

FREE MOVEMENT BETWEEN
IRELAND AND THE UK: FROM
THE "COMMON TRAVEL AREA"
TO THE COMMON TRAVEL AREA

Elizabeth Meehan

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For Ronan Fanning

Executive summary

1 The Blue Paper

This *Blue Paper* is about Ireland's choice to preserve the long-standing Common Travel Area (CTA) between it and the UK by securing the same exemptions as the British from provisions in the Amsterdam Treaty intended to accomplish the lifting of controls on internal borders within the European Union (EU) as a whole.

2 Strategic aspects of this choice

a *Northern Ireland*. Though Northern policy was not a primary factor in the development of Ireland's negotiating position at Amsterdam, to have agreed to lift controls on EU routes, while the British retained them, may have had a paradoxical result; the imposition of border formalities between north and south at the very time when both governments and Northern Irish politicians have agreed to minimize the effects of there being two jurisdictions on the one island.

b The resilience of Ireland's independence in terms of its historical relationship with the UK and its use of the EC/EU as a means of escaping from that relationship. On the one hand, the CTA, itself, is sometimes taken to be symptomatic of a neo-colonial link between the two islands in that Ireland's freedom of manoeuvre over Amsterdam was conditioned by the UK's stance. Moreover, it is said, Ireland's interest in taking account of the British position may have induced a double dependency – on future British decisions about the CTA and on the goodwill of its European partners in not vetoing any desire to take part in related free movement developments short of the abolition of controls at internal borders. On the other hand, the public position is that Ireland succeeded in negotiating for itself the most reasonable of all possible worlds: freedom to continue to benefit from the CTA; freedom to opt-in to related measures when indicated by the national interest; clear statements of the distinctiveness of the Irish position from that of the British; and a unique method whereby Ireland may put an end to its opt-outs.

3 Academic interest of the research

Though the CTA achieved international recognition in the Amsterdam Treaty and, as a result, is now frequently mentioned, almost nothing has been published on its seventy-five years of history, interrupted only between 1939-40 and 1952. Most references are misleading in their stress on its lack of foundation in law or agreement and in their greater emphasis on freedom for individuals of the two states than on immigration controls on others. The National Archives provide a useful corrective, especially the records of the Department of the Taoiseach.

4 Research findings

- a The CTA is not a mark of neo-colonial dependency – though it can be understood how it is sometimes seen as such.
- b The agreements about the CTA, while presented to the public as informal, involved politics and diplomacy at the highest levels – as well as routine and mutually beneficial co-operation at the operational level.
- c The CTA has served the strategic interests of government and the individual interests of citizens well, the Irish agenda having been pursued successfully in periods of stability and in the context of change in the UK.
- d Since the CTA was, and is, as valuable to Ireland as to the UK, the public position on preserving it, but with distinctiveness and flexibility, is right.
- e Nevertheless, the interests so well served by the bi-lateral arrangements may change and it is necessary to keep under review conditions which might occasion a re-consideration of priorities. These include changes in the patterns of movement and trade, labour market needs and conditions, the future of Northern Ireland and shifting British outlooks on frontier controls.
- f The conclusion is that conditions are propitious for Ireland to persuade the UK that it is in both states' interests to fuse the CTA with the EU common travel area – which would have the effect of restoring a symbiosis in Ireland's northern policy and its European policy.

5 Presentation of the research

Chapter 1 sets out the problem and how it is tackled. This is supplemented by Appendix 2 on the 'communitarization' of the

Schengen Agreement, which gave rise to Ireland's dilemma.

Chapter 2 provides a brief background on those aspects of the history of Irish-British relations which provide the basis for suspicion that the CTA is symptomatic of dependency.

Chapter 3 (on co-ordinated immigration procedures) and chapter 4 (on reciprocal rights and social policy co-operation) show that, contrary to this possible suspicion, Irish policy-makers considered the CTA to be in Ireland's real interests, autonomously defined. The chapters also show how they 'squared the circle' between the pursuit of interests and vulnerability to charges of neo-colonialism. This is augmented by Appendix 1 on a watershed in UK immigration policy in 1961-62, during which apparent indifference in Ireland to British problems coexisted with political and diplomatic co-operation – a lesson on not accepting public pronouncements at their face value.

Chapter 5 indicates the scale of pragmatic or individual interests which Irish governments sought to protect through the CTA. It then considers conditions under which Ireland might change its policy priorities, beginning, however, with the possibility that this might never happen because of senses of 'island exceptionalism' on the part of both states. In turning to shifts in interests which, hence, may no longer require the protection of the bi-lateral system, the chapter deals with trends in travel, trade, labour markets and asylum-seeking.

The strategic question is raised of whether the reunification of Ireland would make it possible for Ireland to make a unilateral decision to prioritize free movement in the EU over free movement between the islands. While the elimination of an open north-south border between different jurisdictions would remove one of the underlying reasons for the CTA, it is not clear that it would become redundant. Though they could be met in ways other than free movement, some consequences of the Belfast Agreement would be difficult to ignore. And it is likely that there would be a continuing interest on the part of residents of the south in control-free travel between east and west. In the meantime, in the context of the island as currently constituted, the shifting trends just mentioned would have to be very strong to justify breaking the bi-lateral arrangements.

In considering the possibility of a British interest in ending

the CTA, the paper suggests that the UK would do so only in the context of a new orientation towards the EU, and, hence, of an alternative to the CTA. Such a shift may come sooner than previously had been expected – indeed, before the advent of a reunited Ireland. The history of co-operation outlined in the preceding chapters means that consideration of what to do about the two free movement systems would not take place without close consultation – between states which are now indubitably equal partners. The paper concludes that conditions are propitious for Ireland to take a lead in encouraging the UK to consider such a reorientation.

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Fellow academics whose generosity, with their own ideas and/or willingness to comment on my drafts, transcended the call of duty are Alan Barrett, Bob Benewick, Jennifer Brown, Ronan Fanning, Yvonne Galligan, John Jackson, and Eunan O'Halpin.

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Though I owe so much to all, I remain responsible for my own mistakes and the blame for any errors or misconceptions in what follows must be laid at my door.

Elizabeth Meehan

Foreword

I welcome this Study by Elizabeth Meehan entitled *Free Movement between Ireland and the UK: from the "common travel area" to The Common Travel Area* and I am pleased that my Department was able to fund it as well as assisting in other ways.

The study is a scholarly analysis of the Common Travel Area, reviewing its history and setting out various scenarios for the future. It will stimulate reflection on both sides of the Irish Sea and, indeed, will be welcomed by all who take an interest in British-Irish relations.

The British-Irish Intergovernmental Conference, established under the Good Friday Agreement, agreed at its inaugural Summit Meeting on 17 December last that asylum and immigration including Common Travel Area issues would be part of its programme of work. This publication is particularly timely in this context and, indeed, in the light of the overall development which is taking place in relations between the two jurisdictions.

Tim Dalton
Secretary General
Department of Justice, Equality and Law Reform

The research problem: free movement in the European Union *v* the Common Travel Area

This chapter sets out the problem that inspired the research for the *Blue Paper*, its objectives and an outline of how the findings are presented. It also provides notes on sources and notes on terminology that are necessary to a proper understanding of the text.

1.1 The research problem

Since the foundation of Sáorstát Éireann, except between 1939-40 and 1952, Irish and British nationals have been able to travel between the two islands without being required regularly to show identification at ports of exit and entry. As in newer European Community (EC) or European Union (EU) developments, this freedom for individuals is 'flanked' by co-ordinated immigration policies and police co-operation to prevent unlawful activity and unlawful cross-border movement by non-nationals of either country.

This does not mean that immigration policies in the two states are the same (or, in EU terminology, 'harmonized'). For example, the 1952 CTA agreement permits each state to have specific asylum policies and rules about deportation differ, the protection of the family unit being a constitutional requirement in Ireland but not in the UK. Before the Second World War there was a common list of countries whose nationals would require visas but after 1952 this was dealt with through co-ordination. What the system does mean is that the two states co-operate to ensure that their respective procedures prevent persons from being allowed to land at a first port of entry if they would not be allowed to enter the other state and if they are suspected of likely to exploit the CTA in order to do so illegally. Previously referred to in policy documents in inverted commas as the "common travel area", these bi-lateral arrangements became internationally acknowledged as the Common Travel Area (CTA) in the Treaty of Amsterdam, agreed upon on 18 June, 1997.

One of the aims of that Treaty is to make further progress on the lifting of controls on persons crossing the internal borders of member

states of the EC/EU. Though the underlying principles of the CTA and European developments are similar, Ireland and the United Kingdom (UK) sought exemptions from the latter in order to maintain passport-free travel between the two islands, in the context of an unwillingness on the part of the UK to abolish controls on EU routes. Both states have indicated, however, their intention to opt-in to elements of European flanking measures. The first important British statement to that effect was that of the Home Secretary, Jack Straw, on 12 March, 1999 which indicated that, in principle, the UK might participate in the whole of the incorporated Schengen *acquis* (see Appendix 2) except for the abolition of controls on persons at ports of entry and anything that put the maintenance of such controls at risk. The immediate import of the statement related to the use of the Schengen Information System (SIS) for the purpose of tackling cross-border crime, the handling of extradition warrants and the harmonization of the treatment of asylum-seekers.¹

The CTA and EC/EU developments are similar, not only in the removal of impediments to internal movement, safeguarded by co-ordinated measures on entry from outside. The removal of impediments coexists with positive measures which make movement easier or more attractive. The two systems differ in the order in which negative and positive freedoms came on stream. Nevertheless, taking the systems as whole, the CTA is a precursor to EC arrangements for common rights in that the absence of border controls is accompanied by reciprocal rights – once asymmetrical but less so now – which facilitate movement. Both cases are also characterized by social and cultural interaction, in the one case as a result of ties of history, kinship and a ‘natural’ common labour market, in the other promoted by ‘soft law’ designed to make the labour market more common.

The Amsterdam Treaty strengthened aspirations in the Treaty of Rome to be an area of free movement by requiring the Council to bring about the removal of identity controls on internal borders – on a Community-wide basis and not confined to those member states which, with two non-member states, participated in similar arrangements stemming from the Schengen Agreement (see Appendix 2). It introduced a Treaty basis in the ‘first pillar’ (or common or Community pillar; hence, ‘communitarization’) for the development of flanking measures to counteract potential risks in

¹*Irish Times*, 3.3.99, *Irish Times*, 5.3.99, *Irish Times*, 13.3.99, *The Times*, 13.3.99.

lifting controls at internal borders; that is, a legal foundation for the development of common controls on external frontiers and police co-operation. Previously, these had been dealt with under the intergovernmental, 'third pillar' of the Maastricht Treaty (on Justice and Home Affairs) and, outside both EC and EU structures, under the auspices of the Schengen Agreement.

At the time of writing, meeting the deadline for allocating different parts of the Schengen *acquis* to the first and third pillars has been thwarted and they all, for the time being, fall into the third pillar. Future outcomes are, at present, very uncertain. In the context of the original intentions, both the Irish and British governments, as noted, sought and secured Protocols enabling them to both opt-out (*Protocol on the Application of Certain Aspects of Article 7A of the Treaty establishing the European Community to Ireland and the United Kingdom*) and opt-in (*Protocol on the position of the United Kingdom and Ireland*). A last minute amendment to the Amsterdam Treaty means that intentions to opt-in to the transferred *acquis* depend on the consent of other states, a condition in which Ireland's interests may be affected by a matter that is otherwise irrelevant to it – the dispute between Spain and the UK over Gibraltar which might occasion a Spanish veto. Unanimity is not required on matters which are initiated on the basis of new Treaty provisions, as opposed to transferred Schengen matters.

Though the two states had a common practical interest in securing similar treatment, their positions were different. When the Treaty was first being drafted, the UK was governed by the Conservative Party. But it was moving into 'election mode' and officials were hampered by ministerial inattention. A new Labour government was elected in the final stages of negotiation. The outgoing government had been absolutely opposed to the lifting of border controls and British officials told their Irish counterparts that no difference was to be expected in the event of a different party in government.² The new government did want, however, to play a more central role in European affairs and, instead of opposing the communitarization of free movement measures, accepted the desire

²Noel Dorr, 1998, 'The Communitarisation of Schengen and the Position of Ireland', paper presented at Conference of the Irish European Law Forum, Dublin, 5.9.98; and interview with author. Bobby McDonagh, 1998, *Original Sin in a Brave New World: An Account of the Negotiation of the Treaty of Amsterdam*. Dublin: Institute of European Affairs.

of other states to do so provided that the UK could be exempted.³ With one government having lost momentum and the other thrown into the final stages (and still the object of resentment amongst other member states), the lead was there for Ireland to take.

Ireland's position was based on the centrality of the EC/EU to its interests.⁴ Given that it was possible that Ireland might be unable to co-operate fully over foreign and security issues, the significance of the EU meant that it was important to Irish policy-makers and negotiators to opt-out as little as possible in other areas. At the same time, the maintenance of the CTA, infeasible in the context of different Irish and British positions on border controls, was considered important. Ireland's negotiators succeeded in ensuring that the general outlooks of the two states are distinguishable in the Treaty. A Declaration by the Irish government stresses that its position stems solely from a desire to maintain the CTA and states its intention to participate in the new Treaty provisions to the maximum extent compatible with the CTA. One Protocol stresses the UK's exemption, referring to Ireland only in connection with the preservation of the CTA. The Protocol on methods of opting-in to specific measures, with the consent of other states, includes a unique method whereby Ireland, should its priorities change, may opt-in to all that from which it has opted-out. Article 8 allows Ireland simply to notify the President of the Council in writing that it no longer wishes to be covered by the Protocol and, instead, that the normal Treaty provisions be applied to Ireland.

Ireland's choice to give priority to the CTA over full-scale participation in the free movement provisions of the Treaty of Amsterdam is of interest in two strategic contexts. First, there is Northern Ireland. While Ireland's European policy and Ireland's Northern policy are usually mutually beneficial, in this policy area, there is a tension. Though Northern policy was not a primary factor in the development of Ireland's position at Amsterdam, to have maintained its pro-EC/EU stance to the extent of accepting fully the new provisions in the context of British resistance to them may have had a paradoxical result. This would have been the imposition of border formalities between north and south at the very time when both governments and Northern Irish politicians have agreed to minimize the effects

³Select Committee on the European Communities. *Evidence by the Minister of State, Home Office, on the UK Presidency Work Programme on Justice and Home Affairs*. House of Lords, Session 1997-98, 12th Report. London: The Stationery Office.

⁴Dorr, *op. cit.*, McDonagh, *op. cit.*

of there being two jurisdictions on the one island.

This leads into the second strategic context; the resilience of Ireland's independence, both in terms of its historical relationship with the UK and its use of the EC/EU as a means of escaping from that relationship. On the one hand, the CTA, itself, is sometimes taken to be symptomatic of a neo-colonial link between the two islands, revealed as still there – despite Ireland's success in the EC/EU – in that Ireland's freedom of manoeuvre over Amsterdam was conditioned by the UK's stance. Moreover, questions have been raised about the possibility that Ireland's interest in taking account of the British position may have induced a double dependency – on future British decisions about the CTA and on the goodwill of its European partners in not vetoing any desire to take part in some free movement developments.⁵ On the other hand, the public position is that Ireland succeeded in negotiating for itself the most reasonable of all possible worlds: freedom to continue to benefit from the CTA; freedom to opt-in when indicated by the national interest; clear statements of the distinctiveness of the Irish position from that of the British; and the unique method whereby Ireland may put an end to its opt-outs.⁶

1.2 Objectives of the Blue Paper and summary of conclusions

The objectives of the *Blue Paper* are to examine the strength of the public position in the face of suspicions of dependency. This entails an exploration of history of the CTA, of which no account has, so far, been published and reflection upon the circumstances which might give rise to a change of policy.

The findings of this research lead to the following conclusions. The CTA is not, and never was, a mark of neo-colonial dependency – though it can be understood how it is sometimes seen as such. Ireland successfully pursued its own interests throughout the history of the CTA. Since the CTA was, and is, as valuable to Irish governments as to the British, the public position on preserving it, but with

⁵Barrett argues that Ireland had little choice other than to join the UK in opting-out to avoid losing the CTA; Gavin Barrett, 1997, 'Justice and Home Affairs Cooperation. An Overview', in Ben Tonra (ed.), 1997, *Amsterdam. What the Treaty Means*. Dublin: Institute of European Affairs, 119-132, pp. 121-2. On the double dependency, see Jennifer Brown, 1998, *Ireland and the Development of European Co-operation in Justice and Home Affairs*, Master's Thesis, Department of European Political and Administrative Studies, College of Europe, Bruges, p. 48.

⁶Brown, *ibid*, p. 5. Dorr, *op. cit.* McDonagh, *op. cit.* and interview with author. Implied in *Treaty of Amsterdam White Paper*, 1998, Pn 4931, Dublin: Stationery Office, chapters 5 to 10, esp. pp. 48-9 and 50-1 on the 'feasibility' of retaining the CTA and its value.

distinctiveness and flexibility, must be right. The value of the bilateral arrangement is, however, instrumental rather than intrinsic and this raises the question of what conditions might occasion a reconsideration of priorities and when the unique method just referred to would shift from being a presentational diplomatic *coup* and become a serious instrument for a new policy direction. Such scenarios include pragmatic interests and strategic questions. The former include shifts in patterns of movement of people and goods and changing labour markets in both states. Under both headings are Ireland's immigration interests and, under the latter, the future of Northern Ireland and developments in the UK's outlook on the EU. The conclusion is that conditions are propitious for Ireland to persuade the UK that it is in both states' interests to fuse the CTA with the EU common travel area – which would have the effect of restoring a symbiosis in Ireland's northern and European policies. These findings are outlined in the last chapter. Before that, the research is presented as follows.

Chapter 1 (supplemented by Appendix 2 on Schengen) continues with notes on sources and terminology. Chapter 2 provides a brief background on aspects of the history of relations between Ireland and the UK, in particular those relating to the Commonwealth and definitions of nationality which provide the basis for suspicion that the CTA is, indeed, symptomatic of a neo-colonial relationship. That, despite this, policy-makers consider the CTA to be in Ireland's real interests is evident in chapters 3 and 4 on the flanking measures, upon which free movement depends, and reciprocity, which reduces disincentives to movement. These chapters (and Appendix 1 on the politics of change in 1961-62) also show how Irish policy-makers 'squared the circle' between the pursuit of their conception of interests and vulnerability to charges that they may be perpetuating neo-colonialism. Chapter 5 opens by indicating the scale of pragmatic and individual interests which Irish governments sought to protect through the CTA – and then considers the conditions, referred to above, under which Ireland might change its priorities. This chapter suggests that the UK may adopt a new orientation to lifting EU controls more readily than had been expected by the Irish government – or by anyone else. It concludes that any reconsideration of the two systems of freedom of movement would not take place without consultation between the two states which now enjoy a patently equal relationship. In this context and in the light of recommendations by the House of Lords Select Committee on the

European Communities, there is scope for Ireland to initiate discussion of a fusion of the two common travel areas.

1.3 Notes on sources

There is a good deal of secondary literature about the EU, including the Amsterdam Treaty. As a result of the acknowledgement of the CTA in that Treaty, the former is now mentioned more than it was in the past. But very little of substance has been written about it. An important exception is a paper by Diarmaid McGuinness⁷ which, unfortunately, is unpublished. Most published references to the CTA stress its lack of legal foundation in law or agreement. And they tend to note the freedom for travellers with less attention to the flanking measures.

A trawl of the National Archives is a useful corrective, especially those of the Department of the Taoiseach which include memoranda and notes from all other departments with an interest in the CTA. Consultation of the records of that Department was supplemented by examination of those of the Department of Foreign Affairs, including some restricted files in the London Embassy Series. This was enriched by the sharing of information by others who had reflected upon the same or related records for other purposes – the aforementioned Diarmaid McGuinness and Jennifer Brown, Noel Dorr, John Jackson, and Eunan O’Halpin. Difficulties inherent in the thirty-year rule in the National Archives Act in respect of material after 1969 (except for some of the restricted files which took the story into the early 1970s), and the retention of some older files, were partly overcome through a variety of means. There are some published or informally circulated policy documents. The research also benefited from interviews and conversations with officials in the Department of Foreign Affairs and the Department of Justice, Equality and Law Reform. The latter Department also provided a lengthy summary of material in post-1969 files and in unreleased, older files. Written communications were also received from the British Home Office and, on the Nordic Passport Union, from the Nordic Institute in Finland. Consideration of scenarios for a re-ordering of Ireland’s policy priorities was greatly assisted by two seminar discussions, involving policy-makers as well as academics, in Dublin and London and by the comments of one anonymous referee.

⁷Diarmaid McGuinness, 1998, ‘Has the Common Travel Area a Future?’. Unpublished paper. Dublin: Law Library.

The documents show that, although discreet and sometimes described as informal, the provisions of the CTA are explicitly agreed at the political as well as administrative levels, discussed in Imperial and Commonwealth Conferences and based on bi-lateral 'undertakings' – even though sometimes these are described more blandly as 'understandings'.⁸ The CTA has a legitimacy in law, it having been ruled in Ireland that there is a public policy interest, strong enough to meet EU standards, in ensuring that it is not jeopardized by 'an accumulation of "backdoor entries"'.⁹ The archives and supplementary interviews show that the whole history of the scheme is characterized by valued administrative co-operation and mutual assistance in intelligence and training.¹⁰

1.4 Notes on terminology

First, the opening section referred to both the EC and EU. This was necessary to emphasize the distinction between common or Community policies of the first pillar which are developed, agreed, implemented and monitored through EC institutions, on the one hand, and, on the other, those reached by intergovernmental agreement under the third pillar and, with limited exceptions, not subject to regulation and review by EC institutions. Since the term EU has become used commonly to denote the whole integration project, the paper now uses EU alone except where it is essential to the meaning to specify the EC, or when quoting from documents of the period when both EC and EU were preceded by European Economic Community (EEC).

Secondly, it should be noted that in official language and common

⁸In 1950 it was noted that:

The two islands were treated as one unit for immigration control. We undertook not to admit here any alien "blacklisted" by the British and the British undertook to exclude aliens "blacklisted" by us. (emphasis added)

Department of Justice, *Memorandum for the Government: American Citizens – Proposal to Exempt from Restrictions of Alien Order, 1946*, 3 July, 1950, D/T S11512B. Documents relating to the proposal in 1952 to resurrect the arrangement use the word 'understanding'. Department of Justice, File Note, *Immigration Control – Cooperation with the British*, 15 February, 1952, D/T S15273A; *Immigration Control – Proposed Arrangement for Co-operation between the British Home Office and the Department of Justice*, 27 February, 1952, D/T S15273A.

⁹McGuinness, *op. cit.*, pp. 12-13 and 20-21 on Justice Geoghegan in *Kweder v The Minister for Justice* [1076] 1 IR 381. McGuinness argues that this ruling is sufficient to rebut all previous scrutiny by jurists.

¹⁰Communication to the author from the Department of Justice, Equality and Law Reform, February 1999.

speech nationality and citizenship are often used as though they were synonyms. Until 1962, the Irish archives are no exception.¹¹ In the literature on citizenship, however, it is argued that the ideological overlap between the terms stems from historical contingency and that they are conceptually separable. In other words, nationality is a form of legal identity, from which no rights need follow though obligations might – as implied in the British conflation of ‘nationality’ and ‘subjecthood’ and in the position of women until the twentieth century. Conversely, citizenship is a status with obligations but which entitles a person to participate in politics and civil society – regardless, sometimes, of nationality. In what follows, it has been necessary to use words as they appear in official documents. Where necessary to the meaning of what seems to be intended, the conceptual distinction is alluded to.

Thirdly, there are ‘borders’ and ‘frontiers’. EU definitions mean that borders are internal to the EU and frontiers are external in the same way that ‘the outer perimeter’ is in the CTA. Thus, internal borders are common land borders, airports for internal flights within the zone of freedom, and seaports for regular trans-shipment from other ports in the zone but not those outside. External frontiers are land borders with non-EU states, sea borders, and airports and seaports that are not internal.¹² So far as possible, this convention will be followed, though some exceptions will be necessary.

Lastly, there are ‘checks’ and ‘controls’. According to the House of Lords Select Committee on the European Communities,¹³ current usage is that ‘controls are systematic, and require every individual who enters a country to pass through an immigration control channel’. Conversely, ‘checks are intermittent, and are used mainly for customs and policing purposes’. Again, subject to the constraint of quoting accurately, this convention will be followed.

¹¹Except on two occasions. One was ironic in view of the asymmetry until 1985 of political participation rights. This was a filed press clipping which, in commenting on the British Nationality Act of 1948, observed that the British had a long way to go in thinking about what citizenship means. The other was official and occurred in a briefing paper for the inter-departmental committee on Legal Issues of the EEC; Memorandum of Representatives of Department of Justice, *Article 7 of Treaty of Rome*, June, 1962, DFA CM/15II.

¹²Jennifer Brown, *op. cit.*, pp. 18-19. But see also House of Lords Select Committee on the European Communities on using ‘frontier’ in the British context, 7th Report, Session 1998-99, 2 March, 1999. London: House of Lords Publications on the internet, <http://www.parliament.the-stationery-office.co.uk/pa/ld/lldhome.htm>, para. 12.

¹³*ibid.*, para. 11.

The political context of the CTA: the Commonwealth and Irish-British relations

The initiation and development of a control-free travel area and reciprocal positive rights took place in the context of difficult relations between Ireland and the UK, especially between 1922 and 1949. The archives reveal a determination by Irish governments to meet two objectives that, on the face of it, were not readily compatible. These were: movement towards Ireland's unambiguous separation from Great Britain and the Commonwealth and, at the same time, the maintenance of individual freedoms for Irish nationals *vis à vis* the UK and Commonwealth. Irish governments were remarkably successful in realizing this uncomfortable pair of objectives, though the political background to their success is also the root of their susceptibility to the charge of perpetuating neo-colonialism. The difficult relations involved high politics and everyday concerns.

