

Meehan, Elizabeth

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The Origins of the Common Travel Area between Ireland and the United Kingdom and its Fate in an Era of Governmental Concern about Undocumented Migration and International Terrorism

Elizabeth Meehan¹

Corresponding Author: philip.o'connell@esri.ie

¹ Elizabeth Meehan; Professor Emerita, School of Law, Queen's University of Belfast; Visiting Professor School of Politics and International Relations, University College Dublin, Email: emeehan@btinternet.com

The Origins of the Common Travel Area between Ireland and the United Kingdom and its Fate in an Era of Governmental Concern about Undocumented Migration and International Terrorism

Introduction

In the late 1990s I chose the Common Travel Area (CTA) as the topic of a research paper I did as a Visiting Fellow at Trinity College Dublin.² This was in the wake of opt-outs by the Irish and British governments from the incorporation of the Schengen Agreement on the free movement of persons into the Treaty of Amsterdam. My intention was to explore the conditions under which an Irish government might see its interests as lying with EU freedom of movement rather than in the continuation of the CTA with the United Kingdom (UK). I was also interested in the associated political and socio-economic rights that made the CTA more of a mini-EU than simply an area of free movement – primarily, voting rights and rights of residence, employment, and access to social benefits and services. But, as this paper concludes, it is important also to remember that the CTA is an agreement about immigration into both states as well as free movement between them.

In developing this work, I came upon a fascinating story that was then largely untold³ but about which there were various myths. The story became more complex when Ireland left the Commonwealth, new nationality laws emerged in the UK, restrictions on entry to the UK from the Commonwealth began to be introduced, and both states acceded to the then EEC. Further complications arose with the necessity to comply with EU regulations on access to employment in public posts – about which there is still controversy in the UK. Time does not permit a full exploration of all these matters. Therefore, I shall concentrate on the three phases of the original CTA and their Commonwealth and EEC/EU⁴ contexts. Finally, I move to the fate of the CTA when policy interests again focus on controls on movement, especially in the context of new concerns about national security. Before concluding, I say a little about the difficulty for both states in ‘squaring the circle’ between the search for security and the bedding-down of a new Northern Ireland.

² E. Meehan, 2000, *Free movement between Ireland and the UK: from the “common travel area” to the Common Travel Area*. Dublin: The Policy Institute, Trinity College/ Department of Justice, Equality and Law Reform [Studies in Public Policy 4]. I am grateful to both for their material and intellectual support. The CTA comprises sea and air routes that link Ireland, Northern Ireland, Great Britain, and the Crown Dependencies of the Channel Islands and the Isle of Man (also known as the Crown Possessions or Crown Territories). For today’s purposes, I concentrate on the first three.

³ An exception – but unpublished – is a paper by Diarmaid McGuinness: ‘Has the common travel area a future?’ Dublin: Law Library, 1998. I am grateful to him for sharing it with me and discussing our common interest.

⁴ But briefly, as the complications here for Irish, British and Commonwealth nationals are more to do with the associated rights than movement *per se*, at least from the 1960s-90s.

The Original CTA

Insofar as there was any popular discussion in Ireland of the CTA when I began my research, it was seen in most quarters as a feature of neo-colonial dependency, unfounded in law and related to the blight of emigration. This is understandable but inaccurate. It is clear from the archives of the Taoiseach's department that the CTA was regarded as a core national interest, especially, in the early days, in terms of how Ireland could control immigration by Bolsheviks and displaced persons in continental Europe⁵ – as well as the more obvious benefit of being a convenience for Irish people living in the UK. And, though presented to the public as informal, agreements about the CTA involved politics and diplomacy at the highest level, as well as routine cooperation at the operational level.

CTA Mark 1. The CTA in the 1920s and 1930s represented a subset of arrangements for freedom of movement, and associated rights of residence, work and voting, for the Commonwealth as a whole. The first formally agreed provisions that were specific to Ireland and the UK began in 1924 when the Irish government started issuing Irish passports, thereby raising security concerns in the UK. The practice then agreed was to share the names of people on each other's 'Suspect Index' and to notify each other of action taken over the wish of a 'suspect' to land. The two countries also had a common list of countries whose nationals would require visas. Aliens who would be excluded by one state were inadmissible in the other, to prevent them from making use of the absence of controls on routes between the two. With respect to admissible travellers, the two states provided each other with duplicate landing cards.⁶ Sometimes, the volume of cards meant that these might not have been forwarded from one country to the other until after the traveller concerned had been and gone. Nevertheless, both states were satisfied that the system worked.⁷ Had it not, it would not have been possible to restore the system after restrictions to it during and just after the Second World War.

⁵ Such people were seen as a threat to a homogeneous Irish culture and insupportable in a poor economy. (Eunan O'Halpin, 1999, *Defending Ireland: The Irish State and its Enemies since 1922*. Oxford: Oxford University Press, pp. 75-7, 132). Hostility towards Jewish immigration became even more marked around the Second World War (Dermot Keogh, 1998, *Jews in Twentieth Century Ireland*. Cork: Cork University Press; O'Halpin, 1999, *Defending Ireland*, 292-7). In reviewing the pre-war CTA, the Department of Justice believed that arrangements had worked disproportionately in Ireland's favour (most people landed in the UK first) and that Britain had 'operated rigid controls on Ireland's behalf', allowing the latter to preserve its 'ethnic and religious' character, while the 'odium' of limiting entry by refugees was incurred by the UK (O'Halpin, 1999, *Defending Ireland*, 76-7).

