



# Re-bordering the Common Travel Area

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## ABSTRACT

The Common Travel Area (CTA) promises – and has delivered – extraordinary benefits for British and Irish citizens for over a century. Here, we briefly outline the scattered and diverse legal norms around the CTA. We then look at how it encapsulates a narrow view of citizenship before briefly outlining the challenges posed by Covid which underline how important political goodwill is to this free movement arrangement.

**Keywords:** Common Travel Area; EU law; Covid; Brexit.

## INTRODUCTION

The Common Travel Area (CTA) promises – and has delivered – extraordinary benefits to British and Irish citizens for over a century.<sup>1</sup> The name undersells what it provides. There is a panoply of rights and benefits conferred alongside the right to move freely between the two states.<sup>2</sup> The experience of Irish citizens in the United Kingdom (UK) and British citizens in Ireland is such that they notice no real difference in their political and social rights with access to social welfare, health and education, as well as statutory rights to vote in parliamentary and local elections.<sup>3</sup>

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- 1 Bernard Ryan, ‘The Common Travel Area between Britain and Ireland’ (2001) 64 *Modern Law Review* 855–874; Imelda Maher, ‘Crossing the Irish land border after Brexit: the Common Travel Area and the challenge of trade’ (2018) *Irish Yearbook of International Law* 51.
  - 2 Imelda Maher, ‘The Common Travel Area’ in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2021).
  - 3 Silvia de Mars, C R G Murray, Aoife O’Donoghue and Ben T C Warwick, *Discussion Paper on the Common Travel Area* (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission 2018).

This arrangement is not referred to in the Belfast/Good Friday Agreement 1998 but underpins the choice given to those born in Northern Ireland to choose British or Irish citizenship or both<sup>4</sup> and hence is of considerable political importance.<sup>5</sup> It was not legally formalised, being more a result of custom and practice even after it was first mentioned in law in Protocol 20 of the Treaty of Amsterdam 1999, in relation to the UK and Ireland opt-outs from the Schengen arrangements in European Union (EU) law.<sup>6</sup> After a period in the political limelight following the Brexit vote and concerns about how to manage the only land border between the EU and the UK, a Memorandum of Understanding (MoU) between the two governments set down in writing the core framework of the CTA.<sup>7</sup> Here we examine the limitations of the CTA. First, we briefly outline the scattered and diverse legal norms around the CTA. We then look at how it encapsulates a narrow view of citizenship before briefly outlining the challenges posed by Covid which underline how important political goodwill is to this free movement arrangement.

### THE CTA SMORGASBORD OF NORMS<sup>8</sup>

The key CTA MoU is non-binding but, in the accompanying declaration, the British and Irish Governments commit to maintain it ‘in all circumstances’. Some of the rights and privileges listed in the MoU are supported by law: notably legislation allowing voting in

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- 4 Art 1(iv) and annex 2. At least one parent must be a British or Irish citizen or otherwise entitled to reside in Northern Ireland without any restriction on their period of residence. For Ireland, see art 9(2) of the Constitution. UK law applies a contentious presumption that all are born British: see *Secretary of State for the Home Department v Parker De Souza* [2019] UKUT 355. In that case, following an appeal, the Home Office agreed that British and Irish citizens born in Northern Ireland would be treated as EU citizens up to June 2021, thereby rendering the appeal moot: see F McClements, ‘Emma DeSouza withdraws immigration case after British government concession’ *Irish Times* (Dublin 21 May 2020). The Tribunal decision served as the basis for rejecting a judicial review concerning the question of that presumption of British citizenship in the High Court in Northern Ireland in *Chuinneagain, Re Application for Judicial Review* [2021] NIQB 79.
- 5 Michael Dougan, *The UK’s Withdrawal from the EU* (Oxford University Press 2021) 264.
- 6 Maher (n 2 above).
- 7 The CTA extends to Ireland, the UK and Jersey, Guernsey and the Isle of Man. See the MoU between the two governments, 8 May 2019.
- 8 Imelda Maher, ‘The Common Travel Area: the limits of codification’ in Federico Fabbrini (ed), *The Law and Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022).