The latter included the periodically varying problem, continuing into the later period of the CTA, of whether emigration was useful as a safety valve for unemployment or a sign and cause of weakness in Ireland's ability to develop an independent economy. Full freedom for UK nationals to participate in the Irish economy was difficult to contemplate when British domain over Ireland had just been broken. A continued presence, albeit economic not political, could be seen as impinging upon new opportunities for Irish nationals to remain and prosper in Ireland (see chapter 4). The British demand for Irish labour could be understood as equivalent to that which it drew in, particularly after 1945, from its colonies. The treatment of Irish migrants by the British public was often as discriminatory as that meted out to black and Asian immigrants. As recently as 1997, it was reported that some of the Irish in Britain still experience considerable socio-economic disadvantage and institutionalized racism.¹ Conversely, when, in 1962, the UK introduced the first

¹The varying fortunes of different kinds of Irish emigrants to Britain until the 1960s is discussed in John Archer Jackson, 1963, *The Irish in Britain*. London: Routledge and Kegan Paul. The later experiences were reported by Mary Hickman and Bronwen

restrictions on Commonwealth immigration, British-policy-makers justified 'special treatment' for the Irish, after Ireland had left the Commonwealth, by reference to the immeasurable Irish contribution to British economic, cultural and social life. Their special pleading, on the basis of Ireland's gifts to the UK, was used by opponents to clinch their claim that the new policy was racist (see Appendix 1).

Among the issues of high politics were British security problems and Irish ambitions that the 1921 Treaty was to bring about *reciprocal* citizenship. This was seen as reflecting a relationship of equality compared with the British view that the Treaty embodied the *common* citizenship (or subjecthood) of the Commonwealth – which was taken to denote a more hierarchical connection. The difference between the two states over reciprocity and commonality was interlocked with conflicting Irish and British definitions of nationality.

2.1 British security concerns

The independence of Ireland and, it is argued,² especially de Valera's insistence that, being islands, Ireland and Great Britain were by nature separate geo-political units, opened the UK to attack or infiltration from the south-west. And, indeed, as O'Halpin³ points out, the co-ordinated flanking measures of the CTA owe a good deal to British concerns, especially after the Irish started issuing their own passports in 1924, about the spread of Bolshevism and, later, the threat from Germany. The British saw a common passport system as the only possible way of 'shielding' its 'open backdoor'. Hence, it was necessary 'to persuade the Irish that it was in their interests' to maintain a common approach. While persuading another state of its own interests may be read as pressure by the powerful upon the weak, it will be shown in chapter 3 that Irish governments had similar concerns to those of the UK. It was equally in Ireland's interests to co-operate in the control of aliens. Fianna Fáil were as 'robust' on immigration as the Cosgrave administrations were between 1922

Walter, 1997, *Discrimination and the Irish Community in Britain*. London: Commission for Racial Equality. See review of this report by Jackson in which he notes the successful lobbying by the Irish in Britain to ensure that the Irish should be included as a distinct ethnic group for inclusion in the monitoring procedures of the Commission; John A. Jackson, 1998, *Irish Studies Review*, 6(2), pp. 209-10.

²G. R. Sloan, 1997, *The Geo-Politics of Anglo-Irish Relations in the 20th Century*. London: Leicester University Press.

³Eunan O'Halpin, 1999 (a), *Defending Ireland: the Irish State and its Enemies since 1922*. Oxford: Oxford University Press, pp. 75-7, 131-2.

and 1932, as evident in the Aliens Act, 1935,⁴ exemptions from which, based on reciprocity, allowed the CTA to work (see chapter 3).

The need for a common approach was reinforced by the consequences of partition. Neither government could control the new border effectively in order to minimize political disorder; in addition to the peculiarities of the shape of the border there were many road links and, in 1922, some twenty cross-border rail tracks.⁵ A relatively open border coupled with police co-operation was a more sensible solution than systematic controls on every route.⁶ But this method made both states vulnerable to infiltration *via* Northern Ireland. Ironically, perhaps, security concerns, while impelling a zone of free travel *between* the states, backed-up by co-operation over the internal border and co-ordination in respect of external borders, also occasioned restrictions on travel *within* one of them. Travel between Northern Ireland and Great Britain remained controlled after the Second World War (see chapter 3) and identity checks were reintroduced under the Prevention of Terrorism Act, 1975, passed in response to the extension to Great Britain of the republican bombing strategy. As in the inter-war period, later IRA activity in Britain also had the effect of reinforcing anti-Irish prejudice.⁷

2.2 Common or reciprocal citizenship rights and nationality

While security concerns were taken to imply a system of uncontrolled travel between the states and co-ordinated external controls, mutual rights of entry, with or without verification, stemmed from *Sáorstat Éireann's* membership of the Commonwealth with its common citizenship for all British subjects. This was difficult for Ireland.

Michael Collins and Arthur Griffith have been credited with securing British agreement to a different constitutional nuance for Ireland to that of other Dominions;⁸ that is, recognition of a concept of citizenship that was reciprocal, not common. In the long-run, that is so. But in June 1922, in replying under pressure to one of six questions put by Lloyd George, Arthur Griffith stated that it was intended:

⁴*ibid.*, p. 132.

⁵Robin Wilson, 1999, 'Conclusions' in Robin Wilson (ed.) *No Frontiers: North-South Integration in Ireland*. Belfast: Democratic Dialogue.

⁶Letter to author from UK Immigration and Nationality Directorate, Home Office, 1.2.99.

⁷John Archer Jackson, 1963, *op. cit.*, p. 98, John A. Jackson, 1998, *op. cit.* p. 210.

⁸J. J. Lee, 1985 (1998 ed.), *Ireland 1912-1985. Politics and Society*. Cambridge: Cambridge University Press, p. 43.

that the Irish Free State shall be not merely associated with, but a member of and within the community of nations known as the British Empire and on the basis of *common* citizenship as explicitly provided by the Treaty. (emphasis added)⁹

The 1921 Treaty had included agreement that the 1922 Constitution would provide a definition of Irish citizenship and refer to the need for legislation on how it might be acquired or lost. The Constitution came into operation on 6 December, 1922. Article 3 conferred Irish citizenship on all those who had been born in Ireland (north and south), those whose father or – progressively for the time – mother had been born there, and all those domiciled in the Free State territory on the date of the Constitution's coming into effect.¹⁰ Any such people who were citizens of another state could reject Irish citizenship. Article 17 of the Constitution, on oaths to be taken by members of the Oireachtas, also referred to 'the *common* citizenship of Ireland with Great Britain' (emphasis added).

Thus, the Constitution reflected the twin intentions of the Treaty which, on the one hand, stipulated that the privileges and obligations of Irish citizenship were to be 'within the limits of the jurisdiction of the Irish Free State' (indicating the exclusion of Northern Ireland arising from partition) and, on the other, linked them to an external power through the Oath of Allegiance to the British Crown and common citizenship of the Commonwealth. Though unique in the Commonwealth of the day, Irish citizenship, therefore, was not an autonomous status.

It was not until the 1930s that 'an Irish citizenship (or nationality) for international purposes was established',¹¹ independently of a Treaty and Constitution enacted as British statutes. Under the power contemplated in Article 3 of the 1922 Constitution, the Nationality and Citizenship Act, 1935, repealed the British Nationality and Status of Aliens Act, 1914 (as amended in 1918).¹² It specified that, under Irish law, Irish citizens (or nationals) were those born in the territory of the whole island of Ireland or those who chose to activate an

⁹*Irish Times*, 21.1.67, reporting on release of British cabinet records.

¹⁰Diarmaid McGuinness, 1998, 'Has the Common Travel Area a Future?'. Unpublished paper. Dublin: Law Library, p. 4.

¹¹*Irish Press*, 1.1.49, D/T S14452.

¹²McGuinness, *op. cit.*, pp. 6-7, quotes the Act's doubt about their status; 'if insofar as they respectfully are or ever were in force in Saorstát Éireann'. He also points out that related common law, 'insofar as it is or ever was ... in force ... shall cease to have effect'.

inherent right to the status derived from either parent, resident or not, who had been born on the island. Its gestation period was long. It drew on the conclusions of the 1930 Commonwealth Conference that each member could define for itself its own nationals while maintaining mutual recognition of common status. It was considered in both Houses from November 1933, passed on 4 April, 1935 and signed by the king six days later.¹³

Though drawing on Commonwealth conclusions, the new law was passed as Ireland began withdrawing from the Commonwealth and its British leadership. The Oath of Allegiance had been abolished by constitutional amendment in 1933 and, in 1934, during consideration of the Nationality and Citizenship Bill, instructions were given by the Executive Council to the Department of External Affairs to delete 'specific references to the British Commonwealth of Nations'.¹⁴ Following its enactment, Ireland introduced its own Aliens Act under which anyone who was not a citizen of Saorstát Éireann was an alien.¹⁵ This made the British as alien as any other nationality but an exemption Order (S.R. + O. No 80 of 1935) excluded them and the peoples of the Commonwealth from the application of the 1935 Act and, hence, permitted the continuation of free movement.¹⁶ In 1936, the External Relations Act was passed. This Act reflected de Valera's position at the time of the 1921 Treaty; that the king should not be Head of State in Ireland, though he would be Head of the Commonwealth with which Ireland might have an external relationship. Thus, the Act brought into being a 'state internally a republic' but with 'an act of parliament [i.e. a statute, not 'a fundamental law'] associating us in certain respects with the states of the British commonwealth' for the duration of the legislation 'and no longer'.¹⁷ The 1937 Constitution, for which preparation had begun in 1935, the year of the Nationality and Citizenship Act and the Aliens Act,

¹³D/T S6501.

¹⁴Letter from Mr Seán O'Muimhneacháin, Office of the President of the Executive Council to the Private Secretary to the Minister for External Affairs, 15.1.34, D/T S6501.

¹⁵McGuinness, *op. cit.*, p. 7.

¹⁶McGuinness, *op. cit.*, p. 8.

¹⁷Ronan Fanning, 1983, *Independent Ireland*. Dublin: Helicon Limited, p. 119. De Valera's position was prescient. The Commonwealth now has many members which are republics and even a state that was never a British colony. Speech to the Irish Association by Commonwealth Secretary-General, Dublin Castle, 10.12.98. The Queen, however, remains its Head – a situation with which, according to the Secretary-General in response to a question about a rotating Headship, all current members are content.

contains no direct reference to the British Crown or Commonwealth. Article 29, however, maintains a general possibility for legislation allowing the state to associate itself with 'any group or league of nations'.

The UK, because of the common citizenship of the Commonwealth, had not amended its Nationality and Status of Aliens Act, 1914 (amended 1918), which specified that persons born in what was then the United Kingdom of Great Britain and Ireland, as well as the Commonwealth, were British subjects. There being no change in UK law until 1948 meant, as McGuinness¹⁸ points out, that British judicial opinion was able to maintain – as late as 1942 – that Ireland's 1922 Constitution 'did no more than confer ... a national character as an Irish citizen within the wider British nationality'; and that this remained the case despite the 1937 Constitution.

'From the British point of view the peoples of all these lands have status as British subjects, and generally there is no discrimination among British subjects as to place of birth within the Commonwealth'¹⁹ in their access to citizenship rights in the UK. But, from the Irish point of view, this was an insurmountable barrier against entering into reciprocal conventions with the UK and Commonwealth states, allowed under Section 23 of the Nationality and Citizenship Act, 1935. In looking back, after the barrier had been removed, the Taoiseach pointed out in 1948 that '[i]nasmuch as Irish citizenship [nationality] was not recognised in Britain, the provisions of Section 23 were inapplicable'.²⁰ For a long time, orders of reciprocity conferred fewer rights in Ireland than those available in the UK – notably in connection with voting (see chapter 4). Despite satisfactory reform of British law in 1948 (see below), little in respect of reciprocity changed when Ireland replaced its Nationality and Citizenship Act, 1935, with a new law in 1956 – though this is of interest for other reasons.²¹

The conflicting definitions of nationality also led in the 1930s to increasing concern that British law had the potential to make Irish

¹⁸McGuinness, *op. cit.*, p. 6.

¹⁹*Irish Independent*, 4.2.47, D/T S14002A.

²⁰Dáil Éireann debate on the Republic of Ireland Bill, Second Stage, 24 November 1948. Official Report of Debates, Vol. 113, No. 3, Cols. 382-3, D/T S9551.

²¹Section 23 was redrafted as Section 26, principally to ensure that reciprocity would not depend, alone, upon the existence of conventions but would also require orders. The other matters of interest relate to nomenclature in the south in respect of the north and will be outlined in the further development of the author's research on this topic.

nationals liable to conscription. The Irish government considered that, in such an event, it might follow the lead of South Africa by appealing to the recommendation of the 1930 Hague Protocol that persons with two nationalities should render military service only 'to that focus of allegiance with which they were more closely associated'.²² British law also drew Irish nationals in Great Britain into the net of the British National Service Act, 1947.²³ Between 1947 and 1949, this was regarded as particularly objectionable because the liability stemmed from the unrepealed 1914 definition of the Irish as British subjects. The situation was different in principle, though potentially not in practice, from 1949 because of the coming into operation of the British Nationality Act, 1948.

This Act removed, or mitigated, obstacles to reciprocity, though it did not appear at first that it would do so. For most of 1947, it seemed that Irish nationals might remain British subjects. In contrast to Canada, where a law introducing Canadian citizenship (nationality) had accepted that Canadians were also British subjects, in Ireland, there could be 'no question' of Irish citizens (nationals) 'remaining British subjects'.²⁴ Hence, the Irish government protested about a Bill which, as drafted 'purporte[d] to provide that Irish citizens everywhere shall be bound by statutes ... affecting British subjects'. Even if equal treatment would apply in practice only to Irish residents in Britain, this conflicted with the Irish view of reciprocity; that is, that 'obligations appropriate to Irish citizens are *not* imposed on British subjects living in Ireland' (emphasis added).²⁵

²²Department of External Affairs, *Nationality Bill, Observations on Points Raised by the Executive Council*, 10.1.34, D/T S6501. It was made clear during the Second World War that the liability of Irish workers in Great Britain to be called-up did not apply to those who had come for war work and who intended to return to Ireland; John Archer Jackson, *op. cit.*, p.101. Political considerations meant that the UK government did not conscript residents of Northern Ireland (though there were volunteers from both of the 'two communities'), so the question of people there considered by the Irish government to be Irish did not, in the event, arise.

²³D/T S10967.

²⁴The UK government consulted the Irish government between January and February, 1947. Later in 1947, the Irish Government protested strongly to the British on several grounds (Minister for External Affairs to British Representative in Dublin, *Memorandum: Observations of the Irish Government on draft British Nationality Bill*, 24.10.47, D/T S14002A).

²⁵To make matters worse, as the above Memorandum also notes, the Bill made 'Irish citizens in the six partitioned north-eastern counties of Ireland British subjects of the United Kingdom and Colonies', which was unacceptable since the Irish Government could not 'recognise the moral validity of partition nor accept the imposition on Irish citizens of the partitioned area of any outside allegiance'.

As a result of pressure from the Irish government, the Bill was amended to provide an Act that was satisfactory from the nationality point of view. It specified four categories of person. British citizen,²⁶ citizen of the United Kingdom and Colonies, Alien and, for the first time, Irish citizen. The last category attracted praise in the Dáil from the Minister for External Relations despite his reservation about the status of residents of Northern Ireland.²⁷

With respect to citizens of the United Kingdom and Colonies, however, McGuinness²⁸ suggests that the separation of British and Commonwealth citizenship was 'the thin end of [a] wedge' which eventually led to immigration restrictions in 1962. The problem at the time was, indeed, how to define nationality and to determine access to citizenship rights in a situation where three kinds of people had to be taken into account: British nationals in the sense of members of the UK state alone; peoples of Commonwealth states which had introduced their own nationality laws but wished to maintain a connection; and peoples of Commonwealth countries which had not so legislated or, as colonies, lacked the authority to do so. The meaning of 'British citizen' was not made clear beyond serving as the first, though seldom used until the 1980s, break from the old term, 'British subject'.²⁹ It did little to clarify the positions of the three categories and nothing, at the time, to single out categories for better or worse treatment – since all of them remained citizens of the United Kingdom and Colonies. It was because of the complications in how to define British nationality at the end of empire that, in the first immigration restrictions, the problem was ducked in favour of differentiating between the rights of peoples with the same legal

²⁶*Irish Independent*, 3.1.49, D/T S14452. This was a symbolic advance upon 'subject'. But the term was seldom used until after the coming into force, in 1983, of the Nationality Act, 1981. See J. P. Gardner (ed.), 1997, *Citizenship: The White Paper*. London: Institute for Citizenship Studies/British Institute of International and Comparative Law, p. 5.

²⁷That is, about 'the imposition of a non-Irish status on our fellow countrymen in the Six Counties'. He was also concerned about clauses on the retention of British nationality by those Irish who wanted to do so. Memorandum and attachments by Mr M. H. Ellison, 8.12.48, D/T A105/1/13. The Act permitted Irish nationals entitled to be regarded as British subjects before 1948 to 'continue to be so regarded, and that their Irish citizenship would not be a bar to such acquisition if it had not previously been acquired'; McGuinness, *op. cit.*, p. 11.

²⁸McGuinness, *op. cit.*, p. 10.

²⁹Later, the overarching term was expressed as 'Commonwealth citizen'. Speech by Minister of State at the Home Office, Alex Lyon, to Conference of UK Immigration Advisory Service, 18.4.74, DFA London Embassy Series F100/4/3 II. See also note 26 on the lack of use of the term 'British citizen' until after the Nationality Act 1981.

nationality. The choice by the UK government of this solution politicized the freedoms afforded to the Irish, with a different nationality, by the CTA (see chapter 3 and Appendix 1).

In the meantime, however, the 1948 Act's acknowledgement of the legal status of Irish nationality was approved of in Ireland as a basis for equal rights; 'Irish citizens ... qua Irish citizens [would be entitled] to the rights and privileges of British subjects'. However, some uncertainty remained as to obligations. The Department of External Affairs pointed out that, while the practice of conscription was to be deplored, its legal premise (Irish citizens/nationals, equal under the law but not British subjects) was more acceptable after the 1948 Act than before.³⁰ However, this was to be a matter for further discussion and 'it was not to be concluded' from 'a strictly legal construction' that the law would be 'applied in like manner to citizens of Éire who [were] not British subjects'.³¹

Despite this uncertainty and the problem that the Act affirmed the status of 'Irish citizens in the Six North-Eastern Counties' as 'citizens of the United Kingdom and Colonies' and 'British subjects' (see notes 25 and 27), its coming into force on 1 January, 1949, 'ended a long-standing controversy between the two countries in the field of nationality law', in which the rights enjoyed by the Irish in Britain had been 'accorded to them, not as Irish citizens but as British subjects'.³²

This Act was passed in the UK before the repeal in Ireland of the External Relations Act, 1936, and Ireland's transformation, in 1949, into a republic. In his speech on the Republic of Ireland Bill in November 1948, the Taoiseach, John Costello, stressed that Ireland's new status was not intended to destroy the reciprocity of friendship and real interests. He announced his hope to introduce new nationality legislation 'to rectify anomalies in the 1935 Act' and to afford 'Commonwealth citizens rights comparable to those afforded our citizens in the British Commonwealth'. (It was not introduced until 1956.) In the meantime, he wished to make it plain that the business now before the Dáil did not mean that Ireland regarded them as 'foreigners', nor that they should treat Ireland as 'foreign'. Ireland would not be in the Commonwealth but:

³⁰Department of External Affairs, *Position of Irish Citizens in Regard to Conscription in Great Britain, 1948-49*, 14.12.48, D/T S10967.

³¹*ibid.*

³²*Irish Press*, 1.1.49, D/T S14452.

it recognises and confirms the existence of a specially close relationship arising not only from ties of friendship and kinship but from traditional and long-established economic, social and trade relations, based on common interests. [He wanted to strengthen the] exchange of rights and privileges [in a] special relationship which negatives the view that other countries could raise valid objections on the ground that Ireland should be treated as a "foreign" country by Britain and the Commonwealth countries for the purpose of this exchange of rights and privileges.³³

The UK reacted with its own Ireland Act of 1949. The passage of both Acts was clouded by suspicions of unprecedented intentions on both sides to take the other by surprise. As in 1948, Irish politicians disliked the fact that the UK's Ireland Act reinforced partition by restating – in their view unnecessarily, given prior Acts of Parliament – the British status of the territory and people of Northern Ireland.³⁴ Even more controversial a feature of the Act was that it introduced for the first time a role for the Northern Ireland Parliament in stating that there could be no change to status without its consent. Though great principles appeared to be at stake, the impact of disputes about them on free movement and co-ordinated flanking measures was short-lived (see chapter 3).

Apart from the problem of Northern Ireland, the UK's Ireland Act was important because it declared in Section 2 that, though Ireland was not part of His Majesty's Dominions, it was not a foreign country. Consequently, the Head of the Irish legation in London, while termed Ambassador, would be the equivalent of a Commonwealth High Commissioner. Ireland's not being foreign 'for the purpose of any law in force in the UK' meant that the 1949 Act restated the position in the Nationality Act, 1948, on the rights of Irish nationals in Britain. This was reaffirmed in the Nationality Act, 1981, which, while reducing British Protected Persons to second class citizenship, states that statutory references to 'alien' should be read as excluding them, Commonwealth nationals and nationals of the Republic of Ireland. Until 1991, this had the effect of exempting such persons from nationality restrictions in recruitment to the Home Civil

³³Dáil Éireann debate on The Republic of Ireland Bill, Second Stage, 24.11.48. Official Report of Debates, Vol. 113, No. 3, Cols. 382-3, D/T S9551.

³⁴D/T S14528.

Service and, in the case of Commonwealth but not Irish nationals, to the Northern Ireland Civil Service. Compliance in 1996 with EC law on freedom of movement had an adverse impact on the rights of Commonwealth nationals in the UK and, ironically perhaps, Irish nationals in Great Britain (see chapter 4).

2.3 Conclusion

For some quarter of a century from 1922, freedom of travel and rights for Irish nationals in the UK rested on a British conception of legal identity that was an anathema to a newly independent people and to a reluctant Dominion from which a section of what it saw as its natural territory had been partitioned. Nevertheless, after some quirks of policy in the 1920s, when the Irish government toyed with exploiting the new customs barrier to win back for the Free State parts of Northern Ireland,³⁵ that very partition contributed to both governments' interests in maintaining freedom of movement. Policing the border has been mentioned already. Moreover, in terms of peaceful traffic, north-south freedom of movement at least mitigated the practical impact of partition. But, Irish interests in an open north-south border made Ireland, like the UK, vulnerable to illegal immigration *via* Northern Ireland which was off-set by co-operation over entry into both states (see chapter 3). Equally, patterns of kinship, trade and employment indicated that east-west freedom of movement, backed up by flanking measures, also met the pragmatic interests of both governments and their peoples (see chapter 5).

The public records show that these interests were autonomously identified and defined by Irish policy makers even in periods when Ireland's larger neighbour still appeared as powerful as it always had been. Irish dependence on British markets led Irish policy-makers to believe in the 1960s that Ireland would have to shadow the UK in respect of the EC. But it was important for Ireland not to be seen by prospective partners as an appendage of the UK – not for unreconstructed nationalist reasons but because accession was seen as a means of expanding Ireland's opportunities. And, indeed, the common membership of the two states did much to equalize their status. Reluctant Britons had to come to terms with accession as a mark of the end of empire and of the high costs of its role as junior partner in world affairs to the United States. Conversely, Ireland's

³⁵D/T S1955A.

aspirations, like those of the Benelux countries before it, that 'pooling sovereignty' was an escape for smaller countries from the shadow of larger neighbours, were soon vindicated. Moreover, while other European states once may have sought to understand the Irish through the British, Ireland is now sometimes a mediator through which British and EU misunderstandings can be explained and reconciled.³⁶ It is in the context of this indubitably equal relationship between two friendly states that the CTA was recognised and accommodated in the Amsterdam free movement provisions. It is in the same context that any reconsideration of the CTA (see conclusion) would take place.

³⁶Garret FitzGerald, 1996, 'The Irish Presidency and the British Problem', *Irish Times*, 2.7.96, quoted by Jennifer Brown, 1998, *Ireland and the Development of European Co-operation in Justice and Home Affairs*, Master's Thesis, Department of European Political and Administrative Studies, College of Europe, Bruges, pp. 32-3.

The CTA's flanking measures: co-ordinated immigration policies in Ireland and the UK

Chapter 1 noted that co-ordinated flanking measures, upon which depend uncontrolled movement between the two islands and rights of entry with or without verification, are matters of extensive discussion and agreement, even if presented as 'informal'. This chapter outlines those arrangements agreed upon at key points. Chapter 2 noted that Irish governments acted according to what was autonomously defined as being in the national interest but, at the same time, were susceptible to charges of neo-colonialism. This chapter shows how they reconciled this through discretion about their bi-lateral contacts in public statements. Appendix 1 records a particularly fascinating history of warm political and diplomatic understanding between two governments which was veiled from the Irish public in 1961-62.

3.1 The pre-war CTA and war-time restrictions

Chapter 1 noted that the origins of the CTA lay in the principles of the Commonwealth and British security concerns. Thus, arrangements in this period were both multi- and bi-lateral.

From the multi-lateral point of view, the Commonwealth, rather than the two islands, was the area of free movement and, hence, the combined unit of policy *vis à vis* the entry of aliens. In the Irish Free State, as elsewhere, mutual rights of entry within the Commonwealth were protected by, for example, the recommendation of 1929 Commonwealth Conference that all members would adopt substantially the same procedures for naturalization as those of the UK.¹ This safeguarded each Commonwealth state against being forced to accept an 'undesirable' migrant who had immigrated to one of their number and had been naturalized under unsatisfactory criteria.² From the

¹Department of External Affairs, *Nationality Bill, Observations on Points Raised by the Executive Council*, 10.1.34. D/T S6501.

