

NORTHERN IRELAND HUMAN RIGHTS AND BREXIT

- A VIEW FROM SOUTH OF THE BORDER

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The brief which James and I received for today was to look at the issues surrounding the question of Northern Ireland, Human Rights and Brexit from “*an outside but adjacent point of view*”. We will endeavour to meet that requirement, from the perspective of criminal/human rights lawyers who advise clients in circumstances where the interrelationship between Northern Ireland and the Republic of Ireland is a matter of every day practical reality, not least, but not only¹, because of the Belfast Agreement (otherwise commonly known as the Good Friday Agreement (GFA)).

As for having ‘*an outside point of view*’, it is important to state that while we perhaps, but not definitely, come with a different perspective, it is not ‘*an outside point of view*’. All people on this island have, because of the GFA, “skin in the game”, so to speak, underpinned by the overwhelming support at the ballot box, in both jurisdictions, for the Agreement, which was also accompanied by fundamental constitutional change in the South.

For those of us, who live and work in a border region, it is a fact of everyday life that literally thousands of people, in both jurisdictions, have a daily interaction with the other jurisdiction. A jurisdiction which has a different currency, different tax rates and, for some, a cultural identity different to their own. Northerners who look southwards and Southerners who look to the North. Whether because of that constant cross-border interaction or otherwise (and perhaps contrary to the strongly held beliefs of some), we, in the South, do recognise the unique position of Northern Ireland itself, within the United Kingdom and accept quite readily the words of Professor Fiona de Londras when she says;

*“Constitutionally and culturally, Northern Ireland has a particular status within the United Kingdom and, of course, it is a place that straddles multiple identities: Irish, British, Northern Irish, European”*²

It is a fact that many people live their daily lives in *both* jurisdictions. Children live in one jurisdiction and go to school in the other. People go to their daily work in the other jurisdiction – and earn their pay in the currency of that jurisdiction. People live in one jurisdiction and conduct their daily trade and business in the other. Many businesses operate their core functions at locations in both jurisdictions, farmers farm in both jurisdictions, milk and other food products are produced in one jurisdiction, processed in the other and then marketed in both. Women residing in one jurisdiction give birth to children at hospitals in the other and, in general, geographic convenience sometimes dictates attendance at a hospital in the other jurisdiction when medical assistance is required. Those participating in commerce; bankers, lawyers, accountants, professionals of every type, travel up and down the M1 from Dublin to Belfast and in the other direction, every day and do so seamlessly regardless of administrative and cultural differences. If you are installing a new kitchen in your house in Dublin, the contractor might just as easily be from East Belfast as from anywhere else on the island. In all those transactions there is a parity of esteem which occurs without thinking. It is a way of life

¹ We will discuss in this paper the fact that Brexit does not only have an impact on the GFA but also on other extremely important matters including the Common Travel Area and Cooperative Justice Arrangements.

² The Impact of Brexit on Human Rights – 2018 Annual Human Rights Lecture, Law Society of Ireland 15 May 2018

underpinned by, what Professor de Londras describes as, “...*the institutions and human rights commitments that lie at the heart of the Good Friday/Belfast Agreement.*”³

Quite apart from the GFA there are other fundamentally important arrangements, understandings and agreements, some, but not all, of which flow from our common membership of the European Union and which are relevant to the working life of human rights/criminal lawyers on this island. I refer, particularly, to the Common Travel Area (CTA) and the Cooperative Justice Arrangements (CJA) including the European Arrest Warrant (EAW) system.

At the time of writing this paper there is no immediate prospect of the UK withdrawing from the EU based on an Agreement – it looks increasingly as if it will be what is commonly referred to as “*a no deal Brexit*”. There is also, at this present moment an absence of clear guidance or information about contingency planning in many areas, including the area of security and criminal justice cooperation. The legal uncertainty, if unresolved, will lead to disruptions and delays in all forms of cross-border co-operation in the area of criminal justice, including the investigation and prosecution of cross-border crime, much of which is perpetrated by organised criminal gangs.

In the absence of an agreement we will revert to national law on both sides. Requests from the UK for cooperation in support of UK criminal investigations and prosecutions would fall, then, to be governed by the national laws of the requested EU member state.