⁶ The British passed to the Irish cards pertaining to those who, on landing, said they intended to go on to Ireland. Only a few cases emerged, after the war, of people who had not admitted an intention to travel to Ireland. The Irish treated all arrivals as likely to travel to the UK (*In-House History of MI5's War-Time Irish Section*, p. 23, Public Record Office KV4/9; with thanks to Eunan O'Halpin).

⁷ File note of conversation with Mr P. O'Toole, Department of Justice, 28.1.71. Department of Foreign Affairs (DFA) London Embassy Series F100/4/46. See also note 5.

CTA Mark 2. Following this period of restrictions (which included controls between Northern Ireland, as well as Ireland, and Great Britain), the CTA was re-established in 1952 after official-level talks, authorized by the Irish cabinet to reach agreement on ‘informal arrangements’.⁸ Similar arrangements for the ‘Suspect Index’ resumed, as did the undertaking not to allow anyone to land in one state who would not be admitted to the other. But the new arrangements were to be stricter. It was agreed that persons on the ‘Suspect Index’ who were mistakenly allowed to land, and travel onwards, would be readmitted by the state that had admitted them in the first place. In the case of aliens allowed to enter, both states would assume that they intended to travel to the other. Both states would record and exchange information about the arrivals and departures of all lawfully present aliens and police forces would exchange information about their movements. One departure from the previous arrangement was that there would no longer be a common list of countries whose nationals required visas to enter either state, though operational coordination would continue. This it did, though the proceedings of the British Irish Inter-Parliamentary Body (BIIP, now named the British Irish Parliamentary Assembly (BIPA)⁹) regularly reveal the existence of problems (but see note 47 on a new proposal).

The documents in the Irish National Archives reveal a number of concerns; bureaucratic overload, the Department of Social Welfare concern that the removal of war-time controls would reduce its capacity to regulate the pattern of emigration, and how the renewal of free movement arrangements would be seen by the Irish public. The conclusion was, however, that the risks of being overloaded by cards from the UK and not being able to regulate emigration were offset by the benefits of cooperating in a system of clearance at first ports of entry which would minimize illegal entry into Ireland both on direct routes from Great Britain and *via* Northern Ireland.¹⁰ Care was taken, in cooperation with the UK, over the public presentation of the renewed arrangements to enable the Minister for Justice to tell the Dáil on 23 April 1952 that:

The Government was informed beforehand that the British Government had decided to abolish the immigration controls on passenger traffic – as from 7 April. Its attitude was that the abolition of a British Control was a matter for the British themselves.¹¹

It remains the case that informality is stressed in Ireland:

⁸ Department of Justice, File Note, *Immigration Control – Cooperation with the British*, 15.2.52, Department of the Taoiseach (D/T) S15273A. Extract from Cabinet Minutes, item 6, 29.2.52, D/T S15273A.

⁹ The change took place in 2008 after a period of discussion of its changed remit and composition, consequent upon the Good Friday Agreement and devolution. For simplicity’s sake, I shall call it the BIPA throughout.

¹⁰ Meehan, 2000, *Free Movement*, 28-29.

¹¹ In reply to a question put by Sean McBride, TD. For a summary of the exchanges on presentation (to avoid being seen as agreeing to something – the ‘reintroduction of a single immigration unit’ – that might be ‘out of keeping with our position as an independent State’), see Meehan, 2000, *Free Movement*, 29-30.

There is no formal agreement between Ireland and UK regarding the common travel area and it is not provided for in legislation. The first legal recognition of the common travel area ... is contained in the Treaty of Amsterdam.¹²

CTA Mark 2½. In 1962, at the same time of the first applications by both states to the EEC, the UK introduced its first restrictions on rights of entry and residence for Commonwealth nationals – which did not apply to the Irish (see below). The single immigration unit was revisited between 1966 and 1975 when the UK introduced further restrictions on Commonwealth nationals. In the context of the possibility that displaced East African Asians might seek to enter the UK through Ireland, Ireland amended its 1962 Aliens Order to prevent this. At the time of actual accession to the EEC, the UK had just introduced a new Immigration Act in 1971 which came into effect via regulations in 1973. The details need not detain us here, except to note an improvement from the Irish point of view. Previously, Irish passengers were not formally exempt from restrictions; rather, immigration officers were directed not to apply the controls at ‘Anglo-Irish ports’. Now, Irish passengers could travel to the UK without controls as a result of statutory recognition (in the UK) of the CTA, a position restated by the new Labour government in 1974.¹³ Things remained much the same for the next twenty years.

Though seen as a core interest, the perception that the CTA benefitted Ireland had been tempered until 1948 by disquiet about British nationality law.¹⁴ This brings me to the Commonwealth dimension.

The Commonwealth Dimension to the CTA, Ireland’s Departure from it, and the Accession of both States to the EEC/EU

As noted, the CTA was a specific case of that which was possible throughout the Commonwealth with respect to entry into the UK. From the UK point of view, Commonwealth freedom of movement (and associated political and socio-economic rights) rested on a common nationality. All peoples in the Commonwealth, including Ireland, and the metropolitan centre were, under British law, Subjects of the United Kingdom and Colonies. At the time of the 1921 Treaty, Michael Collins and Arthur Griffith had sought to enshrine a notion of reciprocal, rather than common, citizenship but this took some time to become a reality.

The nationality provisions of the 1922 Constitution, which were not international in character,¹⁵ were replaced in 1935 with a new Irish Nationality and Citizenship law designed

¹² Common Travel Area between Ireland and the United Kingdom, Citizens Information Board, last update 16 July 2009, available at http://www.citizensinformation.ie/en/moving_country/moving_abroad/freedom_of_movement_within_the_eu/common_travel_area_between_ireland_and_the_uk.html.