²Department of External Affairs, *Observations of the Department of External Affairs on points raised by the Executive Council on the proposed Nationality Bill*, 17.11.33. D/T S6501.

External Relations Act, 1936, and the 1937 Constitution in Ireland to the British Commonwealth Immigrants Act, 1962, the 'single immigration unit' comprised the Commonwealth, under the aegis of the UK, and Ireland – except for the emergency provisions during the Second World War.

The bi-lateral provisions, first formally agreed in 1924,³ in the wake of the introduction of Irish passports, consisted of the practice of sharing the names of people on each other's 'Suspect Index'. Aliens who would be excluded by one country were inadmissible in the other, to prevent them from being able to make use of the absence of controls between the two. With respect to those allowed to land, the two states provided each other with duplicate landing cards. The British passed to the Irish cards pertaining to those landing in the UK who said they intended to travel to Ireland, but not those who expressed no such intention. The Irish treated all arrivals as likely to travel to the UK.⁴ The two countries also had a common list of countries whose nationals would need visas.⁵

While objecting to the British legal basis allowing Irish nationals into the UK (as British subjects), Irish governments also saw the public interest as lying in co-operation – not simply to retain freedoms for departing Irish nationals but also to protect those remaining at home by keeping aliens out. In the 1920s, the Irish shared British suspicions of Bolshevism and, later, of displaced continental Europeans who were regarded as a threat to a homogeneous Irish culture and as insupportable in a poor economy.⁶ Irish resistance to refugees

³Eunan O'Halpin, 1999 (b), 'MI5's Irish Memories: Fresh Light on the Origins and Rationale of Anglo-Irish security Liaison in the Second World War' in Brian Girvan and Geoff Roberts (eds.), *Ireland and the Second World War: Politics, Society and Remembrance*. Dublin: Four Courts Press.

⁴In connection with those who gave no indication of onward travel to Ireland but who did so, 'Several such cases [came] to light after the war'. Though the Irish treated every arrival as likely to travel to the UK, the length of time taken for cards to be forwarded meant that such persons may have been and gone before notification reached the UK, extract from the *In-House History of MI5's War-Time Irish Section*, p. 23, Public Record Office KV4/9; with thanks to Eunan O'Halpin. On the other hand, later operational officials trusted each other's systems. The Department of Justice was confident that 'the stringency of [its] controls meant that 'the British had no apprehensions whatsoever about the use of Ireland as a backdoor for the purpose of entering Britain. Had it been otherwise the British commitment to the Common travel Area might not be as strong as it was', File note of telephone conversation with Mr P. O'Toole, Department of Justice, 28.1.71, DFA London Embassy Series F100/4/46.

⁵Communication to the author from the Department of Justice, Equality and Law Reform, February 1999.

⁶Eunan O'Halpin, 1999 (a), *Defending Ireland: the Irish State and its Enemies since 1922*. Oxford: Oxford University Press, pp. 75-7, 132.

was particularly marked in the case of Jews. The harsh treatment of Jewish refugees before, during and after the Second World War remained a quiet controversy, now brought to public light again in the context of the diminishing population of Jewish Irish nationals and a new set of European asylum-seekers.⁷

British assistance, through passport and immigration control, in excluding those not exempted from the Aliens Act, 1935, was so relied upon that, in reviewing the pre-war period, the Department of Justice believed in the 1950s that arrangements had worked disproportionately in Ireland's favour. Britain 'operated rigid controls on Ireland's behalf', allowing the latter to preserve its 'ethnic and religious' character, while the 'odium' of limiting entry by refugees was incurred by the UK.⁸ Moreover, as will be seen in chapter 4, Ireland was able to maintain its interests as a newly independent country by restricting the reciprocity of positive rights for all non-nationals, including those of the UK.

The Second World War led both states to consider it necessary to impose controls on travel between the states, though neither government wished to restrict movement completely and, in retrospect, described the war-time measures as 'irksome'. The Irish government thought it necessary to guard against an influx of people escaping the deprivations of a country at war or seeking refuge from that country.⁹ Also, despite neutrality, it was not intended that Ireland should be used as a route through which its neighbour might be undermined.¹⁰ While entry from Great Britain was not banned, and throughout the war 'the actual crossing of the Border ... could not be

⁷Jewish Irish nationals in Ireland have been shocked by how relatives and co-religionists were refused entry, as revealed in Dermot Keogh, 1998, *Jews in Twentieth Century Ireland*, Cork University Press. The 1935 Aliens Act is now regarded by some members of the Jewish community as specifically aimed at Jews attempting to escape from Germany and the words 'perfidy' and 'duplicitous' are used by a relative of a victim to describe the Department of Justice (and a particular official, Peter Berry, in that Department) and 'to a lesser extent', the Departments of External Affairs and Industry and Commerce; *Irish Times*, Weekend Section, 13.3.99. *Sunday Independent*, 14.3.99. See also O'Halpin, 1999 (a), *op. cit.*, p. 295.

⁸O'Halpin, 1999 (a), *op. cit.*, p. 77. On the other hand, the system may not have been as 'rigid' as suggested in the early period; see note 4.

⁹D/T S11133A and B.

¹⁰Ireland's neutrality should be set against de Valera's 1938 pledge that Ireland would never permit itself 'to be used by foreign powers to harm Britain's strategic interests' – a pledge that, given security co-operation during the war, was less meaningless than it might have seemed from a profession of neutrality; O'Halpin, 1999 (b), *op. cit.*, p. 1.

prevented or even controlled',¹¹ passengers were required from 1939 to arrive at approved ports and to be in possession of identification documents. Failure to be able to produce them, if asked to do so by the Gardaí, might lead to restrictions on movement, detention or return. Between 1943 and 1946 full immigration controls operated at ports of entry from Great Britain.¹²

The British government did not find it necessary to control entry from Ireland for security reasons until after the fall of France in 1940, which exposed the UK on both its southerly flanks to the risk of invasion by Germany (though see footnote 10). From 11 June, the UK required travellers from Ireland to be in possession of travel documents which were inspected by the police on arrival. It therefore became necessary for the Irish government to issue passports or limited travel documents (through the Gardaí) for travellers to Great Britain.¹³

The Irish co-operated fitfully with British measures operating in Ireland intended to facilitate recruitment for war-work but which had the effect of bringing about an additional control; the need to be in possession of a British permit issued in Ireland, to be granted only if travellers to Great Britain were on 'business of national importance'.¹⁴ Despite this additional control, the UK's insatiable need for Irish labour in agriculture and essential manufacturing industries meant that traffic soon reverted to a net outflow from Ireland.¹⁵

In co-operating with the British over an exodus of Irish nationals, the Irish were able to impose restrictions on the type of person who could be recruited, generally unemployed men over twenty-two and women who were, or could be trained to be, nurses and teachers.¹⁶ The risk that Irish nationals might be conscripted was removed by an explicit British undertaking that it would not apply to those emigrating for the purpose of temporary war-work.¹⁷

¹¹*In-House History of MI5's War-Time Irish Section*, p. 12, Public Record Office KV4/9, with thanks to Eunan O'Halpin.

¹²Control of Aliens Order, 1939, Emergency Powers Order, 1939, Passenger Traffic Regulations Order, 1939. For 1943-46 period, Communication to the author from the Department of Justice, Equality and Law Reform, February 1999.

¹³Communication to the author from the Department of Justice, Equality and Law Reform, February 1999.

¹⁴John Archer Jackson, 1963, *The Irish in Britain*. London: Routledge and Kegan Paul, pp. 98-101.

¹⁵*ibid.*, pp. 98-9.

¹⁶*ibid.*, p. 102.

¹⁷*ibid.*, p. 101.

Contradictory considerations persisted in both countries at the ending of hostilities, though Ireland was first to restore fully uncontrolled entry from Great Britain, under the Aliens Order, 1946, enabling British nationals to enter Ireland without documentation. The British modified their regulations to encourage freedom of movement for the sake of their continued need for Irish labour. But there were still controls on entry to Great Britain from Ireland and Northern Ireland. There was some concern in Ireland that a proposal in 1950 to exempt American nationals from the Restrictions of Aliens Order, 1946, might inhibit, by differentiating Irish provisions from those of the UK, the reintroduction of the CTA in its pre-war form. This concern – in the year after the Ireland Acts in the two countries – was tempered by interests in the Departments of Justice and External Affairs in the possibility of higher priority being given to states other than the UK and it was not shared by the Department of Social Welfare which viewed British controls as a useful means of discouraging people from seeking employment in Great Britain.¹⁸ However, uncontrolled travel between Ireland and Britain was re-established in 1952 and, when it was, agreement on the flanking measures was set out explicitly within government, if discreetly for public consumption.

3.2 The re-establishment of the CTA – 1952

Questions were raised, by Northern Irish MPs with support from other quarters, in the British House of Commons in 1950 about the continuation of controls on travel from Northern Ireland to Great Britain in the context of an open north-south border. The tourist authorities of both states also raised the matter. The British thought the initiative lay with Ireland since, according to the Home Secretary, the Irish immigration system now allowed entry to aliens who might not be admitted to the UK. In Ireland, where there was no record of any such entries, the government thought the UK should take the initiative.¹⁹ And, indeed, in February 1952, two Home Office officials held informal talks with officials in the Department of Justice about a British proposal to lift barriers on traffic from Ireland and, hence, about what could be done to maintain 'reasonable controls' upon

¹⁸Department of Justice, *Memorandum Proposal to Exempt from Restrictions of Aliens Order, 1946*, 3 July, 1950, D/T S11512B.

¹⁹Communication to the author from the Department of Justice, Equality and Law Reform, February 1999.

passengers who were aliens under the laws of either and both states.²⁰ On 27 February, the Irish Minister for Justice, Gerald Boland, asked the Cabinet to allow his officials to enter 'into an informal arrangement with officials of the Home Office, London, for co-operation in the control of aliens'.²¹ Two days later, the Cabinet agreed.²²

The co-operation was to cover the following areas. As before the war, each side would notify the other of action taken over aliens seeking to land whose names appeared in the other's 'Suspect Index'. Aliens would not be allowed to land in either country intending to transit to the other if immigration officers were not satisfied that they would be allowed to land in the other. The implementation of the new arrangement would be more rigorous and comprehensive. It was agreed that both sides would assume that aliens allowed to land were likely to travel to the other state. Both sides would keep, and exchange, traffic indices of the arrivals and departures of all aliens and police forces would exchange information about their movements. It was agreed that aliens landing in either state *via* the other who were not acceptable would be re-admitted by the state which had admitted them in the first place. It was agreed that such arrangements need not apply to Americans landing in Ireland and would not prejudice particular policies on asylum.

It should be noted that the new arrangements did not refer, as before, to the maintenance of a common list of countries whose nationals would require visas. There was some discussion on the British side as to whether there was any point in such a common list since, in the absence of immigration control on CTA ports of entry and exit, there would be no-one there to inspect them.²³ However, co-operation ensued at the operational level intended to secure co-ordinated lists and this continues into the present.²⁴ During the 1950s and 1960s both states, under the aegis of the Council of Europe, increasingly abolished visa requirements and kept each other

²⁰Department of Justice, File Note, *Immigration Control – Cooperation with the British*, 15.2.52, D/T S15273A.

²¹Department of Justice, *Immigration Control – Proposed Arrangement for Co-operation between British Home Office and the Department of Justice*, 27.2.52, D/T S15273A.

²²Extract from Cabinet Minutes, item 6, 29.2.52, D/T S15273A.

²³Letter from Irish Ambassador in London to The Secretary, Department of External Affairs, 8.2.52, DFA London Embassy Series A102/1/1.

²⁴Diarmaid McGuinness, personal communication to the author, September 1999. On the European dimension, see Diarmaid McGuinness and Eileen Barrington, 1997, 'Immigration, Visa and Border Controls in the European Union' in Gavin Barrett (ed.), *Justice Cooperation in the European Union*. Dublin: Institute of European Affairs.

informed about when visa abolition agreements had been reached and under what terms.²⁵ From 1975, the Irish list of countries whose nationals need visas appears in the Sixth Schedule of S.I. 128 and amendments to it reflect similar changes in the UK.²⁶ Though the EU has a common list of countries whose nationals require visas, this is problematic for the UK, given its Commonwealth relationships. Bi-lateral arrangements, such as those between Ireland and the UK, are permitted under EU rules provided they are compatible with EU policy.

The documents pertaining to the re-establishment of the CTA²⁷ reveal some concern about the risk of being 'swamped with British [landing and departure] cards' pertaining to the 450,000 aliens there compared with the 3,000 in Ireland. Another disadvantage might be that the Department of Social Welfare would no longer be able to use British war-time restrictions and their continuation to influence the pattern and volume of emigration by Irish workers. However, both that Department and the Departments of Industry and Commerce and External Affairs felt 'that the case for continuing the control on the emigration of workers is not so strong as to justify us in refusing to co-operate with the Home Office'. In any case, it was now considered beneficial that 'irksome' formalities for Irish travellers to Britain and tourists coming to Ireland would be removed.

The 'balance of advantage' was seen to lie with the Irish because 'we have no check on the entry of aliens from Great Britain and the Six Counties'. Since none could be imposed on the north-south border, it was in Ireland's interest to co-operate in a system of clearance at first ports of entry, which would rule out unlawful arrivals in Ireland both on direct routes and *via* Northern Ireland. The risk of being overburdened by 'British cards' was counter-balanced by the fact that co-operation would reduce the risk 'that when the British lift their controls, a number of the hundreds of thousands' of aliens there 'may drift over here'. The proposed arrangements were more satisfactory than the pre-war 'understanding' about the mutual banning of anyone on each other's Suspect Index in bringing about a more 'completely reliable index

²⁵DFA London Embassy Series A104/2.

²⁶Diarmaid McGuinness, personal communication to the author, September 1999. Also communication from the Department of Justice, Equality and Law Reform, October, 1999.

²⁷i.e. those noted at 20 and 21.

of the entry and departure of aliens' (see note 4 on limitations in the previous system of sharing cards). Of special value was 'the undertaking by the Home Office to re-admit aliens who drift here from Great Britain' since, '[a]t present we have difficulty in getting rid of such aliens and we are sometimes put to the expense of deporting them to the Continent'.

In considering the issue, prior to the request to the Cabinet, a question was raised in the Department of Justice about whether the reintroduction of a 'single immigration unit' might be out of 'keeping with our position as an independent State' but it was noted that this might be offset if, when meeting British officials, Ireland could secure – as it did – the re-admission undertaking. However, constitutional delicacies were attended to in the manner of announcing change. Not being seen as 'a consenting party' also allowed the Irish government to avoid any accusation that it might be facilitating emigration.²⁸ It was agreed that the arrangement would be:

put into effect by an exchange of informal letters between the Assistant Secretary of the Department of Justice and an Assistant Secretary in the Aliens Department of the Home Office. The letters would make it clear that it was to be entirely informal and in no way binding on the two Governments.²⁹

The exchange of letters took place in March 1952 and it was announced in response to a question in the House of Commons that new arrangements would take effect from 7 April, 1952. The Home Office had offered to discuss the terms of the announcement with the Department of Justice and had been told that any publicity in the UK – which might find its way to Ireland – 'would be undesirable' given that they were 'entirely informal'. It was, however, suggested that the Irish Ambassador in London could be consulted over 'the form' of the announcement.

In Ireland, the Department of Justice considered it appropriate to present the matter as a British decision, taken for British reasons which were a matter for them alone, the only Irish involvement having been to accept consultation after the decision had been made

²⁸Teleprinter message from Department of External Affairs to Irish Ambassador in London, 7.7.52, DFA London Embassy Series A102/1/1.

²⁹From document referred to at note 21.

but before it was to be put into effect.³⁰ Thus, the Minister for Justice, Gerald Boland, replied to a question in the Dáil by Deputy Seán McBride on 23 April, 1952, by stating that:

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

The next month, a public information note in several languages ('Notice to Foreigners who intend to go to the Republic of Ireland') was issued by the Department of Justice with no mention of the bilateral arrangements. Behind the scenes, however, consultation and contacts continued throughout the 1950s in respect of the implementation of the co-ordinated arrangements and the topic again became a matter of high politics in 1961.

3.3 Further developments in the CTA, 1961-62: the British Commonwealth Immigrants Act

Agreement on immigration policy in what, by then, was acquiring its modern name but with inverted commas not capital letters,³¹ was restated during 1961-62. This was in the context of a watershed in British and Commonwealth history in the form of the Commonwealth Immigrants Bill. For the first time, it was proposed to place statutory restrictions on entry from the Commonwealth by differentiating between British subjects or, since 1948, citizens of the United Kingdom and Colonies.

³⁰Communication to the author from the Department of Justice, Equality and Law Reform, February 1999. See also Diarmaid McGuinness on a similar tone in a reply by the Minister for External Affairs, Mr Frank Aiken, 'Has the Common Travel Area a Future?'. Unpublished paper. Dublin: Law Library.

³¹At initial exploratory discussions, the British official referred to the two countries being 'an area of "common travel" ...'; Department of Justice, *Meeting with Mr Chinchon* [sic], *British Home Office, Summary*, 20.10.61, D/T S15273B. Shortly afterwards, a proposed British statement about the Irish position *vis à vis* the Commonwealth Immigrants Bill said that:

The two countries operate a *common travel area* for obvious geographical reasons and this arrangement requires uniformity in the control of immigration to each country from third countries. (emphasis added)

In being asked for his approval, the Taoiseach was briefed that 'it seems that the expression "common travel area" is well known and frequently used in the context of immigration control', File notes, 11.12.61. D/T S15273B.

Apparently, the British government did not relish this necessity, having in mind the tradition of unrestricted entry and the need for labour. It had tried to put off legislating by attempting to devise 'administrative' and regulatory schemes.³² But the practical and legal difficulties of non-statutory methods, combined with strong demands at the 1961 Conservative Party Conference, and beyond the Party, forced the government to consider legislation³³ – even though this might entail changes to the British Nationality Act, 1948, and the Ireland Act, 1949, a 'thicket' into which 'parliamentary draftsmen would be reluctant to enter'³⁴ (see also chapter 2).

On 11 October, 1961, the day after the Home Secretary, R.A.B ('Rab') Butler, had had to reply to Conference resolutions, the British Chargé d'Affaires informed the Department of External Affairs that the Home Secretary would tell the Conference that the government was considering legislation about which he would consult the Commonwealth.³⁵ The Irish government would also be approached within about ten days. The British Chargé said that a Bill 'as contemplated' would read as applying to Irish nationals but, in practice, 'no attempt would be made to apply to them the controls envisaged'. This would be stated in Parliament, should a Bill be introduced. On 12 October, 1961, the Irish Government Information Bureau, told the *Irish Independent* that consultation was expected but that there were no specific proposals yet.³⁶

The promised consultative meeting took place on 19 October, 1961 in Dublin. The participants were: Mr Chin-Chen, Assistant Chief Inspector of the Immigration Branch of the British Home Office and officials of the Departments of Justice, External Affairs and Industry and Commerce. A lengthy summary of it was conveyed the next day by the Minister for Justice, Charles Haughey, to the Taoiseach, Seán Lemass, the two having discussed the proposed British measures about a week before.³⁷

³²*Irish Independent*, 14.10.61. D/T S15273B.

³³*Irish Press*, 12.10.61. D/T S15273B.

³⁴*Irish Independent*, 14.10.61. D/T S15273B.

³⁵Department of External Affairs, File Note of telephone conversation, 12.10.61. D/T S15273B.

³⁶It did so on behalf of the Department of External Affairs, which had cleared the statement with its Minister, the Taoiseach and the British, File Note, 12.10.61, with further comments appended on 13.10.61. D/T S15273B.

³⁷Department of Justice, *Meeting with Mr Chin-chen* [sic], *British Home Office, Summary*, 20.10.61, and covering Letter from Minister for Justice to the Taoiseach, 20.10.61. D/T S15273B.

The basis was that, since the British 'did not intend to apply the controls' to Irish nationals or 'to impose checks at points of entry from Ireland', they needed Irish 'co-operation' to prevent Ireland from being 'used as an "open backdoor" to Britain'. The British had in mind 'an arrangement more or less identical with that at present working so well between the two countries whereby the two islands are an area of "common travel" on the basis of a uniform system of alien control at the "outer perimeter" of the two islands'. But the Bill could not be written that way since, as 'the Irish authorities would readily appreciate ... it would be impossible actually to write into the Act an exemption that would give Irish citizens a legal status superior to that to be given to citizens of the Commonwealth and indeed superior to that of many of their own citizens'.

This potential superiority for Irish nationals arose from complications in nationality and citizenship legislation. As noted in chapter 2, some Commonwealth countries, such as Canada, had their own laws and their peoples were, for example, Canadian nationals in addition to their status under British law (like Ireland in 1935 but with consent not reluctance). However, in terms of rights, there was:

no such thing as citizenship of Great Britain ... or of the United Kingdom: ... only a single indivisible citizenship of the United Kingdom and Colonies, so that the legal citizenship of a West Indian is identical with that of a Londoner (though different from that of Canadians, etc., who hold their own citizenship).

The proposal was that a single category of citizenship (nationality) would remain but that rights of entry would distinguish between 'belongers' and 'non-belongers'. 'Belongers' – mainly English, Scottish and Welsh but also others who, having arrived earlier, might have acquired a passport issued in the UK – would, on verification, have the right to land. Those whose passports were issued through Governors-General, such as West Indians coming to the UK for the first time, could be refused leave to land despite a citizenship status that was identical to that of 'belongers' with 'home' passports. Visitors, students and people of independent means would be allowed in but those seeking employment would have to be in receipt of a voucher issued by the Ministry of Labour. It was not intended to require this of Irish nationals. A Bill specifying that, because of the CTA, Irish nationals, holders of the passport of another state altogether, were exempt from restrictions, including the employment voucher requirement, would mean that they would

have stronger rights of entry than 'non-belongers', holding the wrong type of British passport. The proposed solution lay in how arrivals were to be handled (see below) and, later, through a public statement specifying that there would be no entry controls on arrivals from Irish ports of exit (see Appendix 1).

Discussion ranged over many other issues: the dependants of voucher-holders; voucher fraud; people considered by immigration officers to be physically or mentally ill; evaders of immigration control who were not criminals (evasion of controls was not, itself, a criminal offence until 1968); the deportation of convicted criminals when recommended by a court (which *would* apply to the Irish); and periods of residence to qualify for naturalization. Irish officials pointed out that Ireland had no law entitling the state to distinguish between one citizen of the United Kingdom and Colonies and another. They also drew attention to their 'own interests in the way of excluding persons' and to likely repercussions on existing reciprocal arrangements with Commonwealth and other countries. There were particular concerns about Irish missionaries in India and South Africa, the latter complicated by unfinished business following secession from the Commonwealth. The Irish also wondered whether 'outer perimeter' controls could be exercised with variation provided the overall effect was the same.

In respect to how 'outer perimeter' controls would work in practice, the British intended to implement a method whereby 'belongers' and the Irish could be 'waved through' while 'others' would be obliged to reply to questions from an immigration officer. These 'others' would include both white and 'coloured' people. It was likely that 'the Canadian, for example' would be 'let through right away and the Coloured West Indian questioned closely'. Though the British expected to be criticized as racist, they were 'not disposed on their side, nor would they expect us on our side acting on their behalf, to put up a facade of impartiality by putting questions to the Canadian, merely for the sake of putting a better appearance on the questioning of the West Indian'. In summarizing the meeting, officials noted that this 'possible cause of much controversy' would be more so 'in Britain rather than here' because, as noted more explicitly when the matter was discussed again the following year, it was not the tradition of 'coloured' people to travel to Ireland from Britain.

While noting that many regulatory and legislative implications would need to be considered and insisting that the talks must be

regarded as 'exploratory only', Irish officials told Mr Chin-Chen that 'he could take it' that 'the Irish Government would be most anxious not only to preserve the existing rights of Irish citizens but to preserve the present arrangement for unrestricted travel' (i.e. the right to enter the UK and to do so without verification). It was agreed that the initiative now lay on the Irish side and that outstanding issues would be 'carried out through diplomatic channels' but only after satisfactory responses to urgent enquiries by the Department of External Affairs on matters of reciprocity elsewhere.

The Bill did, indeed, provoke much more controversy in Britain than in Ireland, on grounds of racism. This jeopardized the position of the Irish. The political story of how the two governments cooperated at the turn of 1961 and 1962 to secure their interests in safeguarding the Irish exception is a lesson in not accepting at face value public statements of indifference. It is recorded in Appendix 1.

The Irish government discussed possible action that would satisfy the British sufficiently to safeguard an exception for travel to and from Ireland at the beginning of February, 1962. The Department of External Affairs Memorandum presented by its Minister to Cabinet recalled for colleagues the earlier discussion with Mr Chin-Chen and noted differences between the two states.³⁸ For example, the Irish were not 'aliens' in UK law and, as a separate category of non-citizens of the UK and Colonies, could be exempted from controls by administrative means. In contrast, the British were 'aliens' under Irish law but, like 'old Commonwealth' nationals, some 'new' Commonwealth nationals and some nationals of non-Commonwealth states, they were exempted legally by orders of reciprocity from certain restrictions applied to other aliens. The Memorandum stated that it was 'essential that the existing freedom of movement between this country and Great Britain should be preserved to the greatest degree possible' (without either restrictions or controls) and that steps should, indeed, be taken 'to institute an "outer perimeter" control which would meet the requirements of the situation'. This might entail special measures for certain countries already in reciprocity with Ireland which might be adversely affected by co-ordination with the UK.³⁹ While officials had told Mr Chin-Chen that dis-

³⁸Department of External Affairs, *Memorandum for the Government, Control of Alien Immigration into Ireland, 7.2.62. D/T S15273B.*

³⁹Such 'special treatment' might 'not meet all the objections' but could have sufficiently 'mollifying effects' to safeguard the rights of Irish travellers, *ibid.*

tinguishing between different kinds of citizen of the United Kingdom and Colonies might require legislation, the Memorandum noted the Attorney-General's advice that the Aliens Act, 1935, permitted change to be brought about through an Order issued by the Minister for Justice.