Legal professionals will have to have careful regard to several important issues;

1. EAW issued by a member state, including Ireland, will not be recognised in the UK, including Northern Ireland after exit day, *unless the requested person has already been arrested*. The EU has yet to issue any guidance on what will happen to outstanding UK EAWs after exit day. A recent Court of Justice of the European Union (CJEU) preliminary ruling relating to the status of EAW issued prior to UK withdrawal (to which we refer in greater detail later in this paper) relates to the position which will pertain only until the date of withdrawal. Similarly, European Investigation Orders (EIOs) and other forms of cooperation that involve giving effect to an order made in another member state, for example, decisions to collect evidence or to freeze bank accounts, will not be recognised in the UK if received after exit day.
2. After the UK withdraws, they will no longer be required to give effect to orders made in connection with criminal proceedings in another member state, or vice versa, such as European Protection Orders, ‘Euro-bail’ or financial penalties imposed on those found guilty of a crime. The UK will no longer be a party to reciprocal arrangements to facilitate access to compensation in one member state by victims of crime in another member state
3. After withdrawal, and again in the absence of agreement, the UK, including Northern Ireland, will cease to be a member of any of the specialist EU agencies and will no longer be eligible to access data held or participate in data exchange agreements operated or facilitated by them. There are contingency arrangements proposed by the UK but at the time of writing, a little over a month before the stated date of withdrawal there are no agreements to give effect to those proposals.
4. The UK will no longer be able to initiate or participate in Joint Investigative Teams set up in support of cross-border police investigations under EU instruments after withdrawal, in the absence of an agreement to the contrary. This will have significant and immediate impact on this island in respect to cross-border investigations into the activities of organised criminal gangs involved in drug

³ Ibid page 9

trafficking; smuggling of fuel, cigarettes and other contraband; organised thefts of ATM and their contents and even human trafficking.

5. Withdrawal without agreement will have an impact on Prisoner Repatriation and Deportation Programmes.

It is unnecessary to emphasise that the enjoyment of a trans-jurisdictional lifestyle, including access to ongoing education, employment and trade, involves the exercising of human rights protected under the ECHR⁴. What may require emphasis for those colleagues visiting our shores or less familiar with life on the island of Ireland is that those trans-jurisdictional engagements are aided by but are not a creature of any European Union Treaty or the GFA. Rather they exist by virtue of a unique non-treaty based arrangement between the UK and Ireland - The Common Travel Area (CTA).

The openness of travel between the UK and Ireland dates to 1922, with neither country requiring passports from the other⁵. The UK's 1949 Ireland Act, section 2, formalised the special relationship between the UK and Ireland by declaring that Ireland, while no longer a dominion of the UK, is not a 'foreign country'. In 1952 the CTA came into force and exists as a collection of legal provisions in each of the relevant jurisdictions rather than as an international treaty. These provisions enable UK and Irish citizens to be treated almost identically within both states.

The CTA permits freedom of travel and benefits including unfettered access to social welfare entitlement, healthcare, employment and education between the UK, Ireland, the Channel Islands and the Isle of Man. UK citizens in Ireland and Irish citizens in the UK have the right to vote in local, national and European elections. Oddly, although Irish citizens can run for the UK Parliament, UK citizens cannot be elected to the Dáil, nor can they vote in constitutional referenda or Presidential elections. Irish citizens resident in the UK could and did vote in the Brexit Referendum (to give it that description).

In a Discussion Paper on Brexit written by UK based academics, Colin Murray, Aoife O'Donoghue and Ben Warwick for the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission⁶, the authors point out that *'historically the CTA was not seen in a human rights context. But as gaps between EU freedom of movement and CTA rights open, the CTA will become a more critical source of protection for, in particular, economic, social and cultural rights'*.⁷

At present the EU Treaties allow for the operation of the CTA under the provisions of the Treaty on the Functioning of the European Union (TFEU)⁸. In practical terms the functioning of the CTA was unproblematic both before and after the UK and Ireland became members of the EU. However, post withdrawal, the CTA will cover the relationship between a nation within the EU and another which is fully external to it. As Murray, O'Donoghue and Warwick point out the history of the EU does not provide any significant precedent governing that situation. The closest comparator is Norway's inclusion in the Nordic Common Labour Market but *'...that is not a true analogy: Norway is in the EEA and consequently has signed up to the EU's freedom of movement acquis, meaning it cannot be*

⁴ For example; Economic rights under Article 1 of Protocol 1 and the right to education under Article 2 of Protocol 1.

