

Selected legal aspects of the impact of Brexit on the rights of children across the island of Ireland

A research paper compiled by A&L Goodbody on behalf of the Children's Rights Alliance and the Children's Law Centre

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1 December 2017

Given the enormity of the topic and uncertainty surrounding the various issues involved, this paper is naturally selective and constrained in its analysis and therefore no liability is accepted in respect of its contents. This paper is confined to setting out the legal position only: no position is taken on issues of policy, politics, or otherwise. This paper does not represent the views of A&L Goodbody, its partners, staff or clients, or any other persons connected with the firm.

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Treaties and Conventions

Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968

Charter of Fundamental Rights of the European Union 2000

Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/03 (Lugano II Convention)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention)

Council of Europe Convention on Action against Trafficking in Human Beings 2005 (Trafficking Convention)

Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996

Hague Convention on the International Aspects of Child Abduction 1980

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EU SECONDARY LEGISLATION

Regulations

Reg. 1612/68/EEC on the free movement of workers [1968] OJ Spec Ed I-475

Reg. 539/2001/EC listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L081

Reg. 1206/2001/EC on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/01

Reg. 2201/2003/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa) [2003] OJ L338/01

Reg. 4/2009/EC on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation) [2009] OJ L7/01

Reg. 492/2011/EU on freedom of movement of workers within the Union [2011] OJ L141/01

Reg. 1291/2013/EU establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) [2013] OJ L347/120

Reg. 1299/2013/EU on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal [2013] OJ 347/259

Reg. 1303/2013/EU laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund [2013] OJ L347/320

Directives

Dir. 93/42/EEC concerning medical devices [1993] OJ L169/01

Dir. 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Citizens' Rights Directive)

Dir. 2005/36/EC on the recognition of professional qualifications [2005] OJ L255/22

Dir. 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L280/01

Dir. 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L88/45

Dir. 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L101/01 (Trafficking Directive)

Dir. 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography [2011] OJ L335/01

Dir. 2012/13/EU on the right to information in criminal proceedings [2012] OJ L142/01

Dir. 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57

Dir. 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/01

Dir. 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/01

Decisions, Recommendations, Frameworks

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/01

Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L271/49

Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2008] OJ C111/01

IRELAND: Statutes

Aliens Act 1935

Child Care Act 2001

Criminal Justice (Legal Aid) Act 1962

Criminal Law (Human Trafficking) (Amendment) Act 2013

Criminal Law (Human Trafficking) Act 2008

Criminal Law (Sexual Offences) Act 2017

Non-Fatal Offences against the Person Act 1997

Student Support Act 2011

IRELAND: Statutory Instruments

Aliens (Amendment) (No. 3) Order (SI 277/1997)

Citizens of the United Kingdom and Colonies (Irish Citizenship Rights) Order 1949 (SI 1/1949)

NORTHERN IRELAND: Statutes

Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

Justice (Northern Ireland) Act 2002

Justice (Northern Ireland) Act 2015

NORTHERN IRELAND: Statutory Instruments

Child Abduction (Northern Ireland) Order 1985 (SI 1638/1985)

Criminal Justice (Children) (Northern Ireland) Order 1998 (SI 1504/1998)

Legal Aid Advice and Assistance (Northern Ireland) Order 1981 (SI 228/1981)

Police and Criminal Evidence (Northern Ireland) Order 1981 (SI 1341/1981)

Working with Children (Exchange of Criminal Convictions) (England and Wales and Northern Ireland) Regulations 2013 (SI 2945/2013)

St Andrews Agreement Act 2007

Youth Justice and Criminal Evidence Act 1999

UNITED KINGDOM: Statutes¹

Children Act 1989

Extradition Act 2003

Immigration Act 1971

Ireland Act 1949

Modern Slavery Act 2015

Northern Ireland Act 1998

Sexual Offences Act 2003

UNITED KINGDOM: Statutory Instruments

Special Measures for Child Witnesses (Sexual Offences) Regulations 2013 (SI 2971/2013)²

Working with Children (Exchange of Criminal Convictions) (England and Wales and Northern Ireland) Regulations 2013 (SI 2945/2013)

¹ All listed UK Statutes have geographical extent in England and Wales, Scotland and Northern Ireland unless otherwise indicated.

² Geographical extent: England and Wales only.

TABLE OF CASES

Baumbast v Secretary of State for the Home Department (Case C-413/99) [2002] ECR I-7091, ECLI:EU:C:2002:493

Chen v Secretary of State for the Home Department (Case C-200/02) [2004] ECR I-9925, ECLI:EU:C:2004:639.

Dano v Jobcenter Leipzig (C-333/1) ECLI:EU:C:2014:2358

Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (Case C-184/99) [2001] ECR I-6193, ECLI:EU:C:2001:458

Metock and Others v. Minister for Justice, Equality and Law Reform (C-127/08) [2008], ECR I-6241, ECLI:EU:C:2008:449

Pensionsversicherungsanstalt v Peter Brey (C-140/12) ECLI:EU:C:2013:565

Zambrano v Office national de l'emploi (ONEm) C-34/09) ECLI:EU:C:2011:124

ABBREVIATIONS

CJEU	Court of Justice of the European Union
CRD	Citizens' Rights Directive
Dir.	Directive
EC	European Communities
ECHR	European Convention on Human Rights
ECR	European Court Reports
EU	European Union
PSNI	Police Service of Northern Ireland
Reg.	Regulation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child

BIBLIOGRAPHY

Books

Barnard C, *Substantive Law of the EU: The Four Freedoms*, 5th edn (Oxford University Press, 2016).

Foster N, *Foster on EU Law*, 6th edn (Oxford University Press, 2017).

Hillman J, *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union* (Institute of International Economic Law, Georgetown Law, 2017).

Journal Articles

Atkinson J, 'The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children' (2011) 63(4) *Oklahoma Law Review* 647.

Birrell D and Gray A M, 'Devolution: The Social, Political and Policy Implications of Brexit for Scotland, Wales and Northern Ireland' (2017) 46(4) *Journal of Social Policy* 765.

Gormley-Heenan C and Aughey A, 'Northern Ireland and Brexit: Three effects on "the border in the mind"' (2017) 19 *British Journal of Politics and International Relations* 497.

Mole N, 'Some thoughts on the Impact of Brexit on the Rights of Children' (2017) 6 *European Human Rights Law Review*, 529.

Nevin S, 'Brexit and relocating with children overseas – mind the immigration and family law gaps' *The Law Society Gazette*, 23 August 2017.

Newspaper Articles

—'European commissioner Carlos Moedas reassures UK researchers post-Brexit' *Times Higher Education* (London, 1 July 2016).

Barnard C, 'Theresa May claimed her offer to EU citizens would be 'generous'. It isn't' *The Guardian* (London, 27 June 2017).

Batchelor T, 'Road to Brexit: Leaving EU could make it "impossible" to tackle human trafficking, warn campaigners' *Independent* (London, 9 May 2017).

Contigugli C, 'Everything you need to know about the EU agencies leaving London because of Brexit' *Politico* (London, 8 July 2017).

Cullen P, 'Ireland's health service must "prepare for the worst" post-Brexit' *The Irish Times* (Dublin, 19 June 2017).

Hennessy M, 'Concern gardaí will become targets for terrorists at post-Brexit border post' *The Journal* (Dublin, 30 April 2017).

Khan M, 'Four of the mini-successes in August Brexit talks' *The Financial Times* (London, 31 August 2017).

Orde H, 'Letters to the Editor' *The Times* (London, 29 November 2017).

Whelan N, 'Nightmare scenario is a fudge over the Border' *The Irish Times* (Dublin, 1 December 2017).

Other Papers and Reports

Bar Council Brexit Working Group, *Brexit Paper 6: Family Law*, 3rd edn (London, 2016).

Barber S, *Brexit and Medicines Regulation*, House of Commons Briefing Paper (Number 8148, 20 November 2017).

Children's Law Centre, 'The United Nations Convention on the Rights of the Child' <<http://www.childrenslawcentre.org.uk/images/UNCRC.pdf>>.

Children's Rights Alliance, 'Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child', September 2015 <http://www.childrensrights.ie/sites/default/files/submissions_reports/files/AreWeThereYet.pdf>.

Children's Rights Alliance, 'The United Nations Convention on the Rights of the Child' <<http://www.childrensrights.ie/childrens-rights-ireland/un-convention-rights-child>>.

Coram, 'Brexit: children's rights at risk or future opportunity in the global era?' (February 2017) <http://www.coram.org.uk/sites/default/files/resource_files/FINALCoram%20commentary%20on%20Brexit%20and%20the%20rights%20of%20children1702%20%281%29.pdf>.

Department for Education [UK] 'Initial Teacher Training census for the academic year 2016 to 2017' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/572290/ITT_Census_1617_SFR_Final.pdf>.

Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (CM 9446, March 2016).

Department of Children and Youth Affairs, 'Sectoral Dialogue with Children, Young People and Other Stakeholders Regarding the Impact on the Lives of Children and Young People of the UK's Decision to Leave the EU' (Croke Park, Dublin, 30 January 2017).

DLA Piper, 'The Impact of Brexit on Child Rights', September 2016 <<https://www.childrensociety.org.uk/sites/default/files/research-note-on-the-impact-of-brexit-on-child-rights.pdf>>.

Doughty Street Chambers, 'Report on how designated special status for Northern Ireland within the EU can be delivered', 16 October 2017 <http://www.doughtystreet.co.uk/documents/uploaded-documents/NI_Special_status_report_161017_FINAL.pdf>.

European Commission, *Negotiating Directives for Article 50 Negotiations* (XT 21016/17, 22 May 2017).

European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU and the UK, *Comparison of EU/UK Positions on Citizens' Rights – 19/07/2017* (TF50 (2017) 10).

Higher Education Authority, 'Brexit and Irish Higher Education and Research: Challenges and Opportunities', 28 November 2016 <<http://hea.ie/assets/uploads/2017/06/Brexit-And-Irish-Higher-Education-And-Research-Challenges-And-Opportunities.pdf>>.

House of Commons Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum: First Report of Session 2016-17*, (HC 48, 26 May 2016).

HM Government, *Northern Ireland and Ireland Position Paper*, 16 August 2017.

HM Government, *United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, (Cm 9464, 2017).

Joint Agency Task Force - Strategic Oversight Group, 'Report January – June 2016' <http://www.justice.ie/en/JELR/Joint_Agency_Task_Force-Strategic_Oversight_Group_Report_January-June_2016.pdf/Files/Joint_Agency_Task_Force-Strategic_Oversight_Group_Report_January-June_2016.pdf>.

Joint Oireachtas Committee on Education and Skills, *Implications of Brexit for the Irish Education System: Discussion*, 21 March 2017.

Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, *Implications of Brexit for the Good Friday Agreement: Key Findings* (32/JCIGFA/01, June 2017).

— — *Brexit and the Future of Ireland: Uniting Ireland & Its People in Peace & Prosperity* (32/JCIGFA/02, August 2017).

Lang, Arabella, *Brexit: the July Negotiations*, House of Commons Briefing Paper (Number 8068, 2 August 2017).

Miller V, *Brexit: the October Negotiations*, House of Commons Briefing Paper (Number 8125, 27 October 2017).

Northern Ireland Human Rights Commission, 'Submission to the United Nations' Committee on the Rights of the Child: Shadow Report on the Third and Fourth Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', May 2008 <<http://www.nihrc.org/uploads/documents/treaty-and-international-work/2008/submission-on-uncrc-shadow-report-may-2008.pdf>>.

Qualifications and Curriculum Authority [UK], 'Report Referencing the Qualifications Frameworks of the United Kingdom to the European Qualifications Framework' (2010) <http://scqf.org.uk/content/files/europe/QFUK_Joint_Report_-_Updated_March_2010.pdf>.

Tonge, Jonathan, *The Impact and Consequences of Brexit for Northern Ireland*, European Parliament Briefing (PE 583 116).

Ulster University, 'Brexit Symposium Discussion Paper: Impact of Brexit on Education in Northern Ireland' (Brexit Symposium, Ulster University, Belfast, 14 June 2017).

Vargas-Silva C, 'Potential Implications of Admission Criteria for EU Nationals Coming to the UK', 6 May 2016, *The Migration Observatory at the University of Oxford*.

Whitman R, 'Devolved External Affairs: The Impact of Brexit' (February 2017) *The Royal Institute of International Affairs*.

Web-based Materials

— '€26.5 million EU funding for cross border health and social care' [Press Release] 28 June 2017 <<https://www.hse.ie/eng/services/news/media/pressrel/%E2%82%AC26-5-million-EU-funding-for-cross-border-health-and-social-care-.html>>.

— 'An Garda Síochána and the Police Service of Northern Ireland, with the support of the Department of Justice and Law Reform and the Department of Justice have published a Cross Border Policing Strategy' [Press Release] 12 December 2010 <<http://www.garda.ie/Controller.aspx?Page=6644&Lang>>.

— 'Brexit: EP outlines its red lines on latest UK citizens' rights proposals', European Parliament News, 8 November 2017 <<http://www.europarl.europa.eu/news/en/press-room/20171108IPR87615/brexit-ep-outlines-its-red-lines-on-latest-uk-citizens-rights-proposals>>.

— Cross Border Policing Strategy 2016 <<http://www.drugsandalcohol.ie/27925/1/cross-border-policing-strategy-2016.pdf>>.

— Eurojust <<http://www.eurojust.europa.eu/Pages/home.aspx>>.

— 'Is adherence to the European Convention on Human Rights a condition of European Union membership?' Parliamentary Research Briefings, 26 March 2014 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06577>>.

— List of PEACE IV funded projects (accurate as of 1 August 2017) <https://www.seupb.eu/sites/default/files/styles/file_entity_browser_thumbnail/public/PEACE%20Content%20Type/July_Beneficiaries_Spreadsheet_PEACE_Webcopy_English_0.XLSX>.

— 'Minimum Income Requirement for Non-EEA Family Members in the UK' (27 January 2016) *The Migration Observatory* <<http://www.migrationobservatory.ox.ac.uk/resources/reports/the-minimum-income-requirement-for-non-eea-family-members-in-the-uk-2/>>.

— 'North-South Cooperation – Cross Border Seminar on Organised Crime' [Press Release] 28 September 2016 <<http://www.justice.ie/en/JELR/Pages/PR16000262>>.

— 'PM's Florence speech: a new era of cooperation and partnership between the UK and the EU', 22 September 2017 <<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>>.

Department of Education and Skills, 'Student Grants' <<https://www.education.ie/en/Learners/Information/Student-Grants/>>.

Department for Business, Energy & Industrial Strategy [UK], 'Official Statistics: UK's participation in horizon 2020: February 2017' <<https://www.gov.uk/government/statistics/uks-participation-in-horizon-2020-february-2017>>.

European Centre for Disease Prevention and Control <<https://ecdc.europa.eu/en>>.

European Citizens' Initiative, 'FAQ on the EU competences and the European Commission powers' <<http://ec.europa.eu/citizens-initiative/public/competences/faq>>.

European Commission, 'Rights of the Child' <http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm>.

—, 'Erasmus+ Programme Guide' <http://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/files/resources/erasmus-plus-programme-guide_en.pdf>.

—, 'ERASMUS+: The EU programme for education, training, youth and sport (2014-2020)' <http://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/library/erasmus-plus-factsheet_en.pdf>.

—, 'Erasmus+ spotlight' <https://ec.europa.eu/programmes/erasmus-plus/anniversary/spotlight-bringing-europe-together_en>.

—, 'Together against trafficking in human beings' (2010) <https://ec.europa.eu/anti-trafficking/legislation-and-case-law/eu-legislation_en>.

—, 'ECRIS (European Criminal Records Information System)' <http://ec.europa.eu/justice/criminal/european-justice/ecris/index_en.htm>.