The Memorandum observed that the British definition of 'belongers' included people born in colonies, such as the West Indies, if they had been able to acquire a 'home' passport issued in the UK. It suggested that Irish interests would be better served by a definition of 'belongers' as those born in the UK ('an expression' which 'must be taken to include the Six Counties although of course the vast majority of citizens born there are Irish citizens'). It was also noted that there was 'reason to believe' that the UK would not object to this narrower definition. Ireland might be accused of being even more racist than the UK but 'prudence call[ed] for such a course and, by adopting it, 'we will not, in practice, be excluding from Ireland any persons who by tradition came and went freely to and from our island'.

The Minister for External Affairs, with the concurrence of the Minister for Justice, thus requested approval for:

- the creation of system to control entry of all aliens except those of UK 'belongers', born in the UK;
- retention, should the UK object to the narrower definition of belonging, of the right to exclude those who 'might create a problem here';
- special treatment for 'Commonwealth countries which have by tradition enjoyed' exemption and which gave similar treatment to Irish nationals;
- further talks with British officials to establish agreement on the 'preservation of the "common travel" area'.

His requests were agreed to on 9 February, 1962.⁴⁰ And, in June, 1962, after further bi-lateral and internal consultation, the Minister for Justice presented his draft Order to Cabinet.

The draft Order incorporated the Irish interest in a narrower definition of 'belonger' by amending the Aliens Order, 1946 (No 395), to refer to persons 'born in Great Britain and Northern Ireland'. For others, including South Africa, the Order set out uniform conditions

⁴⁰Noted in: Department of Justice, *Memorandum for the Government, Control of Alien Immigration into Ireland*, 25.6.62. D/T S15273B.

for permission to land at the 'outer perimeter', or refusal, that were consistent with those of the UK (see Appendix 1 for conflicting opinions about this). The draft was agreed, subject to an amendment on Commonwealth citizens (see Appendix 1) and became the Aliens (Amendment) Order of 1962 [S.I. No. 112] which exempted persons born in Great Britain or Northern Ireland from restrictions on aliens and subjected remaining Commonwealth citizens to control. There was a continued entitlement to admission under certain circumstances which, if not met, would foreclose permission to land.⁴¹

Both Ministers also agreed that the opportunity should be taken to remove 'irksome' – though seldom obeyed – requirements on tourists, which applied, theoretically, even to visitors from Northern Ireland and Great Britain as well as to those holding Irish visas or from countries with which visa requirements had been abolished. Such restrictions included registration with the police and departure within a month unless approval had been obtained for longer stays. As a result, a second order was also agreed revoking the Aliens (Exemption) Order, 1935 (No 80), to grant visa-holders and those who did not need one, who entered *via* Britain or Northern Ireland, the right to stay for up to three months without formality. Similar authorization was to be given to those entering through the 'outer perimeter' by an immigration officer. In practice, the system of clearance at a first port of entry means that there has been no control on anyone, not just British-born and Irish nationals, arriving in Ireland *via* Great Britain and *vice versa*. This makes the CTA the same in its operation as is expected when controls on internal borders are lifted in the other EU states.

3.4 Post-1962 CTA

The Order which was so satisfactory to all concerned (see Appendix 1) did not deal with matters relating to the European Economic Community. At that stage, the first British and Irish applications were only in the pipeline and, in any case, were not eventually successful. But the relationship between the two policy areas was discussed in the Legal Committee on EEC Problems, whose members were representatives of the Attorney-General's Office and the Departments of External Affairs, Justice and Finance. In June 1962, Department of Justice officials briefed their colleagues on the then current legal

⁴¹A second Order, S.I. 113 of 1962, repealed the general 1935 exemptions for Commonwealth nationals. See McGuinness, *op. cit.*, pp. 15-6.

situation and the impending June Order and the implications of accession.⁴² Among other issues, they noted that the UK nationals (and, because of other exemptions, those of some non-member states) would have greater freedom to enter Ireland than other EEC nationals. It was suggested that the granting of further exemptions from the Aliens Order of 1946 would ensure compliance with Article 7 of the Treaty of Rome. Some controls over aliens who were nationals of EC member states could be possible through the Treaty's provisions in respect of the maintenance of public order, public security and public health.

The 'single immigration unit' with the UK was revisited between 1966 and 1975, a period of further British restrictions on Commonwealth nationals which coincided with expulsions of Asians from Kenya and Uganda. Under the Commonwealth Immigration Act, 1968, entry without coming through immigration control became, for the first time, a criminal offence in the UK.⁴³ In the same Act, entry was permitted to East African Asian holders of UK passports but only if they had no other citizenship or nationality. At this time there were in the UK both fears and hopes, depending on outlooks on immigration and human rights, that East African Asians might be able to enter the UK through Ireland.⁴⁴ The Irish government amended its 1962 Order to make it explicit that Commonwealth nationals and other aliens would not be allowed to land if they were intending to move to the UK but would not be admitted there; and, indeed, there were cases of Asians (though not from East Africa) not being allowed to land in Ireland.⁴⁵

The appreciation by both sides of the CTA was plain at the time of new immigration legislation in the UK in 1971-73. Regulations came into effect on 30 January, 1973, to implement the Immigration Act, 1971. These were intended to deal with the rights of two categories – EEC nationals, with rights of entry as result of the UK's accession, and Commonwealth nationals. There was still no further

⁴²Memorandum of Representatives of Department of Justice, *Article 7 of Treaty of Rome*, June, 62. DFA CM/15II.

⁴³Speech to UK Immigration Advisory Service by Minister of State at the Home Office, Alex Lyon, 18.5. 74, DFA London Embassy Series F100/4/3 II.

⁴⁴DFA London Embassy Series F100/4/3.

⁴⁵Communication to the author from the Department of Justice, Equality and Law Reform, February 1999. See also Aliens (Amendment) 1975, cited by John Handoll, 1997, 'The Free Movement of Persons' in Ben Tonra (ed.), 1997, *Amsterdam: What the Treaty Means*, Dublin: Institute of European Affairs, pp. 133-45, pp. 134, 144. On refusals to land, see DFA London Embassy Series F100/4/3.

clarification of the 1948 position on nationality and rights of entry continued to be differentiated by distinctions between people with the same legal identity. Rights of entry would no longer lead to the right to settle. The 'right of abode' was to be restricted to what the Conservative government called 'patrials'. These were: citizens of the United Kingdom and Colonies with a personal connection with the territory of the UK (and Ireland if the connection occurred before 1922) by virtue of birth, parent or grandparent, adoption, or naturalization; and Commonwealth citizens of the United Kingdom and Colonies already settled in the UK or with parents or grandparents born there.⁴⁶ In this period of reform, Irish rights in the UK were superseded by the new freedoms of EEC nationals in criticisms that the government's intentions were racist and/or anti-Commonwealth.⁴⁷

The new rules extended the possibility of deportation to Ireland from the UK to cover persons, not only deported as a result of a court order, but also those whose exclusion was thought by the Home Secretary to be in the 'public good'.⁴⁸ What was more important from the Irish perspective was a shift in the cast of British policy on the CTA. Previously, the UK approach had been not formally to exempt Irish nationals from their 'domestic' controls but to direct immigration officers not to operate controls at 'Anglo-Irish' ports. Neither, in effect, were Irish nationals treated as aliens at English Channel ports. Now, Irish nationals could travel without controls between Ireland and Britain as a result of statutory recognition of 'the Common Travel Area' of the UK, Channel Islands, Isle of Man and the Republic of Ireland.⁴⁹ The exceptional position for Irish nationals

⁴⁶Aide Memoire for the Ambassador of the Republic of Ireland on the Immigration Bill, 11.2.71, DFA London Embassy Series F100/4/46.

⁴⁷The satisfactory outcome for Ireland had been preceded by 'kite-flying' rumours in 1970 that the UK intended to introduce a work requirement, though not travel documents, for Irish nationals entering Britain. This was strongly denied by the Foreign and Commonwealth Office to the Irish Embassy in London (DFA London Embassy Series F100/4/46). On invoking the Irish as evidence of racist intent in the UK, see Appendix 1. Instead, in 1972, one MP, of Australian origin, proposed that the CTA be extended to include Australia, Canada and New Zealand and others proposed that it should encompass all states which recognized the Queen – the aforementioned and the West Indies, Malta, Mauritius, Brunei and Fiji (*Daily Telegraph*, 25.11.72, DFA London Embassy Series F100/4/3). The Government Whips were reported to be 'kicking themselves' for getting 'immigration and the EEC entangled' (*Observer*, 26.11.72, DFA London Embassy Series F100/4/3).

⁴⁸DFA London Embassy Series F100/4/46 and F100/4/3 II.

⁴⁹Communication to the author from the Department of Justice, Equality and Law Reform, February 1999. See also McGuinness, *op. cit.*, pp. 16-17.

was restated by the new Labour government of 1974.⁵⁰

Arrangements, by-and-large similar to those agreed upon in 1961-2 and 1971-4, continued as they were until 1997-99. In 1999, in the context of revising rules for aliens, the Irish government ended its definition of British nationals exempt from aliens control as those born in the UK. This removed the possible anomaly of exempting a person who was not a British national but who had been born there and it extended the category of person qualifying for exemption to those defined as UK nationals in the British Nationality Act, 1981.⁵¹ As noted in chapter 2, that Act had reduced the status and rights of entry of residents of the few remaining British colonies, defining them as British Protected Persons. Also in 1999, new British nationality rules renewed their equal status and restored their right to enter the UK. At the time of writing, it is not known whether the new Irish definition of British nationality will reflect this change in the UK and, hence, what implications there may be pertaining to entry by such people into Ireland.

From the operational point of view, the CTA's history of the sharing of expertise and intelligence was reinforced in the 1990s. New structures were set up to improve such exchanges, especially in connection with returning people and transit issues. An official meeting, which formally acknowledged the long existence of the CTA and formalized its co-operative procedures, was held in London in October 1997:

for the purpose of discussing the operation of the Common Travel Area that has long existed between the two countries. Arrangements were agreed for a programme of work which would enhance co-operation between both administrations in this regard. It was also agreed that senior management with responsibility for operational matters in these areas would in future meet twice yearly.⁵²

⁵⁰Letter from Mr J. Lynch, First Secretary, Irish Embassy in London, to The Secretary, Department of External Affairs, 8.6.74, DFA London Embassy Series F100/4/3 II.

⁵¹Aliens (Amendment) (No. 2) Order, 1999 (S.I. No. 24 of 1999 and Aliens (Exemption) Order, 1999.

⁵²The outline of these were referred to in a report prepared for or from bi-lateral business carried out in the margins of a meeting of the European Council at the end of the year in which the Amsterdam Treaty was signed. *Progress Report on Co-operation between Ireland and the United Kingdom. Developing East/West Relations*. Issued in the margins of the European Council Meeting in Luxembourg on 12/13 December, 1997. The additional information in the preceding text was provided in an interview in the Department of Justice, Equality and Law Reform.

3.5 Conclusion

The source of the above quotation – an intergovernmental meeting at the margins of a European Council in 1997 – acknowledges, more explicitly than was regarded as possible in the past, shared political interests in the CTA. Indeed, in 1996, submissions in a judicial review case, made on behalf of the Minister for Justice, described the CTA, and its safeguarding with due respect to EC law, as ‘fundamental’ to Ireland’s interests.⁵³ The fact that arrangements regarded as so important were able to be operated without full harmonization – that is, in the context of variations in rules about, for example, deportations and definitions of British nationality – reinforces the idea that Ireland’s interests in the CTA were autonomously defined. Moreover, as shown in chapter 5, Ireland was able to impose intermittent checks on CTA routes in the context of concern about illegal immigration.

All such considerations suggest that Ireland’s major decision in 1997 to do what was necessary in the EU to maintain the CTA in the light of the UK position on EU border controls was an independent judgement about interests and not a mark of continuing dependency. The existence of successful co-ordination ought, as some have pointed out, to reassure the British about new arrangements in the EU. That, too, is dealt with in chapter 5. In the meantime, the next chapter outlines the positive and reciprocal measures that accompany freedom of movement.

⁵³*Kweder v The Minister for Justice* [1996] 1IR 381, cited by McGuinness, *op. cit.*, p. 20.

Positive measures facilitating free movement between Ireland and the UK: reciprocal rights and co-operation

With respect to the EU, there is extensive policy literature and jurisprudence dealing with disincentives, other than border formalities, to free movement; namely, the loss of legal, socio-economic and political rights. The European approach began with legal and social issues, rather than formal political rights and the abolition of frontier controls. Regulations were developed to co-ordinate different social security and social assistance systems so that workers would not be made worse-off by migrating. Social policy initiatives, such as efforts to bring about the mutual recognition of qualifications, also have this in mind, while other measures, such as equal pay, provide common norms for workers who may or may not migrate. Concerns to eliminate legal and social disincentives 'spilled-over' into the introduction of some political rights. Though external frontier and internal border controls are only now being tackled by the EC as a whole, the formalities of 'internal' controls (operated in the 'interior' of states), such as residence permits, began to be simplified some time ago.

Chapter 1 noted the distinction between the intergovernmental third pillar and the EC first pillar in EU treaties. Policies developed under the latter are called 'common'. But this sense of 'common' is not the same to Ireland as the 'commonality' of the old Commonwealth since, in the EU, policies arise from agreement amongst states which are not in dispute about their status. This sense of 'common', then, embodies the equality implied in the reciprocity sought by Ireland in 1921-2 (see chapter 2). As shown in this chapter, the early Irish preference for reciprocity over commonality and conceptions of economic interests had the deliberate result of a degree of non-reciprocity, except in terms of the previously discussed freedom from frontier controls. However, reciprocity began to become more symmetrical as relations with the UK improved and as the economy came to be seen as requiring participation by aliens, as in the terminology of the time.

This chapter illustrates, but does not cover comprehensively, the history of reciprocity. It should be remembered that many policy areas in which there may be rights-based incentives and disincentives to movement have become subject to EC regulation. Arrangements meeting the bi-lateral interests of the two islands – excluding EU matters but sometimes facilitated by the use of EC programmes – have shifted from specific rights to policy co-ordination. This began when the Taoiseach, Charles Haughey, and Prime Minister Margaret Thatcher initiated ‘joint studies’, then relatively unimportant but which foreshadowed a programme of work on north-south co-operation, under the aegis of the 1985 Anglo-Irish Agreement, that became extensive in the 1990s.¹ Such work will continue under the Belfast Agreement, should it be implemented. East-west co-operation has also been institutionalized and is ‘driven and co-ordinated by a joint Steering Group co-chaired by the Department of the Taoiseach and the Cabinet Office’.² It takes place under sixteen broad headings, including science and culture as well as the legal and socio-economic issues associated with individual free movement.

4.1 Legal and political rights

Section 23 of Ireland’s Nationality and Citizenship Act, 1935, allowed for conventions between the Irish Free State and other countries enabling citizens to enjoy reciprocity in ‘all or any of the rights and privileges’ in each country, ‘either absolutely or subject to compliance with conditions’. Similar provisions could be made by Order for aliens resident in Ireland whenever the Executive Council was satisfied that the laws of their country gave Irish nationals such rights and privileges. Section 26 of the Nationality and Citizenship Act, 1956, required there to be Orders in all cases. In addressing the Dáil in 1948 on the Republic of Ireland Bill, the Taoiseach assured the House that Britain and the Commonwealth countries had indicated their willingness to maintain co-operation over rights for Irish nationals despite new constitutional relationships.³ As noted in

¹Etain Tannam, 1999, *Cross-Border Cooperation in the Republic of Ireland and Northern Ireland*. Basingstoke, Macmillan, ch. 3.

²*Progress Report on Co-Operation Between Ireland and the United Kingdom; Developing East/West Relations*, Issued in the margins of the European Council Meeting in Luxembourg on 12/13 December, 1997, Introduction and Contents Page. (NB, a report for or from a bi-lateral meeting held in the opportunity afforded by EC/EU business.)

³Dáil Éireann debate on The Republic of Ireland Bill, Second Stage, 24 November 1948. Official Report of Debates, Vol. 113, No. 3, Cols. 382-3. D/T S9551. See also extracts from Taoiseach’s speech in chapter 2.

chapter 2, the British Nationality Act, 1948, and Ireland Act, 1949, maintained the right of Irish nationals resident in the UK to equal treatment under the law. As a result of the 1948 British Act, Section 23 of the 1935 Irish Act was used to promulgate an Order for reciprocity with the UK which, like the new British law, would come into force on 1 January, 1949.⁴ The Order opened and closed by stating the Irish government's satisfaction with the British Act's references to the rights and privileges of Irish nationals in the UK. Because of recognition in the UK of a distinct Irish nationality, 'Citizens of the United Kingdom and Colonies would, subject to law, enjoy in Ireland similar rights and privileges'. A similar Order was made for New Zealand and, in the next two years, for Australia, South Africa, Southern Rhodesia and others.⁵

Whether the Orders added much for aliens to their existing rights of entry and protection from some duties⁶ is questionable – except to restore something of the equality over residence and residential property that had been guaranteed by the Free State Constitution.⁷ Voting rights (see below) remained exclusive to Irish nationals under the 1937 Constitution. Section 23 of the Nationality and Citizenship Act, 1935, expressly excluded rights to own ships or shares in ships. It also stated that it did not apply to rights and privileges specifically restricted by Acts of the Oireachtas to Irish nationals or non-Irish wives of Irish nationals.⁸

⁴*Citizens of United Kingdom and Colonies (Irish Citizenship Rights) Order*, 1949, 1st day of January, 1949. D/T S14452 and D/T S9551.

⁵The processing of the Orders revealed a small tension between the Departments of Justice and External Affairs. The Department of External Affairs drafted the Order for Southern Rhodesia (10.1.51) without seeking 'formal approval from the Department of Justice on the ground that the proposed order was identical with previous orders, to the making of which no objection had been raised by that Dept'. The Secretary of the Department of Justice, Mr Coyne, was satisfied in that particular case but was concerned 'that the Minister for External Affairs, in submitting all these memoranda to the Government' (20.12.48, 19.1.49, 27.7.50 '& the present memorandum dated the 10th inst') 'is encroaching on the bailiwick of the Minister for Justice, having regard to the fact that the Minister for Justice is "the Minister" for the purpose of the Irish Nationality & Citizenship Act, 1935'. File Notes, 11.1.51. D/T S14452.

⁶Exemptions from the Aliens Act, 1935, and Order 1946 (see chapter 3) and protections from some duties such as jury service (Nationality and Citizenship Act, 1935, and Juries Act, 1927).

⁷See reference to Article 7's insistence that, in respect of the inviolability of property, 'citizen' meant any resident and not just 'citizens of the Irish Free State' in: *Heads of Nationality Bill* attached to Department of External Affairs Memorandum, *Nationality Bill, Observations on Points Raised by the Executive Council*, 10.1.34. D/T S6501.

⁸Conversely, it was still the law in 1937 that only 'a subject of the British Crown' could be elected as a fellow of Trinity College and elected only by members of the

Thus, legal rights to participate in economic activity were more limited than implied by the deceptively bland phrase, 'subject to compliance with conditions' (or, in other documents 'subject to law' – see below). In preparation during 1953 for the new Nationality and Citizenship Act, a list was compiled of Acts of the Oireachtas in which were contained such conditions. The main concern at this time was the incompatibility between 'subject to conditions' and the definition of Irish nationality, since the former imposed disabilities, not only on aliens, but also on 'Six Counties persons'.⁹ The relevant Acts and Regulations were the:

Merchant Shipping Act, 1947;
 Harbours Act, 1947;
 Pilotage Act, 1913 (as operated under subsequent bye-laws);
 Road Transport Act, 1935;
 Control of Manufactures Acts, 1932 and 1934;
 Control of Imports Act, 1934, and Control of Imports (Amendment) Act, 1937; Agriculture Produce (Cereals) Act, 1933;
 Air Navigation and Transport Act, 1936;
 Air Navigation (General) Regulations, 1930;
 Industrial and Commercial Property (Protection) Act, 1927,
 as amended by the Industrial and Commercial Property
 (Protection) (Amendment) Act, 1929.¹⁰

College who were British subjects. Under British law, this would allow Irish and British recruitment. But under Irish law, which had removed the effectiveness in Ireland of British nationality law (see chapter 2), Irish recruits would be excluded. The problem would have to be dealt with in the 'forthcoming' Nationality Bill (promised with the new Constitution but which, in the event, did not emerge until 1956) – or in the Executive Powers (Consequential Provisions) Bill. Letter from Cabinet Secretary, Maurice O' Muimhneachtáin, to The Secretary, Department of External Affairs, 2.2.37, D/T S9551.

⁹Note on: *Legislation administered by the Department of Industry and Commerce which imposes on Six County persons any disabilities which might be regarded as inconsistent with the Constitution or existing Nationality and Citizenship law*, u/d. D/T S13707A.

¹⁰Later – in 1964 – it was agreed to amend the Land Bill, then being considered in Dáil Éireann, to tighten control over the purchase of rural land by non-nationals by seeking to ensure that any such transfers of title could not take place without the consent of the Land Commission. D/T S14200B/63 and S14200C/95. Consideration was given at the time as to whether this would conflict with EEC rules. Prior to successful accession to the EC, the Irish Embassy in London made several enquiries to the embassies of other actual and prospective member states about a range of issues, including the effect of the EC on the rights of foreign ownership of land and enterprises, DFA London Embassy Series O103/19/32.

Asymmetrical reciprocity, obfuscated in a language that appeared to offer more (unless the full import of the qualifying phrases were understood), was a deliberate policy to serve the independence of the state and the interests of Irish nationals at home and overseas. A Department of Justice Memorandum on the 1948 Orders stated that they conferred 'not the rights and privileges of Irish citizens', but 'similar rights and privileges'. Reciprocity being 'subject to law', the 'special position of Irish citizens ... [was] ... fully safeguarded'.¹¹ Equally, a 1962 Department of External Affairs Memorandum on immigration sought to reassure the Cabinet that little would follow from co-ordinating immigration procedures, in order to maintain unrestricted travel between the two islands, by explaining that Sections 23 and 26:

grant[ed] reciprocal citizenship rights ... [but] conferred [them] "subject to law" and the change effected by such orders was stated in the relevant submissions to the Government at the time to be one of "*status rather than of substance*". *The making of the Orders appeared nevertheless to give satisfaction to the other countries concerned.* (emphasis added)¹²

However, in 1954 the Irish government had begun to define the national economic interest as implying a reduction of limitations, not only on residents of Northern Ireland (see above), but also on aliens. The days of need for restrictions had 'passed', according to the new Taoiseach, John Costello. 'Now we need to encourage the import of foreign capital and know-how'.¹³ Later, the elimination of various forms of socio-economic national discrimination was reinforced by the underlying principles of the EC. In the decade after the Taoiseach's declaration, political disincentives to movement – or asymmetrical reciprocity – began to be reduced.

In 1963, residence, not nationality, became the criterion for eligibility to vote in local elections and, in 1974, for the right to stand as a candidate.¹⁴ But the apex of citizenship rights did not begin to

¹¹Department of Justice, *Memorandum to the Government, Grant of Reciprocal Citizenship Rights to British and New Zealand Nationals*, 20.12.48. D/T S.9551 and S.1.4452.

¹²Department of External Affairs, *Memorandum to the Government, Control of Alien Immigration into Ireland*, 7.2.62. D/T S15273B.

¹³Taoiseach, 1.10.54, D/T S1152B.

¹⁴J.P. Gardner (ed.), 1997, *Citizenship: The White Paper*. London: The British Institute of International and Comparative Law/The Institute for Citizenship Studies, pp. 320, 323.

be tackled until 1983, succeeding at the second attempt in 1984-85. In 1984, a referendum authorized the Constitution to be amended to allow voting rights at Dáil elections to other nationals as specified by legislation.¹⁵ The consequent Electoral (Amendment) Act, 1985 made British nationals eligible to vote in general elections.¹⁶ But they are not allowed to vote in referendums. Nor may they vote in Presidential elections. Moreover, only Irish nationals are entitled to be candidates in general elections.

In the UK, resident Irish and Commonwealth nationals have always been entitled to vote and stand as candidates in all elections.¹⁷ The status of the British referendum is different and inferior to that in Ireland but, in those which have been held, entitlement to vote has been defined by eligibility to vote in parliamentary elections¹⁸ – thus including Irish nationals. There is, of course, no British equivalent of presidential elections but, if there were, current legal principles would enable Irish nationals to participate.

4.2 Mutual recognition of qualifications and other employment and educational issues

In 1923, Saorstát Éireann passed an Act, arising from a Private Member's Bill promoted by the Irish Law Society, exempting, subject to other conditions, English and Scottish solicitors from 'service and examination' in admission as Solicitor in the Irish Free State. The British government had intimated that there would be reciprocity

¹⁵Department of the Environment. Referendum on Extension of Voting Rights at Dáil Elections (1984) (Ninth Amendment of the Constitution Bill, 1984). Approved by the people on 14.6.84 by 828,483 votes to 270,250. Bill signed by the President on 2 August 1984 and promulgated as a law. The prior setback had been a finding by the Supreme Court that a first proposal for legislation was unconstitutional; *In re Electoral (Amendment) Bill, 1983 [1984] IR 268*.

¹⁶The Electoral Act, 1992 [No. 23], which deals with the provisions of the Maastricht Treaty on local and European Parliamentary elections, also confirms what was envisaged in the 1985 Act about EU citizens (Gardner, *op. cit.*, p. 320); that they might vote in Dáil elections should the state of which they were nationals ever grant the same right to Irish residents there. No such case has yet occurred.

¹⁷Gardner, *op. cit.*, p. 60 on UK and p. 323 on Ireland. In the 1950s and 1960s, there were Irish mayors in half a dozen London boroughs, five major Midland and northern authorities and many smaller towns. Minute, dated 16.6.68, by Mr T. Feehan, Local Advisory Officer, Irish Embassy in London on *The Change in Attitude to the Irish in Britain*. Written for Dr Brennan who forwarded it to Department of External Affairs on 21.8.68 in connection with the *Draft Memorandum from Department of Labour to Government on Emigration*, a document that was circulated to other Departments for comment during the summer of that year. DFA London Embassy Series B100/221.