¹³ Meehan, 2000, *Free Movement*, 38-9.

¹⁴ Meehan, 2000, *Free Movement*, 12-21.

¹⁵ As McGuinness, 1998 (‘Has the CTA a Future?’, 6.), points out, judicial opinion in the UK was able to maintain, until the 1940s, that the 1922 Constitution ‘did no more than confer ... a national character as an Irish citizen within the wider British nationality’ and that this remained the case despite the 1937 Constitution.

to bring about a definition of Irish nationality for international purposes. British law, however, remained the same until the year before Ireland left the Commonwealth. After a year of exchanges and pressure from Ireland¹⁶ in 1947 about the proposed new UK law, a distinctive Irish nationality was recognized. The British Nationality Act 1948 specified four categories of person: British Citizen (no longer ‘Subject’ but it was a long time before ‘citizen’ used in everyday parlance); Citizen of the United Kingdom and Colonies; Alien; and, for the first time, Irish Citizen.¹⁷

This was welcomed in the Dáil by the Minister for External Relations, despite his reservations about ‘fellow countrymen in the Six Counties’ and some other matters, and it paved the way for eventual reciprocity on associated political and socio-economic rights.¹⁸ However, the separation out of a distinct category, Citizen of the United Kingdom and Colonies, for people beyond the shores of the UK was ‘the thin end of the wedge’ which eventually led to the first UK immigration restrictions in 1962.¹⁹

The coming about of the Commonwealth Immigrants Act 1962 was another period of high-level engagement between Ireland and the UK over free movement and associated rights. By that time, Ireland had, of course, left the Commonwealth.²⁰ During months of intense diplomatic activity and debate, it was in the balance as to whether or not the new restrictions would apply to Ireland.²¹ The Home Secretary, R. A. B. Butler, wanted Ireland to be exempt. Northern Ireland Unionist MPs were thought to be in favour of a voucher scheme for Irish nationals, seemingly to “to bolster up their own Safeguarding of Employment Act the future of which they [were] worried about in the event of Britain and Ireland joining the Common Market”.²² (and see note 25 below.)

Elsewhere in the UK, the Commonwealth Immigrants Bill was under attack for being racist—a claim seemingly, to its opponents, clinched by the likelihood that it would not apply to Irish nationals (as, indeed, it did not). According to the Irish Ambassador in London, “officials will not deny privately that the coloured problem is at the root of the question”.²³ Moreover, the Bill was seen by defenders of the Commonwealth on both sides of the House of

¹⁶ The Irish government was determined that it could not follow the example of Canada where it had been accepted that, in a new Canadian nationality law, Canadians could be both Canadian citizens and British subjects.

¹⁷ Meehan, 2000, *Freedom of Movement*, 16-7.

¹⁸ It may be of interest to note here that, in the last government, a review of citizenship was commissioned by the Prime Minister, Gordon Brown, from Lord Goldsmith, QC. His recommendation that voting rights (except those covered by EU rules) for non-UK nationals be phased out was not taken up by that government.

¹⁹ McGuinness, 1998, ‘Has the CTA a Future?’, 11.

²⁰ The UK’s Ireland Act 1949, in response to Ireland’s Republic of Ireland Act 1949, contained a similar ‘mantra’ to that of the 1948 Nationality Act. Ireland, though not part of His Majesty’s Dominions, was not a foreign country. There were the UK and colonies, dominion states, foreign countries and Ireland. Similarly, the Irish Taoiseach, John Costello, had said in 1948 in the Dáil debate on the bill leading to the Republic, that the Act was not intended to render Commonwealth states and citizens ‘foreign’ and hoped that they would not treat Ireland as ‘foreign’ (Meehan, 2000, *Freedom of Movement*, 18-9).

²¹ Meehan, 2000, *Freedom of Movement*, 84-93.

²² Letter from the Ambassador to The Secretary, Department of External Affairs, 24.11.61, D/T S15273B.

²³ Letter from the Ambassador to Con Cremin, Secretary, Department of External Affairs, 3.11.61, D/T S15273B.

Commons, and in both Houses, as an added attack on that body, already wounded by the UK's decision to apply for EEC membership; while, at the same time, protecting nationals of a state which had "deserted" it.²⁴

The EEC/EU dimension

There was considerable interaction between the EEC²⁵/EU and the CTA between the 1960s and the present. Of particular significance were complications arising from EU non-discrimination provisions, Commonwealth and Irish access to public employment in Great Britain and Northern Ireland, and new nationality conditions in the UK intended to bring about compliance with EU law. Since this is more about the associated rights dimension to the CTA and because I have dealt with these issues elsewhere, I say no more here.²⁶

What in previous Irish policy documents was known as the "common travel area" became acknowledged as the Common Travel Area in the Treaty of Amsterdam. This Treaty brought into the first pillar the provisions of the 1985 inter-governmental Schengen Agreement among (at the time) the six original member states on the abolition of controls on internal borders. While not opposing the incorporation of Schengen into Community policy, Ireland and the UK²⁷ sought opt-outs from parts of its application; that is, exemption from removing border controls while maintaining the right to opt-in to some of the 'flanking measures' on intelligence, policing, etc.

²⁴ See debates in House of Commons and House of Lords; also *Irish Press*, 13 March 1962 in D/T S15273.