Special EU Programmes Body, 'PEACE IV Programme Overview' <<https://www.seupb.eu/piv-overview>>

1 INTRODUCTION

The United Kingdom's exit from the European Union continues to raise questions of a political, legal, constitutional and social nature. The intense level of scrutiny on negotiations between the EU and the UK is testimony to the complexity of the issues involved. This research paper, commissioned by the Children's Rights Alliance and the Children's Law Centre, considers one aspect of these issues — the impact of Brexit on the rights of children across the island of Ireland. However, it is an aspect of Brexit which involves consideration of a number of broader issues, including the rights of citizens, treatment of EU/UK borders post-Brexit, and the fate of certain EU treaties, legal instruments, regulatory bodies, and funding.

This paper will discuss selected aspects of the fundamental legal rights of children on the island of Ireland, consider the current legislative and regulatory framework underpinning them, and explore the changes which may occur following the withdrawal of the UK from the EU. While considering pertinent aspects of Irish, UK, EU and international law, this paper will place particular emphasis on the impact of Brexit on Northern Ireland. Northern Ireland occupies a unique position in any consideration of Brexit, as it will share the UK's only land border with a Member State of the EU (namely Ireland) after the UK leaves the EU. Brexit is also of great significance to Northern Ireland because of what such a border could mean for the Good Friday/Belfast Agreement and continued peace and stability in the region. Any 'hardening' of the border between Northern Ireland and Ireland involves a consideration of issues such as citizenship, human rights, and the Common Travel Area; as well as how such a border may affect those moving back and forth regularly for reasons of, for example, work, education, or health.

It is important to stress that any discussion of Brexit is constrained by the uncertainty surrounding the agreement that may be concluded between the UK and the EU. At the time of writing, the prospect of moving to Phase Two of negotiations on the EU's future relations with the UK remains in doubt and political negotiations are at a particularly crucial stage.

2 RIGHTS OF THE CHILD: LEGAL FRAMEWORK

2.1 Definition of a 'Child'

There is no universal definition of a 'child' in law and the definition may vary depending on the legislation or policy area concerned. For the purposes of this paper, a child is deemed to be a person aged 18 years or under in accordance with the UN Convention on the Rights of the Child.³

2.2 EU Law and Children

Children who are citizens of EU Member States enjoy EU citizenship and the relevant EU law rights flowing from that citizenship in the same way as adults. This means that children are holders of rights and not simply objects of protection. That being said, it is a legal reality that the rights of children are often exercised by parents or those standing in loco parentis on their behalf.

The European Commission's webpage on the Rights of the Child states that '[p]rotection and promotion of the rights of the child is one of the objectives of the European Union. All policies and actions with an impact on children must be designed, implemented and monitored in line with the best interests of the child.'⁴ This principle of best interests is carried forward in the Charter of Fundamental Rights of the European Union.

2.2.1 *Charter of Fundamental Rights of the European Union*

The Charter of Fundamental Rights of the EU brings together the fundamental rights protected in the EU.⁵ The Charter contains rights and freedoms under six titles: Dignity, Freedom, Equality, Solidarity, Citizens' Rights, and Justice. The Charter was proclaimed in 2000 and became legally binding on EU Member States with the entry into force of the Treaty of Lisbon in December 2009. Children are specifically afforded rights and protections in the Charter. One of the key features of the Charter from a children's rights perspective is the principle of 'best interests' of the child. This rationale is in line with Article 3 of the UN Convention on the Rights of the Child, which emphasises that the most important factor to be taken into consideration is the child's best interests, no matter the context.

³ Article 1 of the UN Convention on the Rights of the Child defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier' <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>.

⁴ European Commission, 'Rights of the Child' <http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm>.

⁵ Charter of Fundamental Rights of the European Union [2000] OJ C364/01 <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>.

Article 24 of the Charter sets out the rights of the child as follows:

- 1 Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- 2 In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- 3 Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with his or her parents, unless that is contrary to his or her interests.

The provisions of the Charter apply to the institutions and bodies of the EU and to national authorities when they are implementing EU law. Following the UK's exit from the EU, the Charter will no longer apply in the UK and Northern Ireland. While the protection of fundamental rights will remain guaranteed under the constitutional traditions of the UK and by way of any international conventions ratified by the UK, the loss of the Charter and its specific recognition of the rights of children may have significant repercussions. These rights are of fundamental importance to a child, such as in situations where they have come into contact with the criminal justice system.

2.2.2 ***Role of the Court of Justice of the European Union (CJEU)***

The founding Treaties of the European Communities did not expressly deal with the protection of fundamental rights, although they contain a number of rights-based articles (such as freedom of movement of workers in Article 48 of the Treaty Establishing the European Community). The CJEU has, therefore, always played an important role in the development of rights, including those of children.

The role of the CJEU post-Brexit remains unresolved, but it is a significant issue, particularly for Northern Ireland. The EU maintains that the CJEU must have final authority to adjudicate post-Brexit disputes concerning the rights of EU citizens living in the UK – such as may occur for Irish citizens living in Northern Ireland. The UK, however, has argued that any continuing jurisdiction of the CJEU over the UK post-Brexit is unacceptable.

It is not yet known what the precise role of the CJEU may be post-Brexit, or how existing precedents of the Court will be treated. The UK Government's White Paper on the Great Repeal Bill proposed converting 'historic' CJEU case law into the UK's common law system by giving it the status of binding precedent.⁶ In her Florence Speech, Prime Minister Theresa May's comments suggest a slight softening of the UK's stance on the CJEU, but how that

⁶ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446, March 2016)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf>.

may take shape in the final agreement remains unknown.⁷ However, any diminution of the Court's function in the UK and Northern Ireland post-Brexit would be a great loss to human rights jurisprudence and to the rights of EU citizens living in Northern Ireland.

2.3 European Convention on Human Rights

The European Convention on Human Rights (ECHR) protects the human rights of people living in nations that are members of the Council of Europe, which is an organisation completely separate from the EU.⁸ The ECHR was adopted into domestic legislation in the UK under the Human Rights Act 1998. While the UK will remain bound by its ECHR obligations post-Brexit, it will then have more freedom regarding the ECHR's implementation, as it is widely accepted that adherence to the ECHR is a condition of membership of the EU.⁹

There is also reference to the ECHR in the Good Friday/Belfast Agreement where the British Government pledges 'to complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency'.¹⁰ Any change in the UK's implementation of the ECHR could necessitate a corresponding change to the Agreement.

Even if the UK's Human Rights Act remains unchanged, this will not compensate fully for the absence of the Charter of Fundamental Rights from UK jurisprudence, particularly in the areas of children's rights and the right of non-discrimination, neither of which is explicitly recognised in the ECHR.

2.4 United Nations Convention on the Rights of the Child

Children are also afforded rights and protections under the United Nations Convention on the Rights of the Child (UNCRC) which was introduced in 1989 and is 'the most widely ratified human rights treaty in history'.¹¹ The UNCRC consists of 54 articles which set out the rights of children across a number of diverse areas.

⁷ 'PM's Florence speech: a new era of cooperation and partnership between the UK and the EU', 22 September 2017 <<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>>.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.echr.coe.int/Documents/Convention_ENG.pdf>.

⁹ 'Is adherence to the European Convention on Human Rights a condition of European Union membership?', Parliamentary Research Briefings, 26 March 2014 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06577>>.

¹⁰ Good Friday/Belfast Agreement 1998 <<https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf>>, [20].

¹¹ Children's Rights Alliance, 'United Nations Convention on the Rights of the Child' (reproduced with permission of the UN) <<http://www.childrensrighs.ie/sites/default/files/UNCRCEnglish.pdf>>.

There are four general principles which underpin and inform the implementation of the other rights and protections set out in the UNCRC. These are:

- (i) The rights set out in the UNCRC are to be enjoyed by all children without discrimination of any kind (Article 2);
- (ii) The best interests of the child is the primary consideration in all actions concerning children (Article 3);
- (iii) Every child has the inherent right to life, and to the maximum extent possible, survival and development (Article 6); and
- (iv) Where a child is capable of forming their own view, that child must be given the opportunity to be heard and their view must be taken into account in all matters affecting them (Article 12).

Other rights and protections of note include the right to access health services (Article 24), the right to education (Article 28), protection against sale, trafficking and abduction (Article 35) and the administration of juvenile justice (Article 40).

The UNCRC came into force in both Ireland and the UK in 1992. Both governments agreed to be assessed periodically by the UN on their progress in implementing the rights in the Convention. In Ireland, the Children's Rights Alliance also submits an independent report on behalf of non-governmental organisations, known as the 'Parallel Report'.¹² In the UK and Northern Ireland, a number of organisations do likewise. In Ireland, the UK and Northern Ireland, prominent organisations such as the Children's Rights Alliance and the Children's Law Centre have called for full implementation of the Convention and the UN Committee's recommendations.¹³

¹² Children's Rights Alliance, 'Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child', September 2015 <http://www.childrensrightrights.ie/sites/default/files/submissions_reports/files/AreWeThereYet.pdf>.

¹³ Children's Law Centre, 'The United Nations Convention on the Rights of the Child' <<http://www.childrenslawcentre.org.uk/images/UNCRC.pdf>> ; Northern Ireland Human Rights Commission, 'Submission To The United Nations' Committee on the Rights of the Child: Shadow Report on the Third and Fourth Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', May 2008 <<http://www.nihrc.org/uploads/documents/treaty-and-international-work/2008/submission-on-uncrc-shadow-report-may-2008.pdf>>.

3 THE GOOD FRIDAY/BELFAST AGREEMENT

3.1 Background to the Agreement

The Good Friday/Belfast Agreement was signed on 10 April 1998 by various political parties in Northern Ireland, as well as the Irish and UK Governments (who are co-guarantors of the Agreement).¹⁴ It was subsequently endorsed by referenda of the people across the island of Ireland in May 1998 and is lodged at the United Nations as an international agreement.

Enshrined in the Good Friday/Belfast Agreement is the right of all people born in Northern Ireland to choose either Irish or British citizenship, or to choose both. The Agreement is made up of three 'interlocking' strands:¹⁵

- (i) Democratic institutions in Northern Ireland;
- (ii) North-South Ministerial Council; and
- (iii) British-Irish Council (East-West).

The main institutions established under each strand include the devolved Assembly and Executive for Northern Ireland with mandatory power-sharing (Strand 1), the North-South Ministerial Council (Strand 2), and the British-Irish Council and British-Irish Intergovernmental Conference (Strand 3).

The Northern Ireland Act 1998 is an Act of Parliament passed at Westminster 'to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland ...' The Act allowed Westminster to devolve power to Northern Ireland. It set out the powers of the Assembly and Executive in relation to transferred, excepted and reserved matters. It also stated that laws passed by the Assembly could not contradict European law and Human Rights legislation. The Act also outlined the election process for appointing the First Minister and the deputy First Minister, which was amended by the St Andrews Agreement Act 2007. Given the references to European law, this Act will also have to be amended following the UK's exit from the EU.

¹⁴ Its official title is 'The Northern Ireland Peace Agreement', but it is better known as 'The Good Friday Agreement', or 'Belfast Agreement'. It will be referred to as 'the Agreement' throughout this chapter and as the Good Friday/Belfast Agreement elsewhere.

¹⁵ Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, *Implications of Brexit for the Good Friday Agreement: Key Findings*, (32/JCIGFA/01, June 2017), 11 < http://www.sinnfein.ie/files/2017/JCIGFA_Brexit_Report_FINAL.pdf >.

3.2 The Agreement and the EU

While the EU is not a party to the Agreement, the Agreement was concluded while its co-guarantors were both members of the EU. The Agreement expressly refers to both governments' commitment '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'.¹⁶

Nor is this the only reference to the EU in the Agreement. For example, Strand Two provides that the North-South Ministerial Council will 'consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework'.¹⁷ At a minimum, the Agreement will require revision to amend these references in the future.

3.3 Impact of Brexit

As an international agreement, and not part of the EU treaty framework, the Agreement will remain in force regardless of the outcome of the Brexit negotiations. The Joint Oireachtas Committee on the Implementation of the Good Friday Agreement affirms this: 'The Committee recognises and strongly supports the fact that, as an international agreement, whatever the outcome of the Brexit negotiations, the Good Friday Agreement will remain in force'.¹⁸ The centrality of the Agreement to ongoing stability and reconciliation in Northern Ireland has been affirmed by Irish, UK and EU stakeholders. Nonetheless, there is significant value in putting the matter beyond doubt by way of an express and comprehensive clause in the final Brexit settlement.¹⁹

Among the implications of Brexit for the Agreement, the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement makes the following observations:²⁰

- (A) Will powers held now at EU level be devolved unchanged to the Assembly if the UK passes a 'Great Repeal Bill'²¹ intended to repatriate powers from the EU to the UK? 'Should it be decided to first change

¹⁶ Good Friday/Belfast Agreement 1998 <<https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf>>, [32].

¹⁷ *ibid*, [16].

¹⁸ Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, *Implications of Brexit for the Good Friday Agreement: Key Findings*, June 2017 (32/JCIGFA/01), 10.

¹⁹ Noel Whelan, 'Nightmare scenario is a fudge over the Border', *The Irish Times* (Dublin, 1 December 2017).

²⁰ Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, *Implications of Brexit for the Good Friday Agreement: Key Findings*, June 2017, 11.

²¹ This bill is now called the European Union (Withdrawal) Bill and is currently before the UK Parliament. Further information on the Bill's progress can be found on the UK Parliament's website at <<https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>>.

and then devolve these powers (e.g. in relation to employment rights or environmental standards), it is possible that there would be implications for the rights guaranteed by the Good Friday Agreement.'

- (B) The 'limited scope' of the North South Ministerial Council (NSMC) and other North-South implementation bodies means that 'much of their focus at present centres on EU-related work, for example management of EU funding and coordination on compliance with EU regulations. If Brexit means there is no longer an EU focus to Strand 2 the question arises as to how to ensure this Strand remains meaningful.'
- (C) The British-Irish relationship envisaged in Strand 3 'could provide a mechanism for consultation that may partly compensate for less day to day British-Irish interaction in the EU.' The British-Irish Council could also become a forum for addressing the implications of Brexit. Consideration could also be given to the British Irish Parliamentary Assembly meeting more frequently.

While it is widely believed that the legal status of the Good Friday Agreement will not be affected by Brexit, it is impossible to state at this stage what the effects of Brexit will be on relations in Northern Ireland and, in particular, on the rights of children in Northern Ireland. At the time of writing, the devolved administration remains suspended and there is no common voice on Brexit coming from political parties in Northern Ireland. We do not yet know what form a border between North and South might take, but the introduction of any type of border 'is freighted with meanings of identity' and this represents a far less tangible consequence of Brexit.²²

It is quite possible that children in Northern Ireland could have fewer and lesser rights post-Brexit than their counterparts in Ireland unless UK law redresses in full the loss of EU rights. While equivalency of rights is referenced in the Agreement, it is framed as an obligation on the Irish Government to provide 'at least an equivalent level of protection of human rights as will pertain in Northern Ireland.'²³ How this principle of equivalency will be maintained post-Brexit when Irish citizens will potentially have greater rights by virtue of their EU citizenship remains unclear.

²² Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three effects on "the border in the mind"', (2017) 19 British Journal of Politics and International Relations 497, 497.

²³ 'The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and 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.'
<<https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf>>, [22].

4 THE COMMON TRAVEL AREA

4.1 Background to the Common Travel Area

The Common Travel Area (CTA) is a 'border-free zone' comprising the UK, Ireland, the Channel Islands and the Isle of Man.²⁴ The CTA has had a long history and has been in place for most of the period since the Irish Free State was established in 1922. Historically, however, the CTA has not always meant a 'border-free' arrangement. For example, from 1922 to 1992 there was a CTA yet there were still long delays, security checks and customs checks on the border between Northern Ireland and Ireland.²⁵

The CTA is made up of a set of arrangements under which the Irish and UK governments facilitate free movement and reciprocal rights to citizens, and coordinate immigration policies as they relate to other countries. In practical terms, the existence of the CTA means that citizens of the two states (and areas within the CTA) may enter and reside in the CTA without a visa or residence permit, and without being subject to requirements such as proof of resources, or maximum time limits for each stay.