⁵ Those familiar with being required to produce passports in the present era when travelling by air between Britain and Ireland are doing so in the context of modern-day security requirements for the purpose of identification verification.

⁶ Murray, O'Donoghue and Warwick: 'Discussion Paper on Brexit, (2018). Available at <http://www.ihrec.ie/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>

⁷ Ibid at page 20.

⁸ Protocol 20 of the TFEU.

considered a full 'third country' in the way the UK will become once the UK leaves the EU⁹. If they do so without an agreement.

This is no trifling or peripheral matter. The Phase 1 Joint Report¹⁰ of the EU and UK negotiators, states that the EU and UK agree that the arrangements between the UK and Ireland relating to the movement of persons (CTA) *may* continue with the stipulation that its continuation respects the rights of natural persons as conferred by EU law and the UK confirms that the continuation of the CTA will not impact on Ireland's obligations under EU law, including the free movement of persons.¹¹ However, it is not possible to over-state at least two concerns regarding the future of the CTA. Its fundamental importance to life in the Southern jurisdiction – and not just for the 2000 or so people who travel weekly to attend football matches in England and Scotland – and the extent to which it is not yet clear whether potential incursions into the liberties provided by CTA are threatened by UK withdrawal from the EU, notwithstanding the expressions of intent from the political negotiators. The CTA, as already stated, is not treaty based. It is relatively flexible and informal and therefore vulnerable to modifications that may go unnoticed but have significant and far reaching effect on our daily interaction not only with England, Wales and Scotland - but with Northern Ireland also.

Murray, O'Donoghue and Warwick recommend, inter alia, the negotiation of A Common Travel Area Treaty between the UK and Ireland to prevent incremental changes to the CTA's operation and to give UK and Irish citizens assurances as to their status and continued access to social, education, democratic, health and welfare rights.¹² That is a recommendation with merit subject to the real concern that the negotiations may, in the manner of such engagements, lead to some diminution, if such is considered expedient to 'seal the deal'.

A further point of concern is that while the CTA is non-treaty based, the special relationship which underpins its existence may come under pressure from nationalistic influences, which have been visible within England, in particular, giving rise, perhaps, to a less sympathetic attitude towards the special treatment of Irish citizens and a movement away from the principle of not regarding Ireland as a foreign country. The question is also begged as to what possible dynamic might emerge if there are voices within the European Union unhappy with what becomes perceived as 'special treatment' of Irish citizens, if the treatment of other EU citizens, residing in the UK, becomes more restrictive than it currently is.

Earlier in this paper we summarised some of the Cooperative Justice Arrangements affected by a 'no deal' withdrawal by the UK, particularly the EAW, EIO, EU Agencies, JITs and EU data exchange networks and EU databases. The threats to cross-border justice arrangements on this island under these headings are severe and *'Brexit will lead inevitably to a diminution in the level and nature of cooperation between the UK and remaining EU states, for structural, legal, political and practical reasons'*.¹³ These issues are impressively addressed in the Discussion Paper on Brexit by Murray, O'Donoghue and Warwick¹⁴, to which I have already referred, and also in a significant and detailed

⁹ Murray, O'Donoghue and Warwick: 'Discussion Paper on Brexit, (2018). Page 20.

¹⁰ Phase 1 Report, Joint Report from the negotiators of the EU and the UK Government on the progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU (TF50 2017,19) 8 December 2017.

¹¹ Ibid para 54.

¹² Ibid page 27 para 9.

¹³ L Campbell, Beyond Brexit -Beyond Borders Mutual Assistance in Policing and Investigating Organised Crime (Durham University Centre for Criminal Law and Criminal Justice, 2017) page 1

¹⁴ Murray, O'Donoghue and Warwick: 'Discussion Paper on Brexit, (2018). Pages 47-58.

manner in the study *Evolving Justice Arrangements Post-Brexit* by Kramer, Dickson and Pues¹⁵. We commend both studies to you for consideration.