²⁵ Despite misgivings in London, the Northern Ireland Government had managed to secure some extension of wartime controls (over entry for the purposes of residence and employment) on British citizens (then under British law still including Irish citizens) from outside Northern Ireland. Its Safeguarding of Employment Act arose during negotiations for membership of the then EEC, the first attempt coinciding with the first restrictions on free movement within the Commonwealth. A compromise was sought during negotiations in 1971 by the UK government which secured a five-year transition period for the ending of the act's effectiveness. This was pragmatically accepted by the Irish government—though it was criticized in the Dáil for not arguing more forcefully for immediate abolition. Both Dr Hillery, Minister for Foreign Affairs, and his questioners agreed that the act was "nasty" and political", intended more to discriminate against Irish nationals than to protect Northern Ireland workers. It is not clear that Irish negotiators made any great play for abolition instead of a transitional ending; as Dr Hillery pointed out, insistence on abolition was not worth failing to be admitted to the EEC (Dáil debates 255, 27 July 1971 and 4 Aug. 1971). Though phased out in practice, the act was not formally repealed until 1981. The phasing out of the Safeguarding of Employment Act after accession to the then EEC appeared to give Irish nationals more freedom to work in Northern Ireland (where the position would now be comparable to that in Great Britain). But the full range of public sector opportunities for both Irish and Commonwealth nationals was subsequently restricted—ironically, through the complexities of compliance with EU law.

²⁶ Except to note that even now, five years after I last wrote about this, there is still controversy about how best to deal with the issue. Mr Andrew Dismore, MP, (and others) tried some eight or nine times to secure the passage (sometimes with government help) of a Private Member's Bill to reform the nationality requirements for recruitment to the civil service (Mr Dismore represented a constituency in London, a city with a vast number of employees who are non-UK nationals). He finally succeeded in getting his Bill inserted into the last government's 2008-10 Constitutional Reform and Governance Bill at clauses 20-23. This was welcomed at the Report Stage by the government spokesperson. Yet, when the Bill reached the House of Lords, clauses 20-23 were withdrawn by the government. At the time of writing, I have been unable to discover the reasons for this.

²⁷ At least, after Labour replaced the Conservative in government during negotiations in May 1997. Denmark also looked for specific treatment because, while wanting to be part of the zone of free movement, it would have preferred a continuation of the inter-governmental method and succeeded in retaining power to match, through national legislation, provisions to match Community ones.

Electoral politics in the UK and a change of government in the midstream of negotiations meant that Ireland was in the lead. Its negotiators succeeded in ensuring that the two states' positions were clearly distinguishable in the Treaty. Among these differentiations is a unique method through which Ireland might change its mind and opt-in to the border checks aspect. There is also a Declaration by the Irish government that its position stemmed solely from a desire to maintain the CTA which could not be done if one state opted-in while the other did not (in contrast to the UK position that the removal of controls at UK borders was out of the question). Though unstated in public at the time, it seems possible that another consideration, in addition to the Irish in Great Britain, may have been Northern Ireland. The timing of the Amsterdam Treaty coincided with talks that led to the Good Friday Agreement and the transformation of the north south border (see below).

Also around this time, the CTA began to be affected by governmental concerns about illegal immigration and international terrorism and it is to this that I now turn.

The CTA and National Security

By the late 1990s and early 2000s, the CTA had been in existence for some eighty years and was well-established in the public mind as a zone of control-free movement and reciprocal rights, reflecting the mosaic of links amongst the peoples of Ireland and the UK. Arguably, the public did not (and do not) see the CTA primarily as a common immigration system. But now its effectiveness as just that was called into question by the governments of both states. This began before the terrible events of 9/11 and first came about for three reasons: growing numbers of asylum-seekers, perceptions of a growth in illegal immigration; and a larger than expected take-up of the opportunities provided by the fact that both Ireland and the UK (and Sweden) did not apply the transition measures for inward migration from the then eight accession countries in eastern Europe.

As is often pointed out, it is not really possible to know exactly about illegal immigration since many people enter legally and then remain. An increase in undocumented migrants in Ireland, and the rise in asylum-seeking, could have stemmed from the absence, at that time, of any policy in Ireland for 'routine' immigration and naturalization. Be that as it may, both states began to have less confidence in the system of clearance at first ports of entry and to think that Northern Ireland was a conduit for undocumented migration in both directions. In 1997, the Irish Minister for Justice, Nora Owen TD, authorized immigration officials to make random checks on travellers entering Ireland from Northern Ireland²⁸ (the Northern Ireland conflict meant that, for many years, there had been random checks on travellers from there to Great Britain). Authorization for checks was also extended to routes from Great Britain;

²⁸ Briefing notes on the operation of this Order suggest that they would be unobtrusive and of little inconvenience to those who were normally free to travel without checks (Personal communication to the author from the Department of Justice, Equality and Law reform, February 1999). This was similar to the British view that checks on EU/EEA travellers would be a 'minor inconvenience', done by 'lightness' and a 'wave through' (Letter to the author from the UK Immigration and Nationality Directorate, Home Office (now the UK Borders Agency), 1. February 1999; see also House of Lords Select Committee on the European Communities, 7th Report, Session 1998-99, paras. 15, 21, 22 and Minutes of Evidence, paras. 86 and 97.

travellers could be asked, on an occasional basis,²⁹ for some form of photographic identification.³⁰ In the same year, a meeting of officials of the two states agreed upon a programme of work to enhance cooperation and agreed to meet on a twice-yearly basis.³¹ Random checks on trains and busses from the north were reintroduced by the Irish government in 2006 as an unwelcome but necessary response to ‘economic migrants’, asylum-seeking, smuggling and increased security risks.³² As after the 1997 decision, there were anecdotes about different treatment of non-Caucasian and white travellers.³³ True and widespread or not, this issue recurred in connection with the British e-border initiative (see below).