4.2 Statutory footing

The CTA is implemented by means of inter-governmental agreements, national legislative measures and administrative practices. Citizenship (Irish or British) is a key component of the CTA and the rights exercisable thereunder – one must be either an Irish or a British citizen in order to access the benefits of the CTA.²⁶ This is particularly relevant to the Good Friday/Belfast Agreement, Section 1(vi) of which recognises the birth right of all the people of Northern Ireland 'to identify themselves and be accepted as British or Irish or both as they so choose'.

Section 2(1) of the Ireland Act 1949 (a UK statute) declares that Ireland is not a foreign country for the purposes of any law in force in the UK.²⁷ The practical effect of this is that Irish citizens are treated as nationals under UK law (for example, in immigration law, or social security regulations). Ireland adopted a corresponding statutory provision when it enacted the Citizens of the United Kingdom and Colonies (Irish Citizenship Rights) Order 1949,

²⁴ HM Government, *Northern Ireland and Ireland Position Paper*, 16 August 2017, 7 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>.

²⁵ Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, *Implications of Brexit for the Good Friday Agreement: Key Findings*, June 2017, 30.

²⁶ This will be covered in Chapter 5 of this paper on Citizenship and Movement.

²⁷ Ireland Act 1949, section 2(1): 'It is hereby declared that, notwithstanding that Ireland is not part of His Majesty's dominions, Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom or in any colony, protectorate or United Kingdom trust territory...' See Appendix 1 for the full text of this section.

SI 1/1949.²⁸ The CTA was also placed on a statutory footing in the UK by section 1(3) of the Immigration Act 1971, which states:

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

Whether these statutory provisions will remain post-Brexit depends on whether Ireland's continuing membership of the EU affects the CTA and such reciprocal immigration arrangements with the UK.

Unlike the UK's Immigration Act 1971, the CTA is not explicitly referenced in Irish legislation. However, under the Aliens Act 1935 (part of Irish immigration law) British citizens are held to be outside the definition of 'non-national' and therefore not subject to immigration law.²⁹ In 1997, Ireland introduced the Aliens (Amendment) (No. 3) Order, SI 277/1997, the effect of which was the introduction of identity checks (usually in the form of passport controls) for persons entering Ireland from the UK. These are carried out at entry-points into the country (principally air and sea ports) and do not affect the UK citizen's right to enter and reside in Ireland. However, these checks are only implemented where one enters the island of Ireland via a port in Ireland and not if one enters the island via Northern Ireland – a fact which may also be subject to change post-Brexit.

4.3 Common Travel Area and the EU

EU law also gives rights of entry and residence within Member States, many of which are indistinguishable from their CTA counterparts. For example, an Irish citizen living and working in the UK is currently permitted to do so by virtue of the CTA *and* EU law, and UK citizens may do the same in Ireland.

The CTA is explicitly recognised in Protocol 20 of the Treaty on the Functioning of the European Union (TFEU) in relation to the application of certain aspects of Article 26 of the TFEU to the UK and Ireland, 'having regard to the

²⁸ Section 2 of the Citizens of the United Kingdom and Colonies (Irish Citizenship Rights) Order 1949 states: 'Citizens of the United Kingdom and Colonies shall, subject to law, enjoy in Ireland similar rights and privileges to those enjoyed by Irish citizens in the United Kingdom and Colonies by virtue of the British Nationality Act, 1948.'

²⁹ Section 10(1) of the Aliens Act 1935 states: 'The Executive Council may by order exempt from the application of any provision or provisions of this Act, or of any aliens order, the citizens, subjects or nationals of any country in respect of which the Executive Council are satisfied that, having regard to all the circumstances and in particular the laws of such country in relation to immigrants, it is proper that the exemption mentioned in such order should be granted.'

existence for many years of special travel arrangements between the United Kingdom and Ireland.³⁰ Protocol 20 does not give the CTA legal force, but it permits it to operate without breaching any EU law obligations.

Article 1 of Protocol 20 entitles the UK and Ireland to exercise control over their own borders on all persons, including on citizens of other EU Member States and their dependants. Article 2 allows both states to agree issues of border control between themselves. Measures may be enacted under Protocol 20 independently of Article 26 TFEU (which establishes a borderless internal market for the free movement of goods, persons, services, and capital) and of Article 77 TFEU (whereby the EU commits to developing a policy of reducing, among other things, controls on people crossing borders within the internal market).³¹

4.4 Impact of Brexit

The CTA was formed before either the UK or Ireland was a member of the EU, but its position once the UK exits the EU is unclear. Protocol 20 of the TFEU works on the basis that *both* Ireland and the UK are Member States of the EU, so it may have to change when the UK is no longer a member. As a member of the EU, Ireland may not ordinarily give greater rights to citizens of a third country (as the UK will be post-Brexit) than it does to other EU Member States. The EU and Ireland will, therefore, have to decide if the CTA in its current form can continue post-Brexit.

In its August 2017 Report, the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement remarked:

The central and most noticeable feature of the CTA is the minimal border controls between Ireland and the UK. ... If, after its exit from the EU, the UK chooses to limit the access it grants to non-Irish EU nationals, such restrictions will very likely require some sort of checks or inspections on arrivals from the Republic at ports, airports and even border crossings with Northern Ireland. This would amount to a fundamental change in the nature of the CTA. As previously discussed in this paper, whether there will be a border post-Brexit and, if so, what form it might take, remains an unknown. However, if the UK is no longer a member of the customs union post-Brexit, then it is difficult to see how an open border between the UK and Ireland via Northern Ireland can be maintained.³²

³⁰ For the full text of Protocol 20, please see Appendix 1.

³¹ For the full text of these Articles, please see Appendix 1.

³² Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, *Brexit and the Future of Ireland: Uniting Ireland & Its People in Peace & Prosperity*, (32/JCIGFA/02, August 2017), 83 <http://opac.oireachtas.ie/AWData/Library3/Brexit_and_the_Future_of_Ireland_Uniting_Ireland_and_its_People_in_Peace_and_Prospereity_100342.pdf>.

Issues surrounding freedom of movement of persons – as a right enshrined in EU law and as part of the CTA – continue to divide opinion, both within UK/EU Article 50 Negotiations and among external commentators. Despite persuasive arguments to the contrary, the UK Government continues to hold firm to its contention that the UK may leave the internal market and still avoid a hard border between Northern Ireland and the Republic:

Both the UK Government and Irish Government are firmly committed to protecting and maintaining the CTA and associated rights. ... For its part, the UK wants to continue to protect the CTA and associated reciprocal bilateral arrangements. This means protecting the ability to move freely within the UK and between the UK and Ireland with no practical change from now, recognising the special importance of this to people in their daily lives, and the underpinning it provides for the Northern Ireland political process.³³

The European Commission also supported the continuance of the CTA in its Negotiating Directives of May 2017; although some amendments to Protocol 20 will have to take place: 'Existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised.'³⁴

It is impossible to predict the outcome of negotiations, but the feasibility of the UK being outside the internal market while maintaining a border-free Northern Ireland is not convincing at present from a legal perspective. It may well be that, while the UK would be disposed towards an open border with Ireland, there may be greater pressure on Ireland to secure its border with the UK; a border post-Brexit that will be, not only an Irish-UK border, but an external border of the EU.

³³ HM Government, *Northern Ireland and Ireland Position Paper*, 16 August 2017, 9.

³⁴ European Commission, *Negotiating Directives for Article 50 Negotiations*, (XT 21016/17, 22 May 2017) <https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations_en>.

5 CITIZENSHIP AND MOVEMENT

Free movement of persons between Member States is one of the four fundamental pillars upon which the European Union was established. The concept of freedom of movement of persons was originally designed to benefit those who wished to work in other Member States, but it is now central to the concept of EU citizenship and is a right enjoyed by all citizens, both adults and children, regardless of their age. Therefore, the comments made in this chapter apply equally to children and adults.

5.1 Article 21(1) of the TFEU and the Development of EU law

Article 21(1) of the TFEU gives EU citizens the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and secondary legislation. Article 21(1) states: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'³⁵

Initially, the wording of Article 21(1) created uncertainty as to whether it was intended to simply codify the existing law (where free movement of persons was subject to employment and economic considerations), or to create a free-standing right of movement for all EU citizens regardless of their economic status (e.g. non-workers, such as retired persons or children). The CJEU's clear statement on citizenship came in *Grzelczyk* where it was held that 'union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'³⁶

This decision of the CJEU 'paved the way for the Court in *Baumbast*³⁷ to sever the link between migration and being economically active'.³⁸ In this case, the Court held that the Treaty on European Union (TEU) 'does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two, on citizenship of the Union'.³⁹

This led to the finding in *Chen* that a baby, born to Chinese parents in Northern Ireland (which gave the baby Irish nationality), enjoyed the rights of Union citizenship and could exercise her right to reside in the UK under

³⁵ Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01.

³⁶ Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, ECLI:EU:C:2001:458, para 31.

³⁷ Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-7091, ECLI:EU:C:2002:493.

³⁸ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed. (Oxford University Press, 2013), 437.

³⁹ *Baumbast*, para. 83.

Article 21(1) TFEU.⁴⁰ The rights provided by Article 21(1) TFEU must therefore be viewed in the context of the Citizens' Rights Directive (CRD) – in other words, citizenship and movement now go hand-in-hand.

5.2 Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizens' Rights Directive)⁴¹

The CRD aimed to 'strengthen the right of free movement and residence of all Union citizens'.⁴² 'At the heart of the CRD lies the basic idea that the rights enjoyed by the migrant citizen and their family members increase the longer a person is resident in another Member State.'⁴³ In *Metock*, the Court insisted that the provisions of the CRD could not be interpreted restrictively so as to deprive them of their effectiveness.⁴⁴ However, in subsequent cases, such as *Brey*⁴⁵ and *Dano*⁴⁶, 'greater political realism' was applied and the CJEU stated that, while the CRD is intended to facilitate and strengthen the exercise of the primary and individual right to move and reside freely, it is also intended to set out the conditions governing the exercise of that right, such as proof of sufficient resources in the case of non-economically active citizens.⁴⁷

The CRD applies to 'any person having the nationality of a Member State' (the union citizen) who moves to, or resides in, a Member State other than that of which he or she is a national (the host Member State).⁴⁸ The CRD also applies to family members who accompany or join the union citizen, irrespective of their nationality.⁴⁹ The family members of union citizens may only claim rights of residence in the Member State in which the union citizen resides.⁵⁰ This right is, therefore, particularly significant for children who relocate with their families, as children typically exercise residency rights on the basis of a parent/guardian. However, children who are EU citizens may exercise their free movement rights independently of their parent(s) in certain circumstances, such as where they are enrolled as students.

⁴⁰ Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9925, ECLI:EU:C:2004:639.

⁴¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77. The Citizens' Rights Directive; hereinafter referred to as the CRD.

⁴² C-127/08, *Metock and Others v. Minister for Justice, Equality and Law Reform* [2008], ECR I-6241, ECLI:EU:C:2008:449, paras 84 & 93.

⁴³ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed. (Oxford University Press, 2013), p. 331.

⁴⁴ *Metock*, paras 84 & 93.

⁴⁵ C-140/12, *Pensionsversicherungsanstalt v Peter Brey*, ECLI:EU:C:2013:565, para 53.

⁴⁶ C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

⁴⁷ Catherine Barnard, 332.

⁴⁸ CRD, Article 3(1).

⁴⁹ *ibid*, Recital 5.

⁵⁰ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, ECLI:EU:C:2011:124, para 39.

The CRD grants rights of residence, which are divided into three periods. First, union citizens will have rights of residence in a host Member State for a period of up to three months, without the need to meet any formalities apart from the requirement to hold a valid identity card or passport.⁵¹ This temporary right of residence is extended to family members who are not nationals of a Member State and who are accompanying or joining the union citizen, such as children of the union citizen.⁵²

Second, union citizens will have rights of residence in a host Member State for periods of longer than 3 months if they are workers⁵³ or can provide proof of sufficient resources to support them and their family members, so as not to become an unreasonable burden on the Member State.⁵⁴ Union Citizens may also gain residency rights if they are enrolled as students.⁵⁵

Third, union citizens and their family members, who have legally resided for a period of five years shall be granted permanent residency in the host Member state.⁵⁶

5.2.1 ***Citizens' Rights Directive and Expulsion***

Member States are permitted to introduce measures to restrict or limit EU citizens from enjoying the right to free movement in some situations. While these restrictions also apply to children as EU citizens, they usually have less impact on them directly. However, where a family's movement is restricted, this can have knock-on effects on the ability of a child to enjoy the right to free movement that they hold in their own right. Articles 45(3), 52 and 62 of the TFEU allow derogations on grounds of public policy, public security and public health. Simply put, these derogations enable discriminatory measures or conduct which limit or deny a citizen's access to a particular Member State to be objectively justified.

Any limitation based on public policy or public security must satisfy a strict 'proportionality' test and must be based solely on the conduct of the individual concerned. Personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.⁵⁷

⁵¹ CRD, Article 6.

⁵² *ibid*, Article 6(1).

⁵³ *ibid*, Article 7(1)(a).

⁵⁴ *ibid*, Article 7(1)(b).

⁵⁵ *ibid*, Article 7(1)(c).

⁵⁶ *ibid*, Article 16.

⁵⁷ *ibid*, Chapter VI: 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health'.

The CRD provides that the greater the degree of integration of Union citizens and their family members in a host Member State, the greater the degree of protection against expulsion should be. The CRD provides that EU citizens who have resided in a host Member State for more than five years can only be deported on 'serious grounds' of public policy or safety, and those who have been resident for more than ten years can only be expelled from a Member State on 'imperative grounds of public safety'.

The CRD goes on to state that such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

In determining whether to deport a citizen, Member States must have regard to various factors including the individual's family situation. The CJEU has developed a significant body of case law which provides guidance in respect of the circumstances in which the exceptions to the freedom of movement can be relied upon.

For example, the CJEU has ruled that the right to reside does not apply to someone who has moved with the sole purpose of claiming benefits (*Dano*), and has permitted Member States to impose certain conditions on the right to reside where the individual is claiming certain social security benefits (*Brey*).⁵⁸

The CJEU has recognised the right to respect for family life in a number of cases where an individual faced deportation from a country where close members of his or her family were living. The CJEU has stated that an assessment has to be made by national authorities, on a case-by-case basis, to decide where a fair balance lies between the legitimate interests in complying with the general principles of EU law and the protection of fundamental rights such as the right to family life.

5.3 Frontier Workers

The issue of frontier workers is particularly important for Northern Ireland and Ireland given the land border between the two jurisdictions. The EU is seeking a solution in line with Regulation 492/2011 for those who are currently frontier workers – i.e. resident in one Member State, but working in another – and which will continue to apply post-Brexit.⁵⁹ There are an estimated '30,000 frontier workers who travel regularly to the UK, mostly from eastern Europe and the Balkans'.⁶⁰

⁵⁸ See Table of Cases for full case citations.

⁵⁹ Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the Union [2011] OJ L141/01.

⁶⁰ Mehreen Khan, 'Four of the mini-successes in August Brexit talks', *The Financial Times* (London, 31 August 2017).

Following the August negotiations, it was agreed that EU-citizen frontier workers will still be able to travel to the UK for work after Brexit. However, the fate of British-citizen frontier workers who need to travel within the EU for work has not been explicitly resolved and this could be problematic for British citizens living in Northern Ireland and travelling over the border to work in Ireland. This issue is scheduled to be revisited in further stages of the negotiations, as it encompasses economic, as well as citizenship rights, issues.