Having regard to the limited time available to us we wish, if we may, to briefly address just one of those issues particularly important to our daily trans-jurisdictional engagements on the island of Ireland; the EAW.

The UK is one of the most active users of the EAW and between 2009 and 2016 surrendered 7,436 individuals wanted by other EU member states and it issued 1,669 warrants¹⁶. Its value to the UK therefore appears to be beyond any reasonable argument. Regarding Northern Ireland, between 2007 and 2017 of the 154 EAWs sought by the PSNI, 113 involved a request to the Republic of Ireland.¹⁷

The operation of the EAW system is overseen by domestic courts and, since 2009, CJEU has enjoyed the jurisdiction to hear references from domestic courts regarding the operation of the EAW.¹⁸ The CJEU's interpretation of EU law within a preliminary ruling issued to such a reference, is binding upon the domestic courts of the member states. In the course of such rulings the CJEU applies the provisions of the EU Charter of Fundamental Rights (CFR).¹⁹ It will not require explanation that the EU CFR Articles in respect of the right of liberty²⁰, the right to humane treatment,²¹ the right to a private and family life²² and the right to a fair hearing²³, have particular importance when advising any clients in the matter of an EAW.²⁴

The UK Government has expressed previously an intention or desire to maintain the EAW, but it is not possible to reconcile that aspiration with their refusal to countenance any oversight by the CJEU in any area of law and its non-retention of the CFR post withdrawal from the EU. In the case of no deal, the alternative basis for extradition between the UK and the EU27, including between Northern Ireland and Ireland, will be the 1957 European Convention on Extradition, a Council of Europe instrument ratified by all member states as well as several third countries. Unlike the EAW system, the Convention does not impose time limits on the execution of requests, does not prevent extradition being refused for lack of dual criminality or political, military or fiscal offences and permits parties to refuse to extradite their own nationals. Extradition requests between UK and the EU27 would have to be transmitted through diplomatic channels rather than decisions being made exclusively by judicial authorities and transmitted directly between the relevant national authorities.

As already stated, there is no indication of how outstanding EAWs issued by the UK will be treated by the EU27 from withdrawal day onwards. It is possible that a person detained by a member state, including Ireland, because of an EAW issued by the UK, may be released unless a re-issued request

¹⁵ *Evolving Justice Arrangements Post-Brexit* – Amanda Kramer, Racheal Dickson and Anni Pues (August 2019) Irish Human Rights and Equality Commission and Northern Ireland Human Rights Commission

¹⁶ UK in a Changing Europe 'Post-Brexit law enforcement cooperation: negotiations and future options' page 40. As cited by Kramer, Dickson and Pues in *Evolving Justice Arrangements Post-Brexit*, fn93.

¹⁷ C. Campbell, 'Government fears "essential" extradition powers to combat crime will be lost after Brexit' *The Detail* (23 November 2017) as cited by Murray, O'Donoghue and Warwick: 'Discussion Paper on Brexit, (2018), fn 178.

¹⁸ TFEU, Article 267

¹⁹ C-399/11 Melloni -v- Ministerio Fiscal [2013] 2 CMLR43, [54] (Grand Chamber, CJEU)

²⁰ EU CFR Article 6

²¹ EU CFR Article 4

²² EU CFR Articles 7, 9, 33.

²³ EU CFR Articles 47 and 48.

²⁴ The CFR also recognises the comparable ECHR rights as the base-line standard. EU CFR – Preamble and Articles 52(3) and 53.

was received within any period specified by the national law of the requested member state for this purpose. A problem will obviously arise where the national legislation which governed extradition with the UK prior to the introduction of the EAW has been repealed. Undoubtedly however, member states, including Ireland, will move quickly to introduce and pass the necessary legislation should a lacuna arise in such an important area.