The status of the CTA is frequently questioned at meetings of the BIPA,³⁴ possibly because, since devolution, its composition fully reflects the geography of the CTA and its revolving locations take members on all the CTA routes. One of the BIPA’s major enquiries was into the implications for the CTA of the UK proposal to introduce ID cards³⁵ but, since the proposal was abandoned, I shall proceed to the next matter of concern, not only to it, but also members of the British Houses of Parliament – e-borders.

²⁹ General Overview of Irish Immigration System, Irish Naturalisation and Immigration Service, available at <http://www.inis.gov.ie/en/INIS/Pages/WP07000207>.

³⁰ Common Travel Area between Ireland and the United Kingdom, Citizens Information Board, last update 16 July 2009, available at http://www.citizensinformation.ie/en/moving_country/moving_abroad/freedom_of_movement_within_the_eu/common_travel_area_between_ireland_and_the_uk.html.

³¹ Referred to in a report prepared for or from bi-literal business carried out in the margins of a meeting of the European Council at the end of the year in which the Amsterdam Treaty was signed: *Progress Report on Co-operation between Ireland and the United Kingdom*, European Council Meeting Luxembourg on 12/13 December 1997.

³² Foreign Minister, Dermot Ahern at 32nd Plenary Meeting of the BIPA, 24-5 April 2006, 48 available at <http://www.britishirish.org/>. According to the *Irish Times*, by 2007 the Irish government believed that 90 per cent of illegal immigrants enter via Northern Ireland (‘Electronic border control spells end of Common Travel Area’, 25 October 2007). Equally, the UK claimed that Northern Ireland was a ‘loophole’ allowing illegal immigration into Great Britain (Parliamentary Under-Secretary of State at the Home Office, Lord West of Spithead - HL Deb, 21 November 2007, cols. 832-4).

³³ These circulated widely in university circles where there are frequent cross-border visits by staff and students from diverse backgrounds.

³⁴ The Assembly also takes a keen interest in the conditions of the Irish in Britain (related to the associated rights of the CTA) and in how all jurisdictions integrate newly arrived migrants.

³⁵ See, for example, BIPA, Report from Committee (Sovereign Matters) on *The Implications for the Common Travel Area of the Introduction of British ID cards*, Doc No. 119, April 2006; Report from Committee A (Political and Sovereign Affairs) on *Response from the British Government*, presented at the 32nd Plenary Session, Doc No. 122, October 2006; See also debates in Summaries of Plenary Sessions 33 (23-4 October 2006), 34 (5-6 March 2007), 36 (28-9 April 2008) and 38 (29-31 March 2009 – on additional information supplied to Committee A by the British government in Doc No. 144). All available on the BIPA website, <http://www.britishirish.org/>. The BIPA was also concerned about the position of Irish nationals in the UK and people in Northern Ireland who chose to be Irish. It emerged at the 32nd Plenary (4-5 April 2006, 54-8) that the Irish government might also introduce ID cards but for the purpose of access to services, not to record identities.

E-borders. The public announcement (though not the private preparation³⁶) of the British e-borders initiative was pre-dated by action on the Irish side. In addition to the reintroduction of checks on busses and trains from the north in 2006, passengers arriving at Irish airports from Great Britain began regularly, not occasionally, to have to show passports or other photographic forms of identification and, moreover, at immigration control desks. At the time travellers entering the UK from Ireland were channelled through domestic arrival areas (and still are) and not subject to immigration controls. The CTA 'no longer exists at Irish airports', as one BIPA member put it.³⁷ Soon after, however, the boot was on the other foot. News of the British initiative appeared in a front-page headline in the *Irish Times* of 24 October 2007 which announced that: 'Electronic border control spells end of Common Travel Area' by 'sealing off the two islands'.³⁸

In discussions between the two governments, the British told the Irish that they intended to put in place by 2009 an electronic data-collection system on all sea and air travel to and from the UK. This would raise an 'alert' if the person travelling were on a 'watch-list'. In reporting to the Dáil, the Taoiseach said that plans were well advanced for a comparable system—the Irish Border Information System. This was announced in January 2009 by the Minister for Justice, Dermot Ahern TD, who explained that passenger information collected by carriers would be sent in advance of travel to an Irish Operations Centre for screening against various 'watch lists'. If matches were found, the relevant agency would be alerted and action taken 'to monitor, intercept, question, stop or arrest the individual concerned'. He expected the scheme to begin in 2010.³⁹

In contrast to Ireland where changes are a matter of administration, legislation was required in the UK. The British proposal to subject all CTA routes to passport controls and to operate intelligence-led checks on the north-south border appeared in the 'portmanteau'⁴⁰ Borders, Citizenship and Immigration Bill (enacted in 2009) at clause 46 (later renumbered as 48). It

³⁶ It was reported that, in mid-2006, the British government began to look into the possibilities of how to check the movement of illegal immigrants, terrorist suspects and criminals. In July 2007, the UK prime minister asked the cabinet secretary to report by October on how an 'e-border' system could be implemented 'soon' (*Irish Times*, 24 October 2007).

³⁷ Conservative MP, Robert Walter. BIPA Plenary Session 24-5 April 2006, 48 available at <http://www.britishirish.org/>. At this time, the requirement to show a passport, rather than, say, a photographic driving license, was not a government one but demanded by one private airline, Ryanair.

³⁸ See also letter to the *Irish Times* from Robert Walter, MP on 27 October 2007, reiterating the concerns expressed by him and others at the BIPA.