5.4 Impact of Brexit

One of the outstanding areas for agreement in Phase One of the Article 50 Negotiations concerns the issue of citizens' rights. The UK has sought to make what it terms a 'generous' offer to EU citizens residing in the UK post-Brexit, although some commentators have taken issue with this.⁶¹ So far, the UK has maintained its position that the EU law rights of EU27 citizens in the UK should not continue post-Brexit. By this, the UK means that, while EU citizens will still *hold* these EU law rights by virtue of their EU citizenship, they will not be *exercisable* in the UK post-Brexit and EU citizens will instead be subject to UK law, such as in the area of immigration. There is also disagreement between the EU and the UK on the issue of the rights of posted workers (employees sent by their employers to carry out services in another EU Member State on a temporary basis). In addition, the UK wants the status of EU27 family members to be governed by UK immigration law post-Brexit, rather than by current EU law rights of residence. These outstanding issues have huge consequences for EU citizens, both adult and children alike.

There could be restrictions on the free movement of all those born in Northern Ireland within Ireland and the UK after the UK leaves the EU. Northern Ireland-born children may retain EU-specific rights by obtaining Irish citizenship and having Irish citizenship will allow them to travel within the EU on an Irish passport. However, this may create an elementary discrimination between Irish-citizen children and British-citizen children in Northern Ireland, as Irish-citizen children in Northern Ireland may be able to exercise EU rights that British-citizen children cannot. Such an arrangement may discriminate against those who choose not to hold Irish citizenship for political, religious, or cultural reasons. Irish-citizen children born in Northern Ireland may also be treated differently to those born in the rest of the UK, because they will have an option to obtain/retain EU citizenship where their counterparts born in other parts of the UK will not.

Another key point of divergence between the UK and the EU concerns the enforcement of rights. This is part of a wider discussion concerning the role of the CJEU in the UK post-Brexit, which was discussed in Chapter 2 of this paper. The UK maintains that rights in UK law should be enforceable only through the UK judicial system and that the Withdrawal Agreement cannot have direct effect in EU law. Without direct effect, a EU27 citizen in the UK would have no recourse to the courts or other governing body to challenge the application of the Withdrawal Agreement, or the potential infringement of their rights.

⁶¹ Catherine Barnard, 'Theresa May claimed her offer to EU citizens would be 'generous'. It isn't' *The Guardian* (London, 27 June 2017) <<https://www.theguardian.com/commentisfree/2017/jun/27/theresa-may-offer-generous-eu-citizens-tories-rights-uk>>.

The role of the CJEU has not yet been clarified, but a judicial mechanism is necessary to provide an authoritative interpretation of the Withdrawal Agreement. The EU favours the Commission monitoring compliance, but the UK is calling for an independent monitoring body (although there has been no clarification as to what form such a body would take).

5.5 Concluding Remarks

It is a common refrain, both in this paper and in the wider world, that Brexit is a great unknown. Indeed, 2017 is drawing to a close without clarity on fundamental issues such as citizens' rights. While children are not explicitly referenced in the CRD, they are citizens like any adult EU national and their future wellbeing hinges on the deal reached between the UK and the EU. On 8 November 2017, the European Parliament's Brexit Steering Group, chaired by Guy Verhofstadt, issued a statement which included the following: 'We don't recognise reports suggesting that a deal on citizens' rights is almost finalised. There are still major issues that have to be resolved.' This Chapter cannot give answers where there are none, but it is hoped that some clarity on the interactions between children, citizenship and movement has been provided.⁶²

⁶² 'Brexit: EP outlines its red lines on latest UK citizens' rights proposals', European Parliament News, 8 November 2017 <<http://www.europarl.europa.eu/news/en/press-room/20171108IPR87615/brexit-ep-outlines-its-red-lines-on-latest-uk-citizens-rights-proposals>>.

6 FAMILY LAW AND THE MOVEMENT OF CHILDREN AND FAMILIES

6.1 EU Family Law: The Current Position

There are two key pieces of EU legislation that provide jurisdictional frameworks for family law issues:

1. Brussels IIa (Regulation 2201/2003) – covering divorce and custody arrangements, both in parental disputes and where children are in care;⁶³ and
2. The Maintenance Regulation (Regulation 4/2009) – covering disputes about maintenance obligations.⁶⁴

The Brexit Working Group of the Bar Council (of England and Wales) has commented that '[t]hese instruments provide certainty about jurisdiction, helping affected families to determine where issues concerning the welfare of children, divorce and maintenance can be resolved.'⁶⁵ Features of the Regulations include recognition and enforcement of orders in other Member States, protective measures where a dispute is ongoing, and 'first in time' rules regarding jurisdictional disputes in the courts. The Regulations also necessitate each Member State to designate a central authority to enable cross-border enforcement of orders and exchange of information where the welfare of a child is concerned.

6.1.1 *Impact of Brexit*

The Brussels IIa Regulation is currently being revised and the UK Government opted in to these negotiations in October 2016, despite the outcome of the Referendum. However, if Brussels IIa or the Maintenance Regulation ceases to apply in the UK post-Brexit, the UK would lose the jurisdictional rules for divorce that are currently addressed by Brussels IIa. In terms of maintenance and child protection issues, the following international instruments could go some way to fill the gaps:

- Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996: Both Ireland and the United Kingdom of Great Britain and Northern Ireland are contracting parties to this Convention, but the European Union as a whole is not (i.e. Member States chose to contract on an independent basis and not all of the EU28 did so).

⁶³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIa) [2003] OJ L338/01.

⁶⁴ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation) [2009] OJ L7/01.

⁶⁵ Bar Council Brexit Working Group, *Brexit Paper 6: Family Law*, 3rd ed (London, 2016), 2 <http://www.barcouncil.org.uk/media/575181/brexit_paper_6_-_family_law.pdf>.

- Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007: As a member of the EU, the UK is currently bound by this Convention, but would need to accede to it independently post-Brexit. The Convention is not as comprehensive as the EU Maintenance Regulation and does not cover jurisdictional rules.
- Lugano II Convention: as a member of the EU, the UK is currently bound by this EU Convention, but would need to accede to it independently post-Brexit. It could be a substitute for the jurisdictional rules contained in the Maintenance Regulation, which might otherwise be lost.⁶⁶

6.2 Child Abduction

6.2.1 Definition of Child Abduction

Child abduction is broadly defined as a move from one country to another (i.e. removal) or the non-return of a child (i.e. wrongful retention). In order for a removal or retention to be classified as 'child abduction' under the Hague Convention on the International Aspects of Child Abduction,⁶⁷ the following must apply:

- (i) The child has to be habitually resident in the country from where it is taken;
- (ii) The move has to be in breach of another person's 'rights of custody'
- (iii) These 'rights of custody' have to exercised at the time of the move.⁶⁸

6.2.2 The Role of EU Law in Child Abduction

Brussels IIa (as mentioned previously in part 1 of this chapter) also covers aspects of child abduction between Member States.⁶⁹ Within the EU, this Regulation takes precedence over the Hague Convention and forms the heart of cross-border family law in the region. Brussels IIa provides that in cases of wrongful removal or retention of a child, the return of the child should be obtained without delay. The Hague Convention also applies in such

⁶⁶ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/03.

⁶⁷ [Hague] Convention on the Civil Aspects of International Child Abduction 1980 <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>>.

⁶⁸ The terminology may differ from country to country and may be dependent on other factors, such as whether family law proceedings are ongoing at the time.

⁶⁹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/01.

circumstances, but an EU citizen taking such action in an EU Member State (and where the child has been abducted to/within a Member State) would initiate action under Brussels IIa.

The only significant difference between the Hague Convention and the protections provided for under EU law is the 'override mechanism'. This mechanism enables a court in an EU Member State where a child was habitually resident before the child's abduction (to another EU Member State) to override the non-return order by the second Member State, if it was made on the basis of Article 13 of the Hague Convention and for the override return order to be automatically enforceable in all EU Member States, with no grounds for refusal.⁷⁰

Brussels IIa provides that the final ruling by the court in the country of origin is automatically recognised and enforceable in the other EU Member State without the need for a declaration of enforceability (provided that the judge in the first country proceedings has issued a certificate to this effect).

Brussels IIa requires Member States to designate Central Authorities to co-ordinate communications between countries under these Regulations. Information exchanged between these agencies can be vital in terms of preparing evidence for hearings. Other European networks also provide for co-operation through EU wide watchdogs and assistance services, such as the Missing Children Hotline which allows parents and children alike, whether at home or in another European country, to get free emotional, psychological, social, legal and administrative support.

EU law provides that the hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, which provides a measure of uniformity in how such proceedings are conducted.⁷¹

6.2.3 **National Law on Child Abduction**

In the UK and Northern Ireland, section 49 of the Children Act 1989 makes it an offence to remove and retain a child without the consent of a responsible person. Section 3 of the Child Abduction (Northern Ireland) Order 1985 sets out when an offence has been committed. In Ireland, the Non-Fatal Offences against the Person Act 1997 deals with the crime of international child abduction. All of these legislative offences and provisions will remain in force post-Brexit.

⁷⁰ Article 13 of the Hague Convention allows the judicial or administrative authority of the requested State to not make an order to return the abducted child if the person seeking the return is not thought to have been exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

⁷¹ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/01.

6.2.4 *Hague Convention on the Civil Aspects of International Child Abduction 1980*

The Hague Convention is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. Both the UK and Ireland are signatories to this Treaty and Brexit will not impact upon the operation of the Convention in either jurisdiction.

One of the main areas of contention within the Convention involves the meaning of 'habitual residence'; a required element in proving that an incident of child abduction has occurred. The Convention does not define 'habitual residence', so it is up to the courts to make a determination in each case. Jeff Atkinson examines this lack of definition in his paper on the meaning of habitual residence under the Hague Convention. Atkinson finds that there has been some inconsistency in the application of the meaning of habitual residence; in some instances the perspective of the child is given more weight than the perspective of the parents.⁷²

The Hague Convention is unlike other laws about children in that the focus is not on the welfare issues of the child, but is instead on the jurisdictional issues involved in a potential case of child abduction. The Convention regulates which country has the jurisdiction to decide where the abducted child should live — i.e. the country where the child is habitually resident. The Convention facilitates the return of the abducted child to that country.

In essence it is a treaty outlining where the jurisdiction of one nation's courts ends and the jurisdiction of another nation's courts begins. Under the Hague Convention, if a court orders the return of an abducted child to its country of habitual residence, this decision has not been made in consideration of the child's best interests. The Convention is designed to return a child to their country of habitual residence and it is then up to the courts and institutions of that country to determine what should happen from that point onwards.

6.2.5 *Impact of Brexit*

The Hague Convention currently applies to cases for which the EU Regulation does not apply (i.e. where one of the countries involved is not a member of the EU). If no measures are put in place as a result of Brexit, the Hague Convention will govern issues of child abduction between the UK and EU Member States. Therefore there is a fall-back position post-Brexit whether or not alternative arrangements are agreed during the negotiation process. However, it is generally thought that the provisions under EU law and the co-operation between relevant bodies and the enforceability of judgements mean that the EU system is more effective and less time consuming than the alternative. Therefore any negotiations on cross border civil judicial co-operation will impact on the area of child abduction particularly in respect of mutual recognition and enforcement of judgments.

⁷² Jeff Atkinson, 'The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children', (2011) *Oklahoma Law Review*, 63(4), 647 <goo.gl/w2e6R4>.

The wording of the Withdrawal Bill suggests that EU Regulations such as Brussels IIa will be converted into domestic law and continue to apply until the UK Parliament decides otherwise. However, the foundation of Brussels IIa is one based on mutual trust and reciprocity between EU Member States and, even if the UK were to convert Brussels IIa into domestic law at the time of exiting the EU, there will be no obligation on other Member States to make reciprocal arrangements with the UK and such arrangements could be constrained by EU law.⁷³

6.3 Movement as Part of a Family

6.3.1 Development of EU law

The development of EU law on freedom of movement was outlined in Chapter 5 of this paper on Citizenship and Movement, so it will not be repeated here. The rights of family members was previously governed by Regulation 1612/68, Article 10 of which enabled family members, whether such family members were EU citizens or not, to enter and reside with the EU citizen worker in the host Member State.⁷⁴

The Regulation granted family members the right to take up employment in the host Member State and also required the host Member State to allow children of workers access to education under the same conditions as nationals of that host Member State.

Regulation 1612/68 was amended by the Citizens' Rights Directive and the definition of those who could 'install themselves with a worker' extended. Regulation 1612/68 was later repealed by Regulation 492/2011 and the sections on the rights of family members removed; they are now covered by the CRD.⁷⁵

6.3.2 Citizens' Rights Directive and Movement as Part of a Family

Family members of EU citizens who are not themselves EU citizens need only have an entry visa in accordance with Regulation 539/2001 in order to enter the host Member State.⁷⁶ Following expiration of the initial three-month period, the CRD sets out conditions under which those who are EU citizen workers or EU citizen non-workers may continue to reside (with their families) in the host Member State.

⁷³ For further discussion on this point see Nuala Mole 'Some thoughts on the Impact of Brexit on the Rights of Children' [2017] 6 *European Human Rights Law Review*, 529.

⁷⁴ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ Spec Ed I-475.

⁷⁵ Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the Union [2011] OJ L141/01.

⁷⁶ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L081.

Families of EU citizen workers may continue to reside in the host member state beyond the three-month period. For EU citizens who are not workers, they and their families may only continue to reside if the worker has health insurance and provides proof of sufficient financial resources so as not to 'become a burden on the social assistance system of the host Member State'.⁷⁷ EU citizens and their families may also continue to reside if the worker is enrolled in an accredited educational institution, has health insurance and has sufficient financial resources.

After a period of five years of uninterrupted legal residence, EU citizens acquire the right of permanent residence in the host Member State. Under Article 16 of the CRD, residence will be considered to have been 'interrupted' if the EU citizen worker has been absent from the host Member State for a period longer than six months.⁷⁸

The CRD also extended the definition of 'family member'. Under Article 2, a family member may include a spouse, descendants aged under 21 years of age⁷⁹ or dependent children, dependent ascendants, or registered partners if the host Member State's legislation considers a registered partnership to be the equivalent of a marriage. Irrespective of their nationality, these family members have the right to reside in the same country as the worker.⁸⁰

6.3.3 *Impact of Brexit*

As stated in Chapter 5 of this paper, the area of citizens' rights is still unresolved in the Brexit negotiations. However, if the UK imposes domestic immigration law on EU citizens post-Brexit, then family members of EU citizens residing in the UK will face much more onerous conditions before being allowed to join their families. Irish citizens are currently treated as British nationals under UK immigration law (and vice versa) — as was discussed earlier in this paper in relation to the Common Travel Area. If these reciprocal statutory arrangements between Ireland and the UK are amended as a result of Brexit, Irish citizens living in the UK (for example, Northern Ireland-born children who identify as Irish citizens in Northern Ireland) may face stricter immigration conditions alongside their EU national counterparts. It remains to be seen what will be agreed in this regard.

An example of such onerous UK immigration law occurs where a non-EU citizen wishes to move to the UK to join their spouse or partner who is a UK citizen: the UK citizen must meet a minimum annual income threshold of

⁷⁷ CRD, Article 7(c).

⁷⁸ Absences longer than six months will not 'interrupt' the period of residence if caused by compulsory military service. If the EU citizen worker has been absent due to 'important reasons', such as pregnancy and childbirth, serious illness, study or vocational training, or posting abroad, then this will only interrupt the residence period if the worker has been absent for longer than twelve consecutive months.

⁷⁹ In *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, the CJEU took a broad interpretation of 'descendant' to include, not just the descendants from the present relationship between the worker and spouse, but also descendants of the worker and those of the spouse from a previous relationship that was terminated by a divorce.

⁸⁰ CRD, Articles 6(2), 7(2), and 16(2).

£18,600. Where they wish to bring a dependent child, this threshold rises by £3,800 and by another £2,400 for each additional child.⁸¹ Incoming non-EU spouses and partners must also pass an English language test.

6.4 Movement as Part of a Disbanded Family

6.4.1 Definition of Disbanded Family

Chapter 6.3 addressed a child's right to movement within the EU as part of a family. This section outlines the scenario where the child's family has disbanded. 'Disbanded family' is not a legal term of art. Therefore, for the purposes of this section, 'disbanded family' has been narrowly construed to encapsulate scenarios where only one of the child's parents is an EU citizen and that parent either leaves the Member State in which the child is residing or has died.