The prospect of the UK abandoning the EAW system is already impacting the EAW process between the UK and Ireland and advice to be given to clients facing an application for surrender to the UK. In the South several Respondents opposing applications for their surrender to the UK, including Northern Ireland, under EAW have objected to their surrender because of, inter alia, the withdrawal of the UK from the EU. In the *Minister for Justice and Equality -v- O'Connor*²⁵, the Supreme Court of Ireland, on the 12th March 2018, made a Preliminary Reference to the CJEU under Article 267 of the TFEU on the issue of the impact, if any, on the operation of the EAW system arising from the fact of the Article 50 Notice delivered by the UK. Shortly thereafter (May 2018) the Irish High Court in the *Minister for Justice and Equality-v- R.O.*²⁶ also made a request for a preliminary ruling under Article 267 TFEU, on the same form of issue, together with a request that the reference be dealt with under the urgent procedure having regard to the fact that, unlike Mr. O'Connor, in the Supreme Court reference, Mr. R.O. was in custody. On the 19th September 2018, having granted the request that the Court deal with the reference under the urgent procedure the CJEU ruled²⁷;

“Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a European Arrest Warrant with respect to an individual, the executing Member State must refuse to execute that European Arrest Warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that European Arrest Warrant is at risk of being deprived of rights recognised by the Charter of Fundamental Rights of the European Union and Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European Arrest Warrant while the issuing Member State remains a member of the European Union”²⁸

In the premises until such time as the UK withdraws from the EU, it has full rights, powers and obligations under the EAW system. Regarding the position post withdrawal, we respectfully submit that there is a clear and urgent requirement for a replacement of the EAW between the UK and Ireland if, as seems inevitable, the UK leaves the current system. That replacement system must provide for adequate judicial oversight mechanisms which take account of developing EAW jurisprudence, maintains comparable standards of rights protections and excludes discretion over the transfer of a country's citizens.

²⁵ Supreme Court [2017] IEHC 518

²⁶ [2018]IEHC283

²⁷ Case C-327/18 PPU

²⁸ Subsequently on the 2nd November 2018 the High Court [Donnelly J., [2018] IEHC 612], ordered the surrender to the UK (NI) of R.O. It may be of interest to note that a second strand of the objection to surrender had been a claim that there were specific deficiencies in Maghaberry Prison which raised a real risk of a breach of R.O.'s right under Article 3 of the ECHR to be free from inhuman and degrading treatment. Having considered a number of matters including information provided by the issuing judicial authority, Judge Fiona Bagnall, the High Court rejected this strand of R.O.'s objection also.

We will turn now to the issue of the potential direct impact of withdrawal on the GFA – which is the issue which seems to most exercise media commentators.

The GFA is a collective commitment by, the vast majority, of the people on the island of Ireland to abandon any historical claims on one another and to support a reality where Northern Ireland is part of the United Kingdom by consent and can elect to leave that Union at any time. We have accepted and embraced a promise under the terms of the Agreement that rights would be respected North and South, that the ECHR would have domestic force and that cross-border institutions would operate to maintain close and effective relationship between the three governments – Ireland, the United Kingdom and the Northern Ireland government.

The Preamble of the British-Irish Agreement, within the GFA, states the wish of both those governments to;

“...develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union...”²⁹

That part of the Agreement, reached in the Multi-Party Talks, provides that the Northern Ireland Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas *“subject to.....the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void”³⁰* .

Strand Three of the GFA contains specific provision in respect of Rights, Safeguards and Equality of Opportunity. These require, inter alia, that:

- The British Government will complete incorporation *into Northern Ireland law* of the ECHR, with direct access to the courts and remedies for breach of the Convention including power for the courts to overrule Assembly legislation on the grounds of inconsistency³¹;
- The Northern Ireland Human Rights Commission (created under paragraph 5 of the subject strand of the Agreement) would be invited to consult and to advise on the scope for defining in Westminster legislation, rights “ *...supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem and- taken together with the ECHR – to constitute A Bill of Rights for Northern Ireland”³²*

The GFA further requires comparable steps by the Irish Government equally drawing upon the ECHR and other international legal instruments in the field of human rights . This requirement specifies that, *“...the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”³³*

The GFA includes, therefore, a commitment to the protection of rights on an *equivalent* basis across the two jurisdictions. It is abundantly clear that the GFA is also constructed on the belief and

²⁹ Para. 3 of the Preamble to the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland made the 10th day of April 1998.