both jurisdictions<sup>9</sup> and the Social Welfare Convention.<sup>10</sup> Rights to reside, work and be self-employed arise indirectly through legislation on citizenship status,<sup>11</sup> while healthcare<sup>12</sup> and education<sup>13</sup> are addressed through (non-binding) MoUs. There is also a common visa waiver scheme which so far only extends to Chinese and Indian nationals on tourist visas.<sup>14</sup> This smorgasbord shows how, within a legally complex and often non-binding framework, the CTA operates mainly on the strength of political goodwill and good working relations in the operational sphere. This can be seen especially in relation to monitoring of air and sea borders to prevent illegal migration.<sup>15</sup>

The uncertainties surrounding the CTA were apparent in a recent political spat where an Irish Minister controversially claimed that 80 per cent of asylum seekers coming to Ireland came across the land border. The Irish Government pointed to an operational agreement between the two states to return asylum seekers to each other but admitted it had never been used and the then British Prime Minister sought to link any such return agreement to EU returns more generally, especially to France. Within days, emphasis was again being placed on how the CTA rests on good operational relations – thus highlighting

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- 9 Art 13 CTA MoU; the UK Representation of the People Act 1983 and the Irish Electoral Act 1992, s 8. Irish citizens resident in the UK have always been able to vote there: see Neil Johnston, *Who Can Vote in UK Elections?* (House of Commons Library 23 September 2023) 25 for the complex history. The equivalent franchise was only given to British citizens resident in Ireland in 1992, following the ninth referendum to the Constitution allowing those other than Irish citizens to vote: see John O’Dowd and Stephen Coutts, ‘Access to electoral rights: Ireland’ Access to Electoral Rights Report (RSCAS/EUDO-CIT-ER 2014/2).
- 10 Convention on Social Security, 1 February 2019, incorporated into Irish Law by SI No 746/2020 and incorporated into UK law by SI 2019/622 and SSI 2019/93 (for Scotland).
- 11 The main provisions are: in the UK s 3Za Immigration Act 1971 introduced by s 2 Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 and s 2(1) Ireland Act 1949; and in Ireland s 114 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.
- 12 18 December 2020.
- 13 14 July 2021.
- 14 Graham Butler and Gavin Barrett, ‘Europe’s “other” open-border zone: the Common Travel Area under the shadow of Brexit’ (2018) 20 *Cambridge Yearbook of European Legal Studies* 252–286.
- 15 Known as Operation Gull (UK) or Operation Sonnet (Ireland). About 5000 people trying to enter Ireland were refused entry between 2013 and 2022 inclusive (2800 by land and 2200 by sea – mostly from Britain): see C J McKinney, Michael Potter and Terry McGuinness, *The Common Travel Area and the Special Status of Irish Citizens in UK Law* (Commons Library Research Briefing 16 August 2023) 10.

the legal limits of the CTA for non-Irish and non-UK migrants and especially for those seeking international protection.<sup>16</sup>

### WHO BENEFITS?

In Ireland, British citizens are the second largest group of migrants, of whom there are more than 100,000. There are between 377,000 and 447,000 people born in the Republic of Ireland living in the UK.<sup>17</sup> In neither state is there a positive affirmation or recognition of each other's citizens in law. Instead, in the UK, an Irish citizen does not require leave to enter or remain in the state.<sup>18</sup> Under Irish law, a non-national does not include UK citizens.<sup>19</sup> A key limitation of the CTA is that it only applies to individual British and Irish citizens. No status or rights are conferred on family members through association with the citizen so a family member who is not Irish or British cannot avail of the CTA. And, following Brexit, EU members of the family of a British or Irish citizen lost their free movement rights in both Ireland and the UK although EU nationals travelling to Ireland retain their rights under EU Law.<sup>20</sup>

Overall, about 12 per cent of the population of Ireland does not have Irish citizenship and therefore cannot avail of the CTA.<sup>21</sup> This limitation is most acute in relation to the land border which is open and invisible (but for some car number plate recognition cameras).<sup>22</sup> Despite the lack of an obvious land border, they need a passport and possibly a visa to gain entry to Northern Ireland, although Irish citizens and those lawfully resident in Ireland who do not need a visa are excluded from the new British electronic travel authorization programme.<sup>23</sup> Under UK law, business visas are limited to those with three years'

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16 'Emergency legislation will allow "operational agreement" between Ireland and UK on return of asylum seekers to come into force, Government says' *Irish Times* (Dublin 30 April 2024).