6.4.2 Current Position

As discussed previously, family members of EU workers are entitled to permanent residence in an EU Member State following five years of uninterrupted residence. Therefore, if a child has resided in the host Member State for five years prior to the death or departure of the EU citizen parent, the child will already have acquired a right of permanent residence in the host Member State.⁸²

However, children are also EU citizens in their own right and are entitled to freely move and reside within the EU, subject to the same conditions as an adult EU citizen. Where a child has been residing in a Member State as a family member of an EU worker within the meaning of the CRD, the death or departure of the EU worker parent prior to the child acquiring a right of permanent residence will not affect the child's right of residence where the child is an EU citizen and can satisfy the conditions of residence in Article 7 of the CRD:

- (i) the EU citizen must have sufficient resources not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance; or

⁸¹ See the Migration Observatory website for further information at <<http://www.migrationobservatory.ox.ac.uk/resources/reports/the-minimum-income-requirement-for-non-eea-family-members-in-the-uk-2/>>.

⁸² CRD, Article 16.

(ii) the EU citizen must be exercising their right to full-time education in the host Member State and have comprehensive sickness insurance and sufficient resources⁸³ not to become a burden on the host Member State.⁸⁴

Irrespective of the child's nationality, the death or departure of the EU worker parent will not impact the child's right of residence or of the parent who has actual custody of the child, if the child resides in the host Member State and is enrolled at an educational establishment for the purpose of studying there, until the completion of their studies.⁸⁵

The CRD only applies where the child has exercised their right of free movement; that is, when they are asserting a right to reside in a Member State of which they are not a national. Where an EU citizen child is left in the care of a non-EU citizen parent as a result of the death or departure of the EU citizen parent, the child has a right to continue residing in their Member State of nationality and for their non-EU citizen parent to remain with them in circumstances where to act otherwise would compel the child to depart the territory of the EU as a whole.⁸⁶

6.5 Concluding Remarks

On 8 November 2017, the European Parliament's Brexit Steering Group, chaired by Guy Verhofstadt, issued a statement which included the following:

We don't recognise reports suggesting that a deal on citizens' rights is almost finalised. There are still major issues that have to be resolved. ... On family reunification, Parliament will not accept any weakening of existing rights that EU citizens currently enjoy with respect to family reunification, including both direct descendants and relatives of direct dependence in ascending line.⁸⁷

Rights related to the free movement of children, with or without their families, cannot be resolved until the EU and the UK reach consensus on the issue of citizen's rights. The above statement clearly does not accord with the UK Government's current stance, as outlined in this paper, and it illustrates the uncertainty still remaining at the heart of the Brexit process.

⁸³ The source of the EU citizen's 'sufficient resources' is irrelevant; See C-200/02 *Man Lavette Chen and Kunqian Catherine Zhu v Secretary of State for the Home Department*, [2004] ECR I-09925, ECLI:EU:C:2004:639.

⁸⁴ CRD, Article 12.

⁸⁵ *ibid*, Article 12(3).

⁸⁶ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, [2011] ECR I-01177, ECLI:EU:C:2011:124.

⁸⁷ 'Brexit: EP outlines its red lines on latest UK citizens' rights proposals', European Parliament News, 8 November 2017 <<http://www.europarl.europa.eu/news/en/press-room/20171108IPR87615/brexit-ep-outlines-its-red-lines-on-latest-uk-citizens-rights-proposals>>.

7 EDUCATION

7.1 Current Position

The EU has competence to support, coordinate or supplement the actions of the Member States in areas including 'education, vocational training, youth and sport'.⁸⁸ While the EU is committed to 'contribute to the development of quality education' in Member States, it has a limited remit in this area, and must do so 'while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'.⁸⁹ This means that the EU cannot adopt legally binding acts requiring Member States to harmonise their laws and regulations in these areas.⁹⁰

7.2 Key Aspects of Education Impacted by Brexit

The EU's involvement in education development that will be most acutely impacted by Brexit include:

- Student mobility and the facilitation of youth exchange programmes
- Recognition of qualifications, including teacher qualifications
- Provision of EU Funding

Generally, the UK's withdrawal from the EU could have implications on the diverse composition of students from different backgrounds, languages and cultures attending schools in Northern Ireland. Potential changes in residency requirements, transferability of qualifications and access to funding could all affect the mobility of both Irish and Northern Irish students and teachers.

7.2.1 *Student and Teacher Mobility*

Depending upon the terms of Brexit and whether an alternative arrangement emerges, there will be implications for UK and Irish students and institutions. Under existing EU rules, an EU student is to be treated as a national from the country in which they are studying. An EU citizen studying at an university in another EU Member State

⁸⁸ Article 2 of the TFEU, Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01.

⁸⁹ *ibid*, Article 165.

⁹⁰ European Citizens' Initiative, 'FAQ on the EU competences and the European Commission powers' <<http://ec.europa.eu/citizens-initiative/public/competences/fag>>.

may not be required to pay higher course fees, and is entitled to the same grants to cover course fees as nationals of that host country.⁹¹ Any disruption to this requirement for equal fees will have considerable consequences for third level students from Northern Ireland who wish to study in Ireland. For example, particular limitations may be felt by those wishing to study Veterinary Medicine given that University College Dublin is the only university on the island of Ireland to offer this course of study. This shows how Brexit has the potential to have very real implications for young people wishing to access professional courses.

Similar impact is likely to be felt by primary and post-primary students living in border areas. It is estimated that approximately 400 pupils from Northern Ireland study in primary or post-primary schools in Ireland, and nearly four times more students from Ireland currently study in Northern Ireland.⁹² Changes in residency requirements and the cost of education are likely to be factors influencing a student's choice of institution, which has potential implications for the diverse make up of student populations.

7.2.2 **Exchange Programmes**

The EU has been credited with providing students with opportunities to study abroad through exchange programmes. In 2015/16, over 127,000 EU students were studying in UK Higher Education institutions and the potential loss of any exchange programme is likely to negatively impact access to UK institutions.⁹³ In 2014, the EU consolidated its schemes for education and launched Erasmus+, its new programme for education, training, youth and sport.⁹⁴ The seven-year programme has an overall budget of €14.7 billion, and up to 2 million students, including 450,000 trainees and 800,000 teachers, are expected to benefit from grants to study and train abroad.⁹⁵ It is estimated that since the Erasmus student exchanges was introduced in 1987, 9 million people have gone abroad supported by Erasmus+ and its predecessor programmes.⁹⁶

There is no clarity yet as to whether UK students may continue to avail of the Erasmus+ scheme to partake in exchanges with EU institutions post-Brexit. Likewise, UK institutions may be excluded from receiving EU students going on Erasmus+ funded exchanges. However, it is of note that the new Erasmus+ is designed to allow non-EU

⁹¹ Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECR [2002] I-00663, ECLI:EU:C:2001:458.

⁹² Ulster University, 'Brexit Symposium Discussion Paper: Impact of Brexit on education in Northern Ireland' (Brexit Symposium, Ulster University, Belfast, 14 June 2017) <https://www.ulster.ac.uk/_data/assets/pdf_file/0008/179423/Impact-of-Brexit-in-education-in-NI.pdf>.

⁹³ *ibid.*

⁹⁴ European Commission, 'Erasmus+ Programme Guide' <http://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/files/resources/erasmus-plus-programme-guide_en.pdf>.

⁹⁵ European Commission, 'ERASMUS+: The EU programme for education, training, youth and sport (2014-2020)' <http://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/library/erasmus-plus-factsheet_en.pdf>.

⁹⁶ European Commission, 'Erasmus+ spotlight' <https://ec.europa.eu/programmes/erasmus-plus/anniversary/spotlight-bringing-europe-together_en>.

countries to participate, either fully as programme countries, or through more limited participation as a partner country, so the UK may choose to participate on that basis, or via some kind of transitional arrangement.

7.2.3 Access to Tertiary Education Grants

In Ireland, a means-tested student grant scheme, Student Universal Support Ireland (SUSI), operates to provide financial support to eligible students attending full-time further and higher education courses. It was established by the Student Support Act 2011 and is run by the Irish Department of Education.⁹⁷ SUSI grants are available to Irish and EU national students studying in approved institutions across the EU, in particular in Ireland and Northern Ireland. In the 2015/2016 academic year, a total of 1,447 students availed of SUSI grants to study in Northern Ireland and Great Britain.⁹⁸

Within the terms of the current SUSI schemes, in order to be eligible for grant support students must be an Irish national attending an approved institution within the EU, or a national of an EU Member State attending an institution in Ireland.⁹⁹ It is unclear how Brexit will impact on the application of SUSI and whether the availability of SUSI financing to UK students will remain the same post-Brexit. UK citizen students may continue to have recourse to SUSI through Irish law, such as the Aliens Act 1935 (discussed in Chapter 4 on the Common Travel Area), but whether these statutory provisions will remain post-Brexit depends on whether Ireland's continuing membership of the EU affects the CTA and these reciprocal immigration arrangements with the UK.

7.3 Recognition of Qualifications

The European Qualifications Framework (EQF) was adopted by the European Commission in 2008 to facilitate the comparison of qualifications across countries to promote student and worker mobility.¹⁰⁰ The EQF acts as a translation device to make different countries' national qualifications transferable across Europe, and applies to all types of education, training and qualifications, from school education to academic, professional and vocational. Alignment between the EQF and Member State qualification frameworks increases the efficiency and ease of mobility of students and graduates.

⁹⁷ Department of Education and Skills, 'Student Grants' <<https://www.education.ie/en/Learners/Information/Student-Grants/>>.

⁹⁸ Higher Education Authority, 'Brexit and Irish Higher Education and Research: Challenges and Opportunities' <<http://hea.ie/assets/uploads/2017/06/Brexit-And-Irish-Higher-Education-And-Research-Challenges-And-Opportunities.pdf>>.

⁹⁹ Section 14 of the Student Support Act 2011 defines 'student' as including a national of an EU Member State, a contracting state of the EEA Agreement or the Swiss Confederation, with some limited exceptions. Please see Appendix 1 for the full text of Section 14.

¹⁰⁰ Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2008] OJ C111/01.

The UK's current EQF Referencing Report has been in place since 1 March 2010.¹⁰¹ The UK's continued participation in EQF post-Brexit is somewhat unclear as EQF participation is not dependent upon EU membership, with participation also being open to 'candidate countries'. Alternatives to EQF include the International Standard Classification of Education, a statistical framework for organizing information on education maintained by the United Nations Educational, Scientific and Cultural Organization (UNESCO).

7.3.1 **Teacher Qualifications**

Teachers qualified in one EU Member State are entitled to have their qualifications recognised in all other Member States.¹⁰² The mutual recognition of qualifications between EU Member States allows fully qualified teachers to travel and develop their careers in other Member States; and in 2016, 4,795 teachers from EU countries were qualified to teach in the UK.¹⁰³ Admission numbers for teacher training places funded by the Northern Ireland Department of Education are currently capped, resulting in admission being highly competitive.¹⁰⁴ This competitiveness is only set to increase should Northern Irish trainee teachers face fee hikes to study in Ireland and other EU Member States.

Whether teacher qualifications in the UK and the EU will continue to be mutually recognised post-Brexit will have implications on opportunities for diversity of cultural and linguistic backgrounds in the teaching profession in the UK. Teacher shortages in the UK may affect the viability of certain subjects in the curriculum (such as foreign languages), and may have adverse implications for the range of subjects that may be offered by examination boards. In particular, there may be implications on the teaching of the Irish language in Northern Ireland schools. The subject of teacher qualifications is therefore greatly relevant to children and their ability to access education, and needs to be monitored carefully.

7.4 **UK Government's Position on Education in Brexit Negotiations**

In a policy paper published in June 2017, the UK Government pledged the following:

- The UK will ensure qualifying EU citizens who arrived in the UK before the specified date will continue to be eligible for Higher Education (HE) and Further Education (FE) student loans and 'home fee' status in line with persons with settled status in the UK. Such persons will also be eligible to apply for maintenance

¹⁰¹ Qualifications and Curriculum Authority [UK], (2010) 'Report Referencing the Qualifications Frameworks of the United Kingdom to the European Qualifications Framework' <http://scf.org.uk/content/files/europe/QFUK_Joint_Report_-_Updated_March_2010.pdf>.

¹⁰² Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

¹⁰³ Department for Education [UK], (2016) 'Initial Teacher Training census for the academic year 2016 to 2017' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/572290/ITT_Census_1617_SFR_Final.pdf>.

¹⁰⁴ *ibid.*

support on the same basis they do now. (Subject to respecting the devolution settlement and the constitutional position of the devolved administrations.)

- To help provide certainty for EU students starting courses as we implement the UK's exit (including those who are not currently living in the UK), we have already confirmed that current EU students and those starting courses at a university or FE institution in the 2017/18 and 2018/19 academic years, will continue to be eligible for student support and home fee status for the duration of their course. We will also ensure that these students have a parallel right to remain in the UK to complete their course; and
- The UK will seek to ensure that citizens with professional qualifications obtained in the EU27 prior to the UK's withdrawal from the EU will continue to have those qualifications recognised in the UK (and vice versa).¹⁰⁵

7.5 European Funding

Structural funding provided by the EU is a significant financial resource in the development of educational programmes, research and innovation. Access to such funding programmes is crucial to Northern Ireland's attractiveness to EU academics and researchers, which, in turn, has an impact on the ability of children and young people to access high-quality education.

7.5.1 The PEACE Programme

The PEACE Programme was born in the wake of the 1994 paramilitary ceasefires, stemming from an EU desire to make a positive impact on cross-community relations in Northern Ireland and Ireland, supporting peace and reconciliation. The current €270 million PEACE IV Programme (2014-2020) is targeted at the capital development of schools and shared education projects in Northern Ireland and the border counties of Ireland (including Cavan, Donegal, Leitrim, Louth, Monaghan and Sligo).¹⁰⁶ ¹⁰⁷ Eighty-five percent of the PEACE IV Programme

¹⁰⁵ HM Government, *The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, (Cm 9464, 2017), 5-6 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf>.

¹⁰⁶ Regulation (EU) no 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, [2013] OJ L347/320.

¹⁰⁷ Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal [2013] OJ 347/259.

(representing €229 million) is provided through the European Regional Development Fund (ERDF), with the remaining fifteen percent matched-funded by the Irish Government and the Northern Ireland Executive.¹⁰⁸

Some of the projects that the current PEACE IV Programme has funded include initiatives to promote positive relations between people from different communities and backgrounds, such as Mid Ulster District Council's cross-border literary trail related to Nobel literary laureates Seamus Heaney and WB Yeats.¹⁰⁹ Schools in Northern Ireland and Ireland currently benefit hugely from the PEACE IV Programme, in particular schools within border counties.

The current PEACE IV Programme is scheduled to run until 2020, with expenditure eligible for a contribution until December 2023.¹¹⁰ In its position paper on Ireland and Northern Ireland, the UK government proposes that 'the UK and the EU should agree the continuation of funding for PEACE IV for the duration of the existing programme and, with the Northern Ireland Executive and Irish Government, explore a potential future programme post-2020. In doing so, the UK wants to work with the EU on how together we can maintain the implementation of the PEACE IV programme, including the role of the SEUPB as managing authority, and that of the NSMC in agreeing the policy direction of future programmes.'¹¹¹

7.5.2 *Horizon 2020*

In 2011, the European Commission consolidated its previous research and innovation funding under a single common strategic framework, Horizon 2020: its biggest ever programme with nearly €80 billion of funding available over seven years (2014 to 2020).¹¹² As of February 2017, higher or secondary education establishments in the UK have availed of approximately €2.1 billion of Horizon 2020 funding, making the UK the largest recipient country in this regard, receiving 25.5% of total EC funding in this category.¹¹³

¹⁰⁸ Special EU Programmes Body, 'PEACE IV Programme Overview' <<https://www.seupb.eu/piv-overview>>.

