UK without prior permission and can cross the land border freely based on deemed leave.

Under the ETA system, non-visa nationals must apply in advance and pay for ETA before crossing the border into Northern Ireland — this includes non-visa nationals who are residents in the Republic of Ireland. The Nationality

and Borders Act makes knowingly arriving in the UK without a required ETA a criminal offence.²²

Clearly, this will have a unique detrimental impact on non-visa nationals in the Republic of Ireland who need to enter Northern Ireland for activities such as visiting family, accessing childcare, permitted work engagements and accessing services and goods. This system will also impact the ability of members of the migrant community to take part freely in cross-border projects and programmes. Concerns have also been raised about the impact of ETA on business and tourism, as it would require non-visa nationals travelling to Northern Ireland to obtain an ETA before their visit.²³

The enforcement of this requirement is also a serious area of concern. The Home Office has committed to no checks on the land border but has offered no absolute clarity on the policing of ETA. The government response has been to emphasise there are no routine border controls, seemingly implying that you won't get "caught",²⁴ creating a climate of arbitrariness as to whether there is a requirement or not. Added to this is the complexity of who is required to hold an ETA. British and Irish citizens are exempt, as are people who already have immigration status in the UK. It is unclear how this will be distinguished if checks are carried out, but it is eminently foreseeable that they risk increasing racial profiling and discrimination incidents.

Applying the ETA scheme to the land border also conflicts with commitments in the *Ireland/Ni Protocol* to maintaining the CTA. The NI Human Rights Commission and Equality Commission have recommended that all journeys into Northern Ireland that originate from the Republic of Ireland should be exempt from ETA requirements. In addition, they have raised concerns that the proposed ETA requirement could also lead to a breach of the "no-diminution" commitment under Article 2 of the *Ireland/Northern Ireland Protocol*.²⁵

During the passage of the *Nationality and Borders Act*, the ETA provision was amended in the House of Lords by Baroness Margaret Ritchie and others.²⁶ This amendment exempted local journeys on the land border from ETA requirements. However, when it returned to the House of Commons, the UK government voted down the amendment to the bill. The debate around the ETA system focused on the impact on residents and tourists on the island of Ireland, with Viscount Brookeborough stating: "*What the Government are talking about is simply unworkable and disastrous.*"²⁷ The Irish government has also spoken out against the ETA system.²⁸ The wording of the ETA

provisions in the *Nationality and Borders Act* appears to leave room for an exemption, but whether action will be taken to mitigate the impacts on the island of Ireland remains to be seen.

A hard border for some

These post-Brexit changes to the CTA represent a move towards restricting and limiting its use in a way that mainly affects migrant and minority ethnic people living on the island of Ireland. Moreover, this change is occurring despite existing CTA provisions already excluding and discriminating against large numbers of people residing on the island of Ireland.

North West Migrants Forum (NWMF) campaigns on the impact of the CTA on migrant and minority ethnic people.²⁹ Their campaign highlights how many people residing legally on the island of Ireland are excluded from freedom of movement within the CTA (because visa nationals must obtain prior immigration permission to cross the border, even for short local journeys). This particularly affects people from countries in Africa, Asia, and South America, as they are the least likely to have non-visa status in the UK and Ireland and is severe in border communities where visa nationals are ‘trapped’ inside a border invisible to most others. For example, visa nationals living in Northern Ireland must apply for a visa to cross the border into the Republic of Ireland to shop, visit friends and family, or even for school trips. NWMF states: “*Effectively there is an invisible – racist – hard border stopping people from moving freely to work, to access healthcare or to visit friends.*”³⁰

This also prevents visa nationals from accessing services provided on a cross-border basis. NWMF has highlighted the severe consequences of this through a case study:

*A refugee child born in Belfast with a congenital heart condition requiring urgent treatment. The child was taken to Paediatric Cardiology in Dublin for treatment as part of the all-island congenital heart disease (CHD) Network scheme. Unfortunately, due to her immigration status, the mother was not able to accompany her child for treatment, causing undue stress on the family. A visa was eventually granted after an emergency application. However, the stress and anxiety are ongoing, especially as if they need further treatment, they may find themselves in the same situation again.*³¹

A situation made worse by checks – that appear to be based on racism and discrimination – within the CTA. We have already discussed the concerns raised about conducting checks on UK routes. Similarly criticised are gardaí for carrying out checks in a racist and discriminatory manner.³² The powers granted by the Immigration Act 2004 only permit checking people who are not British, Irish, or EU citizens, naturally raising the question: how can gardaí tell who is Irish or British or an EU citizen simply by looking at them? Concerns have been raised that this law fuels racism and discrimination and that checks are carried out based on ethnic stereotypes about what an Irish, British or EU citizen ‘should’ look like. Senior gardaí have conceded before the Policing Authority that not engaging in profiling was a “challenge”.³³

Incidents of racism and discriminatory practices in the conduct of checks within the CTA have led to a situation where people who are not white feel they are required to carry passports and ID documents when travelling within the CTA, even when they are legally exempt from checks. NWMF describes this as “a ‘hard border’ based on skin colour.”

NWMF’s campaign calls for the CTA to be modernised and reformed to end the exclusion of visa nationals.³⁴ The campaign currently focuses on the Irish government and asks that the Irish government provides a form of deemed leave for visa nationals residing legally in Northern Ireland, allowing them to enter the Republic of Ireland without prior permission. NWMF is also campaigning to amend Section 11 of the Immigration Act 2004 to address racist and discriminatory checks.

Recent changes to the CTA indicate that instead of being reformed to end racism and discrimination, the direction of travel is moving towards further restricting and limiting the CTA. Changes such as introducing Electronic Travel Authorisation will uniquely affect migrant and minority ethnic community members. If not halted, this direction of travel risks seeing the issues raised by NWMF affect even more people living in our communities.

Restricting the use of the CTA demonstrates a failure to acknowledge the importance of freedom of movement within the CTA to non-British and non-Irish people, particularly those residing on the island of Ireland. The direction of change risks excluding and marginalising many people within our communities and increasing incidents of racism, discrimination and human rights abuses. Restricting the CTA hardens the border for some, disrupts North-South, and East-West cooperation and is the antithesis of the rights-based society promised by the *Belfast/Good Friday Agreement*.

Endnotes

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