¹⁸Gardner, *op. cit.*, p. 47.

but – possibly because of opposition in the English Law Society – it retreated from responding to the Irish Act with a UK Order-in-Council and suggested, instead, that Ireland would have to adopt, as an Act of the Oireachtas, the Colonial Solicitors Act, 1900. Irish legal advice concurred in principle but, since the 1900 Act included objectionable terms, such as ‘British possessions’, its adoption was problematic. Notwithstanding lobbying from the Irish Law Society, it was decided that no such law could be contemplated.¹⁹ The news that there would be no legislation to activate reciprocity by the UK provoked letters of disappointment in 1930 from New Zealand and, in 1932, from Belfast and London. These were insufficient to move the Irish government which eventually, in 1947, repealed the 1923 Act.²⁰

However, general university and other qualifications were mutually recognised, except on rare occasions when one UK employer or another restricted recruitment to graduates of British universities. For example, following partition, Ireland took steps to recognize the qualifications of school teachers from Northern Ireland and Great Britain, measures which still exist though now subsumed under EU rules about the mutual recognition of diplomas.²¹ The occasional restrictions imposed by UK employers in the 1950s, according to the Irish Embassy in London, were not inconsistent with the 1948 Nationality Act’s recognition of Irish rights in Britain since they did not debar the recruitment of an Irish national educated in Britain and did disallow the recruitment of a British national educated in Ireland. In general, ‘graduates of Irish universities seem[ed] to be afforded reasonable opportunities of competing for employment in Great Britain’ – though it also proved necessary to protest in 1955 about Burnham Committee recommendations limiting special increments to graduates of UK universities.²² Until the early 1960s, Irish-born women in Great Britain formed a rather higher proportion among professional occupations than did men – albeit in the lower rather than the higher professions.²³ By the late 1960s, the position of all Irish professionals in Great Britain was

¹⁹Letter from Governor-General, T. M. Healy, to Secretary of State for Dominion Affairs, 24.8.25. D/T S3746A.

²⁰At the same time as repealing nineteenth-century legislation on Irish solicitors by the Solicitors Amendment Act, 1947. D/T S5830 and S13858A.

²¹I am grateful to Diarmaid McGuinness for this example.

²²D/T S2147 and D/T S2175.

²³John Archer Jackson, 1963, *The Irish in Britain*. London: Routledge and Kegan Paul. p. 106.

described as highly successful – in the senior ranks of the civil, public and armed services and in the arts.²⁴ For men and women, the situation was different in Northern Ireland where the devolved government's Safeguarding of Employment Act, 1935 restricted recruitment to 'natural born British subjects'.²⁵

In terms of professional or non-manual employment, Irish access to public service posts in Northern Ireland and Great Britain has been affected positively and adversely by steps taken to comply with EC free movement provisions. Until 1991, Commonwealth nationals could serve in the Home Civil Service and the Northern Ireland Civil Service. Irish nationals could serve in the former but not the latter. The European Communities (Employment in the Civil Service) Order, 1991, enabled aliens to be appointed to both services if they were nationals of the EC or the European Economic Area (EEA), so long as the posts in question were not exempt, under Article 48(4) of the EC Treaty, from the non-discrimination principle. Case law in the European Court of Justice (ECJ) is quite strict about what justifies the restriction of recruitment to nationals – though it ruled that the requirement in Ireland to pass an Irish language test was not unlawful indirect discrimination against non-nationals. Posts covered by Article 48(4) must be shown to presume on a special relationship of allegiance to the state because their holders would be participating in the determination of affairs of state or, in carrying out their duties, would be expected to compel obedience from other agencies and individuals.²⁶

On the one hand, the 1991 Order expanded the rights of Irish nationals by opening the possibility of recruitment to non-exempted posts in the Northern Ireland Civil Service, while maintaining their

²⁴Minute by Local Advisory Officer, Irish Embassy in London, *op. cit.* He also pointed out that, in his view, successful access to occupations, middle-class housing and education for their children did not compel assimilation but that the climate enabled them to play a full part in British life while remaining clearly identifiable as Irish.

²⁵D/T S9616. See chapter 2 on the difficulties of defining what 'British subject means'. Even if the Northern Irish had in mind something like 'belongers' or 'patrials' (see chapter 5), they still required nationals from Great Britain to be in receipt of an employment permit – 'the real anomaly' in British law (not Irish freedoms in Great Britain), in the view of Mr Paul Rose, MP, letter to *The Times*, 1.1.71, DFA London Embassy Series F100/4/46. See also references in Appendix 1 to Unionist fear that this legislation would have to go on accession to the EC.

²⁶Summarized by Lord Chief Justice Carswell in his Judgment on applications for judicial review by Edward Michael O'Boyle and Suzanne Plunkett. Belfast: Court of Appeal in Northern Ireland.

access to the full range of posts in Great Britain. Nevertheless, an anomaly remained in that Commonwealth and Irish nationals had access to posts in Great Britain (and Commonwealth nationals in Northern Ireland) which were denied, because exempted, to EC and EEA nationals. In 1996, their special position was brought to an end in revised Civil Service Nationality Rules which restricted recruitment to all exempted posts to UK nationals exclusively. (This may change again – see chapter 5.)

In manual occupations in the 1960s, there was what Jackson²⁷ calls 'a characteristically ambivalent British attitude towards the Irish by employers and fellow-workers'. On the one hand, there was no occupation from which the Irish were excluded and their labour was almost indispensable in some sectors. On the other, there were doubts about them, mainly relating to perceptions of their commitment.²⁸ In the main, however, there were 'equal opportunities in the labour market' in Great Britain. All the same, the adverse impact on Irish employees, in manual and other occupations, of misunderstandings was sufficient to inspire officials of the two states to take steps to reduce them. At a meeting in 1969, it appeared that there was some confusion arising from a 'lack of synchronisation between educational qualifications in the two countries', making it 'difficult for Irish emigrants to Britain to know what jobs their qualifications here would fit them for'.²⁹ It was agreed to consider the possibility of 'a ready reckoner', from which equivalent qualifications could be read

²⁷John Archer Jackson, *op. cit.*, pp. 106-8.

²⁸On the other hand, the Local Advisory Officer in the Irish Embassy in London, *op. cit.*, took the view that 'the Irish labourer' had been pushed 'a rung or two up the social ladder' as a result of the 'continuing influx of coloured immigrants' which made Ireland an 'accepted' country to come from and, like middle-class counterparts, could 'claim his equal place in English society if he wants it, without losing his own national identity'.

²⁹The meeting was between Secretary of the Department of Labour and Sir Denis Barnes, Permanent Under-Secretary, accompanied by other officials of the British Department of Employment and Productivity, 5.2.69. DFA, London Embassy Series L121/3. The year before, the Minister of Labour, Patrick Hillery had made a widely reported speech in which he had said that, while there were those who thought that emigration should be stopped, it was a fact of life that there were not enough employment opportunities in Ireland to save everyone from being forced to seek work abroad. The well-educated, he said, were 'geared to cope with ... emigration'. In addition to seeking to create new opportunities in Ireland, his department would be seeking ways of ensuring that 'boys and girls with lower standards of education', forced to seek work abroad, were provided with better information about job opportunities. *Speech on the Occasion of the Official Opening of the New Employment Exchange in Cahirciveen*, 19.7.68, DFA London Embassy Series B100/221.

across. The meeting also raised other issues arising from a renewed desire by the Irish government to discourage emigration – to a target of five thousand by 1980 – while, at the same time, ensuring that those who did go were properly supported. Discussion covered housing in the UK for mobile and seasonal labour, the regulation of British private employment agencies and, without reverting fully to the pre-1935 system of advertising British vacancies in Irish labour exchanges,³⁰ the possibility of providing information in Ireland about jobs in Great Britain and vice versa.

Similar issues, updated to modern conditions, are still discussed. In the 1990s, there were talks about the mutual recognition of the qualifications of electricians and construction workers and common training for film and television work.³¹ In 1991, the Transfrontier Committee on Employment and Training was established in response to a report by the British-Irish Inter-Parliamentary Body on the Irish in Britain. This 'brings together the employment and training services of Britain and Ireland to facilitate the free movement of migrant workers between the two countries'.³² Familiarity with each other's training and qualifications is facilitated by north-south and east-west educational exchanges and partnerships – some of them in the context of EU initiatives.³³ Outright discrimination has been brought within the ambit of British law, the Irish now being covered in the work of the Commission for Racial Equality.³⁴

4.3 Social security agreements and health

Provisions to disentangle public insurance schemes in the context of the new Irish Free State and the UK were enacted in 1923. They

³⁰See also John Archer Jackson on recruitment arrangements during and just after the Second World War, *op. cit.*, pp. 98-105. In 1968, the Department of External Affairs strongly opposed a proposal to collaborate formally with the British Employment Service on the basis that freedom of travel might become tempered by British control or influence on the volume and pattern of recruitment to employment. The Department had in mind the pressures in the UK throughout the 1960s to halt all immigration from the Commonwealth, likely to be reinforced by bad labour market forecasts in 1968. *Observations of Department of External Affairs on Department of Labour's Memorandum for the Government on Emigration*, undated, DFA London Embassy Series B100/221.

³¹*Progress Report on Co-Operation, op. cit.*, pp. 25, 46.

³²*ibid.*, p. 26.

³³*ibid.*, pp. 1-10. There is also a small programme of exchanges of civil servants; p 36.

³⁴John A. Jackson, 1998, Review of Mary Hickman and Bronwen Walter, 1997, *Discrimination and the Irish Community in Britain*. London: Commission for Racial Equality, in *Irish Studies Review*, 6(2), pp. 209-10.

also enabled the authorities of both states to make mutual arrangements to provide support for nationals temporarily resident in the other state. It was also agreed to exempt nationals of one state, normally resident at home but having moved to the other for temporary employment, from the need to contribute to the other scheme.³⁵ From 1923 onwards, various reciprocal agreements were put into force which, until the 1960s, covered the following entitlements, most of them paired:

Ireland	UK
Disability Benefit	Sickness Benefit
Maternity Benefit	Maternity Benefit
Marriage Benefit	—
Unemployment Benefit	Unemployment Benefit
Workmen's Compensation	Industrial Injuries Benefit
Widow's (contributory) Pension	Widow's Benefit
Orphan's (contributory) Allowance	Guardian's Allowance ³⁶

There were some limitations to reciprocity in unemployment and widows benefits. And, until 1966, there was nothing at all on old age pensions. This was because there was no comprehensive contributory scheme in Ireland until 1961 and its absence was used as a reason by the British to freeze the amount of old age pensions paid to persons leaving the UK for Ireland to the rate which pertained at the time of either retirement or departure. This affected over twelve thousand persons in Ireland in receipt of retirement or widows' pensions from Great Britain and eight hundred in receipt of pensions from Northern Ireland. This was resolved – with the *quid pro quo* that, in assessing eligibility for Irish social security, Ireland would disregard the first £80 of British War Pensions – in a new Agreement on Social Security between the Government of Ireland and the Government of the United Kingdom, signed on 28 February, 1966 and effective from 4 April of the same year.³⁷

Earlier in the 1960s, Ireland had participated – somewhat reluctantly³⁸ – in multi-lateral social security developments arising

³⁵Privy Council; *National Health Insurance (International Arrangements) Order, 1923*. D/T S2082.

³⁶Department of External Affairs, *Memorandum for the Government, 21.2.66*. D/T S17973. ³⁷D/T S17973.

³⁸Article 12, Paragraph 4 of the 1961 European Social Charter (in preparation since 1954) deals with equality for migrants. 'It provides that Parties shall take steps "by the conclusion of appropriate bilateral and multilateral agreements, or by other means" to ensure equality of treatment for the nationals of the Contracting Parties in respect

from the 1961 European Social Charter. These international provisions were considered in the lead-up to the 1966 agreement with the UK but rejected in favour of the simplicity of bi-lateral solutions. The long bi-lateral experience, however, of reciprocity in the aggregation of contributions and apportionment of responsibility for payment was noted as advantageous for Ireland as membership of the EC was contemplated.³⁹

Bi-lateral approaches continue in the 1990s, though sometimes motivated more by the need to tighten regulation than by the idea of supporting each other's nationals. For example, the UK proposed in 1996 that there be a Memorandum of Understanding between Ireland and the UK on social security fraud and the two governments agreed to work on it. There is also co-operation over the work of the British Child Support Agency.⁴⁰ However, the two governments still collaborate over the preparation of emigrants and support for them in the host country. This includes special attention to homelessness amongst Irish nationals in Great Britain, the Irish government contributing to the funding of centres there. But it also covers British homelessness in Ireland.⁴¹

of social security rights and the granting and maintenance of such rights by such means as accumulation of assurance periods completed under the legislation of each of the Contracting Parties'. The Tánaiste and Minister for Health, Seán MacEntee, objected to the paragraph because it 'might require us to make such agreements whether they are needed or not'. The Minister for Finance objected because it might involve a 'substantial cost falling on public funds'. Another objection was that it might entail having to give out information about family planning - never on the public policy agenda since the 'hierarchy had reacted so adversely in 1940s'. The Tánaiste also thought signing would be 'tantamount to entering into a condominium' and inconsistent with Irish sovereignty. He argued that the Charter was not comparable to the EEC where regulation from outside the state was a 'quid pro quo' for other benefits and for avoidance of the bleak future that would follow from staying out while Britain went in. Despite his lengthy case for not signing, the government agreed to do so, noting it would not be bound by Article 12, Paragraph 2 on levels of social security specified in ILO Convention 102 because the government had not ratified that Convention. The government signed the Charter at Turin on 18.10.61. Department of External Affairs, *Memorandum for the Government, European Social Charter*, 2.9.61. *Memorandum for the Government, Draft European Social Charter: Signature*, 6.9.61. *Memorandum for the Government, Council of Europe, Proposed European Social Charter*, 7.9.61. Letter from Cabinet Secretary, Dr N. S. O'Nualláin to departments, 8.9.61, and extract of Cabinet minutes, item 1, 8.9.61. All in D/T S15360D.

³⁹Briefing note, C.D.63/62. D/T S17246F/62.

⁴⁰*Progress Report on Co-Operation, op. cit.*, p. 33.

⁴¹*ibid.*, p. 30. In the 1960s, there had been considerable controversy about financial assistance by the Irish government. A number of contradictory factors had to be weighed up. The tradition had been to help only those forced by adverse circumstances to return to Ireland, leaving voluntary associations to help with other problems. Public

In the absence of organ transplant facilities in Ireland, Irish patients needing lung, liver and, previously, heart transplants are, or were, referred to hospitals in England. Such arrangements are in the process of being more formalized and, in the longer term, the UK will co-operate over the establishment of expert centres in Ireland.⁴² Both states also share data and research findings relating to the misuse of drugs and to food safety.⁴³

4.4 Conclusion

Should the Belfast Agreement be implemented, an even denser pattern of co-operation may come into play. In addition to the North-South Ministerial Council, which will have the authority to deal with the same kinds of functional issues explored hitherto under the Anglo-Irish Agreement, and current east-west inter-state co-operation, the British-Irish Council has the potential to formalize co-operation between Ireland and all the component parts of the UK with elected assemblies. The over-riding importance of freedom of travel for seventy-five years (chapter 3) and the value of reciprocal rights and policy co-operation invite consideration of the interests served by these policies. This forms the opening of the next chapter which then considers the conditions under which priorities could change.

assistance with accommodation, as opposed to counselling over jobs and qualifications, etc, might be seen to be encouraging emigration. Moreover, the majority of Irish emigrants were successful or, at least, managing and did not need assistance with accommodation. However, if they did fall into difficulty, it was thought, in Ireland, that since they had paid taxes in the UK and contributed to the British economy, the UK should take responsibility for them. Yet, again, 'realities' in the relationship between the two labour markets had to be faced. Thus, from the late 1960s, the position on Irish public financial support for voluntary agencies in Great Britain began to change, DFA London Embassy Series B100/221; that is, in addition to the limited shift towards greater co-operation between the employment services of the two states (see notes 29, 30).

⁴²*ibid.*, pp. 27-8.

⁴³*ibid.*, pp. 28-9.

The value of the CTA to Ireland and conditions under which Irish policy priorities might be re-considered

Chapter 3 (see also Appendix 1) showed that Irish governments willingly co-operated with the UK over immigration control in order to meet their own conception of interests in security, cultural homogeneity and aspects of the economy – even during periods of inauspicious inter-state relations (chapter 2). At times, the freedom of movement protected by this co-operation seemed inconsistent with the discouragement of emigration. But there were also periods in which emigration was a ‘safety valve’ for unemployment and entry into the UK without controls was useful in smoothing the path of emigrants. Chapter 4 showed that Irish governments succeeded in ensuring that Irish nationals in the UK remained entitled to the equal protection of the law, while, for a long time, British and other aliens in Ireland enjoyed only ‘similar’ rights which were ‘subject to conditions’. This chapter opens with an indication of the scale upon which individuals exercise the freedoms and rights of the CTA in terms of private or business traffic and of residence. It then considers conditions under which policy priorities on freedom of movement might change. In conclusion, the chapter revisits the relationship between Ireland and the UK – this time in its modern form – within which any reconsideration of the CTA would take place.

5.1.1 General passenger traffic

As is well known, the volume of passenger traffic on air and sea routes between Ireland and Great Britain, to which the CTA applies, is much higher than that between Ireland and the European continent. This reflects the greater closeness of ties of kinship, language, culture, economics and history between the two islands than between them and the continent. Thus, though there is no means of verifying the number of repeat visits, journeys between the islands are likely to involve members of the same families, possibly making the crossing several times a year. Such travellers might be expected

particularly to value the absence of controls; this is certainly the case in the border regions of France where domestic and working life involves daily crossings.¹

Table 1: Estimated visits overseas by Irish residents via cross-channel and continental routes ('000s): air and sea

<i>Year</i>	<i>Total</i>	<i>Cross-channel</i>	<i>Cross-channel as % of total</i>	<i>Continental</i>	<i>Continental as % of total</i>
1978	1,107	826	75	281	25
1979	1,190	844	71	346	29
1982	1,232	831	67	401	33
1983	1,206	821	68	379	32
1984	1,183	821	69	362	31
1985	1,204	876	73	328	27
1986	1,305	956	73	349	27
1987	1,493	1,084	73	409	27
1988	1,654	1,171	71	483	29
1989	1,718	1,243	72	475	28
1990	1,692	1,267	75	425	25
1991	1,660	1,242	75	418	25
1992	1,840	1,359	74	481	26
1993	1,914	1,397	73	517	27
1994	2,212	1,623	73	589	27
1995	2,401	1,712	71	689	29

Bord Fáilte passenger statistics, January 1998: all departures

1996	7,046	5,424	77	1,622	23
1997	7,800	6,034	77	1,766	23

Sources:

For 1978-95. Central Statistics Office: Statistical Bulletin, September 1974, tables 8, 9, 10, p. 159; Statistical Bulletin, June 1980, table 6, p. 87; Statistical Bulletin, September 1991, tables 2 and 7, pp. 436 and 441; Statistical Bulletin June 1997, table 7, p. 411.

For 1995-96. Bord Fáilte: Passenger Statistics, January, 1998. (These should be halved for an estimate of outward traffic.)

¹House of Lords Select Committee on the European Communities, 7th Report, Session 1998-99, 2 March, 1999. London: House of Lords Publications on the internet (<http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhome/htm>). Minutes of Evidence, para. 48.

Table 1 on traffic out from Ireland shows that, between 1978 and 1995, estimated visits by Irish residents to Great Britain rose from about 0.83 million to almost 1.71 million and, possibly, 3.0 million in 1997. In contrast, estimated visits to the European continent were much less numerous, rising in the same period from 0.38 million to 0.69 and possibly 0.8 million.

Table 2 shows comparable figures for inward visits to Ireland. The estimates for visits from Great Britain amount to 1.32 million in 1978, 3.19 million in 1995 and probably about the same in 1997. Again, the continental estimates for the same period are much lower at about 0.18 million rising to 0.79 and possibly 0.8 million.

Table 2: Estimated visits to Ireland via cross-channel and continental routes ('000s): air and sea

<i>Year</i>	<i>Total</i>	<i>Cross-channel</i>	<i>Cross-channel % of total</i>	<i>Continental</i>	<i>Continental % of total</i>
1978	1,494	1,316	88	178	12
1979	1,544	1,345	87	199	13
1982/83	1,576	1,345	85	235	15
1984	1,688	1,463	87	225	13
1985	1,699	1,447	85	252	15
1986	1,620	1,378	85	242	15
1987	1,827	1,555	85	272	15
1988	2,132	1,822	85	310	15
1989	2,511	2,128	85	383	15
1990	2,854	2,357	83	497	17
1991	2,827	2,258	80	569	20
1992	2,935	2,336	80	599	20
1993	3,127	2,474	79	653	21
1994	3,439	2,713	79	726	21
1995	3,978	3,193	80	785	20
<i>Bord Fáilte Passenger Statistics, January 1998 : Total arrivals</i>					
1996	6,947	5,345	77	1,602	23
1997	7,766	6,026	78	1,740	22

Sources:

For 1978-95: Central Statistics Office: Statistical Bulletin, September 1974, tables 3, 5, p. 158; Statistical Bulletin, June 1980, table 2, p. 86; Statistical Bulletin, September 1991, table 3, p. 439; Statistical Bulletin, June 1997, table 3, p. 409.
For 1995-96: Bord Fáilte: Passenger Statistics, January 1998. (These should be halved for an estimate of inward traffic.)

Table 3 shows estimated inward visits according to area of residence. Visits by residents of Great Britain rose from about 1.19 million in 1984 to 2.34 in 1995. Visits by continental residents are much lower, though they rose from about 0.30 million to 1.09 million in the same period. (A comparison of Tables 2 and 3 would suggest that, in 1984, between a third and a half of visits from British air- and seaports were made by people who were not resident in Great Britain and about a quarter in 1995.)

Table 3: Estimated visitors to Ireland by area of residence, excluding transatlantic ('000s)

<i>Year</i>	<i>Total</i>	<i>GB</i>	<i>GB as %</i>	<i>Continental</i>	<i>Continental as</i>
1984	1,486	1,188	80	298	20
1985	1,430	1,104	77	326	23
1986	1,410	1,084	77	326	23
1987	1,591	1,209	76	382	24
1988	1,863	1,465	79	398	21
1989	2,206	1,668	76	538	24
1990	2,517	1,786	71	731	29
1991	2,553	1,729	68	824	32
1992	2,613	1,758	67	855	33
1993	2,811	1,887	67	924	33
1994	3,057	2,087	68	970	32
1995	3,450	2,365	69	1,085	31

Sources: Central Statistics Office: Statistical Bulletin, September 1991, table 3, p. 439; Statistical Bulletin, June 1997, table 3, p. 409.

5.1.2 Trade and business

The figures in Tables 1 to 3 include visits made for business purposes as well as other reasons. It is worth noting that the abolition of internal EU borders stems from the costs incurred in moving goods and the need to ease the difficulty of transnational service-provision, as much as from the rights of individual citizens to move without hindrance. The UK is still Ireland's largest export market and Ireland is still very high amongst countries to which the UK exports.² Trends are

²Garret FitzGerald, Paul Gillespie and Ronan Fanning, 1996, 'Britain: A Crisis of Identity' in Paul Gillespie (ed.), *Britain's European Question; The Issues for Ireland*, Dublin: Institute of European Affairs, pp. 9 and 23.

moving (see below) but the current pattern and balance of trade suggest that a lack of formalities, on cross-channel sea routes and north-south land routes, must be more valuable to the two countries than the elimination of them between both and the continent.

5.1.3 Labour market convenience

There has been a persistent British demand throughout most of the twentieth century for Irish labour and, in the 1940s, 80 per cent of the outflow from Ireland went to Great Britain.³ Although Irish migration to Great Britain is now less than half of the total outflow, the other island is three times more likely than the rest of Europe to be the chosen destination. Thus, from the point of view of employers and employees (and their families), control-free travel between the two islands is likely still to be more significant than a similar convenience between Ireland and the continent.

5.1.4 British nationals resident in Ireland and Irish nationals resident in Great Britain

The figures in Tables 1 to 3 do not enable us to compare how Irish and UK nationals benefit from the absence of controls and the existence of rights – since the statistics are based on route or residence, not nationality. From a statistical summary of the most recent electoral register for Ireland, it can be deduced that there are 20,719 UK nationals living in Ireland registered to vote; that is, 0.75 per cent of the electorate.⁴ Estimates of the numbers of Irish-born living in Great Britain are controversial – as in 1961-62 (see Appendix 1). In 1951, UK census data identified just over 1.2 million people born in the north and south of Ireland; that is 1.5 per cent of the population.⁵ A more recent estimate, published in 1996, is just that there are over 0.5 million born in the Republic, rising to 0.8 million if those born in Northern Ireland are included;⁶ the 1991 census records 837,464 Irish-born people in Britain. The 1996 source also states that there are 2.0 million Irish citizens in Great Britain – presumably including those not born in Ireland but Irish by descent. These various figures suggest that Irish nationals in the UK amount to between 1 and just over 3 per cent of the population.

³Alan Barrett, forthcoming, 'European Migration: What do We Know? The Case of Ireland'. Dublin: Economic and Social Research Institute.

⁴Data provided by the Franchise Division, Department of the Environment.

⁵John Archer Jackson, 1963, *The Irish In Britain*, London: Routledge and Kegan Paul, p. 187-8.

⁶FitzGerald, Gillespie and Fanning, *op.cit.*, p. 8.