¹⁰⁹ List of PEACE IV funded projects (accurate as of 1 August 2017, opens in Excel xls format) <https://www.seupb.eu/sites/default/files/styles/file_entity_browser_thumbnail/public/PEACE%20Content%20Type/July_Beneficiaries_Spreadsheet_PEACE_Webcopy_English_0.XLSX>.

¹¹⁰ Article 65(2) of Regulation (EU) 1303/2013 laying down common provisions...

¹¹¹ HM Government, *Northern Ireland and Ireland Position Paper*, 16 August 2017, 6 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>.

¹¹² Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC [2013] OJ L347/120.

¹¹³ Department for Business, Energy & Industrial Strategy [UK], 'Official Statistics: UK's participation in horizon 2020: February 2017' <<https://www.gov.uk/government/statistics/uks-participation-in-horizon-2020-february-2017>>.

Although the European Commissioner has confirmed that there are no immediate changes to the UK university sector's ability to participate in research and innovation programmes such as Horizon 2020¹¹⁴, the long term future remains to be decided by Brexit negotiations. It has been recognised by Ireland that bilateral arrangements will have to be coordinated to preserve knowledge networks with the UK and Northern Ireland.¹¹⁵

7.6 Concluding Remarks

As with all areas discussed within this paper, the impact that Brexit will have on education is very much uncertain. While it is evident that educational resourcing and funding will most definitely be affected, it is critical that the impending changes are adequately acknowledged and addressed or mitigated where possible. Given that there are various iterations of the definition of a child, and university students may be considered within this definition, changes to the education of any child, not just budding teachers, has the potential to impact generations of children.

¹¹⁴ 'European commissioner Carlos Moedas reassures UK researchers post-Brexit', *Times Higher Education* (London, 1 July 2016).

¹¹⁵ Joint Oireachtas Committee on Education and Skills, *Implications of Brexit for the Irish Education System: Discussion*, 21 March 2017
<<http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/committeetakes/ESJ2017032100002?opendocument#M00100>>.

8 HEALTH

8.1 Key Aspects of Health Impacted by Brexit

This chapter deals with the impact of Brexit on children's access to healthcare and on healthcare policy generally. Brexit may affect such healthcare areas as:

- Public health;
- Research and development;
- Pharmaceuticals and medical devices; and
- Tackling Emerging Threats.

In particular, healthcare rights of children in the UK post-Brexit may be restricted as their cross-border access to healthcare may be curbed and the European Health Insurance Card scheme may no longer apply to them.

8.2 The EU's Role in Access to Health Services

The EU acts as an umbrella for research, standards and policies and serves to link the work of Member States in these areas. The EU ensures that a high level of human health protection is at the forefront of thinking in all actions undertaken by the EU.¹¹⁶ The EU enables a collaborative, harmonious approach to health care taken between Member States.¹¹⁷ Such an approach leads to a large pool of resources being available across the EU, especially for research and practice development.

¹¹⁶ Article 168(1) of the TFEU, Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01.

¹¹⁷ *ibid*, Article 114.

8.2.1 **Public Health: Directive 2011/24/EU on the application of patients' rights in cross-border healthcare**¹¹⁸

The Directive, which came into force on 25 October 2013, has afforded patients an opportunity to travel between Member States and benefit from cross-border healthcare. Patients traveling to another EU member state will enjoy equal treatment with the citizens of that Member State. This allows citizens to travel within the EU in order to avail of the best care available for them. For example, of the 1,700 treatments funded for Irish-citizen patients last year under the cross-border Directive, approximately 700 were provided in Northern Ireland, according to the Department of Health.¹¹⁹ The Directive provides clarity around the financing of such health care, and states that if the patient is entitled to the healthcare in their home state, the government of the home state will reimburse the patient the cost of the treatment, to the level of the cost in their home state. Currently, children on the island of Ireland can access healthcare under this scheme on either side of the border, including acute/psychiatric hospital services (day, inpatient, outpatient care) and community based outpatient care (to include dental, ophthalmic, orthodontics, speech & language).

Post-Brexit, Northern Irish children may no longer access healthcare under this scheme. While children in Ireland can continue to access healthcare in other Member States under this scheme, they may no longer be able to freely access treatments and procedures, such as those provided by Great Ormond Street Children's Hospital, London.

8.2.2 **EU's INTERREG VA programme**

The INTERREG VA Programme is an EU funding programme specifically designed to address problems that arise from the existence of borders.¹²⁰ The new INTERREG VA Programme proposes to tackle this issue in order to promote greater levels of economic, social and territorial cohesion across Northern Ireland, the Border Region of Ireland and Western Scotland. In respect of health services on both sides of the border, people living in Northern Ireland and the border counties of Ireland are set to benefit from an investment of €26.5 million. This EU funding will be used to support four large-scale cross border health and social care projects up to 2021. The projects are in the areas of acute hospital services, mental health, children's services and community health and well-being.

These EU funded projects will continue until the 2020/2021 period. Each of the contracts for these projects has made funding provision for the complete project period, including the post-Brexit phase. Positive initiatives such as the INTERREG VA Programme may no longer apply to the UK post-Brexit. Due to less investment in cross border services this may impact on children's access to health services on either of the border.

¹¹⁸ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45.

¹¹⁹ Paul Cullen, 'Ireland's health service must "prepare for the worst" post-Brexit', *The Irish Times* (Dublin, 19 June 2017).

¹²⁰ '€26.5 million EU funding for cross border health and social care' [Press Releases] 28 June 2017 <<https://www.hse.ie/eng/services/news/media/pressrel/%E2%82%AC26-5-million-EU-funding-for-cross-border-health-and-social-care.html>>.

8.2.3 *European Health Insurance Card*

EU/EEA nationals travelling within, or on short term stays in, another state of the EEA or Switzerland, are entitled to receive medical care if they become ill or have an accident. The Card does not cover all costs, and some element of co-payment may be required for the services received. Depending on the outcome of the Brexit negotiations, and the form of relationship between the EU and the UK, children in the UK may no longer be in a position to avail of this care. An alternative may be travel insurance, although this is a personal choice rather than an individual entitlement.

In its policy paper on citizenship issues, the UK has pledged to 'seek to protect the ability of individuals who are eligible for a UK European Health Insurance Card (EHIC) before the specified date to continue to benefit from free or reduced cost, needs-arising healthcare while on a temporary stay in the EU. The UK will seek an ongoing arrangement akin to the EHIC scheme as part of negotiations on our future arrangements with the EU.'¹²¹

8.3 **Research Funding**

8.3.1 *EU Investment in Children's Health*

The EU invests in the health of children in various forms, through the following:

- Research projects on health topics and disease groups which affected children, including infant mortality, poverty, harmful environment and nutrition.
- Targeted monetary assistance and encouraging member states to tackle and prevent child poverty.
- Policies and initiatives targeting the protection of the health of children.

While the UK may have its own investment in children's health, it may not be able to avail of the pool of resources and research data which Member States avail of.

¹²¹ HM Government, *The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, (Cm 9464, 2017), 5-6 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf>.

8.4 Pharmaceuticals and Medical Devices

8.4.1 *The European Medicines Agency (EMA)*

If, as part of the UK's exit from the EU, Britain ceases to be a member of the EMA, Britain will have to introduce a separate regulatory process for approval of medicines, which could result in changes to the standard of products entering the UK market and the procedure for the latest medicines reaching patients.¹²² Furthermore, as the EMA will relocate to Amsterdam, concerns have been raised about potential delays for patients accessing medicines in the UK outside of the EMA, as the UK will need staff and infrastructure to take over the work done by the EMA and the other regulatory agencies in the network.¹²³ Post-Brexit access to new medicines and medical devices for children in the UK may be delayed or accelerated depending on the outcome. Those living in Northern Ireland post-Brexit may be able to avail of a different range of medicines to those permitted to be sold within the EU at present, but it is unclear whether these will be subject to the same levels of oversight as are performed by the EMA currently.

Post-Brexit arrangements in this area are not yet known, however other countries — such as Switzerland, Australia and Canada — have reached mutual recognition agreements with the EMA, which in each case outline what elements of manufacturing/distribution practice will be recognised. It is envisaged that a similar regime may apply in the UK. The UK Secretary of State for Health has indicated that, while he did not expect the UK to stay in the EMA, he hoped that there could be a mutual recognition agreement between the EMA and the UK.¹²⁴ This may mean reduce the risk of regulatory divergence between the UK and the EMA and allow for a mutually recognised set of standards to be agreed with EMA.

8.4.2 *Medical Devices Directive 1993/42/EEC*¹²⁵

This Directive sets uniform standards for medical devices accepted in to the EU. The standard is maintained by the requirement for manufacturers to produce technical, detailed documents to evaluate the conformity of their device with the requirements of the Directive, and establish a quality management system.

¹²² Cat Contigugli, 'Everything you need to know about the EU agencies leaving London because of Brexit', (*Politico*, 8 July 2017) <<http://www.politico.eu/article/brexit-ema-eba-european-banking-authority-european-medicines-agency-everything-you-need-to-know-about-the-eu-agencies-leaving-london-because-of-brexit/>>.

¹²³ Sarah Barber, 'Brexit and Medicines Regulation', House of Commons Briefing Paper (Number 8148, 20 November 2017) <<http://researchbriefings.files.parliament.uk/documents/CBP-8148/CBP-8148.pdf>>, 21-25.

¹²⁴ *ibid*, section 4.

¹²⁵ Council Directive 93/42/EEC of 14 June 1993 concerning medical devices [1993] OJ L169/01.

8.4.3 **Tackling Emerging Threats**

The EU assists national governments in preparing for larger scale emerging threats, through the European Centre for Disease Prevention & Control.¹²⁶ The role of the Centre is to identify, assess and communicate current and emerging threats to human health posed by infectious diseases.¹²⁷ This is achieved through collaboration with Member States. The Centre releases publications such on developments of these diseases and offers information on prevention and treatments.

8.5 **Impact of Brexit**

Arrangements in healthcare post-Brexit are unclear and therefore, it is difficult to assess the level of change. Of particular concern is the impact on the healthcare rights of children in the UK and Northern Ireland, which may be restricted if their cross-border access healthcare may be curbed and the European Health Insurance Card (EHIC) scheme no longer applies to them. More broadly, the UK may no longer be able to avail of the pooled knowledge and resources of the EU and this may hamper research and development in the healthcare sector.

Before joining the EEC (as was), the UK had reciprocal health agreements with many European nations. The UK still maintains bilateral deals with 16 countries, such as Australia, New Zealand and the former Yugoslavian republics of Macedonia, Montenegro and Serbia. It is possible that a similar range of deals will be concluded with some or all EU members.

¹²⁶ European Centre for Disease Prevention and Control, an agency of the European Union <<https://ecdc.europa.eu/en>>.

¹²⁷ *ibid* <<https://ecdc.europa.eu/en/about-us>>.

9 PROTECTION OF CHILDREN

9.1 Human Trafficking

9.1.1 *EU Law: Directive on Preventing and Combating Trafficking in Human Beings*¹²⁸

The European Directive on Preventing and Combating Trafficking in Human Beings was introduced in 2011 (the Trafficking Directive). The UK initially opted-out of the Trafficking Directive on the basis that it already complied with many of the provisions, but later chose to opt-in.¹²⁹

The aim of the Trafficking Directive is to encourage global action against trafficking of human beings; reducing vulnerability, supporting and assisting victims and fighting the root causes of human trafficking. Article 14 of the Trafficking Directive imposes an extensive obligation to provide assistance and support to child victims of trafficking and requires Member States to undertake 'an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns with a view to finding a durable solution for the child.'

Prior to the introduction of the Trafficking Directive, the EU's main priority appeared to be the investigation and prosecution of traffickers, with less of an emphasis on the protection of trafficking victims. The Trafficking Directive seeks to address this imbalance.

9.1.2 *Council of Europe: Convention on Action Against Trafficking in Human Beings*¹³⁰

The Council of Europe Convention on Action Against Trafficking in Human Beings (the Trafficking Convention) was introduced in 2005 and is a comprehensive treaty focused on the protection of victims of trafficking and the safeguarding of their rights. The Trafficking Convention entered into force on 1 February 2008 and applies to all forms of trafficking, regardless of the status of the victim; makes no distinction between national and transnational trafficking. The Convention also applies to all forms of exploitation including sexual exploitation, forced labour or services and aims at preventing trafficking as well as prosecuting the traffickers.

¹²⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/01 (Trafficking Directive).

¹²⁹ Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L271/49. Note the date of effect was 17 October 2011.

¹³⁰ Council of Europe Convention on Action against Trafficking in Human Beings (Trafficking Convention) CETS No 197. <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197>>.

The Trafficking Convention provided for the establishment of an independent monitoring mechanism known as the Group of Experts on Action against Trafficking in Human Beings (GRETA) which aims to guarantee Parties' compliance with the Convention's provisions. To date, the Trafficking Convention has been ratified by 47 states including the UK. The Trafficking Convention will remain in place after Brexit as it is a Council of Europe initiative.

9.1.3 **National Law on Human Trafficking**

The Trafficking Directive was implemented, in part, by the UK through the introduction of the Modern Slavery Act 2015. The Criminal Law (Human Trafficking) (Amendment) Act 2013 was introduced in Ireland to enact certain provisions of the Directive. However, the principle legislation relating to human trafficking in Ireland is the Criminal Law (Human Trafficking) Act 2008. All of these provisions are a positive step in terms of expressing the commitment of each jurisdiction to combat trafficking and seek stronger sanctions where an offence has been committed against particularly vulnerable victims, such as children. These Acts also expand on the definition of 'exploitation' to cover situations such as begging, pick-pocketing and theft. Northern Ireland also introduced legislation on human trafficking and exploitation in 2015 via the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.¹³¹ This legislation created new offences of human trafficking and other forms of modern slavery. The legislature of England and Wales has been criticised for a failure to follow suit, as the Modern Slavery Act 2015 does not contain any explicit provisions for the protection of victims' rights.

The Anti-Trafficking Monitoring Group (ATMG) is a coalition established in 2009 to monitor the UK's implementation of European anti-trafficking legislation. The group examines all types of human trafficking, including internal trafficking and the trafficking of British nationals. In comparing the three pieces of legislation – of Scotland, Northern Ireland, and England and Wales – the ATMG uncovered significant differences in a number of key areas. The Group concluded that, 'in the majority of cases where differences occur, it is the Modern Slavery Act that falls short of its counterparts in Scotland and Northern Ireland'.¹³² An example of such a shortfall is the Modern Slavery Act's use of the word 'travel' as the gateway for framing all other trafficking acts such as harbouring or recruitment. The Scottish and Northern Irish legislation does not make this distinction. The ATMG believe this has 'the potential to make convictions more difficult where the movement of a victim is difficult to prove'.¹³³

¹³¹ As did Scotland in 2015.

¹³² Anti Trafficking Monitoring Group, 'Class Acts? Examining modern slavery legislation across the UK, October 2016 <http://www.antislavery.org/wp-content/uploads/2017/01/atmg_class_acts_report_web_final.pdf>.

¹³³ *ibid.*

9.1.4 *Impact of Brexit*

Legal critics of the Modern Slavery Act 2015 say it fails to give adequate protection to victims, instead focusing on the prosecution of those charged with offences under the Act. Tamara Barnett (former political adviser on policing and crime for the Mayor of London and now working for the Human Trafficking Foundation) believes that 'time and time again lawyers are compelled to use EU law to defend victims of trafficking. Without these laws in place, it will be much harder, in some cases impossible, to seek justice on a victim's behalf, and that is obviously very worrying'.¹³⁴

9.2 **Sexual Exploitation**

9.2.1 ***EU Law: Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (Sexual Exploitation Directive)***¹³⁵

The Sexual Exploitation Directive was introduced in order to establish 'minimum rules in the EU concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes' and 'provisions to strengthen the prevention of those crimes and the protection of the victims thereof'.¹³⁶

This Directive criminalises various offences relating to the exploitation of children including coercing a child into prostitution or engaging in sexual activities with a child. The Directive imposes high levels of penalties for said offences and aims to harmonise the laws of Member States in relation to police and judicial cooperation, in order to effectively combat the sexual exploitation of children.