17 2022 Census of Ireland; John Curtis, Cassie Barton, Georgina Sturge and Maria Lalic, *The Irish Diaspora in Britain* (House of Commons Library CDP 2022/0055 17 March 2022).

18 S 3Za Immigration Act 1971: see n 11 above.

19 S 114 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020. See also n 4 above.

20 Tobias Lock, 'Citizenship beyond Irish and British' in McCrudden n 2 above.

21 CSO Ireland, *Census 2022 Profile 5 – Diversity, Migration, Ethnicity, Irish Travellers & Religion*.

22 Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum* (HC 48 2016-17 26 May 2016) para 71.

23 'Apply for an electronic travel authorisation (ETA)' (UK Government 25 October 2023). Lawful residents are only excluded when entering the UK from other parts of the CTA.

experience who have already worked for their company for 12 months. EU nationals in Northern Ireland can enter Ireland for three months without a visa and continue to avail of the EU free movement rights. And while frontier workers' rights are addressed in the Withdrawal Agreement, there are new constraints on them.<sup>24</sup> In short, the CTA is a cold place for non-EU nationals and not a very warm one for non-Irish EU nationals.

### COVID: A FRAGMENTED CTA

The experience in relation to Covid lockdowns and restrictions on free movement highlighted three main challenges for the CTA. First, as public health is a devolved power in the UK, responses across the four nations varied with the lack of coordination across governments leading to introduction of internal borders in the UK. This meant there was not even a common travel area within the UK at times during Covid.<sup>25</sup> For example, travel to Wales from parts of Scotland, England and all of Northern Ireland was restricted in October 2020.<sup>26</sup> Scotland also restricted travel from most parts of Ireland during lockdown.<sup>27</sup>

Second, even though the island of Ireland is treated as a single epidemiological unit for animal health, there is some discussion whether this was the case for human health during Covid.<sup>28</sup> An MoU on Public Health Co-operation was signed within weeks of the first Covid

24 Pt II of the Agreement: see Silvia de Mars and Charlotte O'Brien, 'Inevitably diminished: rights of frontier workers in Northern Ireland after Brexit' (2022) 73(S2) Northern Ireland Legal Quarterly 119–147.

25 The main legislation was the Public Health (Control of Diseases) Act 1984, as amended, and the Coronavirus Act 2020. J Sargeant, 'Co-ordination and divergence: devolution and coronavirus' (*IfG Insight* 28 October 2020).

26 This is in addition to localised restrictions on movement and personal restrictions. Sargeant (n 25 above) 23 and see 'Wales to introduce travel restrictions to prevent the spread of coronavirus' (Welsh Government 14 October 2020).

27 Conor Riordan, 'Scotland lifts travel ban on most parts of Ireland' *Irish Examiner* (Cork 10 December 2020).

28 Sargeant (n 25 above) 18 simply states it is a single unit, but Nolan et al explain that it is so considered for animal but not for human health mainly for political reasons on which they elaborate: see Ann Nolan, Sara Burke, Emma Burke, Catherine Darker, Joe Barry, Nicola O'Connell, Lina Zgaga, Luke Mather, Gail Nicolson, Martin Dempster, Christopher Graham, Philip Crowley, Clíodhna O'Connor, Katy Tobin and Gabriel Scally, 'Obstacles to public health that even pandemics cannot overcome: the politics of Covid-19 on the island of Ireland' (2021) 32(2) *Irish Studies in International Affairs* 225–246. Dobbs and Keenan also say it is a single epidemiological unit for plants, animals and humans: see Mary Dobbs and Andrew Keenan, 'Territorial approaches to a pandemic: a pathway to effective governance' (2022) 73(2) Northern Ireland Legal Quarterly 202–233. The MoU on healthcare does not declare the island to be such a unit. There seems to be a tension here between political and public health descriptions.

death on the island and, following a meeting of ministers from Ireland and Northern Ireland, public health being a devolved power.<sup>29</sup> Non-binding, it pointed to information-sharing, modelling and a weekly phone call between the respective Chief Medical Officers to ensure ‘mutual ongoing understanding’. At the same time, it acknowledged that measures in the two jurisdictions might not be identical but that the executives would seek to ensure consistency. And there were such regular interactions at the level of public health bodies.<sup>30</sup> Within the UK, politics constituted an obstacle to a common public health response to the pandemic, and within Northern Ireland republican parties sought to align with the Covid responses in Ireland while unionist parties sought to align with those in Westminster.<sup>31</sup> Such political responses show how cooperation on public health may be undermined.