Obviously, these percentages of, on the one hand, the electorate and, on the other, populations are not really comparable.⁷ But, in terms of the personal enjoyment of visits back to the country of origin and of receiving home-based relatives without inconvenience, the balance would seem to lie with Irish nationals. It was, indeed, a factor in the Irish negotiating position at Amsterdam that Irish people would not wish to lose their more extensively used rights of free movement in one travel area for more seldom used rights, albeit in a wider sphere.⁸ On the other hand, as noted in Appendix 1, considerable numbers of British tourists were expected in 1961 to be deterred from visiting Ireland by immigration checks of any kind. At the time, the Taoiseach doubted the strength of the case put to him. But insofar as it had some foundation, which might have continued, and added to those UK nationals in Ireland, it can be said that the individual interests of nationals of both countries are still well served by the CTA. The scope of personal and business interests served by the CTA raises the question of whether they could ever be rivalled by strategic and individual interests leading Ireland to use its right to end its 'opt-outs' from the Amsterdam Treaty.

5.2 Conditions under which Irish policy priorities might be reconsidered

If Ireland's security interests were protected by the CTA, it follows that, should those interests change and there were no other overriding concern, the need for the CTA would be weaker. Since the preservation of cultural homogeneity is no longer a public policy objective, this factor might also give rise to reconsideration. If Irish and British passengers enjoy control-free travel – as assumed in the CTA – new patterns of movement would imply a new location for the convenience of an absence of controls. If patterns of inward traffic – personal or economic – shift from Irish-British routes to continental ones, there may be a stronger imperative to abolish border controls in the EU context than to co-operate with the UK. If outward traffic moves in the same direction, it may become relatively less important, for labour market flexibility, to use reciprocity to protect freedom and rights for Irish nationals travelling to, and resident in, the UK –

⁷To compare them directly by deriving from voter figures an estimate of the British population in Ireland (or *vice versa* for the Irish in Britain) voters would involve making rather heroic assumptions about propensity to vote, rates of marriage and size of family, etc.

⁸Interview in Department of Foreign Affairs, 1998.

some of which rights, such as voting and social security, are stronger, or less complicated to claim, than those pertaining in the EU. A longer term factor lies in the future status of Northern Ireland. There is also the possibility that the UK might reverse its insistence that other border controls could never be lifted. In the event of both states accepting EU arrangements, the CTA would be redundant, though some questions of reciprocity would remain. While the rest of this chapter sets out scenarios in which policy might change, it first considers the possibility that it never could.

5.2.1 Never?

Chapter 3 identified security and cultural factors that led to a common interest in bi-lateral control of immigration. The details of those interests have altered since the 1920s but politicians in Ireland and the UK still share geo-political and ideological outlooks, discussed below, which might make it unlikely that either state would ever prefer control-free travel within the EU as a whole to their own bi-lateral system – though, as noted in the final scenario, they could change as a result of complications arising from the opt-outs. Until then, even if traditional concerns were more strongly felt in the UK than in Ireland, it would be in Ireland's interest to continue to take account of them in the absence of new pragmatic interests (see later sections) and because of Northern Ireland (also discussed later).

From the geo-political point of view the UK and Ireland are often contrasted with Luxembourg in that the former – leaving aside Northern Ireland – are both entirely surrounded by sea, more like an external frontier, while the latter is circled by internal land borders (for EU definitions, see chapter 1). Other states fall in between, having some external frontiers but also long land borders in common. Though the significance attached by the UK to the nature of its frontier can be questioned (see below on a UK *volte face*), Great Britain being an island is still crucial to the outlooks of governments on the maintenance of frontier controls.⁹

British interests in controls relate to conceptions of sovereignty, effective security and liberty. A deep cross-party consensus that sovereignty is still coterminous with controlling movement across

⁹House of Lords Select Committee on the European Communities, esp. 31st Report, Session 1997-98, 28 July, 1998. London: House of Lords Publications on the internet (<http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhome/htm>); and 7th Report, *op. cit.*

frontiers, together with ideas about how best to control terrorism, makes systematic checks on persons inescapable.¹⁰ With those as 'givens', Great Britain enjoys a natural advantage in administering controls effectively; 'our island geography means that there is a natural channelling of immigration into a limited number of ports, so it is sensible and efficient to do routine checks there'.¹¹

British policy-makers consider that a frontier control, enabling immigration officers to verify those with a right to land (EU and European Economic Area, EEA, nationals) and to identify those for whom landing is subject to permission, is a 'minor inconvenience'. The House of Lords Select Committee on the European Communities was told of the 'lightness' of 'a wave through', lasting about a minute,¹² for holders of EU or EEA passports or, now, merely identity cards.¹³ The idea that an intermittent check is also a minor inconvenience was suggested by a recent Irish Minister for Justice (see below on asylum-seeking).

To the British, this inconvenience 'is preferable to a system of internal controls which would inevitably be more intrusive and which might also be perceived as having a negative impact on community relations'.¹⁴ The principal reason for avoiding internal

¹⁰Brown quotes former and current Home Secretaries. Kenneth Baker; that conflict over the maintenance of national frontier controls 'will be the ultimate test of "who governs?" – the national or the supranational state'. Jack Straw; that 'our position has always been that the issues of border controls and immigration policy must be for the UK alone to determine ...' and that the 'inevitable results' of having to lift controls would be that 'Britain would be required to introduce identity cards'; Jennifer Brown, 1998, *Ireland and the Development of European Co-operation in Justice and Home Affairs*. Master's Thesis, Department of European Political and Administrative Studies, College of Europe, Bruges, pp. 7, 39. Noel Dorr also notes the strength of British convictions, regardless of which party is in government; 'The Communitarisation of Schengen and the Position of Ireland', Paper presented at Conference of the Irish European Law Forum, 5 September 1998. In evidence by Kate Hoey, Parliamentary Under-Secretary of State, Home Office, in the House of Lords 7th Report, *op. cit.*, she made several references to 'our island nation' – rather oddly, in two senses, given that, in the same evidence, she referred to her possession of a Northern Irish driving licence. The existence of her place of origin means that the UK is not 'an island nation'.

¹¹Letter to author from UK Immigration and Nationality Directorate, Home Office, 1.2.99. House of Lords 7th Report, *op. cit.*, paras. 13, 20, Minutes of Evidence, para. 82. 'Funnelling' and 'choke point' are the analogies used here. Geography, however, may also facilitate the circulation of undesirable traffic, long, deserted coastlines providing too much opportunity for the illegal entry of persons and goods, though according to the 7th Report, there is little evidence that this is a serious problem for the UK as compared to Greece or Italy; Minutes of Evidence, paras. 21, 94, 95.

¹²House of Lords, 7th Report, *op. cit.*, para. 15, Minutes of Evidence, para. 86.

¹³*ibid.*, Minutes of Evidence, para. 97.

¹⁴Letter, UK Immigration and Nationality Directorate, *op. cit.* See also House of Lords, 7th Report, *op. cit.*, paras. 21, 22.

controls reflects a conception of liberty, shared in the UK and Ireland, which has given rise to traditions of minimal surveillance by the state of the movement of persons on lawful, private business. Governments of both states claim that retaining frontier controls enables them to avoid introducing identity cards which, despite the absence of any such requirement in the Schengen *acquis*,¹⁵ both believe would be a corollary of lifting controls. Both governments also believe, contrary to some evidence (see below on a UK *volte face*), that identity cards are widely disliked by both populations.¹⁶ As is clear from the House of Lords Select Committee,¹⁷ the secondary reason stems from bitter experience in the UK of discriminatory infringements of liberty in the implementation of rules permitting persons to be stopped and searched. Problems of inter-ethnic community relations have been rare in Ireland but controversies are growing in the context of attitudes to a rising number of asylum-seekers (see below).

It is also possible that a shared conception of liberty is bolstered by greater trust between the Irish and the British than between either of them and their more recent partners. It would hardly be surprising if almost eighty years of experience did not make each state confident of the other's determination to make their system work, reinforced by having in common, though differently expressed, cultural and strategic senses of 'island exceptionalism'. Indeed, a British lack of trust in the 'outer perimeter' of the EU was evident in 1989 and, to some extent, remains in 1999.¹⁸ As noted in chapter 1, the UK political context caused British officials to acquiesce in the Irish negotiating lead at Amsterdam and thus to accept a position justified by the latter as a desire to protect a system that was much older and demonstrably effective.¹⁹

¹⁵House of Lords 7th Report, Minutes of Evidence, paras., 137-9, 175 (which points out that the Schengen requirement is limited to hotel registration).

¹⁶Brown, *op. cit.*, and see note 3.

¹⁷Most references in the House of Lords 7th Report, *op. cit.*, to the question of identity cards have this in mind; eg., Memorandum presented by Justice, para 2.8, Minutes of Evidence, paras. 100, 141-2.

¹⁸The author was told that the British government does not distrust the Schengen states' systems of control; Letter, UK Immigration and Nationality Directorate, *op. cit.* But this was not true in 1989: K. G. Robertson, 1989, '1992: The Security Implications', *Occasional Paper* 43. London: Institute for European Defence and Strategic Studies. On the lingering of distrust in 1999, see House of Lords 7th Report, *op. cit.*, eg., para. 19.

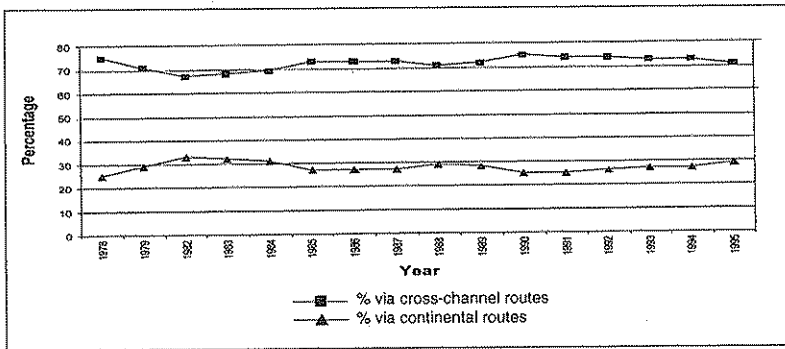
¹⁹Interview in Department of Foreign Affairs, 1998, for the Irish justification of its negotiating position. See chapter 3, especially note 4, on mutual trust even in circumstances where controls may have been less 'rigid' in practice than in theory.

Ireland's successful strategy of securing similar opt-outs but couched distinctively reflects, not now the need to avoid any whiff of neo-colonialism, but its modern European interests. The distancing statements may also indicate that the pragmatic interests, which once needed reliable bi-lateral co-operation, are shifting and might become better met by an Irish decision to break from the CTA by lifting its controls on EU routes. These are now considered.

5.2.2 Trends in travel

The beginnings of one possible change can be seen in Figures 1 and 2, which are drawn from the tables earlier in this chapter. The first shows that, although Irish visits overseas are still predominantly to Great Britain (at least, in the first instance), the gap between visits to Great Britain and the European continent seems to be narrowing slightly. If, as the ferry companies believe, a substantial proportion of passengers to Great Britain consists of 'landbridgers' travelling onwards to the continent, the gap would be a good deal narrower. If figures for inward visits are anything to go by (see above), up to one half of cross-channel passengers could be added to outward visitors to the continent. The closer the gap becomes, the more the balance

Figure 1: Estimated visits overseas by Irish residents: percentages travelling via cross-channel and continental routes (air and sea)



Sources:

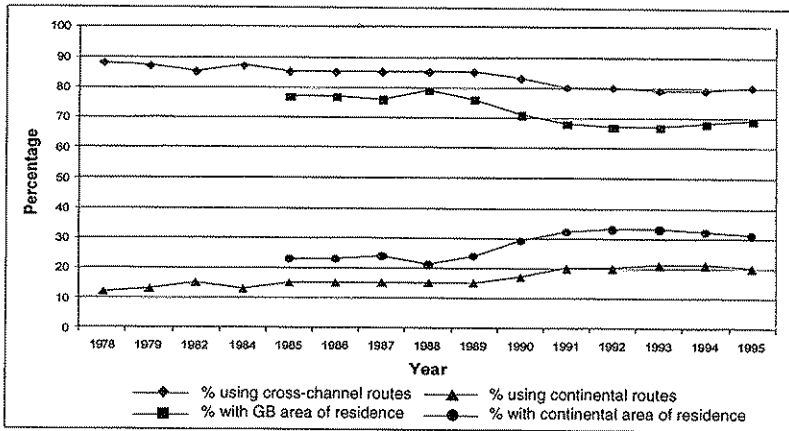
For 1978-95: Central Statistics Office: Statistical Bulletin, September 1974, tables 8, 9, 10, p. 159; Statistical Bulletin, June 1980, table 6, p. 87; Statistical Bulletin, September 1991, tables 2 and 7, pp. 436 and 441; Statistical Bulletin June 1997, table 7, p. 411.

For 1995-96: Bord Fáilte: Passenger Statistics, January, 1998. (These should be halved for an estimate of outward traffic.)

of convenience of control-free travel might be thought to shift towards continental routes. The growing volume of continental travel, however, would have to be considered in the light of two other factors which pull against each other. On the one hand, there is the possibility that control-free travel between the islands is more salient to the quality of life of migrant workers and their families who may be making several journeys a year. On the other hand, an interest in encouraging the new trend in return migration, discussed later, might be an incentive to ignore that salience.

The closing of the gap is more evident in Figure 2 below (derived from Tables 2 and 3 above) on visits to Ireland broken down by both inward routes used and by residents of Great Britain and the continent. It should be borne in mind again that up to one half of cross-channel passengers may be continental residents.

Figure 2: *Estimated visits to Ireland: percentages by inward route used (air and sea) and by area of residence of visitor*



Sources:

For 1978-95: Central Statistics Office: Statistical Bulletin, September 1974, tables 3, 5, p. 158; Statistical Bulletin, June 1980, table 2, p. 86; Statistical Bulletin, September 1991, table 3, p. 439; Statistical Bulletin, June 1997, table 3, p. 409.
 For 1995-96: Bord Fáilte: Passenger Statistics, January 1998. (These should be halved for an estimate of inward traffic.)

Here, there may be implications for the exchequer and the economy. In 1984 estimated expenditure by visitors arriving from Great Britain was 78.3 per cent of total expenditure by visitors. This fell to 72.3 per cent in 1995. Correspondingly, expenditure by visitors from the

continent rose from 21.6 per cent of the total in 1984 to 27.3 per cent in 1995. The comparable change for expenditure by visitors normally resident in Great Britain was a drop from 68.6 per cent to 53.9 per cent and for those resident on the continent an increase of 31.4 per cent to 46.1 per cent.²⁰

5.2.3 Trends in trade

As in the case of visits, while Ireland's trade with the UK remains absolutely more important than with any other single country, trends indicate that removing border formalities elsewhere may become more important than maintaining their absence in partnership with the UK. Between 1972 and 1995, the share of Irish exports which went to the UK fell from 61.5 per cent to 26 per cent, while the share of its exports which went to the EU as a whole rose from 18 per cent to 48 per cent. Imports from the UK dropped from 51.5 per cent of total imports to 37 per cent and remained about the same, 23 and 22 per cent, from the EU as a whole.²¹

5.2.4 Adverse developments in reciprocal rights in the UK and Ireland's need to attract immigration

As noted in chapter 4, the areas of free movement both between these islands and in the EU are accompanied by positive measures which facilitate freedom to move, including employment rights and policy co-operation. Chapter 4 also noted that, while compliance in 1996 with EC law had extended employment rights, subject to Article 48(4) exemptions, to Irish nationals in Northern Ireland, it had reduced access to some categories of public service employment in Great Britain. The nationality restriction is being used in the UK in a wider range of occupations than had been thought, hitherto, to be capable of justification under Article 48(4). Two cases were brought to the Northern Irish courts. Both were brought by Irish nationals, one a successive applicant for two posts of Chief Fire Officer and Deputy Chief Fire Officer, the other for a recurring temporary post of Revenue Officer. On 19 March, 1999, the Court of Appeal upheld the original rulings. Lord Chief Justice Carswell extensively reviewed ECJ jurisprudence in his own ruling and did not refer the case to it.²²

²⁰Statistical Bulletin, September 1991, tables 1, 2, p. 438; Statistical Bulletin, June 1996, tables 1, 2, p. 329. Dublin: Central Statistics Office.

²¹FitzGerald, Gillespie and Fanning, *op. cit.*, p. 23.

²²Lord Chief Justice Carswell, Judgment in applications by Edward Michael O'Boyle and Suzanne Plunkett. Belfast: Court of Appeal in Northern Ireland.

The nationality restriction is applied to, among other posts, court ushers in England and senior water quality officers in Wales. A case involving the former and another Irish national has resulted in an announcement that the 1996 regulations may be repealed but it is also reported that powers to decide on a case-by-case basis may be given to ministers and that this 'could result in even more posts being reserved'.²³

Should considerable difficulty emerge in obtaining public service employment in the UK, this may add to the positive pull of 'the Celtic tiger' in attracting return migration. About half of the recent inflow to Ireland consists of Irish nationals and most of these are returning from the UK.²⁴ However, that also means that half the inflow is from elsewhere and not Irish. As in the case of Irish returnees, the biggest proportion of the non-Irish inflow comprises people who are well educated and, therefore, meet the needs of the labour market.²⁵ The Irish electoral register indicates that there are 4,563 non-UK EU citizens registered to vote – about one quarter of British voters, noted above, in Ireland. The more that the British labour market is no more open to Irish nationals than to other EU or EEA nationals, and the more that the labour market in Ireland both attracts return migrants and is 'Europeanized', the more sensible it might become to 'Europeanize' free movement arrangements.

Indeed, the Governor of the Bank of Ireland, Mr Howard Kilroy, recently drew attention to a serious labour shortage which, in his view, could be filled only by a change in immigration policy and a more positive approach to asylum-seekers²⁶ – the current position being that, with little scope for routine immigration, aside from EEA migrants and foreign investors, almost all that is left is illegal entry or asylum-seeking. Major employers' associations and unions also called for asylum-seekers to be allowed to take paid employment and it seems – probably for humanitarian as much as instrumental

²³*Irish Times*, 22.3.99.

²⁴Alan Barrett and Fergal Trace, 1998, 'Who is Coming Back? The Educational Profile of Returning Migrants in the 1990s', *Irish Banking Review*, Summer '98, pp., 38-51, esp. pp. 42-3.

²⁵*ibid.* While an estimated 400 seasonal staff from overseas – who might not have specialized skills – were expected to be employed in the tourist industry in Kerry in the summer of 1999, there is also a high demand there for head chefs who, given their global shortage, could earn up to £40,000 a year (*Irish Times*, 3.5.99). Some 80 per cent of asylum-seekers may have third level qualifications, a much higher proportion of them than the indigenous population (*Irish Times*, 16.6.99).

²⁶*Irish Times*, 11.2.99.

reasons – that 70 per cent of the public share this view.²⁷ This was also the position of the Progressive Democrats, Fianna Fáil's minority partner in government. On 27 July 1999, the Fianna Fáil Minister for Justice, John O'Donoghue, announced that some asylum-seekers (those having arrived before 26.7.99 and awaiting a decision for more than twelve months) would be allowed to work.²⁸ The announcement also stated that visas permitting employment to be taken up would be offered on a limited basis to persons from less developed countries and other non-EU states.

The announcement about asylum-seekers attracted controversy, partly because of its being taken as a sign of division within government and primarily because of the significance of its detailed effects. The details, it is claimed, mean that about half the current asylum-seekers remain unable to take up employment and that it may be difficult for people to avail themselves in practice of the new formal opportunities. Critics also note that, one month prior to his announcement, the Minister for Justice had expressed his absolute opposition to allowing asylum-seekers to work, in terms that were consistent with a negative view of asylum-seekers as putting pressure on the system rather than contributing to the economy. A negative view of asylum-seekers could also lead to a questioning of the CTA.

5.2.5 Asylum-seeking and illegal immigration

To small non-governmental groups who remain virulently opposed to the cultural diversification of Ireland, the value of the CTA might be diminished if it no longer served the purpose of keeping Ireland homogeneous while allowing the 'odium' (see chapter 3) of excluding the vulnerable to fall upon the UK. To those for whom cultural homogeneity is now irrelevant to public policy but who are responsible for handling a rapidly growing number of would-be immigrants, the value of the CTA might be becoming questionable for practical reasons.

Both asylum-seeking and illegal immigration into Ireland rose between 1992 and 1998 and there are claims that asylum-seeking is being used to short-circuit the difficulties of lawful immigration. In

²⁷*Sunday Independent*, 14.3.99.

²⁸The information is taken from an announcement made by the Government Information Services on 27.7.99. The later commentary on the politics is taken from the *Irish Times*, 28.7.99 and 29.7.99. See also notes 25-27 for sources on the potential contribution of asylum-seekers.

1999, there are an estimated 2,000 illegal immigrants.²⁹ There were only 32 applications for asylum in 1992 but 4,626 in 1998.³⁰ On one reading, the trend is less serious for Ireland than other states, the estimated pattern now showing a slight downward trend in the former while, in the latter, applications have risen by higher, in some cases much higher, percentages and are still rising.³¹ But other factors, such as the ratio between resident populations and numbers of would-be entrants and the contrast with the previously normal pattern in which asylum-seekers did not look to geographically 'peripheral' countries, mean that Ireland now has to deal with the issue on an unprecedented scale. This impinges on the CTA in two ways, one of which restricts – or restricted – the freedom of nationals covered by it, the other revealing its flanking measures to be either failing at its first ports of clearance in Great Britain or, possibly, irrelevant to this new situation.

On the one hand, in 1997, the Fine Gael Minister for Justice, Nora Owen, gave immigration officers leave to make random checks upon people entering Ireland from Northern Ireland and from Great Britain. Briefing notes on the operation of this Order between June and November suggest that checks were unobtrusive and nationals entitled to benefit from their absence would have experienced little inconvenience³² – similar to the British view noted earlier. The public suspicion was that those most likely to be questioned were those whose appearance might be taken as meaning that they were neither British nor Irish.³³ Anecdotal evidence does suggest that checks may have operated more to the detriment of black Irish and British nationals than others. The checks resulted in the detection of almost 1,000 persons seeking to enter illegally.³⁴ Since 1997, checks and

²⁹Brown, *op. cit.*, p. 28. *Irish Times*, 23.1.99.

³⁰Communication from the Department of Justice, Equality and Law Reform, August, 1999.

³¹IGC Secretariat © 1999, 'Asylum Claims: An Overview of the Situation in IGC Participating States, 1998'. Geneva: Secretariat for Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia. On the estimated downturn, see updated figures from the same organization in 'Asylum Claims: An Overview of the Situation in IGC Participating States, June 1999'.

³²Communication to the author from the Department of Justice, Equality and Law Reform, February 1999.

³³Brown, who, in quoting from the press notes the expression, people who do not meet 'normal criteria' a standard which gave rise to the public suspicion noted in the following sentences, *op.cit.*, p. 29.

³⁴Communication to the author from the Department of Justice, Equality and Law Reform, February 1999.

allegations of discrimination have dropped off, partly as a result of greater alertness by the authorities to racial stereotyping.³⁵

However, entry *via* Northern Ireland by people not entitled to benefit from the CTA remains an issue. According to the Department of Justice, Equality and Law Reform,³⁶ in the first seven months of 1999, 85 per cent of those applying for asylum did so from within the island, presenting themselves directly to the Department, without having had any contact with immigration officers. That is, only about 15 per cent identified themselves or were identified at entry points. Of that remainder, about one-third arrived *via* Rosslare and CTA co-operation would have been irrelevant since the port links Ireland directly with the continent. About one-third of the remainder applied at Dublin airport where they may or may not have arrived on a flight from Great Britain. By inference, it would seem, therefore, that the majority of applicants for asylum must have evaded detection at the first point of clearance in Great Britain, becoming able to enter Ireland from the north – or, possibly, landing at Dublin airport without announcing themselves or being noticed.

It is, however, not impossible that they may have arrived undetected *via* the 'outer perimeter', either having been smuggled through Rosslare, or having travelled openly with false documents, and proceeded inland. The disincentives in Ireland to such criminal activity are weaker than in the UK; 'people trafficking' is not a crime and there are no penalties on carriers for transporting passengers without rights of entry. The successful detection of such crimes depends more heavily upon transnational police co-operation than frontier controls (see section on a UK *volte face*). There is, therefore, an Irish interest, as strong as that in British police services, in securing access to the Schengen Information System. The problem also implies a new sphere of co-operation with the Royal Ulster Constabulary, with which – despite what might be inferred from politics – the Gardaí have had a long and satisfactory relationship.³⁷

But, if Northern Ireland is, indeed, a significant route for illegal entry into Ireland, which cannot be resolved through closer police collaboration, this has the potential to add a new complication to the interests, so far, of both states in an open border. As noted in

³⁵Interview in Department of Justice, Equality and Law Reform, 1998.

³⁶Communication from the Department of Justice, Equality and Law Reform, August, 1999.

³⁷Jason Lane, 1999, 'The Development of Irish Cross-Border Police Co-Operation'. PhD thesis submitted in the School of Politics, The Queen's University of Belfast.

chapters 2 and 3, Irish and British interests in co-ordinated immigration policies at the 'outer perimeter' were partly inspired by the necessity – from both states' point of view – of not having controls (except checks during security crises) on north-south passengers. If the constitutional reason for that constraint were to disappear, so, too, would one motivation for the CTA.

5.2.6 Reunification of Ireland

The Belfast Agreement undertakes that, should a majority in Northern Ireland peacefully reveal a preference for a reunited Ireland, the British government would legislate accordingly. In the meantime, the governments and parties concerned have agreed to create institutions reflecting the two senses of national identity in Northern Ireland and making the border even less inhibiting than it was to lawful, private and civil inter-action – and even more a reason for inter-state co-operation. Should the Agreement eventually be implemented and for so long as it is the solution to the disputed territory, it seems impossible (subject to the *caveat* above about an Irish need for controls arising from asylum-seeking) that Ireland could adopt a European policy that might result in British controls on routine travellers on northern routes – though the north was of less concern to negotiators at Amsterdam than the scope of individual freedoms on the east-west axis.³⁸

On the other hand, while unlikely, it is arguable that Ireland could subscribe fully to Amsterdam while the UK did not and still have an open border between north and south, though not on the east-west axis. Systematic exit controls at Northern Irish air- and seaports, which assured the British that no unauthorized person could enter Great Britain, could coexist with none on the border. A person who had entered Ireland *via* an EU route and had moved to Northern Ireland, but who would not have been admitted to the UK at a port in Great Britain, would be refused leave to board. If not arrested, he or she would have no choice but to return to Ireland or to live illegally, without rights and at the risk of discovery, in Northern Ireland.