There are four categories under the Directive:

- (i) sexual abuse, such as engaging in sexual activities with a child who has not reached the age of sexual consent or forcing them to submit to such activities with another person;
- (ii) sexual exploitation, such as, for example, coercing a child to engage in prostitution or to participate in pornographic performances;

¹³⁴ Tom Batchelor, 'Road to Brexit: Leaving EU could make it 'impossible' to tackle human trafficking, warn campaigners' *Independent* (London, 9 May 2017) <<http://www.independent.co.uk/news/uk/politics/brexit-human-trafficking-impossible-eu-police-not-protect-slavery-people-abuse-victims-court-justice-a7689766.html>>.

¹³⁵ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/01 (Sexual Exploitation Directive).

¹³⁶ European Commission, 'Together against trafficking in human beings' (2010) <https://ec.europa.eu/anti-trafficking/legislation-and-case-law/eu-legislation_en>.

- (iii) child pornography, possessing, accessing, distributing, supplying or producing child pornography;
- (iv) the solicitation of children on-line for sexual purposes: proposing, via the Internet, to meet a child for the purpose of committing sexual abuse and, through the same means, soliciting the child to provide pornographic material of themselves.

9.2.2 **Council of Europe: Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (The Lanzarote Convention)**¹³⁷

The EU's Sexual Exploitation Directive was modelled on the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). The Lanzarote Convention was introduced in 2007 with the aim of criminalising many sexual offences against children and it is the most comprehensive international legal instrument on the protection of children against sexual exploitation and sexual abuse.

It takes the relevant United Nations and Council of Europe standards and administers them over a wide range of possible sexual offences against minors — including sexual abuse of a child, child prostitution, grooming and corruption of children through exposure to sexual content and activities. The Lanzarote Convention requires criminalisation of all kinds of sexual offences against children. It sets out that Member States shall adopt specific legislation and take measures to prevent sexual violence, to protect child victims and to prosecute perpetrators.

The UK and Ireland are both signatories to the Convention but have yet to ratify it. Together, the Lanzarote Convention and the Sexual Exploitation Directive impose binding legal obligations that can be directly enforced by children at domestic level before domestic authorities. Both the Convention and the Directive are the most effective means of achieving compliance by the UK and Ireland with international obligations that would otherwise have limited effect.

9.2.3 **National Law on Sexual Exploitation of Children**

Prior to the introduction of the Sexual Exploitation Directive, the main piece of UK legislation providing for the protection of children from sexual violence was the Sexual Offences Act 2003 (the 2003 Act) which includes protections against prostitution, trafficking and general sex offences. A common criticism of the 2003 Act is that it fails to recognise the concept of actual consent, thereby criminalising consensual sexual activities between children. The Sexual Exploitation Directive has been transposed in part in the UK through two pieces of legislation

¹³⁷ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) CETS No 201 <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201>>.

— the Special Measures for Child Witnesses (Sexual Offences) Regulations 2013 and the Working with Children (Exchange of Criminal Convictions) (England and Wales and Northern Ireland) Regulations 2013.

However, the implementation of these Regulations appears to be nothing more than a symbolic gesture as opposed to meaningful transposition of the Sexual Exploitation Directive. The Special Measures Regulations do nothing more than extend section 33 of the Youth Justice and Criminal Evidence Act 1999 by extending the age presumption for determining eligibility for special measures (which applies currently only to victims of human trafficking offences) to relevant offences under the Sexual Exploitation Directive. The Exchange of Criminal Convictions Regulations simply requires the UK to share information relating to criminal convictions of a person with other Member States; including any disqualification from working with children.

In Ireland, new domestic legislation enacted in March 2017, the Criminal Law (Sexual Offences) Act 2017 further strengthens the protections offered to children in Ireland. This legislation addresses child sexual exploitation and abuse online, via social media platforms and various other offences relating to the use of technology. This more advanced legislation in Ireland may lead to discrepancies in how certain sexual exploitation offences are prosecuted in Ireland and Northern Ireland, particularly post-Brexit.

9.2.4 ***European Criminal Records Information System (ECRIS)***

ECRIS was created in April 2012 to facilitate the exchange of information on criminal records throughout the EU. It establishes electronic interconnections between Member States and puts rules into place to ensure that information on convictions as contained in the criminal records system of the Member States can be exchanged through electronic standardised formats, in a uniform and speedy way, and within short legal deadlines.¹³⁸

Following Brexit, the UK (including Northern Ireland) may lose access to ECRIS, the centralised record of criminal offenders which will also include access to child sex offenders who seek to travel between the different Member States to avoid detection. Therefore, it is important that there is an agreement negotiated to ensure that there is access to such networks.

9.2.5 ***Impact of Brexit***

It is vital that the protections afforded by the Lanzarote Convention and the Sexual Exploitation Directive remain in place in Northern Ireland and the UK post-Brexit. While the Lanzarote Convention will not be directly impacted by

¹³⁸ European Commission, 'ECRIS (European Criminal Records Information System)' <http://ec.europa.eu/justice/criminal/european-e-justice/ecris/index_en.htm>.

the UK's exit from the EU (being a non-EU convention), the current shortfalls in UK legislation transposing the Sexual Exploitation Directive could mean the loss of vital resources for the protection of children post-Brexit.¹³⁹

Eurojust is an EU agency which facilitates judicial co-operation and information sharing in criminal matters including child trafficking.¹⁴⁰ This, together with Europol and the European Arrest Warrant, allows for direct collaboration and action between Member States ensuring that issues of trafficking and sexual exploitation can be dealt with and tackled as expediently as possible. The inevitable weakening of cross-border provisions will be severely detrimental to this collaboration and the UK is likely to be at a disadvantage when it comes to potential future disputes involving data protection, privacy and human rights law given its loss of access to many EU databases, including those holding biometrics and other shared intelligence.

The ATMG published research in October 2016 which highlighted the group's concern in respect of 'continuing weaknesses in data collection and the lack of a central, statutory body with the responsibility to collate and analyse data on both victims and perpetrators.'¹⁴¹ There are currently no reporting arrangements in place across the UK for the collection of data in terms of the age of the victims of trafficking offences. This thereby renders the system incapable of acknowledging how many trafficking cases involve child victims.

It is clear that the UK's loss of EU protections in terms of human trafficking and sexual exploitation is likely to have severe negative impacts on the security services' ability to both prevent trafficking and exploitation and to capture and prosecute perpetrators. Commentators on the issue agree that the biggest impact of this loss will be felt by victims. In its current position, the UK is falling short in the provision of measures to protect victims of sexual exploitation and relies heavily on the EU judicial sphere to cover this. It remains to be seen how well-equipped the UK's national legislation and regulatory bodies will be to deal with the gaps remaining following withdrawal from the EU.

¹³⁹ Coram, 'Brexit: children's rights at risk or future opportunity in the global era?' (February 2017) <[http://www.coram.org.uk/sites/default/files/resource_files/FINAL_Coram%20commentary%20on%20Brexit%20and%20the%20rights%20of%20children1702%20\(1\).pdf](http://www.coram.org.uk/sites/default/files/resource_files/FINAL_Coram%20commentary%20on%20Brexit%20and%20the%20rights%20of%20children1702%20(1).pdf)>.

¹⁴⁰ Eurojust <<http://www.eurojust.europa.eu/Pages/home.aspx>>.

¹⁴¹ Anti Trafficking Monitoring Group, 'Class Acts? Examining modern slavery legislation across the UK, October 2016' <http://www.antislavery.org/wp-content/uploads/2017/01/atmg_class_acts_report_web_final.pdf>.

10 CHILDREN AND CRIMINAL JUSTICE

10.1 Children in the Criminal Justice System

Children can come into contact with the criminal justice system in a number of ways, whether as a victim of a crime, a witness, or as someone suspected or accused of committing an offence. There are international conventions, as well as European and domestic laws, currently in force which aim to protect children who find themselves involved in the criminal justice system. This chapter aims to examine the effect that Brexit may have on these protections, particularly in the context of how this may affect children in Northern Ireland and Ireland. It is worth noting that while there are some child-specific provisions in place in relation to the criminal justice system, a lot of the European legislation relates to adults and children alike.

10.1.1 *United Nations Convention on the Rights of the Child (UNCRC)*

The UNCRC sets out 54 articles covering the civil, political, economic, social and cultural rights of children and young people. Specifically in relation to a child that has come into conflict with the law and finds themselves within the criminal justice system, the UNCRC states the following:

Article 3: The best interests of the child must be a top priority in all decisions and actions that affect children.

Article 37: Children must not be tortured, sentenced to the death penalty or suffer other cruel or degrading treatment or punishment. Children should be arrested, detained or imprisoned only as a last resort and for the shortest time possible. They must be treated with respect and care, and be able to keep in contact with their family. Children must not be put in prison with adults.

Article 40: A child accused or guilty of breaking the law must be treated with dignity and respect. They have the right to legal assistance and a fair trial that takes account of their age. Governments must set a minimum age for children to be tried in a criminal court and manage a justice system that enables children who have been in conflict with the law to reintegrate into society.

While both the UK and Ireland have ratified the UNCRC, it is not, by itself, a legally enforceable instrument. When the UNCRC is combined with current EU and domestic law frameworks, this gives further legal weight to the principles contained within the UNCRC. Some of these key legislative measures were discussed in the previous chapter on protection of children.

10.1.2 *EU Law and the Criminal Justice System*

A prime example of EU law is the Directive on minimum standards for the rights, support and protection of victims of crime.¹⁴² This Directive is aimed at protecting vulnerable victims of crime — of which children are a particularly notable category — and provides legal protection to child victims of terrorism, organised crime, human trafficking, gender-based violence, violence in close-relationships, sexual violence or exploitation, hate crime and victims with disabilities.

The EU offers safeguards to all citizens in the context of arrest, detention and the criminal process and makes specific provision for the care of children when dealing with the criminal justice systems of Member States, such as through the Directive on procedural safeguards for children in the criminal justice system.¹⁴³ The Directive is intended to create 'common minimum rules on the protection of procedural rights of children who are suspects or accused persons'.¹⁴⁴

10.1.3 *National Law and the Criminal Justice System*

The arrest and detention of any citizen, including a child, is governed by the Police and Criminal Evidence (Northern Ireland) Order 1981 in Northern Ireland. However, there is also more child-centric legislation in place via the Criminal Justice (Children) (Northern Ireland) Order 1998, which deals with child suspects from the point of arrest, right through to the possible trial and sentencing of the child. This Order provides some specific safeguards for the child, such as special measures when giving evidence. Furthermore, section 53 of the Justice (Northern Ireland) Act 2002 stated that the principal aim of the youth justice system in Northern Ireland is to protect the public by preventing children from offending. This provision was then amended by section 98 of Justice (Northern Ireland) Act 2015 which added the requirement to have the best interests of children as a primary consideration.

There is similar legislation in Ireland that deals with the prevention of criminal behaviour, diversion from the criminal justice system and rehabilitation. These provisions can be found in the Criminal Law Act 1997 and in the Children Act 2001. The Children Act also states that detention of a child should be used as a last resort: the Act requires that all avenues be explored before detention is ordered.

These pieces of domestic legislation that promote the wellbeing of children within the criminal justice systems in both Northern Ireland and Ireland will not be directly affected post-Brexit, but surrounding mechanisms such as cross border policing arrangements and extradition warrants may have adverse consequences for children nonetheless.

¹⁴² Directive (EU) 2012/29 of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

¹⁴³ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/01.

¹⁴⁴ *ibid*, Section 2 of the Preamble.

10.1.4 *Impact of Brexit*

As mentioned above, while the principles of the UNCRC are heavily protective of children that come into contact with the criminal justice system, post-Brexit, some of these protections may fall away if they are only enforceable through EU law. In order for the UK and Ireland to ensure that none of these protections of children in the criminal justice system fall away during the transition period, a move towards incorporation into domestic law, as has happened in Wales in the form of the Rights of Children and Young Persons (Wales) Measure 2011, could be an appealing option. This statute imposes a duty on Welsh Ministers to have due regard to the requirements of the UNCRC.

Furthermore, while there is some precedent for non-EU countries reaching agreement with law enforcement agencies such as Eurojust, Europol and the European Arrest Warrants (such as in the case of Norway), the UK government will need to reach some formal agreement with the EU to ensure that the protections of these agencies does not fall away. This is a key point for the relationship between Northern Ireland and Ireland as Ireland will remain a Member State of the EU and so they will seek to rely on the protections of these agencies in situations involving cross border crime.

The Treaty of Lisbon gave prominence to the EU's fight against abuses within the criminal justice systems of Member States.¹⁴⁵ The Treaty gave Member States the option of opting in to various Directives that were aimed at both victims' rights and also the protection of the rights of suspects and defendants. It is worth noting that when given this choice to 'opt in', the UK chose to opt in to directives concerning victims' rights (for example, in relation to rights to interpretation¹⁴⁶ and rights to information¹⁴⁷), but was not as enthusiastic about the directives that advocated the rights of accused persons. The UK did not opt in to the Directive on the right to access a lawyer, as it believed it would have an adverse impact on the UK's ability to investigate and prosecute offences effectively.¹⁴⁸ Those Directives that the EU opted into have since been transposed into domestic law and will need to be carried over post-Brexit. However, as the UK had already chosen not to opt into Directives promoting the rights of suspects and accused persons, the impact of Brexit in this regard may represent very little change from the status quo.

Finally, in relation to human rights, the removal of the EU's Charter of Fundamental Rights is going to have an impact on children's rights within the UK criminal justice system. It is of vital importance that these topics are discussed in Brexit negotiations and solutions found so as to ensure that the protections of the child are not lost

¹⁴⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C/306/01.

¹⁴⁶ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/01.

¹⁴⁷ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/01.

¹⁴⁸ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/01.

when these provisions fall away. When dealing with a child within the criminal justice system, the best interests of the child should be the key consideration.

10.2 Legal Aid and the Criminal Justice System

10.2.1 *Current Position*

Should a minor from either jurisdiction find themselves in police custody in Northern Ireland or Ireland, the EU Directive on the right of access to a lawyer makes provision for access to criminal legal aid in Member States.¹⁴⁹ Currently both jurisdictions have domestic legislation governing access for those subject to arrest or prosecution. In Northern Ireland, access to criminal legal aid is governed by the Legal Aid Advice and Assistance (Northern Ireland) Order 1981. This legislation guarantees legal aid for anyone who finds themselves in police custody and provides guidance for those who are criminally prosecuted in Northern Ireland. Under these provisions, everyone in custody is entitled to legal aid in Northern Ireland; legal aid is not means tested at this stage and there is no contribution requirement. As such any minor in custody in Northern Ireland is entitled to free legal advice in custody. Similarly, there is domestic provision for access to legal aid for those in Garda custody in Ireland. In Ireland, the Garda Station Legal Advice Scheme grants means tested-access to legal aid for those in custody. In practice, most children should qualify for free legal advice under this scheme.

As with custody situations, a minor being prosecuted in either Northern Ireland or Ireland may avail of legal aid under domestic legislation where the relevant criteria are met.¹⁵⁰ In Northern Ireland this is again governed by the Legal Aid Advice and Assistance (Northern Ireland) Order 1981 and will be granted to a minor defendant who is unable to pay for their own defence and where the judge finds that it is in the interests of justice that legal aid be granted. In Ireland this is governed by the Criminal Justice (Legal Aid) Act 1962. If an applicant can satisfy the court that they do not have the means to fund their defence, the court may grant legal aid — this will be applicable in most cases involving minors. The court must also be satisfied that by reason of the 'gravity of the charge' or 'exceptional circumstances', it is essential in the interests of justice that the applicant should have legal aid.

10.2.2 *Impact of Brexit*

Post-Brexit, children in both Northern Ireland and Ireland who find themselves engaged with the justice system should be reassured that domestic legislation and provisions are robust enough to ensure that they are afforded adequate protections in terms of legal aid. Brexit will present little or no change to current legal procedures.