³⁹ 'Ahern Announces New Border Control System'; Department of Justice and Equality, 15 January 2009, available at <http://www.justice.ie/en/JELR/Pages/PR09000014>. An announcement by the next government on a new law requiring carriers to provide such information was made under the auspices of an EU directive and is irrelevant to the CTA as it is about travel from outside the EU ('Minister Shatter signs new law requiring airlines to provide Advance Passenger Information. New Measures to improve border control and combat illegal immigration', Department of Justice and Equality, 27 October 2011, available at <http://www.inis.gov.ie/en/INIS/Pages/Minister%20Shatter%20signs%20new%20law%20requiring%20airlines%20to%20provide%20Advance%20Passenger%20Information>).

⁴⁰ It covered a vast range of immigration issues, sprawling over policing and customs (formation of a single border policing system), immigration, naturalization and citizenship.

was introduced first in the House of Lords, rather than the Commons.⁴¹ Clause 48 was defeated as a result of opposition led by the Liberal Democrats and the Conservatives.⁴² But at its third reading, the Home Office Minister Lord West suggested security risks were so severe that the matter would have to be looked at again during the Commons passage.

Considerable disquiet was expressed by the Northern Ireland Human Rights Commission,⁴³ as well as within the House; indeed, members of the latter referred to briefings by the former. The criticisms, which included concern about inadequate consultation,⁴⁴ ranged widely, covering:

- the lack of quantified evidence of the threat and, thus, of the gains to be secured through the changes;
- the introduction (under an earlier section of the bill) of a combined customs and immigration UK Borders Agency (UKBA) force to carry out so-called intelligence- or risk-led checks on identity on the north-south border and between Northern Ireland and Great Britain— in the context of the ‘normalization’ of (still sensitive) policing in Northern Ireland;⁴⁵
- the suspicion that intelligence- or risk-led checks by the new combined border policing body would rely on racial-profiling;⁴⁶

⁴¹ The Borders, Citizenship and Immigration Bill [HL] was laid before the Lords on 14 January 2009 (HL Bill EN 15). The second reading took place on 11 February—HL Deb., cols. 1128-1213; clause 46 was dealt with at the committee stage on 4 March—HL Deb., cols. 753-774; now clause 48, it was dealt with at the report stage, where it was rejected by a 2:1 majority, on 1 April—HL Deb., cols. 1096-1137; and the third reading was on 22 April, HL Deb., cols. 1535-43. It was also considered by the Lords Select Committee on the Constitution—see Constitution Committee, Seventh Report, Part 3 of the Borders, Citizenship and Immigration Bill, House of Lords 11 March 2009.

⁴² Liberal Democrat opposition was led by Lord Smith (former vice-chancellor of the University of Ulster), supported by Lord Shutt (with a house in Cork and a strong interest in Northern Ireland through the Rowntree Reform Trust). Lord Glentoran, of Northern Ireland, led Conservative opposition to the clause. He reiterated the suspicions he had voiced in November 2007 that the measure was designed to strengthen the borders of Great Britain, not the UK. On the other hand, he commended the opposition alternative—‘an upgraded electronic border round the whole of the British Isles [sic]’ in close collaboration with the republic—as the only way ‘to avoid disrupting 90 years of free travel around the British Isles and alienating an integral part of the United Kingdom, several Crown dependencies and a close and important neighbour’. Nomenclature was also raised again here, this time in connection with Ireland not the UK (see note 58). Lord Glentoran reminded the House that Ireland should be called Ireland, not the Republic of Ireland.

⁴³ Northern Ireland Human Rights Commission, Submission on the Borders, Citizenship and Immigration Bill, for the House of Lords Second Reading, 11 February; Briefing Paper for the House of Lords Committee Stage, 25 February 2009.

⁴⁴ Peers expressed considerable unease about the effectiveness of consultation with the various partners in the CTA, despite some assurances to the contrary. They were disappointed that more use had not been made of the British Irish Council and the British-Irish Inter-Parliamentary Body/Assembly.

⁴⁵ The NIHRC pointed out that the UKBA force would not have the same standards, training and accountability as the new Police Service of Northern Ireland; Northern Ireland was previously policed by the Royal Ulster Constabulary.

⁴⁶ The NIHRC provided substantial evidence, also cited in the debates, challenging the UKBA’s claim that such checks would never be based on race profiling. The Chief Commissioner, Professor Monica McWilliams, also referred to these anxieties when giving evidence to the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement; Joint Committee, 30 April 2009.

- the disruptive effect of these checks on residents of border areas going about their daily business (people do not normally take identity documents on shopping trips, school runs, or on their tractors!);
- the likelihood of their discriminatory effect on people of ethnic-minority background who were Irish or British citizens and who, equally, might not be carrying passports but who might be more likely to be picked out because, in the eyes of UKBA officers, they did not ‘look’ Irish or British;
- the potential disruption of such checks to inward tourism and the lives of those who travel frequently between the islands to visit families, attend sporting events and so on;⁴⁷
- the possibility of extension from air and sea ports to ‘international’ railway stations, affecting not only Belfast Central Station but also stations on the Dublin route used for local journeys: Lisburn, Lurgan, Portadown and Newry; and
- the ‘open door’ that the measure would provide towards future full passport controls in Great Britain on routes from elsewhere in the UK - on Crown Dependencies⁴⁸ and Northern Ireland routes.⁴⁹

The government’s threat to restore the defeated clause in the House of Commons did not materialize because of opposition there too. But the issue recurred later in 2009 in the Policing and Crime Bill - on customs, rather than immigration, matters. Clause 99 (later clause 97) contained a new power for customs officers to require any person entering or leaving the UK to produce a passport or other travel document. The bill made no mention of any exceptions for CTA routes. The Liberal Democrat peer, Baroness Harris, hotfoot from a BIPA meeting where vigorous opposition to threats to the CTA had been expressed,⁵⁰ returned to the parliamentary fray. She and the Conservative peer, Lord Cope, also just returned from the BIPA, referred back to the earlier debate.⁵¹ Points were again made about ineffective consultation and the risks of racial profiling in ‘intelligence-led’ detection.

