

Bordering Brexit: The Common Travel Area

Borders, Constitution and Money
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Border

As a noun (naming word), border implies splitting apart. As a verb (indicating action), it suggests adjoining. Borders separate people, languages, and cultures, but "they are also there to be crossed at the appropriate time."

Lanie Tankard in her review of Roy Jacobsen, *Borders* (2017)



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Figures

- ▶ NI/Ireland Frontier workers:
 - 13,000 v. 30,000 border workers
- ▶ British in Ireland
 - 112,259 (2011 census) v. 253,605 (UN Population Division, 2015)
- ▶ Irish in Britain
 - 407,357 estimate (2011 census) v. Closer now to 600,000?
- ▶ Travel:
 - 300 formal crossing points across Irish Border.
 - Dublin–London is the busiest air route in Europe and the second busiest in the world with 4.5 million people travelling



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The CTA: What is it?

- ▶ CTA: a Legal Anomaly
- ▶ No passport controls post-1922.
- ▶ S.2(1) Ireland Act 1949 (UK): Ireland not a foreign country.
- ▶ Suspension of CTA during WWII
- ▶ Reintroduced in 1952 via secret exchange of letters
- ▶ Not just travel: vote, reside, work, access social benefits and services



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Irish Citizens in UK

- ▶ Special status given.
- ▶ Up to 1949: Irish were British subjects
- ▶ s.3(2) British Nationality Act 1948: Irish citizens not aliens and British law applied to them in the same way as British subjects.
- ▶ s1(3) Immigration Act 1971: immigration controls n/a to those arriving from Ireland (subject to exceptions)



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British Citizens in Ireland

- ▶ No special status qua British citizen
- ▶ Irish Nationality and Citizenship Act 1956
- ▶ SI: British citizens had right equivalent to those enjoyed by the Irish in the UK
- ▶ But voting rights only given in Electoral Amendment Act 1985 s.2 and Article 16, *Bunreacht na hEireann*: can vote in Parliament and local elections



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Legal archaeology?

- ▶ The Irish Immigration Act 2004:
- ▶ applies to all non-Irish citizens as defined by the 1999 Immigration Act. This definition comes from the 1935 Aliens Act. The 1935 Act: exemptions of citizens from its provisions via statutory instrument
- ▶ British were exempted in 1935.



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Common Visa Scheme

- ▶ SI 473/2014 Immigration Act 2004 (Visas) Orders 2014
- ▶ Common tourist (90 day) visas for China and India



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Mirroring Migration Policy

- ▶ *Kweder v Minister for Justice* [1996] 1 I.R. 381:
- ▶ public policy exception requires preservation of CTA and is justified under EU rules



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Citizenship in Northern Ireland

- ▶ Good Friday Agreement/Belfast Agreement part (vi)
- ▶ People of Northern Ireland can identify as Irish or British, or both, so can choose either/both British and Irish citizenship and, ergo after Brexit, between British and EU citizenship.



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A Thin Veil of Scattered Law

- ▶ Dissonance between law and geography: airports v. train stations v. ports
- ▶ CTA for who?
- ▶ Irish 1997 Aliens(Amendment No. 3) Order: immigration officers can treat those coming from the UK as though they have come from elsewhere (i.e. outside the CTA).



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Pachero v. Minister for Justice [2011]

▶ *‘Hogan J. on the CTA: Whatever about anyone else, Joseph Heller certainly would have approved.’*



image: journal.ie



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What about EU Law? I

- ▶ Protocol 19: Schengen opt-out for UK and Ireland
- ▶ Ireland will be the only MS outside Schengen after Brexit.
- ▶ It can only opt-in to Schengen measures with unanimous support of other MS



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EU Law II

- ▶ Protocol 20:
- ▶ The UK can continue to exercise border controls.
- ▶ The UK and Ireland can have special arrangements for the movement of people between them.
- ▶ As long as this Common Travel Area exists, then Ireland can also have border controls vis a vis EU nationals.



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Brexit

- ▶ Two stage negotiation:
 - ▶ A50TEU and
 - ▶ post-Brexit Agreement
- ▶ Post-Brexit Agreement:
 - ▶ Mixed agreement
 - ▶ Ratification at national and EU levels (like CETA)



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Possibilities?

- ▶ Oireachtas Select Committee on NI Report 2016
- ▶ 3 options post Brexit:
 - Hard NI/Ireland border
 - Border in middle of Irish sea
 - Shared UK/Ireland border policy.
- ▶ Sequencing
 - NI issues hived off
 - Rational for special treatment: optional dual citizenship but see Hungary & diaspora and Rumania & Moldova
 - GFA/Belfast Agreement



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May: Letter to Tusk: 29/3

We want to avoid a return to a hard border between our two countries, to be able to maintain the CTA between us, and to make sure that the UK's withdrawal from the EU does not harm the Republic of Ireland. We also have an important responsibility to make sure that nothing is done to jeopardise the peace process in NI and to uphold the Belfast Agreement.

Image: Daily Express



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Assume Ireland outside Schengen

- ▶ Robust EU Borders: e.g.
 - Faroe Islands (passports), Norway (customs)
- ▶ Future EU Migration policy
 - Full control of external borders
 - Get back to pre-refugee crisis position
 - Consensus on long term migration policy
 - Responsibility and solidarity
 - ▶ Bratislava Declaration (16/9/16)



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Ireland/EU

- ▶ Passport controls will remain for anyone arriving from Ireland to the EU, with the Irish in the non-EU Schengen queue.
- ▶ EU nationals will have passport controls on entering Ireland.



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Ireland/UK

UK nationals could travel to Ireland without noticing too much change in current arrangements for travel purposes.

The same would be true for Irish travelling to the UK.

Issue: British equivalence re benefits in Ireland
Can non-EU citizens receive more favourable treatment by a MS under EU law?



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UK/EU

- ▶ EU citizens checked at the Irish border
- ▶ Could travel to the UK without much hindrance (90 day entry on reciprocal basis with EU)
- ▶ Enforcement beyond 90 days?



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If Ireland joins Schengen

- ▶ Much more complex. EU governs free movement more.
- ▶ NI border?
- ▶ Justification for exception: geography.
- ▶ Challenge: politics.
- ▶ Technology: a supplement, not a full solution
- ▶ The UK in Schengen? Legally possible (Iceland, Liechtenstein, Switzerland, Norway)



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Conclusion

- ▶ CTA a legal anomaly that has worked well enough because it is legally obscure.
- ▶ Brexit requires it to be written down and clearly articulated.
- ▶ Law becomes a constraint and political relationship becomes more apparent.



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- ▶ *While the wind of change may be about to blow the precise direction in which it will blow cannot yet be determined so there is a level of uncertainty, as is evident from discussion about, for example, how Northern Ireland's land boundary with Ireland will be affected by actual withdrawal by the United Kingdom from the EU.*

▶ Maguire J. *McCord* [2016]



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