¹⁴⁹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/01.

¹⁵⁰ People in receipt of Social Welfare payments or who are in employment with earnings of less than €20,316 per year (gross) are eligible to receive help under the Scheme.

10.3 PSNI/Garda Relationships

10.3.1 *Current Position*

The PSNI and An Garda Síochána have been working to improve cross-border policing on the island of Ireland for many years. In December 2010, the then Garda Commissioner, Fachtna Murphy and then Chief Constable of PSNI, Matt Baggott issued a joint press release introducing the first Cross Border Policing Strategy. This Strategy is the result of a shared belief that it is 'increasingly important that law enforcement agencies work in partnership to achieve the shared objective of keeping all of our communities safe'.¹⁵¹

Since then there has been an annual Cross Border Policing Crime Conference, which aims to further enhance co-operation between the PSNI and An Garda Síochána.¹⁵² Bodies such as the Joint Agency Task Force have been established to ensure that there is continued cooperation between the PSNI and An Garda Síochána in recognition of the threat posed by serious crime and organised crime across the border.

A report into the Joint Agency Strategic Task Force, published by the Strategic Oversight Group in 2016, emphasised that enforcement agencies are determined not to allow criminals to use the border to their advantage and that the two police forces are committed to working with each other to tackle organised crime on a cross border basis.¹⁵³ This is further reinforced by the Cross Border Policing Strategy 2016, which states that 'cross border cooperation (between both police forces) has never been higher'.¹⁵⁴ The Strategy expands on plans for cross border operations in relation to combating terrorism, sex offenders, crime in border towns, roads and safety and cross border security information sharing.

10.3.2 *Impact of Brexit*

The relationship between the PSNI and An Garda Síochána will undoubtedly be affected by the installation of any form of border between North and South, regardless of what shape or substance such a border might take. There is a concern that any border may make a 'target' of both PSNI and An Garda Síochána officers and that the lack of clarity from politicians is adding to growing concerns that criminals will be able to exploit the border areas

¹⁵¹ 'An Garda Síochána and the Police Service of Northern Ireland, with the support of the Department of Justice and Law Reform and the Department of Justice have published a Cross Border Policing Strategy' [Press Release] 12 December 2010 <<http://www.garda.ie/Controller.aspx?Page=6644&Lang>>.

¹⁵² 'North-South Cooperation – Cross Border Seminar on Organised Crime' [Press Release] 28 September 2016 <<http://www.justice.ie/en/JELR/Pages/PR16000262>>.

¹⁵³ Joint Agency Task Force - Strategic Oversight Group, 'Report January – June 2016' <http://www.justice.ie/en/JELR/Joint_Agency_Task_Force-Strategic_Oversight_Group_Report_January-June_2016.pdf/Files/Joint_Agency_Task_Force-Strategic_Oversight_Group_Report_January-June_2016.pdf>.

¹⁵⁴ Cross Border Policing Strategy 2016 <<http://www.drugsandalcohol.ie/27925/1/cross-border-policing-strategy-2016.pdf>>.

regardless of the co-operation between North and South.¹⁵⁵ This was highlighted recently by Sir Hugh Orde, former Chief Constable of Northern Ireland, in a letter to *The Times*: 'The political consequences of this will play into the hands of those who are still determined to destroy the relative peace that we have enjoyed through close co-operation and effective policing since 1998 and the Good Friday agreement.'¹⁵⁶ Despite active and ongoing co-operation between the two police agencies this cannot be furthered or enhanced until such times as a decision is made in relation to the border.

It is also worth noting that the PSNI will find itself in a new position when it comes to relationships with the police forces of the remaining Member States. They will no longer find themselves members of European policing agencies such as Europol and Eurojust. This relationship will be further examined in the next section of this paper on European Arrest Warrants.

10.4 Children and the European Arrest Warrant (EAW)

10.4.1 Current Position

The European Arrest Warrant is an arrest warrant valid throughout all Member States of the European Union. The purpose of the EAW is to ensure that a person, who has committed a serious crime in an EU country but who lives in another, can be returned to the first country with little administrative burden. The EAW is enacted by Council Framework Decision of 13 June 2002.¹⁵⁷ In the UK and Northern Ireland, this is given effect by virtue of the Extradition Act 2003. Once the EAW is applied for and granted by the courts in the first Member State (the issuing state), this requires the police in another Member State to arrest and facilitate the transfer of a criminal suspect or convicted person to the issuing state so that the person may be put on trial or required to complete a period of detention.

10.4.2 Impact of Brexit

The introduction of the EAW was a means of standardising the extradition process between Member States. Brexit will certainly create extradition difficulties for the UK in its relations with other Member States, but it will be particularly problematic for Northern Ireland and Ireland due to the land border between the two jurisdictions and the opportunities for evading justice that this may represent post-Brexit. Before the enactment of the EAW, people were extradited between Ireland and the UK and Northern Ireland by way of a bi-lateral treaty, which often led to lengthy and protracted extradition applications before the courts.

¹⁵⁵ Michelle Hennessy, 'Concern gardai will become targets for terrorists at post-Brexit border post' *The Journal* (Dublin, 30 April 2017) <<http://www.thejournal.ie/garda-brexit-3363700-Apr2017/>>.

¹⁵⁶ Hugh Orde, 'Letters to the Editor', *The Times* (London, 29 November 2017).

¹⁵⁷ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/01.

A child caught up in a criminal justice matter involving Ireland and Northern Ireland post-Brexit could find the extradition process increasingly complicated. This could create a massive disparity between children on either side of the border — for example, a child victim in Ireland may benefit from the EAW procedure where a perpetrator is being pursued, but a child in Northern Ireland post-Brexit will not have the same resources.

While the Extradition Act 2003 will still apply to Northern Ireland post-Brexit, the relationships between the UK and EU Member States will have changed, which may cause difficulties in terms of enforcement and recognition. The creation of future extradition agreements with Northern Ireland may be especially problematic, as Justice and Security are devolved matters in Northern Ireland, but there is currently no Assembly sitting in Stormont.

11 CONCLUSION

Given the current level of uncertainty surrounding Brexit and any eventual post-Brexit arrangements, it is impossible to be precise about the implications of Brexit for the legal position, and hence the legal rights, of children across the island of Ireland. Following Brexit, the situation on the island of Ireland will be particularly complex: those in Ireland will remain in the EU, while those in Northern Ireland will no longer be in the EU, but some of those in Northern Ireland (those born in Northern Ireland and opting to hold Irish citizenship) will still have EU citizenship and the rights associated with it.

Despite the difficulty in trying to establish precisely the implications, it is important to map them out in so far as is possible. This paper has done so by setting the scene in the opening chapter and then considering topics such as the Good Friday/Belfast Agreement and the Common Travel Area, as well as specific issues including citizenship and movement, child abduction, the movement of families, education and health, the interaction between children and the criminal justice system, Gardaí/PSNI relationships, and child protection measures. It is to be understood that this paper is naturally selective and non-exhaustive given the enormity of the topic.

It is clear that many of the EU legal rights which children possess derive from: (a) the child being a citizen of an EU Member State and hence being an EU Citizen and/or (b) the child being part of a family or household where one or more of the members of the household (e.g. a mother/father) is a person enjoying an EU right (e.g. as a worker enjoying the free movement of persons rights under EU law). It is also clear that some children may lose EU rights because they are: (a) no longer a citizen of an EU Member State and hence no longer an EU citizen and/or (b) no longer part of a family or household where one or more of the members of the household is a person enjoying an EU right.

If someone is seeking to ensure the retention of EU law rights and/or the acquisition of equivalent rights under UK law, then it would be useful to argue that such rights should be enshrined in any post-Brexit agreement between the EU and the UK. It is a matter for negotiation, but it would seem prudent to ensure that there is broad, general and sweeping language in any such arrangement in order to cover future situations, including how such rights might evolve over time. It may be possible for bilateral agreements to be concluded between the UK and Ireland to address certain issues and preserve certain rights, but the latter State would be constrained by virtue of its obligations under EU law in certain respects.

Hence, as a matter of law and without taking a position on the outcome of the political process, if the rights of children are to be protected then there could be various options: (a) if they are to be protected under EU law then it would be important that such rights are protected as part of a legally binding agreement between the EU and the UK post-Brexit (recognising that the judicial adjudication of such rights could be a difficult issue on which to achieve agreement); (b) if they are to be protected under UK law then there could also be protection under UK law by the enactment of UK legislation on the issue in so far as existing UK law does not provide such legal protection; (c) a combination of EU and UK law; or (d) some combination also involving Irish legal rights.

At the time of writing —1 December 2017 — Phase One of the Brexit Negotiations is still ongoing and issues of great sensitivity concerning the Northern Ireland/Ireland border and the rights of citizens remain to be resolved. While this paper is naturally selective and non-exhaustive given the enormity of the topic and the uncertainty of the outcome, it is hoped that it will assist in the discussion of this important topic.

APPENDIX

A. Section 2(1) of the UK's Ireland Act 1949

Republic of Ireland not a foreign country

(1) It is hereby declared that, notwithstanding that Ireland is not part of His Majesty's dominions, Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom or in any colony, protectorate or United Kingdom trust territory, whether by virtue of a rule of law or of an Act of Parliament or any other enactment or instrument whatsoever, whether passed or made before or after the passing of this Act, and references in any Act of Parliament, other enactment or instrument whatsoever, whether passed or made before or after the passing of this Act, to foreigners, aliens, foreign countries, and foreign or foreign-built ships or aircraft shall be construed accordingly.

B. Protocol 20 of the Treaty on the Functioning of the European Union (TFEU)

ON THE APPLICATION OF CERTAIN ASPECTS OF ARTICLE 26 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO THE UNITED KINGDOM AND TO IRELAND

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the existence for many years of special travel arrangements between the United Kingdom and Ireland,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union:

Article 1

The United Kingdom shall be entitled, notwithstanding Articles 26 and 77 of the Treaty on the Functioning of the European Union, any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the Union or by the Union and its Member

States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:

(a) of verifying the right to enter the United Kingdom of citizens of Member States and of their dependants exercising rights conferred by Union law, as well as citizens of other States on whom such rights have been conferred by an agreement by which the United Kingdom is bound; and

(b) of determining whether or not to grant other persons permission to enter the United Kingdom.

Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible.

Article 2

The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories ("the Common Travel Area"), while fully respecting the rights of persons referred to in Article 1, first paragraph, point (a) of this Protocol. Accordingly, as long as they maintain such arrangements, the provisions of Article 1 of this Protocol shall apply to Ireland under the same terms and conditions as for the United Kingdom. Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union, in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them, shall affect any such arrangements.

Article 3

The other Member States shall be entitled to exercise at their frontiers or at any point of entry into their territory such controls on persons seeking to enter their territory from the United Kingdom or any territories whose external relations are under its responsibility for the same purposes stated in Article 1 of this Protocol, or from Ireland as long as the provisions of Article 1 of this Protocol apply to Ireland.

Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the other Member States to adopt or exercise any such controls.

C. Article 26 of the TFEU

Article 26

(ex Article 14 TEC)

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

D. Article 77 of the TFEU

Article 77

(ex Article 62 TEC)

1. The Union shall develop a policy with a view to:
 - (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
 - (b) carrying out checks on persons and efficient monitoring of the crossing of external borders;
 - (c) the gradual introduction of an integrated management system for external borders.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

- (a) the common policy on visas and other short-stay residence permits;
- (b) the checks to which persons crossing external borders are subject;
- (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
- (d) any measure necessary for the gradual establishment of an integrated management system for external borders;
- (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

E. Section 14 of the Student Support Act 2011

Student — interpretation

14.— (1) In this Act “student” means a person who is ordinarily resident in the State, who has been accepted to pursue, or is pursuing, an approved course at an approved institution and is—

(a) a national of—

(i) a Member State,

(ii) a state which is a contracting state to the EEA Agreement,

(iii) the Swiss Confederation,

(b) a refugee or other person entitled for the time being to the rights and privileges specified in section 3 of the Refugee Act 1996,

(c) a person, pursuant to the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006)—

(i) who the Minister for Justice and Law Reform has determined is eligible for the time being for subsidiary protection pursuant to Regulation 4 of those Regulations, or

(ii) to whom the Minister for Justice and Law Reform has granted permission for the time being in writing to enter and reside in the State pursuant to Regulation 16 of those Regulations,

(d) a person who, in relation to a person referred to in *paragraph (a)*, is a family member prescribed, subject to *subsection (2)* for the purposes of this paragraph, or

(e) a person, other than a person to whom *paragraph (a)* , *(b)*, *(c)* or *(d)* refers, who—

(i) has been granted permission to reside within the State by the Minister for Justice and Law Reform pursuant to such laws as are for the time being in force, and

(ii) is of a class of persons prescribed by the Minister, subject to *subsection (3)* and with the consent of the Minister for Finance, for the purposes of this subparagraph.

(2) Where the Minister is prescribing a class of persons as a family member for the purposes of *subsection (1)(d)*, he or she shall have regard to all or any of the following matters:

(a) the relationship that the family member has to the person referred to in *subsection (1)(a)*;

(b) whether the family member depends on the person referred to in *subsection (1)(a)*;

(c) whether the family member has a right of residence in the State by virtue of being the spouse, civil partner, cohabitant or, a child of a person referred to in *subsection (1)(a)*.

(3) Where the Minister is prescribing a class of persons for the purposes of *subsection (1)(e)(ii)* he or she shall have regard to all or any of the following matters:

(a) the period for which they have been ordinarily resident in the State;

(b) the basis on which they were granted permission to reside within the State;

(c) the conditions pursuant to which they were granted permission to reside within the State;

(d) the degree of connection that they are likely to have to the State;

(e) their entitlement to benefits or services provided by a Minister of the Government, a local authority, the Health Service Executive or the holder of any office or a body established—

(i) by or under any enactment (other than the Companies Acts), or

(ii) under the Companies Acts in pursuance of powers conferred by or under any other enactment, and financed wholly or partly by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government or a subsidiary of any such body;

(f) whether they have access to education in their state of origin;

(g) resources available for the provision of student support.

(4) For the purposes of *subsection (1)*, a person shall be ordinarily resident in the State if the person—

(a) has been resident in the State for at least 3 years out of the period of 5 years ending on the day before the relevant date, or

(b) if not resident as described in *paragraph (a)*—

(i) is temporarily resident outside of the State by reason of pursuing a course of study or post-graduate research at an educational institution outside of the State but within a Member State leading to a qualification that is recognised in accordance with the laws of the Member State

concerned for the recognition of qualifications that correspond to the arrangements, procedures and systems referred to in *section 8(2)(k)(i)* , or if such recognition is not provided by those laws in that manner then otherwise in accordance with the laws of that Member State, and

(ii) was resident in the State for at least 3 years out of the period of 5 years ending on the day before he or she commenced such course of study or post-graduate research.

(5) For the purposes of *subsection (4)*, in the determination by an awarding authority of a question relating to whether a person mentioned in *subsection (6)* is ordinarily resident in the State, the person shall not be entitled to derive any benefit from a period of unlawful presence in the State.

(6) The determination of the question referred to in *subsection (5)* shall not relate to a person who is either—

(a) an Irish citizen, or

(b) a person who has established a right to enter and be present in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997).

(7) In this Act, “tuition student” means a student who may receive a grant in respect of tuition fees, is ordinarily resident in one of the states referred to in *subsection (1)(a)*, has been accepted to pursue and is pursuing an approved course (other than a course known for the time being as a post leaving certificate course) of higher education at an approved institution in the State and to whom *paragraph (a), (b), (c), (d) or (e) of subsection (1)* applies.

(8) For the purposes of *subsection (7)*, a tuition student shall be ordinarily resident in one of the states referred to in *subsection (1)(a)* if the student was resident in any of the states for a period of not less than 3 years out of the period of 5 years ending on the day before the relevant date.

(9) In this section, in relation to an approved course in respect of which a person referred to in *subsection (4)* or a tuition student may apply for a grant, “relevant date” means the date on which a year of study commences on the approved course.

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