⁴⁷ The topic of visas for tourist travel came on to the agenda in the wake of the effect of inconsistencies on the development of cooperative strategies brought about by the Good Friday Agreement. The new Taoiseach, Enda Kenny TD and the Head of Tourism Ireland told the BIPA of plans in Ireland for a visa waiver scheme, whereby people from eighteen countries with valid UK visas would be able to use them to come to Ireland. This would reduce their travel costs by eliminating the need to pay for two visas and would reduce the number of cases when tourists to Dublin went to see attractions in Northern Ireland, unwittingly without a UK visa, and were then stopped at the border on the way back. BIPA Plenary Session 12-4 June 2011, available at <http://www.britishirish.org/>.

⁴⁸ Isle of Man and the Channel Islands.

⁴⁹ Lord Smith succeeded in introducing an amendment that immigration matters would not be introduced under an order in council – which is how changes in UK law affecting Northern Ireland are normally brought about (and was the method used for all changes during Direct Rule); HL Deb, col. 1119, 1 April 2009.

⁵⁰ Especially during debate on a motion on e-borders put by the Hon. Stephen Charles Rodan MHK (Isle of Man); BIPE Plenary Session, 18-9 October 2009, available at <http://www.britishirish.org/>.

⁵¹ At the Committee Stage; HL Deb, cols. 570-675, 20 October.

In addition, both peers were concerned about the dual roles of officers in the amalgamated immigration and customs surveillance system – which has not happened in Ireland, where random checks by customs officials are clearly for customs purposes. The British government insisted that the new power to see documents was a customs power not an immigration one but critics were concerned that it seemed open for the same border officer to ‘change hats’. Between the Committee and Report Stages, the government provided written information and assurances that satisfied Baroness Harris enough to withdraw her proposal to have a specific exemption for the CTA written into the Bill.⁵² No further legislative changes have taken place since the General Election of May 2010.

Personally, I am not sure about those assurances to Baroness Harris; soon afterwards, I presented my driving license at one of the London airports,⁵³ en route for Dublin. When asked for my passport, I said that I didn’t need one to get into Ireland. But I was told: ‘Yes, but from Monday of this week you need one to get out of the UK’. Luckily, that doesn’t happen (yet?) at the airport from where I usually travel. Before coming to my conclusion, I should say something about the conundrum thrown up by the coexistence, on the one hand, of the Good Friday/Belfast Agreement, consequent inter-governmental agreements and implementation laws and, on the other, attempts to reduce security risks.

Security concerns; ‘squaring circles’ with respect to Northern Ireland

The Good Friday Agreement did two things to the north-south border. On the one hand, it reinforced it by acknowledging clearly that it is legitimate under present circumstances. On the other hand, its significance as a barrier to everyday life was to be reduced through policy measures⁵⁴ and by the capacity of Northern Irish citizens to define themselves as Irish or British or both.⁵⁵ How to ‘square the circle’ between maintaining a relaxed border for everyday life on the island of Ireland and ensuring that the Northern Ireland ‘loophole’ (see note 32) does not undermine the ambition for stronger security on external frontiers was and is problematic. At first, it had seemed that there were two options: either that e-border controls would be applied on the north-south border (which, as seen above, was not in the eventual Bill); or that, if not so applied, passengers from Northern Ireland to Great Britain

⁵² Report Stage; HL Deb, cols 494-497, 5 November 2009.

⁵³ It is clear from BIPA Summaries that its members also do this in an attempt to conserve the remains of the CTA, though Senator Martin Mansergh once expressed concern that this might discriminate against older and/or younger travellers; BIPA 32nd Plenary Session, 4-5 April 2006 available at <http://www.britishirish.org/>.

⁵⁴ Demilitarization of key crossing-points is the obvious method of doing so. But north-south cooperation was expected to increase collaborative provision of services, such as health care, on a cross-border basis and there was to be an equivalence of equality and human rights standards both sides of the border. See, e.g., B. Ó Caoidealbhain and P. Clarke, ‘Realising the potential for cross border service provision: lessons from the health sector’ and Colm O’Cinneide, ‘A common floor of rights protection? The Belfast Agreement, “equivalence of rights” and the North-South dimension’, both in C. McGrattan and E. Meehan (eds) *Everyday Life After the Conflict. The Impact of Devolution and North-South Cooperation*. Manchester University Press, forthcoming.

⁵⁵ This, together with the situation of Irish nationals resident in the UK, was an important issue in the BIPA’s concerns about the British proposal to introduce ID cards; see Plenary Sessions 32 (4-5 April, 2006) and 33 (23-4 October 2006).

would be subject to the same passport requirement, and others relating to addresses of destinations, bank accounts, etc., as non-UK nationals.

The implications of what could be in the pipeline for Northern Irish citizens who wished to travel within their own state were raised in November 2007 by the former UUP First Minister, Lord Trimble, and Lord Glentoran. Lord Trimble asked what consultation the government had held with the Northern Ireland Executive Committee.⁵⁶ The Parliamentary Under-Secretary for the Home Office, Lord West of Spithead, said merely that ‘we continue to work closely with both the Northern Ireland Executive and the Government of Ireland on operational and policy issues, including the implementation of the e-borders programme’. Lord Glentoran,⁵⁷ suggested that the government was intent on ‘expelling the people of Northern Ireland ... by putting an electronic boundary around England, Scotland and Wales, excluding Northern Ireland and packaging it with the Republic of Ireland’.⁵⁸

In personal discussions in Dublin about the incompatibility of maintaining cooperation with the UK to keep the north-south border open (without falling foul of charges of discrimination) and cooperating to bring about a shared Irish/British approach to stronger security on external frontiers, one person suggested ‘there would be a fudge’. To my response that this would be logically and practically impossible, another person said with an impish twinkle in his eye that ‘British security policy required the reunification of Ireland’!