³⁰ The Agreement Reached in the Multi-Party Negotiations – Strand 1, para. 26(a).

³¹ Ibid Strand Three Rights, Safeguards and Equality of Opportunity, para. 2.

³² Ibid para. 4.

³³ Ibid para. 9.

understanding, of all parties to it, that both the UK and Ireland would be members of the EU and parties to the ECHR.

While there is a significant degree of the presence of “unknown unknowns” regarding what will happen in exact legislative terms in the United Kingdom, post withdrawal, there is a clearly held view that it is the intention of the UK Government to withdraw from the ECHR. It is also understood that the CFR will be omitted from any retained EU law. It is of course only fair and appropriate to acknowledge that the UK Government, nevertheless, continues to stand by a policy commitment that withdrawal from the EU will not lead to a reduction in rights in the UK³⁴.

Most importantly, you will be aware, that the ECHR is not a creature of EU Law but rather is a Council of Europe provision and was ratified by the United Kingdom in March 1951, long before accession to the EU. Accordingly, the ECHR is not necessarily undermined by the withdrawal of the UK from the EU. Whether the UK government decides to withdraw from the ECHR is, of course, another question. A far different question however is what of the fundamental place held by the ECHR in the provisions of Strands 2 and 3 of the GFA?

As criminal/human rights lawyers we might consider the necessity of a re-writing or amendment of the GFA, but we acknowledge that a political concern arises that this approach might overlook the fact that the inclusion of the ECHR provisions in the Agreement was in fact an important guarantee for Nationalists, who pointed to their position that they had been subject in the past to many years of human rights abuses. Ultimately whether Northern Ireland remains within the ECHR, in recognition of its importance to the GFA or otherwise, is a political issue beyond the scope of this paper. But, as practicing criminal/human rights lawyers, we can surely acknowledge that non-withdrawal from the ECHR would be a solution to the risk of undermining Strands 2 and 3 of the Agreement – without necessarily impinging upon the principles of sovereignty which inspire those who have voted for a UK withdrawal from the EU.

In March 2018 the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, a body envisaged under the terms of paragraph 10 of the GFA,³⁵ published a policy statement on the United Kingdom withdrawal from the European Union.³⁶

The Introduction to the statement includes the following passage;

“Progress towards a lasting resolution of the conflict in Northern Ireland and Ireland has been grounded in the human rights and equality provisions of the 1998 Agreement. The equality and human rights framework which underpinned the 1998 Agreement assumed the UK’s and Ireland’s continuing common membership of the European Union. The significance of that common membership is seen in explicit acknowledgement of their relationship ‘as partners in the European Union’³⁷ and frequent reference to the EU throughout the document. The UK’s withdrawal from the EU therefore creates significant risks for rights protection and the effective functioning of the 1998 Agreement”³⁸

The Joint Committee made six recommendations “in order to honour the ongoing protection of rights on the island of Ireland”;

³⁴ White Paper: Legislating for the United Kingdom’s Withdrawal from The European Union, Cm 9446, 2.25

³⁵ GFA, Strand 3, para.10

³⁶ IHREC-NIHRC Brexit Statement//March 2018

³⁷ As stated in the Preamble to the Agreement between the British and Irish governments within the GFA

³⁸ IHREC-NIHRC Brexit Statement//March 2018 page 2.

1. *Ensure commitment to ‘no diminution of rights’ is evident and enforceable in final Withdrawal Agreement;*
2. *Safeguard North-South equivalence of rights on an ongoing basis;*
3. *Guarantee equality of citizenship within Northern Ireland;*
4. *Protect border communities and migrant workers;*
5. *Ensure evolving justice arrangements comply with commitment to non-diminution of rights;*
6. *Ensure continued right to participation in public life for EU citizens in Northern Ireland*³⁹

I am mindful of the fact that Mr. Les Allenby, Chief Commissioner for Human Rights in Northern Ireland is speaking to you this morning and he is clearly far better qualified to address the significance of the policy statement and its recommendations, which were predicated on an anticipated Withdrawal Agreement, in circumstances where it is now increasingly likely, as we write this paper, that no agreement will be concluded by the date of departure of the UK from the EU. How important is Northern Ireland remaining within the ECHR in those circumstances?