However, such an arrangement probably would be unpalatable to residents of Northern Ireland. Already, the operation of the British Prevention of Terrorism Act 1975 means that there are more checks on travel within a single jurisdiction than between the two jurisdictions. Travellers are more likely (still, if less so than before the

³⁸Interview in Department of Foreign Affairs, 1998.

1994 cease-fires) to be asked for identification between Belfast and London, and other ports of entry, than between Dublin and London. It is hard to envisage that there would be any greater public sympathy now than in 1950 (see chapter 3) for systematic controls on all travellers, especially among those who identify themselves as British and also, perhaps, among those who define themselves as Irish but accept the current legitimacy of the state within which they live. Moreover, systematic exit controls could be a propaganda gift, comparable to exclusion orders, to those who challenge the legitimacy of the state even with its increasingly 'joint authority' features.

This might suggest that only in the event of the reunification of Ireland could an Irish government reconsider the salience and patterns of east-west pragmatic interests and decide that the CTA should be superseded by EU arrangements. Even then, however, there could be difficulties. It has been observed that the cleverness of the Belfast Agreement is that it provides for the nationalist minority in Northern Ireland the same protections that unionists could expect should they find themselves a minority in Ireland.³⁹ Should a united Ireland arrive, it would become necessary for its government 'to observe the Britishness of the unionist community' and Ireland would still 'be inextricably linked to the constituent parts of the neighbouring island through the British-Irish Council'.⁴⁰

This would not necessarily preclude divergence between Ireland and the UK over freedom of movement in the EU. Ireland could acknowledge the Britishness of the unionist minority through cultural and institutional means. And Ireland could meet part of the interests of such people in freedom of movement between the two islands. Since the Amsterdam provisions do not compel participating member states to apply controls to arrivals from countries which have opted-out, Ireland could permit control-free inward travel – that is, subject to the constraints of airport design and management which in the Netherlands, for example, means that all flights to and from UK destinations operate in external frontier locations.⁴¹ With no inward controls in Ireland, the burden of completing the protection of freedom of movement would fall to the British.

³⁹Brendan O'Leary, 1998, 'The Magic Number is 64', *The Times Higher Education Supplement*, 22.5.98.

⁴⁰Conor Gearty, quoted by Roy Foster, 'Ulster Chooses Life', *Independent on Sunday*, 24.5.98.

⁴¹House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, paras. 113, 114.

It is difficult to see how the UK could achieve this in a context of its strict insistence on verifying the identities of all travellers, with or without the right to land. On the other hand, it may not be implausible – despite the government's current view about the detection of illegal immigration on EU routes⁴² – to suggest that the UK could turn a blind eye to passengers arriving *via* Ireland, having entered there without controls because their journeys began at EU ports of embarkation. In the absence of the CTA in its current form, it might be calculated that, since the majority of passengers on flights or vessels arriving in Ireland from EU ports of embarkation would be EU or EEA nationals with the right to land in the UK, there would be little at stake in their avoiding UK controls. That comparable calculations in the UK about the effective allocation of resources in the exercise of controls are not out of the question is indicated later. CTA-type co-operation could continue to take place on flights arriving in Ireland across external frontiers.

Given the spirit of co-operation, however, between Ireland and the UK in the Agreement and potential new relationships between Ireland and the component parts of Great Britain, it might still be difficult for a reunited Ireland to consider ending the tradition of bilateral, control-free movement between the two islands. If, even in the best of constitutional circumstance this were so, the trends noted under previous headings on pragmatic interests would have to be very strong to justify a break between Ireland, as currently constituted, and Britain over free movement in the EU. The onus of persuasion would shift from that of the 1920s (see chapter 2), Ireland now having to convince the British that 'it was in their interests to maintain a common approach' on a continental basis. This may be less difficult than it would appear from the apparently resolute cross-party political consensus discussed earlier. Indeed, there could be a change in the British position on control free travel within the EU before the advent of a reunited Ireland.

5.2.7 *A volte face* by the UK?

In present circumstances, the UK has no more of an interest than Ireland in causing the adverse impact on lawful north-south traffic that would be occasioned by the ending of the CTA with nothing in its place. Thus, if the CTA were to go, or be modified, it seems likely

⁴²House of Lords, 7th Report, *op. cit.*, Supplementary letter from Kate Hoey, Parliamentary Under-Secretary of State, Home Office.

that this would happen only in the context of a new British orientation towards EU border policy.

So far, Irish policy-makers have calculated that the UK would not be able, or want, to maintain its resistance to Economic and Monetary Union – a calculation that increasingly appears correct. But, at the time of the Amsterdam negotiations, the same could not be said about the lifting of border controls. The factors discussed above in the *Never?* section lie behind insistence by British officials at Amsterdam to their Irish counterparts that nothing on this point would change with a new government (see chapter 1). But, it is increasingly plausible that the UK may reconsider its resistance to lifting controls on EU routes and to a common approach to asylum and immigration.

At the time of writing, the whole future of the incorporation of the Schengen *acquis* is in doubt (see Appendix 2). It is not clear how or when the free movement provisions can be brought under the first pillar, as originally intended. However, if and when they are transferred, a number of problems may force the British government to reconsider its position and, indeed, the House of Lords Select Committee on the European Communities has recommended that it should plan for a change of policy over a period of five to ten years.⁴³ That many of the issues are equally problematic for Ireland may reinforce the incentive to persuade the British that interests held in common may be satisfactorily protected through the EU.

One factor is that a combination of administrative and political problems might undermine British confidence that its interests are best secured in the rights to both opt-in and opt-out. A number of witnesses to the House of Lords Select Committee on the European Communities foresaw no difficulty in exercising the right to opt-in. But many others suggested that there would be a predisposition against the UK if it were thought that the British were being too selective.⁴⁴ Moreover, distinguishing between proposals which may or may not be subject to the unanimity procedure (see Appendix 2), a difficult enough task in itself, provides room for political opportunism that might be deployed either by the UK or by one of the thirteen partners against British interests.

⁴³House of Lords, 7th Report, *op. cit.*, paras. 49, 58.

⁴⁴House of Lords, 7th Report, *op. cit.*, paras. 32,33. It is possible that the UK might align its policies on asylum and immigration with those of the EU; House of Lords, 31st Report, *op. cit.*, paras. 86, 141. The two non-EU members of the Nordic Passport Union (see Appendix 2) were in the Schengen Agreement and will be included in Amsterdam arrangements.

This political-administrative factor may also appear at the operational level. Over forty years, valued transnational networks of police, customs and immigration services have been built up, linking the services of Kent, Northern France and Flanders. British police and immigration officers are very concerned that these networks will break-down as the continental contacts increasingly work through the SIS, which allows information on both immigration and crime to be exchanged through 44,000 access points,⁴⁵ to which the British do not have access.⁴⁶ The outcome of the UK government's statement that it wishes to opt-in to the SIS (see chapter 1) remains to be seen.

A second issue, implying a different approach to the EU, is that the government failed to convince the House of Lords Select Committee on the European Communities that current frontier controls represent the most effective use of resources.⁴⁷ The Committee considered EU free movement issues in the light of government aspirations and undertakings in its general immigration policy. Numbers of visitors to Britain are rising rapidly (44 million in 1987-88, 80 million in 1997-98 and 100 million predicted for 2000-1). Some 90 per cent of visitors will come from outside the EEA and it is the government's stated intention to process their arrivals more speedily. But it insists that every person's nationality must continue to be verified by an immigration officer. Yet, despite the steep rise in numbers of visitors, staff have increased by only 10 per cent.⁴⁷ A contribution to reducing the mismatch could be found in accepting that some arrivals might be allowed to land by reason of their port of embarkation. Such arrivals could be handled in the same way as domestic passengers and resources reallocated to where entry must continue to be controlled.

The Committee also considered illegal immigration, the detection of which, according to the government, makes frontier controls indispensable. While frontier controls led to the detection in 1998 of 4,000 people seeking to enter illegally, many more known illegal immigrants – 14,300 in 1998 – would not have been so discovered

⁴⁵House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para., 156.

⁴⁶House of Lords, 7th Report, *op. cit.*, paras. 35, 36, Minutes of Evidence, paras. 59-64.

⁴⁷House of Lords, 7th Report, *op. cit.*, paras. 28, 45-53.

⁴⁸In the Netherlands where, to avoid discrimination, all arrivals at the external frontier location, are seen, under stricter and more equal conditions there has been a significant rise in staff numbers, House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 121, 129, 132.

because they had entered legally, becoming illegal by overstaying.⁴⁹ Moreover, 'devolved' immigration control may be more effective: that is, visa officers in British Consulates and the commercial carriers in preventing the start of illegal journeys;⁵⁰ and tax and social security officers in respect of those who enter.⁵¹ It was suggested to the Committee that transnational intelligence gathering was more important than routine frontier controls in detecting 'people smuggling' (and other forms of crime).⁵²

A third factor is that a number of issues discussed by the Committee show up other irrationalities in an unreflective conviction about Great Britain's fortune in being surrounded by sea borders. First, Great Britain is not completely exceptional. Other states, such as Italy, France, Spain, Portugal, Greece, have long sea coasts. Indeed, France has not lifted controls at seaports since there can be no certainty that all vessels began their voyages in another EU state.⁵³ The same option would be open to the UK. In any case, a large proportion of internal and external traffic is not handled at seaports. The UK is in exactly the same position as any other state with respect to airports where people are arriving from all over the world and who may or may not travel to another EU state.⁵⁴ As noted, this is managed at Schipol airport by ensuring that all aeroplanes which have crossed an external frontier land in a different location from those which have crossed internal borders. For this purpose, flights to and from the UK count as external. Contrary to the UK's expectation that its nationals would remain subjected to only a 'light' control, all passengers, including Britons and other Europeans travelling from the UK, are examined under stricter controls than before – to preclude any opportunities for racial discrimination.⁵⁵

Even the absence of a land frontier in Great Britain may begin to be called into question. A senior French official suggested to the Committee that the Channel Tunnel turned the sea into something of a land border between the UK and France.⁵⁶ On the other hand, to

⁴⁹House of Lords, 7th Report, *op. cit.*, para. 26. This is also the case in other countries.

⁵⁰House of Lords, 7th Report, *op. cit.*, para. 28, Minutes of Evidence, para. 130.

⁵¹House of Lords, 7th Report, *op. cit.*, Memorandum by Justice, para. 1.8. This happens elsewhere, para. 25, Minutes of Evidence, para. 132.

⁵²House of Lords, 7th Report, *op. cit.*, para. 51, Minutes of Evidence, paras. 22, 23. They may be apprehended at borders but that is because it is known in advance that they would be there.

⁵³House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 53.

⁵⁴House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 332.

⁵⁵House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, paras. 114, 121, 129, 132.

⁵⁶House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 55.

the British authorities, it is like a seaport in bringing all travellers conveniently to a single point of entry.⁵⁷ Nevertheless, those responsible for policing the Tunnel depend heavily on the type of co-operation that characterizes open land borders, such as those of the CTA and the continent. This takes place under protocols brought into being at the Tunnel's inauguration⁵⁸ and it is felt that further forms of co-operation are needed, which could be realised through joint participation in the SIS.⁵⁹ The Tunnel's existence may be softening the traditional sharpness of the popular psychological separation of Great Britain from the continent. To the ordinary traveller, the existence of the rail link may reduce the sense that journeys to Brussels from London and Amsterdam are so different from one another. In addition, the Channel is breached or bridged by links between south-eastern England and northern France under an INTERREG programme – aimed at what are called contiguous (despite, in this case, the sea) regions in different states.⁶⁰

Preconceptions that the authorities in the Schengen states cannot be trusted to control the European outer perimeter were also challenged in evidence presented to the Committee. On the one hand, a number of witnesses continued to voice distrust – despite good experiences of operational collaboration. But others suggested that such suspicions are increasingly groundless⁶¹. Apart from the dubiety of such a view of the French and German authorities, there has been pressure on some states to improve and this has succeeded. In any case, the *acquis* allow controls to be reimposed if necessary to public policy, as France did in connection with its north-eastern border because of policy differences between it and the Netherlands over drugs.⁶²

Indeed, EU flanking measures are converging to a strict standard of impregnability. Civil liberties and human rights groups are deeply concerned that opening internal frontiers is being accompanied by increasingly restrictive immigration policies which 'securitize' the

⁵⁷House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 82.

⁵⁸House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 73.

⁵⁹House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 55.

⁶⁰Applications have been made to it by the Kent Police European Liaison Unit for funding of joint projects on information sharing and good practice. House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 72.

⁶¹House of Lords, 7th Report, *op. cit.*, paras. 23, 24, Minutes of Evidence, paras. 165-68, 221-22.

⁶²House of Lords, 7th Report, *op. cit.*, para. 24 and Minutes of Evidence, paras. 49, 221-23.

issue and reinforce the perception that 'third country' entrants are 'undesirable'.⁶³ If both the CTA and the EU system rest on freedom for 'the desirable' and 'high fences' for anyone else, it is difficult to see how it can be maintained that one is acceptable but the other not. Indeed, this was mentioned in some of the evidence to the Committee to the effect that the UK should take heart from the CTA⁶⁴ – though, as suggested above, it seems, from the Irish perspective to have acquired some weaknesses.

There is, however, the objection that the UK, like Ireland, has a different attitude to internal controls. As noted, ministers in both states believe that the lifting of border controls would entail the introduction of compulsory identity cards and that this would be unpopular. However, in addition to there being no such requirement in the Schengen *acquis*, public antipathy to identity cards may be becoming less of a constraint in both the UK and Ireland. Irish people have been shown to have 'sophisticated views', a majority, albeit small, accepting the idea of compulsory identity cards for purposes of access so long as they are not used by public authorities to share information about them.⁶⁵ Since people enjoy control-free travel and, if an identity card were to become the consequence of this, identity cards may be viewed positively as a means of access. While the Select Committee acknowledged the advantages of identity cards, similar to those perceived in Ireland, it also drew attention to the risks to civil liberties.⁶⁶ However, it recommended that the whole question

⁶³Dora Kostakopoulou, 1998, 'Is There an Alternative to "Schengenland"?', *Political Studies* 46(5), pp. 886-902, esp. pp. 888-91.

⁶⁴House of Lords, 7th Report, *op. cit.*, para. 51. It might be noted that this makes the SIS even more important when it is recalled that there were confidential worries in the 1960s that the uncomputerized system of the CTA was not up to the job of exchanging information about a large volume of traffic.

⁶⁵Commissioner for Data Protection, 1996, *Eighth Annual Report of the Data Protection Commissioner 1996*. Dublin: Presented to each House of the Oireachtas pursuant to section 14 of the Data Protection Act, 1988.

⁶⁶These concerns are similar to those of the Home Secretary, Jack Straw, whose early political years were spent in a civil liberties milieu where identity cards were suspected of facilitating invasions of personal privacy by the state, making it easier for the authorities to concentrate in one document information gained through a variety of unchecked surveillance methods. Patricia Hewitt, now a Parliamentary colleague of Jack Straw, then General Secretary of the National Council of Liberties wrote about such surveillance, several times citing his [Jack Straw's] concerns about the police. Patricia Hewitt, 1982, *The Abuse of Power: Civil Liberties in the United Kingdom*. Oxford Martin Robertson. That his views are more ambiguous now, as suggested in the House of Lords 7th Report, *op. cit.*, is also illustrated by Kate Hoey and her equation of her driving licence, with its photograph of her, with an identity card.

be examined more fully.⁶⁷ It was noted a number of times in its deliberations that the adverse potential for community relations of an identity card system lay less in the cards themselves and more in methods of law enforcement. Such a problem is equally inherent in the operation of the SIS and light or selective checks – as indicated in Ireland in 1996 and by the Dutch decision to avoid it by treating all external passengers in the same way.

A final indication of change on the part of the UK sooner rather than later is the possibility of divergent views between the Prime Minister and the Home Secretary and between ministers in general and civil servants. The Prime Minister has made plain his ambition to improve the UK's standing and influence in the EU. His efforts to do so in connection with EMU have had a hostile reaction from the popular press but, so far, there has been no comparable storm about freedom of movement. If and when the *acquis* are incorporated as intended, the risk of loss of influence will be threefold: an adverse reaction by the Schengen states to the UK's desires to opt-in; exclusion, therefore, from policy discussion; and the peculiarity of the UK's position during its turn to preside over meetings which might be on topics from which it has excluded itself or has been so by the others.⁶⁸ These combined could encourage concessions on border controls, asylum and immigration. Another factor that might force the UK's hand is Spain's closure of its border to Gibraltarians⁶⁹ which might provoke the need to make a concession that would be serious enough but would fall short of transferring sovereignty.

While Home Office ministers give no hint of anything other than staunch attachment to the retention of controls, the impression gained from the evidence of civil and public servants to the Select Committee is different, if only implicitly so. As is constitutionally proper, they always refer to 'the political decision' as unquestionable by them. But an inference that they would be willing to question it can be drawn, perhaps, from the fact that the only reason given for the absence of cost-benefit analysis or any other kind of calculus of alternative ways of doing things was that the political decision made 'a detailed study not a proper use of resources'.⁷⁰ More explicit

⁶⁷House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, paras. 119, 163.

⁶⁸House of Lords, 7th Report, *op. cit.*, paras 52, 53.

⁶⁹*Irish Times*, 11.2.99.

⁷⁰House of Lords, 7th Report, *op. cit.*, Minutes of Evidence paras. 34, 79, 83-85 and confirmed by the Parliamentary Under-Secretary of State, Minutes of Evidence, 319, 320.

evidence that they would be willing to consider conditions under which a change of policy might be contemplated was clear in some hypothetical answers to questions about the effective allocation of resources. For example; it would not be worth while 'examining in some detail the flight from Brussels on a Friday night at Heathrow'⁷¹ and there would be 'no point in keeping a control if it is not working'.⁷²

5.3 Conclusion

The history of close co-operation between the two states over travel between them without controls, co-ordinated immigration policy on the 'outer perimeter', and reciprocal rights all suggest that no UK government would end the CTA, either in itself or because of a reorientation towards the EU, without consulting the Irish government. Given the ties of history, economics and kinship, it may also be feasible that some rights for Irish nationals in the UK, extra to those available under the EU, could be maintained – and *vice versa*. Rights were not withdrawn in the UK at the break from the Commonwealth. It seems reasonable, therefore, to expect that they could be allowed to remain in the much less traumatic rift of an end to the CTA to enable both states to participate in something else. Though, as noted, Irish access to public sector employment has been downwardly standardized with that available to EU nationals, voting rights are stronger, now in both countries, than elsewhere in the EU. If in the unlikely event that the UK decided unilaterally to end the CTA, without consultation, the suggestion that such an action would highlight Ireland's twofold dependence (see chapter 1) could be turned on its head. It could be seen as an opportunity for Irish arrangements to reflect fully its European strategy and changing pragmatic interests in travel, trade and the labour market. This, after all, is similar to what happened when the UK sought to renegotiate its terms of EC membership and held a referendum in 1975 on whether to remain a member or to withdraw. As pointed out in one of the seminars held in 1998 by the Institute of European Affairs to mark twenty-five years of Ireland's membership of the EU, Ireland's trade with Britain had made it seem inevitable that, if the UK decided to join, Ireland would have to do so too – albeit a constraint on choice that was sweetened by the prospect of new opportunities (see

⁷¹House of Lords, 7th Report, *op. cit.*, para. 21.

⁷²House of Lords, 7th Report, *op. cit.*, Minutes of Evidence, para. 23.

chapter 2). After just eighteen months of actual membership, there was no question of Ireland's considering that it would have to withdraw if the UK did so as a result of unsuccessful renegotiation.

Whether a solution to competition between a pair of free movement arrangements is found in continued bi-lateral co-operation or the integration of the systems, one thing is now unambiguous. It has been argued in this paper that, since Ireland always pursued its own CTA interests even under the difficult circumstance of unequal status and did so again in weighing the balance between bi-lateral and multi-lateral freedom of movement, it is a misplaced view to see the CTA as a symptom of dependency. No such misunderstanding is now sustainable.

The different starting points between the two states in approaches to the EC have been mentioned (chapter 2). The two states have approached the EU distinctively. Whereas difficulties arising from 'island exceptionalism' are often seen by the British as reasons for fundamental opposition, to Irish governments they are obstacles to be circumvented.⁷³ From the bi-lateral point of view, the EU has provided a context for the maturing of Irish-British relations which has contributed so greatly to co-operation over Northern Ireland. Not even in that corner of the island does the UK retain a 'selfish strategic or economic interest'.⁷⁴ Perhaps the unprecedented address to the Oireachtas in November 1998 by the British Prime Minister and Irish responses to him personify the relationship of interdependence, not dependence, in which future discussion of common or divergent interests in the CTA will take place.

In the new context of that relationship of equality in interdependence, Ireland's prominence at Amsterdam, Ireland's belief that the CTA is failing to minimize illegal entry and asylum-seeking, and given that the UK's position is seen as untenable or irrational, it seems obvious that Ireland should take the lead again – to persuade the British that it is in the interests of both states that the CTA be merged with the EU common travel area.

⁷³Suggested by a former member of the Department of Foreign Affairs.

⁷⁴Whitbread Speech by Secretary of State for Northern Ireland, Peter Brooke, 9 November 1990. Also speech at Coleraine, December, 1992, see Mari Fitzduff, *Irish Times*, 17.7.99.

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Appendix 1: Public detachment in Ireland and diplomatic co-operation to secure the interests of both states in an Irish exemption from the consequences of the British Commonwealth Immigrants Bill, 1961-62

The prospect that, however drafted, the Commonwealth Immigrants Bill would not be applied to Irish nationals reinforced the conviction of its opponents that it was 'a colour bar'. Indeed, according to the Irish Ambassador in London, Mr Hugh McCann, 'officials will not deny privately that the coloured problem is at the root of the question'¹. Moreover, it was seen on both sides of the House of Commons, and in both Houses, as an added attack on the Commonwealth, already wounded by the UK's decision to apply for EC membership; while, at the same time, protecting nationals of a state which had deserted the Commonwealth.² The Six County Unionist MPs' had an additional motivation and were thought to be advocating an employment voucher approach for the Irish 'to bolster up their own Safeguarding of Employment Act the future of which they [were] worried about in the event of Britain and Ireland joining the Common Market'.³

With such vociferous criticism, expected to erupt into even greater furore, the British government felt compelled to tell the Irish government that it might have to postpone until the Committee stage its promised Parliamentary Statement that the measure would not apply in practice to Irish nationals and ports of entry from Ireland.⁴ However, there was a statement in the documents accompanying the Bill's publication and First Reading on 1 November, 1961, that 'an amendment would be made in due course with regard to the

¹Letter from the Ambassador to Con Cremin, The Secretary, Department of External Affairs, 3.11.61. D/T S15273B.

²The House of Commons; Letter from the Ambassador to The Secretary, Department of External Affairs, 24.11.61. D/T S15273B. The House of Lords; *Irish Press*, 13.3.62. D/T S15273B.

³Letter from the Ambassador to The Secretary, Department of External Affairs, 24.11.61. D/T S15273B.

⁴File Note, 1.11.61. D/T S15273B.

extent to which the provisions of the Bill will apply to citizens of the Republic of Ireland'.⁵ The statement was also published in Ireland by the Government Information Bureau, along with the information that the Minister for External Affairs, Mr Frank Aiken, was in consultation with the British Government.⁶ He confirmed this on 15 November, 1961, in answer to several Questions in the Dáil, when he said that, to preserve the mutual advantage of freedom of movement, legislation on uniformity of control might become necessary. He hoped to be able to make a further statement 'in the near future'.⁷

In the meantime, both sides still hoped that a reasonably early statement could be made in the UK about the position of Irish nationals. At the beginning of November, the Irish Ambassador in London had told the Secretary of the Department of External Affairs that, at a reception at Buckingham Palace, the British Home Secretary had initiated a conversation about the proposals, asking him 'to tell Dublin "not to panic" in the matter', repeatedly so assuring him in the course of the evening, and asking for 'week or 10 days' for him to 'sort the matter out for you'.⁸ (He also surprised the Ambassador by commenting 'that of course we are all British subjects!'). Apart from other considerations, including the employability of the Irish, he would be 'appalled by the administrative difficulties of any effective control of movement from Ireland'.

To the Ambassador it was reassuring to hear such statements from the Home Secretary himself, not merely officials. He was also reasonably optimistic that the Opposition, too, would be unfavourable to controlling movement from Ireland, 'if for no other reason than electoral support they get from the Irish' (despite efforts twelve years previously to persuade them to withdraw support from Labour because of the 1949 Ireland Act). But, the Ambassador suggested, the Opposition would harass the government on grounds of racial discrimination, an approach that was likely to highlight the Irish. He intended to 'drop a hint' at a series of dinners he was about to hold with the Opposition Front Bench that they 'should not injure us inadvertently in their enthusiasm for the promotion of other

⁵*Commonwealth Immigrants Bill, Press Handout and Explanatory and Financial Memorandum.* D/T S15273B.

⁶File Note, 1.11.61. D/T S15273B.

⁷Official Report of Dáil Debates, Vol. 192, No. 2, cols., 172-73. D/T S15273B.

⁸Letter from the Ambassador to The Secretary, Department of External Affairs, 3.11.61. D/T S15273B.

causes'. Four days later, he reported a conversation with the Home Secretary at a reception given by the Apostolic Delegate.⁹ Mr Butler had asked the Ambassador if he had told the Taoiseach yet about what he had said at the Palace. He was 'now thinking of facing up squarely to the Irish aspect early on' and of seeking Cabinet approval for a statement during the Second Reading on 16 November.