Third, in relation to travel, both the UK and Ireland introduced passenger locator forms for travellers who all had to comply with the 14-day isolation period on entering the state. The UK treated all of the CTA as the relevant quarantine area, so anyone who had been outside the CTA for more than 14 days would have to self-isolate. The Irish Government took a different approach and defined the island of Ireland as the quarantine zone, so those travelling from Great Britain had to isolate.<sup>32</sup> The more limited quarantine zone may in part be explained by the fact that even just keeping the land border open was at odds with EU recommendations to ban non-essential travel from non-EU states.<sup>33</sup> The land border is famously porous and, practically, could not

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29 [MoU between Irish Government and Northern Ireland Executive in Relation to Covid-19](#) (7 April 2020). And a follow-up MoU between the same parties on Covid-19 Response – Cooperation on an All-Island basis in regard to provision of Critical Care between the Department of Health, Ireland (and its Agencies) and the Department of Health, Northern Ireland (and its agencies), no date given, See Dobbs and Keenan (n 28 above) 217.

30 Nolan et al (n 28 above).

31 Ibid 244–245 in relation to Northern Ireland and Ireland and Sargeant (n 25 above) 12 in relation to the responses of the devolved governments in the UK. Nonetheless, an MoU on reciprocal healthcare arrangements was entered into in December 2020, replacing arrangements that previously operated when the UK was a member of the EU: see [MoU on CTA Healthcare Arrangements \(in recognition of Residency-based Health Systems\)](#) 18 December 2020. See also the ministerial exchange of letters on healthcare arrangements in light of the EU–UK Trade and Cooperation Agreement, 25 November 2021.

32 For an outline of the numerous regulations involved, see Daniel Holder, ‘[From special powers to legislating the lockdown: the Health Protection \(Coronavirus, Restrictions\) Regulations \(Northern Ireland\) 2020](#)’ (2021) 72(S2) Northern Ireland Legal Quarterly 537, 553.

33 European Commission Communication, Covid-19: Temporary Restriction on Non-Essential Travel to the EU COM/2020/115 final.

be shut, though there were political calls to do so.<sup>34</sup> However, it took some time for agreement on the sharing of passenger locator forms of those travelling on from Dublin airport to Northern Ireland to assist in monitoring travellers.<sup>35</sup> The porous border also caused some public outcry in Ireland when it became clear that lockdown legislation did not apply to those travelling across the border from Northern Ireland. Murray suggests that this seems to have been a deliberate policy by the Irish Government.<sup>36</sup>

## CONCLUSION

The CTA is rich in political rhetoric but thinner in laws. It has seen changes over the years but has remained durable and generous for Irish and British citizens. The potential body blow of Brexit has instead resulted in greater clarity through the MoU, although EU citizens in both states have seen their rights diminished and not replaced under the CTA. Originally designed mainly to facilitate the migration of Irish workers to Great Britain, it only recognises the single, unattached migrant citizen in either state. The CTA MoU emphasizes how flexibility allows the governments to be responsive to new developments. Covid constituted one such development and showed that operationally the CTA provides one of the bases for close coordination between public agencies (the Belfast/Good Friday Agreement being the other key pillar in this context). Covid showed how borders can appear not only between the two islands but also within Great Britain and how technical cooperation on public health at times of crisis may still be driven by political considerations. Thus, the CTA is durable, operationally robust but, as Covid shows, it remains vulnerable to political context and is dependent on political goodwill between not just the UK and Irish Governments but also the devolved governments of the UK.

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34 Gillian Anderson, 'DUP suggestion to close border over COVID cases branded "unbelievable"' *Derry Journal* (Derry/Londonderry 19 January 2021).

35 Brian Lawless, 'Coronavirus: new Irish travel rules will affect NI passengers' (*BBC News* 26 January 2021).

36 The main legislation in Ireland was the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020. Colin Murray, 'The Covid-19 crisis across the Irish border' (*UK in a Changing Europe* 14 May 2020).