If Northern Ireland does not stay within the ECHR, then clearly a mechanism is required to give effect in practice to the current agreed position of the EU27 and the UK government that there will be no diminution of human rights after the UK Withdrawal from the EU. As criminal/human rights lawyers the importance of this requirement must be clear, whether we favour withdrawal or not.

The GFA includes a commitment to the protection of rights on an equivalent basis across the two parts of Ireland⁴⁰. We would argue that this commitment is currently met by adherence to the ECHR. But what if the UK withdraws from that? Then there must be remedial adequacy so that the people of Northern Ireland do not have a lower standard of rights protection. Professor de Londras observes that, *‘If people in Northern Ireland have a substantially lower standard of rights protection as a result of remedial inadequacy to that enjoyed (in Ireland) then there is a strong argument based in international law, that the UK is not fulfilling its commitments under the (GFA)’*⁴¹

So, in the spirit of this being a matter of common concern affecting our destiny both on the Northern and Southern ends of this island, there is, we would submit, a need for cross-jurisdictional engagement from those with political mandates in order to ensure the protection of international obligations for rights equivalence. Differences, if any, in rights protections between Northern Ireland and Ireland must be identified and resolved if not before UK Withdrawal then as a matter of urgent priority in whatever negotiations and/or discussions take place after that event. Fresh or closer consideration of the provisions of the GFA addressing a Bill of Rights in Northern Ireland⁴² and a Charter of Rights for the island of Ireland as a whole⁴³, may, perhaps, provide a route to solving the impact upon the GFA of UK withdrawal from the ECHR and non-retention by the UK of the CFR. However, yet another ‘unknown unknown’ in the withdrawal process is the actual extent to which the UK government intends to incorporate EU human rights instruments in order to safeguard the GFA equivalence requirements.

³⁹ Introduction to IHREC-NIHRC Brexit Statement//March 2018 page 2.

⁴⁰ Par. 9 Rights Safeguards and Equality of Opportunity – Belfast/Good Friday Agreement 1998.

⁴¹ The Impact of Brexit on Human Rights – 2018 Annual Human Rights Lecture, Law Society of Ireland 15 May 2018, page 10.

⁴² Belfast/Good Friday Agreement ‘Rights, Safeguards and Equality of Opportunity’ Para 4

⁴³ Belfast/Good Friday Agreement ‘Rights, Safeguards and Equality of Opportunity’ Para 10

Naomi Long MEP, the leader of the Alliance Party in Northern Ireland, expressed the opinion to a rally of the Peoples Vote movement, at the Ulster Hall, here in Belfast, on Saturday 14th September 2019, that people who think that Brexit will not undermine the GFA are *'living in cloud cuckoo land'*. We hope that in this paper we have correctly emphasised that the potential impact of UK withdrawal from the EU, on not only the GFA but on other crucially important cross-border systems, particularly the CTA and CJA – including the EAW – is, indeed, far reaching and profound, in the absence of appropriate agreements and treaties which will protect relations on this shared island after UK withdrawal. To end on a positive note however, it is also clear that there is careful ongoing academic analysis of the pitfalls and the recommended solutions required. This is accompanied by significant and authoritative advice to the politicians from the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. It is to be hoped that some, if not all, of that guidance will register and inform the negotiations and inter-action that must follow.

I will leave you now with a thought borrowed from the narration by Belfast-born actor, Stephen Rea in a short film about Brexit and the Border produced in September 2018.

".....roads that start here and end there, somehow allowing a wound to heal....a gentleness in the mundanity....daily travel across political lines; work, school, grocery shops, back again....there, but not there; a line of imagination that needed imagination to make it exist while unseen....we live here and we're holding our breath again"⁴⁴

⁴⁴ Clare Dwyer Hogg, *Brexit: A Cry From The Irish Border*, narrated by Stephen Rea, www.ft.com/video/33264cie-c744-4b24-bdb7-b89bo9716517, accessed 28 September 2018.