The Home Secretary was reported to have tried this idea out on Conservative backbenchers at a meeting of the 1922 Committee on 14 November, warning them that the Opposition would make capital of an Irish exemption but emphasizing that:

in war and peace, Irish immigrants had provided a mobile labour force of considerable value to the British economy and no doubt they would be needed in the future as in the past – which made an exception for them vital.¹⁰

Most press coverage, except the *Daily Express*, was unfavourable to an Irish exception and, indeed, one judgement was that the storm provoked by its prospect was so great that it was seriously possible that the Bill would have to be dropped.¹¹

Dropping, or, at least, modifying, the Irish exemption rather than the Bill itself was mooted in the winding-up speech by the Minister of Labour, Mr Hare, in the Second Reading Debate on 16 November. To begin with, however, the Ambassador, seated in the Diplomatic Gallery, had been reassured that the Home Secretary's 'smile of recognition from the Front Bench' meant that he would keep his promise to refer to Ireland in his opening speech.¹² But an immediate 'electric' atmosphere foretold 'the storm to come'. When the Home Secretary did, indeed, keep his promise – noting the ties between

⁹Letter to The Secretary, Department of External Affairs, 7.11.61. D/T S15273B.

¹⁰*The Times*, 15.11.61, sent by teleprinter (a permanent line between London and the Department, not matched by similar links with other embassies) from Mr Iremonger, Counsellor in the London Embassy, to Miss Murphy, Assistant Secretary in the Department of External Affairs. D/T S15273B.

¹¹In praising the exemption on 17.11.61, the *Daily Express* cited the assets brought by the Irish to British economic and intellectual life. On 15.11.61, Walter Terry told readers of the *Daily Mail* that the charge that the Bill was now 'a colour bar measure' would 'have to be met' and there were similar comments in other newspapers on 17.11.61 (save for the *Daily Express*). It was the *Daily Sketch* which suggested that day that the Bill would have to be dropped. Teleprinter message from the London Embassy for Miss Murphy, 17.11.61. D/T S15273B.

¹²Letter from the Ambassador to The Secretary, Department of External Affairs, 24.11.61. D/T S15273B.

the islands, the value of Irish immigration, the tradition of freedom, and administrative difficulties in imposing controls – he was greeted with ‘jibes and jeers’. These were renewed ferociously when he went on to tell the House that the Irish were *not* exempted from the deportation provisions.¹³ Such was the strength of feeling in the Party and on the floor of the House that Mr Hare was forced to concede that, however great the difficulty, some way should be found which would not distinguish Irish nationals so sharply from those adversely affected by the Bill.

There followed a flurry of diplomatic activity. The Commonwealth Relations Office assured the Irish Embassy in London that there would be no decision on Mr Hare’s concession without consultation and that ‘we should not worry very much’.¹⁴ Similar assurances were given by the British Embassy in Dublin to the Department of External Affairs, with the request that publicity be avoided as far as possible.¹⁵ At eight formal and informal engagements between 16 and 23 November, the Irish Ambassador had conversations with members of the Government, the Opposition and civil servants about which would have to go, the Bill or the Irish exemption from its application.¹⁶ Patrick Gordon Walker, who had opened for the Opposition at the Second Reading, said no anti-Irish sentiment had been voiced in Labour speeches and that his own implicit support for the Irish exception would be stated explicitly at the Committee Stage and in conversations outside Parliament. At a private lunch on 23 November hosted by Mr and Mrs Hare, the Minister had little to say about the fate of the Bill but hinted to the Ambassador that he might ‘have to come to us for help’.¹⁷ Asking for help may, or may not, have seemed more feasible in the context of his receipt of the text of a public statement in Ireland which implied some indifference (see below).

The hinted request materialized on 1 December when the British Embassy in Dublin showed the Department of External Affairs a

¹³*ibid.*

¹⁴File Note of telephone call on 17.11.61 from Mr Iremonger, London Embassy, to Miss Murphy, Department of External Affairs, 18.11.61. Confirmatory letter from Mr Iremonger to The Secretary, Department of External Affairs, 18.11.61. D/T S15273B.

¹⁵File Note of telephone call from Mr Reed of the British Embassy in Dublin to Miss Murphy of the Department of External Affairs, 18.11.61. D/T S15273B.

¹⁶Letter from the Ambassador to The Secretary, Department of External Affairs, 24.11.61. D/T S15273B.

¹⁷*ibid.*

text about which British Ministers intended to consult the Party prior to a statement at the Committee Stage.¹⁸ The proposed statement announced the introduction of a system of landing and embarkation cards between Ireland and the UK. UK nationals would be required only to provide names and addresses while others would have to answer questions about the nature of their visits. Recalling Mr Hare's statement at the Second Reading, the Embassy official said that the filling-in of cards would not constitute a restriction on immigration and noted that the stated purpose of this non-passport form of verification 'was merely to collect further information as to the extent and composition of ... traffic' between the two states. There was some uncertainty about the position in respect of Northern Irish ports and airports and about cross-border traffic, about which further information was promised. The Embassy had not been asked to obtain Irish views but it was hoped that, in view of the UK government's difficulties, the Irish government would not react unfavourably.¹⁹

The proposal to introduce landing and embarkation cards was unwelcome to the Irish government. Bord Fáilte had warned the Department of Transport and Power of bottlenecks – at Holyhead especially – and that working-class visitors from the North of England would 'just not travel to Ireland if they had to go through any immigration controls'.²⁰ The Department of External Affairs had been led to believe by the British Embassy, though 'on what authority' was uncertain, that an objection *vis à vis* tourism would lead to the abandonment of the proposed procedure. Consequently, the Taoiseach's permission was sought to make such an objection. The Taoiseach thought that 'the Director of Bord Fáilte exaggerate[d] the likely effects but, nevertheless, agreed the impact on tourism

¹⁸File Note of call by Mr Reed of the British Embassy in Dublin on Miss Murphy of the Department of External Affairs, 1.12.61. D/T S15273B.

¹⁹Between then and the Committee stage, it seemed at first as though a landing card system for travel 'between Britain and both parts of Ireland would be put on the long finger' and then that it might be introduced upon the operationalization of the Act. In contrast to Mr Reed's report of a rumour that landing cards might not be used in Northern Ireland (recorded in the document referred to in the previous note 18), another Embassy official, Mr Crombie, 'assumed' that they would be required at Northern Irish ports and airports; 'otherwise it would have to be applied at the Border, "which we all know would be quite impossible". File note of telephone call on Saturday, 9.12.61 from Mr Crombie to Miss Murphy, Department of External Affairs, 11.12.61. D/T S15273B.

²⁰File Notes by Taoiseach and staff, 11.12.61. D/T S15273.

should be used to 'express our dislike' of landing and embarkation cards.²¹

At the same time, the Irish government also agreed to a statement being issued by the British designed to pre-empt questions during further Parliamentary discussion of the Bill. This stated that:

The two countries operate a common travel area for obvious geographical reasons and this arrangement requires uniformity in the control of immigration to each country from third countries.²²

By Christmas, 1961, Irish officials were still trying to discover when it could be assumed that controls would not apply in practice to Irish nationals. The British Embassy was reminded that the Minister of External Affairs had promised the Dáil on 15 November that there would be a further statement in the near future. The response was that the British government had in principle decided against applying controls in practice but did not favour any public announcement, since Conservative back-benchers might 'think up some further attack on the Irish position' during the Christmas recess which had interrupted completion of the Committee Stage.²³ The Embassy also reminded the Department that the Home Secretary had said during the pre-Christmas Committee Stage that the government's attitude 'would be guided entirely by the nature and type of legislation introduced by the Irish Government'.

The Irish government discussed possible action at the beginning of February, 1962, as outlined in chapter 3, which led to changes to the law incorporating the Irish interest in a narrower definition of 'belonger'.

The Department of Justice Memorandum²⁴ covering the draft Order noted that, in the meantime, the British Bill had been enacted and would be operable from 1 July, 1962. The Act was worded so that, on its face, it applied to Irish nationals but the government had

²¹*ibid.*

²²File Note for Taoiseach, 11.12.61, which also advised the Taoiseach that 'it seems that the expression "common travel area" is well known and frequently used in the context of immigration control'. D/T S15273B.

²³File Note, dated 23.12.61, of telephone call by Miss Murphy, Department of External Affairs, to Mr Crombie, British Embassy, made on 21.12.61 at the request of The Secretary, Department of External Affairs. D/T S15273.

²⁴Department of Justice, *Memorandum for the Government, Control of Alien Immigration into Ireland*, 25.6.62. D/T S15273B.

decided not to apply controls on Irish nationals and others entering Great Britain from Ireland – on the assumption that appropriate measures would be taken in Ireland.

The Memorandum also noted that discussions with the UK authorities since February had been satisfactory. Provided there was complete exemption for all persons born in Northern Ireland and Great Britain, the British were not concerned if the Irish wished to impose on others, either generally or selectively, conditions that were more stringent than the minimum required by the terms of co-ordination. Both the Minister for Justice, Charles Haughey, and the Minister for External Affairs, Frank Aiken, agreed that the opportunity should be used:

to impose, as a safeguard for our own interests, controls over and above the minimum required to our commitment to the British arising out of their agreement to preserve free movement between the two islands.

But, as is clear in the Memorandum, they differed over the political implications of distinguishing between one Commonwealth country and another and over the wisdom of treating South Africa as though it were a Commonwealth member. Charles Haughey thought it would be in order to apply minimal controls to travellers from the 'old Commonwealth' but to treat citizens of British colonies 'as full aliens'. Conversely, Frank Aiken was averse to such unequal treatment. But he also favoured special treatment for South African nationals, the wisdom of which Charles Haughey questioned in the context of international opposition to apartheid. There was also the question of whether 'internal' controls (on employment and business) could differ for Commonwealth nationals entering through the 'outer perimeter' and those arriving from the UK. On this point, Charles Haughey favoured the same controls on both sets of travellers. Frank Aiken, however, was unconvinced that Commonwealth travellers from the UK should be treated unequally to British nationals resident in the UK, for the purpose of matching any particular restriction that might be placed on such entrants *via* the 'outer perimeter'. The Minister for Industry and Commerce, Jack Lynch, differed from the Minister of Justice over the possibility of 'refus[ing] permission to take employment for reasons unconnected with the employment situation'. The Cabinet was told that responsibility for employment vouchers might be shifted to another minister, preferably the Minister for Justice, who 'might not have to confine his criteria to those

concerning employment'. It was also thought that generally stricter 'internal' controls on engagement in business could be envisaged.

With these possibilities in mind and, given the varying political intuitions, the draft Order did not embody distinctions between different kinds of Commonwealth nationals – as noted in chapter three. The draft was agreed, subject to the deletion of references in the accompanying Memorandum to controls on Commonwealth citizens entering from Great Britain.²⁵

While the period from October 1961 and June 1962 had been characterized by high level diplomatic exchanges, in the full knowledge of political leaders on both sides, and by co-operation between the two sets of administrative experts, the Irish government had to minimize for its own public its concern about the UK's travails. There was not the studied indifference of 1952 but the Irish interest was presented in tones of detachment.

At one of the Ambassador's engagements referred to earlier, on 20 November 1961, he was told by a Conservative MP of a rumour that 'we in Ireland want Irish immigration to be controlled'.²⁶ The MP may have had wind of what was to be in the Taoiseach's press statement of 21 November; at the Taoiseach's suggestion, the text had been 'shown by the Ambassador to the British authorities – solely ... for information' and had been seen by the Minister of Labour before he dropped his hint about seeking help.²⁷ There is a certain compatibility between the MP's claim and the content of the statement.

The statement both played down the numbers of Irish people travelling to Great Britain for long-term employment (to counteract the 'inflated' figures cited at the Conservative Party Conference) and played up Ireland's need, given developing labour shortages, for them to return. In the context of a need to discourage out-migration, the Taoiseach was not averse to Irish nationals being required to be in possession of 'validated employment-offers' in order to enter Great

²⁵Extract of Cabinet Minutes, item 2, 26.2.62. D/T S15273B.

²⁶Letter from The Secretary, Department of External Affairs to Dr Nicolas O'Nualláin, The Secretary to the Cabinet, Department of the Taoiseach, 21.11.61, D/T S15273B. The MP was Mr Teeling (Brighton).

²⁷Letter from The Secretary, Department of External Affairs to The Secretary to the Cabinet, Department of the Taoiseach, 21.11.61. The Taoiseach, *Statement in response to a request from newspaper correspondents for a comment on proposed British legislation*, Presented at a press interview, 21.11.61. Letter from The Secretary, Department of External Affairs to The Secretary to the Cabinet, Department of the Taoiseach, 21.11.61. All in D/T S15273B.

Britain – so long as these were solely to establish *bona fides* and not issued with a view to encouraging emigration. All the same, he noted that it would be a ‘retrograde step’ to reintroduce the need for passports or identity documents for travel between the two islands and indicated that he was ‘very willing’ to help the British Government, in ways which he did not specify.

They were specified in the New Year in a brief provided by the Taoiseach for Deputy Sean Flanagan who was to appear on 5 January, 1962 in a programme on the British Bill being broadcast by the newly established Telefís Éireann.²⁸ This pointed out that unrestricted freedom of movement of persons between Britain and Ireland depended on two conditions: (a) similarity in the scope of restrictions on entry – passports, visas, and categories of person; and (b) willingness on the part of each country to admit any person admitted to the other. ‘Arrangements have always operated’ in such a way that persons travelling between the two countries were cleared at their first port of entry.

The UK’s introduction of restrictions on entry from the Commonwealth was set in the context of the universality of immigration controls. The briefing noted that Ireland had ‘no political objection to extending its immigration restrictions to countries in the Commonwealth’ if this became necessary; regulations would be ‘extended accordingly’ if this served the advantageous purpose of preserving ‘the existing freedom of travel between Ireland and Britain’.

However, Ireland was ‘not directly concerned in the arguments’ about the UK’s change of policy. So far as Ireland was concerned there was ‘no colour bar in this’. It was a case of ‘Britain decid[ing] for herself the classes of persons’ to be admitted or not and ‘we apply, at Britain’s request, similar restrictions’. There was ‘no good reason why we should put ourselves at a serious disadvantage, such as to our tourist trade, merely to express an opinion on British policy in a matter in which we are not very interested, and which is in any case solely Britain’s concern’.

The political constraints that entailed such careful balancing were evident in the inconsistent premisses which inflamed questions in the Dáil for the first six months of 1962, especially in February and March.²⁹ Some were concerned that Ireland would be adopting ‘a

²⁸Immigration Bill, 5.1.62. D/T S15273. RTÉ was inaugurated on New Year’s Eve, 1961.

²⁹D/T S15273B.

colour bar', either undesirable in itself or undesirable in being done on behalf of the UK. Others demanded consultation in the Dáil before any changes to Irish regulations. Some were not, apparently, motivated by anti-racism but by the general objection that Ireland might have to legislate simply because the UK was doing so. Others were angry only at the possibility that UK legislation might end Irish freedom to travel there without documentation. To them all, the Minister for External Affairs, Mr Frank Aiken, seemingly with endless patience, pointed out that, if Irish people wanted to travel freely to Britain, certain steps would be necessary; that the Irish government had not been asked by the UK to legislate on its behalf; and maintaining the freedom that people wanted might be achievable by other means.

The Attorney-General's advice that change could, indeed, be effected through other means enabled the government simultaneously to realize interests and remain unscathed by charges that Ireland had been forced to legislate by decisions in the British Parliament. The British government, too, was pleased about this. The Home Secretary told the Irish Ambassador in London at a dinner given for Mr McCann by the Lord Chancellor that he 'deeply appreciat[ed] ... the cooperative manner in which the Irish Government [had] handled this whole question'; with 'wisdom and restraint', and 'avoid[ing] any possibility of intrigue between us'.³⁰ He was 'particularly pleased that we had been able to effect the necessary arrangements by Order without resorting to legislation and in this context he paid a tribute to the skill of our lawyers'. The Home Secretary also 'made a passing reference to the fact that he, for his part, had lived up to the assurances he had given' the Ambassador. He came back to the matter several times during the evening and, '[j]ust before departing,' reminded the Ambassador 'to pass on to Dublin his expression of appreciation and, in particular, to let the Taoiseach' – about whom he spoke to Mrs McCann 'with warm admiration' and 'as a friend' – know how grateful he [was]'.

³⁰Letter from The Secretary, Department of External Affairs to Secretary to the Cabinet, with extracts from a report by the Ambassador in London, 5.7.62. D/T S15273.

Appendix 2: Schengen, its origins, the 'communitarization' of the Schengen *acquis*, opting-out and opting-in, and the current *impasse*¹

1 Origins

The original Schengen Agreement, named after the Dutch town where it was signed, was concluded in 1985 by the six founding member states of the EC which wished the Community to move faster on free movement than was possible in the context of opposition by some other member states. The Agreement's intention was 'to create an area of free movement within a single secure external border' by shifting 'the emphasis from internal border controls to external border controls'. The original signatories – Belgium, France, Germany, Italy, Luxembourg and the Netherlands – have been joined since by all member states of the EU, except Ireland and the UK. Moreover, two non-EU member states, Iceland and Norway, have become participants, with 'observer' status, as a result of their membership of the Nordic Passport Union and that Union's desire to preserve itself as its other three members, Denmark and, later, Finland and Sweden, became Schengen signatories.

Thus, the EU area of free movement reflects a fusion of different common travel areas; first, the pre-existing area comprising the three Benelux states, that area then being augmented by France, Germany and Italy and, finally, all of them linking with the Nordic Union. This evolutionary pattern supports the observation quoted in chapter 3 that the UK should take heart from its experience with Ireland in

¹Most of this Appendix is heavily drawn from the excellent account prepared by the House of Lords Select Committee on the European Communities, 31st Report, Session 1997-98, 31 July, 1998. London: House of Lords Publications on the internet (<http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhome/htm>). Except where indicated, all quotes are taken from Parts 1 to 3 of that Report. It also draws upon: Diarmaid McGuinness and Eileen Barrington, 1997, 'Immigration, Visa and Border Controls' in Gavin Barrett (ed.), *Justice Cooperation in the European Union*. Dublin: Institute of European Affairs; and European Court of Justice, Judgement of the Court in *Florus Ariel Wijnsbeek*, Case C-378/97, 21 September 1999 (with thanks to Diarmaid McGuinness).

moving forward in the EU. Evidence of successful fusions might reinforce the possibility, discussed in chapter 5, that the UK could contemplate joining the EU system, albeit later than the other partners, thereby enabling a further merger of common travel areas.

2 The 'communitarization' of the Schengen *acquis*

In 1990, the Schengen Agreement was 'fleshed out' in the Schengen Convention. 'The principle aim of the Convention was to abolish checks on the movement of persons at internal borders ... by transferring them to external frontiers. To achieve this, wide-ranging "flanking" measures were required' – covering asylum, visa and immigration policy, police co-operation, and the exchange of information'.

The Convention, Accession Protocols and a range of other agreements, declarations and decisions have given rise to a large volume of documents collectively known as the Schengen *acquis* (not really translatable but something like the totality of acquired wisdom, rules, policies, conventions, etc) which amount to several thousand pages. The main elements of the Schengen Convention and *acquis* are: removing internal border controls; freedom of movement; police co-operation; judicial and policy co-operation; the Schengen Information System (SIS); data protection and rules about this relating to the SIS and asylum matters; transport and the movement of goods; and the Executive Committee responsible for implementing the Convention.

While the Treaty of Rome and the Single European Act (SEA) embody a Community intention to comprise an area without internal borders, no subsequent implementation measures on border controls were agreed upon; hence, the decision of the Schengen states not to be held back by reluctant partners. Moreover, neither the Treaty nor the SEA affected the right of member states to control immigration from third countries. Thus, neither provided a legal basis for Community rules about the crossing of external frontiers; that is, the flanking measures necessary to the opening of internal borders. Though the internal market was to have been completed by 31 December 1992 in respect of the free movement of EC nationals, member states were to co-operate (in distinction to developing common policies) over the question of the entry and subsequent rights of movement by third country nationals. In the lead-up to the Maastricht Treaty, it was agreed that Schengen's flanking measures were of 'common interest' to all EC members.

The Maastricht Treaty founded the EU on three pillars. The first, or EC pillar, is the basis for the continuation of Community matters, or common policies. The second provides a basis for common foreign and security policy, permitting 'joint actions'. The third provides for matters of common interest in justice and home affairs to be dealt with by intergovernmental co-operation and decision-making. Given the link between an absence of internal border controls and confidence in external frontier controls, questions relating to the promotion of free movement internally were placed in the third pillar alongside intergovernmental approaches to the crossing of external frontiers. Little progress was made in securing the basis for lifting of internal controls, since reaching agreement on a draft Convention on the Crossing of External Frontiers was stymied by the dispute between Spain and the UK over Gibraltar.

At the Amsterdam Treaty, all the Schengen signatories (thirteen out of fifteen EU member states) wanted to secure more progress and to regularize the coexistence of the Schengen *acquis* and the similar ambitions of the Treaties of Rome and Maastricht. It was the ambition of twelve of them to incorporate the Schengen *acquis* into the EC and EU Treaties by 'communitarizing' free movement measures; that is, by placing the appropriate *acquis* in the first pillar instead of the third. As noted in chapter 1, the British position shifted from opposing communitarization, provided it could opt-out of the abolition of border controls (Schengen's primary objective) but opting-in to some of the flanking measures (Schengen's secondary objectives, permitting the realization of the primary one). Future member states will not be allowed to opt-out and this was agreed to by the UK.

The task that ensued from Amsterdam was to identify the proper Treaty bases for each element of the Schengen *acquis*: a new Title IIIa of the Treaty of Rome (or IV in its Amsterdam equivalent), for free movement (including flanking measures relating to visas, asylum, immigration and co-operation amongst police and immigration services on such matters); or Title VI of the third pillar of the Treaty of Maastricht, for other flanking measures (primarily police and judicial co-operation in criminal matters).

3 Opting-out and opting-in

The Danish opt-out is different from those of Ireland and the UK and designed to protect its view that, while it wishes there to be an EU common travel area, the necessary measures should not be

communitarized. In view of its position that they should be intergovernmental, Denmark did not seek the possibility of opting-in. Instead, it must decide within six months whether it wishes to pass national legislation matching EU measures and linked to them under international rather than Community law.² It is possible that, in developments where the UK may choose not to participate (or be prevented from so doing), the government might also align or co-ordinate its national policies with Community provisions on, for example, asylum and immigration.³

So far as Ireland and the UK are concerned, it was noted in chapter 1 that they have distinctive reasons for seeking exemption from the abolition of border controls and securing special arrangements for opting-in to related matters. It was also noted that the Irish government negotiated a unique method of ending its current position. Instead of there needing to be an Intergovernmental Conference, Ireland can simply inform the President of the Council that it wishes the normal Treaty provisions to apply to it.

In connection with participating in discussions of and being covered by specific measures, the procedures for the two states are the same. There are two procedures, depending upon whether the proposal arises from or builds on a transferred *acquis* or whether it is a new measure based directly on the new Title IIIa (or IV). When either state does not wish to be exempt from the transferred *acquis*, opting-in requires the unanimous consent of the thirteen Schengen states (an 'eleventh hour' amendment to the draft Treaty). Other states have undertaken to use their 'best efforts' to facilitate this,⁴ though, as chapter 5 suggested, there may be some reluctance to do so. Unanimity is not required in permitting either state to participate in new measures but, as also noted in chapter 5, it may be difficult to be certain as to whether any given proposal is of one type or the other.

²House of Lords 31st Report, *op. cit.* and Communication to the author from the Nordic Institute in Finland, February 1999.

³House of Lords 31st Report, *op. cit.*, paras. 86, 141. This would create a very complicated and opaque regime in which travellers might exercise their rights, *ibid.*, paras. 42, 43, 47.

⁴House of Lords 31st Report *op. cit.* and 7th Report Session 1998-99, 2 March, 1999. London: House of Lords Publications on the internet (<http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhome/htm>), paras. 77-9. See also John Handoll, 'The Free Movement of Persons' in Ben Tonra (ed.), 1997, *Amsterdam: What the Treaty Means*. Dublin: Institute of European Affairs, p. 142.

4 The present *impasse*

The allocation of the Schengen *acquis* into the first or third pillars was to have been completed before the coming into force of the Amsterdam Treaty in April 1999. There was a 'fall-back position' in that, if agreement could not be reached on correct allocations to the first and third pillars, unallocated *acquis* would be placed in the third pillar.⁵ Negotiation over which was the correct allocation, however, 'created real difficulties', some of them having 'more of a political than a legal nature'⁶ In the event, a Spanish veto on the incorporation of parts of the *acquis* meant that the deadline was missed, thereby placing the whole of the *acquis* into the third pillar. This creates 'a highly unstable situation' and 'legal uncertainty'.⁷ In addition to problems for the UK, discussed in chapter 5, it may be confronted by aspects of the *acquis* becoming communitarized by the European Court of Justice (ECJ) which now has some competence under the third pillar. While this is limited to member states volunteering to allow references by national courts to it, the ECJ's scope no longer depends – as in Maastricht and in vain – on the unanimous consent of member states that their conventions should fall within its jurisprudence.⁸ If ECJ rulings were to cover issues in which, had they arisen under the first pillar, the UK would have declined to participate, this would add to the peculiarities discussed in chapter 5 leading the House of Lords Select Committee to call upon the government to plan for a change in policy.

⁵House of Lords, 7th Report, *op. cit.*, para. 30, Minutes of Evidence, para. 214.

⁶*ibid.*, paras 30 and 214.

⁷Anonymous referee, who also made the point that follows about the ECJ. With special thanks since he or she was kind enough to read part of my paper twice.

⁸Andrew Duff, 1997, *The Treaty of Amsterdam: Text and Commentary*. London: Federal Trust/Sweet and Maxwell, p. 162.