Conclusion; The End of the CTA or Not?

In the sense that the common travel area is about controls on the entry of travellers from outside either state (rather than a system of control-free movement between them) the new common e-border arrangements are no more than an electronic version of what already existed, the new ‘watch lists’ being something like a modern version of the old ‘Suspect Index’ and the new ‘alert’ system being an electronic means of the old exchange of information. As Taoiseach, Mr Bertie Ahern, put it in 2007: ‘All the British authorities were examining is *increased* [emphasis added] cooperation in cross-Border operations ...’. But, to those who see the CTA primarily as a system of control-free travel between the two states, it has changed – albeit that a photographic driving license can be used (so far?) instead of a passport.⁵⁹

⁵⁶ For this and subsequent points in this paragraph, see HL Deb, 21 November 2007, cols. 832-4.

⁵⁷ Echoing concerns expressed in October in a letter from the Independent Unionist, Jim Allister, to the Home Secretary.

⁵⁸ The situation was compounded by Lord West’s reply, in which he repeated a phrase about people moving into Northern Ireland from the south and then ‘travelling across to the UK’ [emphasis added]. When Lord Trimble suggested the phrase demonstrated a lack of understanding of the very concept of the UK (Northern Ireland being *in* the UK), Lord West said it had been a ‘slip’ comparable to that which people make ‘when they forget that the UK is in Europe’. Unfortunately, it is not uncommon for British politicians seemingly not to know the proper name of their country!

⁵⁹ Mr Ahern quoted in the *Irish Times*, 24 October 2007. It did seem in 2007 that, since the electronic information would require access to the machine-readable zone of passports, this ‘increased cooperation’ would lead to government, as opposed to airline, policy that travellers carry passports (and, where necessary, biometric visas). The Northern Ireland Secretary, Shaun Woodward MP, seemed a little confused, however,

The UK proposal to introduce controls on CTA routes came into being at the same time as changes in British rules about permanent settlement and naturalization, some of which were dealt with in the same Borders, Citizenship and Immigration Act 2009 that I mentioned before. According to one analysis,⁶⁰ such changes are linked to an outlook in UK parliamentary debates on immigration and asylum that its authors describe as ‘a politics of unease’ about ‘threats to the legal and social order in various sites within the state’. A contrary point of view was put by the Lord Bishop of Lincoln during debate on what became the Borders, Citizenship and Immigration Act. Though he was addressing questions wider than those relating to the CTA, his words are relevant to how people want to see the north-south border on this island; here they are:

After all, what is a border? Is it a barrier or is it a meeting place? I imagine that most of us want to believe that a border can be a meeting place. Therefore, I imagine that most of us would rather not be debating a Bill which is predicated on a pathology of suspicion and a predetermination towards exclusion rather than welcome. I guess that most of us would rather be debating a Bill driven by the spirit of hospitality rather than hostility to those who wish to settle in this country ...⁶¹

The attractions of the CTA, and its associated political and socio-economic rights, to those who seek to defend it are similar. And their outlook is reinforced by the much repeated idea of ‘the totality of relationships among the peoples of these islands’ used in connection with the new Northern Ireland and the transformed relations between Ireland and the UK. To them, it also symbolizes the idea that, in a democracy, one is free to follow lawful pursuits without interference by the state and they contrast this with the dim view taken in liberal-democratic states of controls on movement in régimes such as the old Soviet Union and apartheid South Africa.⁶² Speaking as citizen I think likewise and, therefore, was sometimes bemused by comments by British politicians and officials that their proposed clause 48 would not put an end to the CTA.

But, it has to be recognized that other citizens are worried about immigration and all of us, no doubt, want to be safe. There is, of course, controversy about whether politicians respond to real anxieties or whether they stoke up fears in order to give themselves more power over people. Either way, it is clear that the last British government saw the CTA as an immigration control system based on inter-governmental cooperation, rather than a zone of convenience for Irish and British citizens. If that is all that the CTA is, then they can, indeed, claim clause 48 would not have abolished it. But for those who see the CTA as something

about this at the BIPA Plenary on 26-7 November 2007. He said that a requirement to carry passports was not envisaged but also said this and other matters continued to be discussed in regular meetings of officials of the two states and he ‘would not speculate’ on whether the new ferry between Donegal and Derry and other crossings on whole north-south border would constitute points of entry under the forthcoming legislation.

⁶⁰ J. Huysmans and A. Buonfino, 2008, ‘Politics of exception and unease: immigration, asylum and terrorism in parliamentary debates in the UK’, *Political Studies*, 56(4): 766-88. See also E. Meehan, 2010, ‘Active Citizenship for Integrating the Immigrants’ in B. Crick and A. Lockyer (eds) *Active Citizenship. What Could it Achieve and How?* Edinburgh: Edinburgh University Press.

⁶¹ Second Reading Debate, HL Deb. 11 February 2009, col. 1142).

⁶² E.g., Andrew Mackinlay MP, BIPA 38th Plenary Sessions, 29-31 March 2009 and 39th Plenary Session 18-9 October 2009.

that both reflects and facilitates the everyday lives of peoples linked through history, culture and kinship, then it does seem to have been damaged, even in the absence of clause 48.

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